KUTAFIN LAW REVIEW

Volume 10 Issue 1 2023

Founder and Publisher — Kutafin Moscow State Law University (MSAL), Moscow, Russian Federation

Frequency: 4 issues per year

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EDITORIAL

Dear Readers and Authors,

The key changes taking place all over the world have undoubtedly reflected all spheres of life. Today's focus on environmental, social and governance principles together with the overall digital and technological transformations of the world paradigm has resulted in reevaluation of the existing constructs. The first issue of our Journal in 2023 offers a fresh outlook on some of the problems that keep raising concern among academia, experts and ordinary people.

Russia has implemented an anti-offshore policy to combat tax evasion and money laundering using offshore companies. This policy includes strict regulations on financial transactions with offshore territories, increased reporting requirements for companies conducting business with offshore companies, and the creation of a special economic zone in Russia to encourage investment and reduce the need for offshore companies. The policy has faced criticism for being too restrictive and hindering economic growth, but proponents argue that it is necessary to ensure financial transparency and stability. In his article, *Vladimir Kanashevskiy* discusses these and other related issues given the fact that the Russian way of dealing with offshore companies differs greatly from the policies implemented by other countries that have faced similar challenges.

The article presented by *Svetlana Zhura, Olga Vorobyova and Irina Ershova* covers an important issue of self- and state regulation of small business enterprises amid demand for innovative start-ups. It is argued that there are concerns about the potential negative effects of excessive state-regulation, which can stifle innovation and entrepreneurship. To strike a balance between self-regulation and state-regulation, innovative start-ups in Russia must be proactive in establishing internal controls and complying with legal and ethical standards, while also working with government agencies to ensure they are operating in compliance with regulations and taking advantage of available resources and support programs.

Irina Ayusheeva focuses on the civil law regulation relations involving non-profit associations of persons established to solve common social, charitable, cultural and other tasks. The author analyzes the current legal acts regulating non-profit organizations, individual organizational and legal forms of associations of persons, including public associations, concluding that currently the category of a public association is used in a rather narrow sense and does not cover all possible non-profit associations of persons. This, according to the

author, should be improved by eliminating the lack of compliance with the provisions of the Civil Code of the Russian Federation.

Human rights are considered form different perspectives in this issue. The paper authored by *Vijay P. Singh* deals with judiciary aspects for the protection and promotion of human rights in India. The article authored by *Marina Glaser, Alla Yastrebova, and Marina Ivleva* considers a particular aspect of the humanitarian law application, namely in the humanitarian crisis that took place in Tigray National Regional State of the Federal Democratic Republic of Ethiopia. *Gianluigi Palombella* focuses on the issues of future generations' rights by scrutinizing some "fundamental threats" to the very conditions of living and survival, together with the problem of their (non)-identity.

Of paramount importance are the rights of vulnerable groups. The technological development is gaining momentum and it is vital to consider the changing environment. Minors are becoming more victimizable amid these changes. On the one hand, we cannot deny the need for information children ought to get. On the other hand, the volume and quality of information are often questionable. *Oleg Rybakov and Olga Rybakova* conduct a comprehensive analysis of the current legislation related to the information security of minors, paying particular attention to the ways of overcoming the existing and newly emerging risks and challenges posed by the information (in particular, online) environment.

Protection and promotion of rights of women and children has been an urgent and painful topic for several decades now. One of the most painful issues remains trafficking in women and children. *Alexander Solntsev and Milica Popovic* consider this issue from the international perspective, outlining the current problems. The study is supported by the multiple cases of trafficking having taken place in the countries of former Jugoslavia. *Damir Bekyashev, Natalia Sheremet* consider the implementation of women' rights in the Carribean.

Human values, equality, attitudes, practices, political communities form are among the basic concepts of the philosophy of law. *Pavel L. Likhter* considers some of the most fundamental philosophical questions that run through main messages of the studies presented in this issue. It is no surprise that amid the development of the ESG principles the core of the discussion is the Plato's Theory of Gradual State Decline. Environmental and social challenges caused by the consumerist era require comprehensive analysis and new outlook.

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BUSINESS LAW AND CIVIL SOCIETY

Research Article

DOI: 10.17803/2713-0533.2023.1.23.003-040

Russian Anti-Offshore Policy: Current Regulation and Perspectives

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Abstract: The paper outlines the regulatory landscape of an anti-offshore policy in Russia. In the first part of this paper, the author gives an overview of effective regulations against offshore businesses that Russia has adopted in the past decade. The CFC rules were developed and subsequently passed because of Russia's participation in the BEPS project. They are of the highest importance for the implementation of the anti-offshore policy. Other measures include transfer-pricing rules, registers of beneficial owners, exchange of financial information and revision of double tax treaties with Cyprus, the Netherlands, Luxembourg and Switzerland. Sanctions imposed by the EU, the USA, the UK and their allies against Russia, Russian individuals and companies in 2022 and counter-measures against Western countries and their residents introduced by Russian authorities also stimulate deoffshorization of the Russian economy. They have limited the free movement of capital between offshore holding companies and their Russian subsidiaries and, consequently, have contributed to the isolation of the Russian economy from the rest of the world, including its offshore infrastructure. The second part of the paper deals with the proposals for the Russian anti-offshore policy. The author shares his ideas on how to make the policy for deoffshorization of the Russian economy more effective. A few of

these anti-offshore actions have already been implemented in draft laws and are currently being considered in the Russian Parliament. All of the measures that are being considered would result in unfavourable tax implications and possible damage to the reputations of those Russian individuals and organizations who still use offshore companies and trusts for the purposes of minimizing taxation and maintaining anonymity. The most important action proposed by the author for the implementation of the anti-offshore policy is the forced deoffshorization of strategic enterprises. Passing the relevant law would entail fundamental changes to the Russian business environment and result in the restoration of economic sovereignty over the Russian economy.

Keywords: deoffshorization; offshore company; controlled foreign company; double tax treaty; redomiciliation; registers of beneficiaries

Cite as: Kanashevskiy, V.A., (2023). Russian Anti-Offshore Policy: Current Regulation and Perspectives. *Kutafin Law Review*, 10(1), pp. 3–40, doi: 10.17803/2713-0533.2023.1.23.003-040.

Contents

I. Introduction

There is a common understanding that offshorization of economies is one of the biggest and most serious challenges for the international community. Thus, many countries suffer from a shortfall in taxes since their national taxpayers use offshore jurisdictions to avoid or minimize taxation. However, in recent decades the situation has changed due to the international implementation of the BEPS action plan. In Russia, offshorization of the national economy has undermined the sovereignty of the country and threatened national security because the Russian way of dealing with offshore companies is fundamentally different from its peers. Russian companies have set up holding and sub-holding companies in offshore jurisdictions in order to transfer monetary assets from Russia, as well as to protect themselves from hostile or forcible takeovers and fraudulent activity, whereas foreign companies usually set up their subsidiaries in offshore territories and use them primarily to minimize taxation.

The issues surrounding anti-offshore policy in Russia will be addressed in detail below. The author starts with an analysis of the current regulations in force regarding the use of offshore companies in Russia and the restrictions currently stipulated by Russian law, including counter-measures that have been introduced as a response to the Western sanctions. Following this, the paper reviews the prospective measures that should be taken for the further implementation of deoffshorization policy. In particular, the author considers the federal draft legislation regarding restriction of the capacity of offshore companies, public registers of beneficiaries of offshore companies and trusts, and the forced deoffshorization of strategic enterprises. Finally, the author explores the issues regarding different instruments that are used in foreign practice and could be introduced or further developed in Russia, such as dividend-stripping rules, exit tax, the taxation of the indirect sales of immovable properties and the redomiciliation of offshore companies.

II. Current Anti-Offshore Measures

II.1. Overview of Russian Anti-Offshore Policies

The offshorization of the Russian economy poses one of the biggest threats to the sovereignty and prosperity of the country. According to statistical data, over 80 % of transactions regarding assets located in Russia have been performed by purchases of shares in the offshore companies that hold the relevant assets (Kheyfets, 2008, p. 210). Consequently, from the perspective of Russian society, offshore jurisdictions play a negative rather than positive role, being "custom-made political jurisdictions — tax havens — that enable them to exercise decisive influence on the historical course of events" (Deneault, 2011, p. viii). Companies may use privileges provided by offshore laws, even if they do not have any substantial relation with the particular jurisdiction, when "the offshore 'laws' provide neither more nor less for the absence of laws" (Deneault, 2011, p. 216).

Proposals to adopt anti-offshore measures have been raised on both international and national levels. On the international level, these measures have been established in the BEPS action plan developed within the framework of the OECD and G20[1] in 2013 and finally approved in 2015.[2] It is necessary to note that the main responsibility for the offshorization of the world economy lies on developed countries, but not on the offshore jurisdictions themselves. As it was rightly pointed out, "the tax havens have traditionally been politically acceptable as long as they are rainy and cold places such as Denmark, Delaware, the Netherlands, Ireland and the United Kingdom. However, if you add a white sand beach and some palm trees it becomes a different story. The tax haven becomes an offensive villain, not only guilty for 'unfair tax competition' but of virtually every other thinkable evil, including terrorism, money laundering, and all poverty on the Earth. The fact that the lion's share of international money laundering takes place in London and New York, not in the Caymans or the British Virgin

[1] BEPS — Base Erosion and Profit Shifting.

[2] The BEPS Monitoring Group website. What is BEPS? Available at: https://www.bepsmonitoringgroup.org/what-is-beps [Accessed 15.06.2022].

Islands, is usually conveniently omitted in any debate on the subject" (Magnusson, 2014, p. 5).

Russian law does not prohibit businesses from registering offshore companies or buying or dealing with shares in them. However, certain legislative acts restrict activities in some areas. For example, the Tax Code in Article 284(3)(2) stipulates that dividend paid by companies registered in offshore jurisdictions to their Russian shareholders have to be subject to 13 % tax, whereas the dividends coming from other countries are not taxable in Russia. The list of offshore jurisdictions was approved by the Russian Ministry of Finance in 2007 and now includes 40 countries and territories.[3]

In Russia, the need to take anti-offshore action was first declared by President Putin in his Address to the Federal Assembly in both 2012 and 2013.[4] The next considerable step was the introduction of rules on controlled foreign companies (CFC) into the Russian Tax Code in 2014. There have been other steps to this effect that will be described in detail below. At this stage, it is necessary to define the term "anti-offshore policy." It should be noted that none of the Russian Federal Laws contains a definition of this notion. Nevertheless, the Letter from the Ministry of Finance No. 03-01-11/38162 dated 27 May 2019[5] states that anti-offshore policy (or "de-offshorization policy") includes the following instruments:

a) Taxation of income from CFCs,

b) Recognition of foreign companies as Russian tax residents being subject to certain conditions,

c) Implementation of the concept of beneficiary ownership into Russian practice,

d) Automatic exchange of financial information,

[3] Russian Ministry of Finance Order No. 108n dated 2 November 2007 "On the List of States and Territories which Provide Tax Benefits and/or which do not Provide Information while Conducting Financial Operations." Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

[4] Presidential Address to the Federal Assembly dated 12 December 2012; Presidential Address to the Federal Assembly dated 13 December 2013. Available at: http://www.consultant.ru/. (In Russ.). [Accessed 10.01.2021].

[5] Letter from the Ministry of Finance No. 03-01-11/38162 dated 27 May 2019. Available at: http://www.consultant.ru/. (In Russ.). [Accessed 25.12.2020].

e) Qualification of the Russky and Oktyabrsky islands as special administrative areas,

f) Capital amnesty.

Although the letter from the Ministry is not a legislative act, but rather their opinion, we will rely upon the definition of the anti-offshore policy given in this Letter because it seems logical and reasonable.

It should be noted that some of the aforementioned anti-offshore measures have already been implemented in Russia. Particularly, the Russian State:

A) Introduced CFC rules into the Russian Tax Code (Chapters 14.4.-1 and 20.2) that have been in force since the 1st of January 2015.

B) Signed the CbC MCAA[6] in January 2017[7] and introduced special rules into the Russian Tax Code (Chapters 14.4.-1 and 20.2) that regulate the collection and automatic international exchange of Country-by-Country Reports.

C) Ratified the MLI[8] in May 2019[9] that covers 71 double tax treaties (DTTs) between Russia and foreign countries.

D) Introduced and changed transfer pricing rules.

We will analyse the most important anti-offshore actions below, particularly the CFC rules, the revision of DTTs, TPRs, registers of beneficial owners, and the exchange of financial information. We will also review prospective measures, such as taxation of immovable property and the restriction of the capacity of offshore companies.

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[6] CbC MCAA — Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports. Available at: https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/cbc-mcaa.pdf. [Accessed 15.06.2022].

[7] The Russian Federal Tax Service signed the CbC MCAA in January 2017 in accordance with the Order of the Russian Government No. 2608-r dated 7 December 2016. (In Russ.).

[8] MLI — Multilateral *Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*. Available at: http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf [Accessed 15.06.2022].

[9] Federal Law on Ratification of the Multilateral *Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* No. 79-FZ dated 1 May 2019. (In Russ.). Available at: http://www.consultant.ru/ [Accessed 15.06.2022].

II.2. CFC Rules

The BEPS project calls on relevant countries to strengthen and implement CFC rules (Action 3). As a response to this call, over 50 countries have already implemented CFC rules into their domestic legal systems.[10] Russian CFC rules were introduced into Russian Tax Code (Chapters 14.4.-1 and 20.2) in 2014 and they have been in force since the 1st of January, 2015. These rules are similar to those that have been adopted in foreign countries and contain certain provisions. Particularly, they:

a) establish that the tax benefits stipulated by DTTs can be granted to the actual beneficial owners of the income but not to transit or conduit companies;

b) oblige residents to notify the tax authorities about their CFCs;

c) oblige residents to declare the undistributed income from their CFCs and pay a profit tax from this income at the rate of 13 % if the resident is an individual, or 20 % if it is a legal entity;

d) ensure liability for the violation of CFC rules;

e) establish rules for the recognition of foreign companies as tax residents of the Russian Federation and being subject to certain conditions.

Russian residents should notify the tax authorities about their CFC's in cases their share in a company's charter capital is equal to or exceeds 10 %, or if a resident exercises actual control over a company in his interests or in the interests of his family. It is obvious that in the latter scenario it is the beneficiary of the offshore company who normally manages it by using nominee shareholders.

Russian judicial practice documents that the courts have refused to grant tax benefits to those foreign companies that were not the beneficial owners of the respective income. For example, in the Severstal JSC case[11] the company paid dividends to Cypriot companies that were in

[10] Action 3 Controlled Foreign Company. Available at: http://www.oecd.org/tax/beps/beps-actions/action3/. [Accessed 05.06.2022].

[11] Decision by the Arbitrazh Court of the City of Moscow, case No. A40-113217/16-107-982 dated 31 October 2016. Available at: http://www.consultant.ru/. (In Russ.). [Accessed 25.12.2021].

turn transmitted to BVI parent companies. Severstal JSC intended to use the 5 % tax rate on income under the Russia — Cyprus DTT of 1998. However, since the Cypriot companies were not beneficiaries of the income received, the court applied for the regular dividend tax rate of 15 % as stipulated by the Russian Tax Code instead of the 5 % rate under the 1998 DTT with Cyprus. The following factors were taken into consideration by the court:

A) The dividends received by the Cypriot companies were transmitted in their entirety to the BVI companies.

B) The charters of the Cypriot companies were identical and the companies were restricted in the disposition of the Severstal JSC shares.

C) Finally, the Cypriot companies did not do any business activities, except the payment of dividends and did not have any other assets except the Severstal shares.

In another case, Vladimirsky Energosbyt JSC,[12] the court established that in May 2011 the company purchased shares of the Russian company Energoservice from Cypriot company Mosslow Ltd. for 900 million RUB. Upon completion of this transaction, those funds were transmitted as dividends to Ronix Ltd., a BVI company that was a parent company of Mosslow Ltd. Vladimirsky Energosbyt JSC applied the rate of 5 % under the 1998 Cyprus-Russia DTT instead of the 20 % income tax rate stipulated by Russian Tax Code. The court concluded that Mosslow Ltd. was a technical company and did not have a right to the income from the sale of Energoservice shares since:

a) It did not have any assets or personnel.

b) It did not pay any taxes in Cyprus.

c) The only deal completed by this company over 4 years was the purchase of Energoservice shares.

d) All of its income was transferred to its BVI shareholder immediately after the sale and transfer of the dividends.

e) The company did not perform any other business activities after the completion of the transaction and was subsequently liquidated thereafter.

[12] Resolution by the Arbitrazh Court of Volgo-Vyatskiy Circuit No. F01-3058/2017, case No. A11-6602/2016 dated 7 August 2017. Available at: http://www.consultant.ru/. (In Russ.). [Accessed 25.12.2021].

Ronix Ltd. was determined to be the end receiver of the income, and therefore its beneficial owner. In this circumstance, Vladimirsky Energosbyt JSC should have withheld 20 % tax under the Russian Tax Code since there was no DTT between Russia and the BVI, and the 5 % tax rate under the 1998 Russia-Cyprus DTT should not have been applied since Mosslow Ltd. was a transit company being used to obtain tax benefits. As a result, Vladimirsky Energosbyt JSC was obliged to pay 180 million RUB in additional taxes.

These cases evidence the fact that the Russian tax authorities, while applying tax benefits, consider the following factors when determining the actual economic activities of a company:

a) the availability of its personnel,

b) employee obligations,

c) office availability,

d) expenditures related to its business activities,

e) commercial risks and cash flow.

Only companies that have an economic presence in the country of residence and wide discretionary authority over the disposition of a company's income may seek tax benefits under the applicable DTT (Arakelov, 2017, p. 55). In addition, under the Russian Tax Code a foreign company that is managed from the territory of the Russian Federation can be qualified as a Russian tax resident and consequently recognized as a Russian taxpayer.

It should be noted that recently, a number of offshore jurisdictions have adopted special laws on economic substance that oblige local companies to rent office space, hire personnel and pay salaries. Thus, under the BVI Economic Substance (Companies and Limited Partnerships) Act, that has been in force since the 1st of January, 2019, companies registered in the BVI should be undertaking business activities, as well as having enough staff and renting office space there.[13] All BVI companies need to pass this information to the BVI authorities and this data has to be integrated and shared with the

[13] Economic substance — BVI law in force. Available at: https://www.harneys.com/insights/economic-substance-bvi-law-in-force/ [Accessed 15.06.2022].

BOSS system.[14] Companies and individuals can be held liable for any violations of economic substance rules and can be delisted, fined, or in the case of individuals also imprisoned.[15] Similar laws on economic substance were adopted and entered into force in 2019 in Bermuda,[16] the Caymans,[17] Guernsey,[18] Jersey[19] and the Isle of Man.[20] Considering these foreign laws, as well as Russian law requirements, many owners created economic substance for their overseas offshore companies, including renting office space, having a qualified director and personnel with substantiated market salaries and drafting commercial and accounting documents.

II.3. Revision of DTTs

In March 2020, the Russian President Vladimir Putin ordered the Russian Government to determine and revise the DTTs to which Russia was party. It was suggested that the tax rate on dividends and interests be 15 % in all of the DTTs and that this tax should be withheld by the Russian tax authorities upon the payment of dividends and interests

[14] BOSS — Beneficial Ownership Secure Search System was introduced in the BVI in June, 2017, by a special law that obliged local incorporating agents to upload data about the beneficiaries of BVI companies into the BOSS, to which the BVI authorities have access.

[15] Government of the Virgin Islands. Economic Substance Legislation. Available at: http://www.bvi.gov.vg/economic-substance-legislation [Accessed 05.06.2022].

[16] Bermuda Economic Substance Act 2018. Available at: http://www.bermudalaws.bm/laws/Consolidated%20Laws/Economic%20Substance%20Act%202018.pdf [Accessed 15.06.2022].

[17] Cayman Islands. International Tax Co-Operation (Economic Substance) (Amendment) Bill 2019. Available at: http://www.legislativeassembly.ky/portal/pls/portal/docs/1/12930557.PDF [Accessed 15.06.2022].

[18] Guernsey Statutory Instrument 2018 No. 90. The Income Tax (Substance Requirements) (Implementation) Regulations, 2018. Available at: https://www.gov.gg/CHttpHandler.ashx?id=116235&p=0 [Accessed 15.06.2022].

[19] Jersey Taxation (Companies — Economic Substance) (Jersey) Law 2019. Available at: https://www.jerseylaw.je/laws/revised/Pages/24.970.aspx [Accessed 05.06.2022].

[20] Income Tax (Substance Requirements) Order 2018 (Isle of Man). Available at: https://www.gov.im/media/1363889/approved-isle-of-man-legislation-income-tax-substance-requirements-order-2018.pdf [Accessed 05.06.2022].

to non-residents. In addition, it was stipulated that if there were any disputes, then the DTTs were to be dissolved.[21] Notices regarding the revision of DTTs have been sent to several countries, including Cyprus, Luxembourg, Malta, the Netherlands and Switzerland. Initially some of these countries provisionally agreed to introduce these amendments into the relevant treaties.

However, in December 2020, the Netherlands refused to amend their DTT with Russia, although the suggested amendments were identical to those that had already been agreed upon by Cyprus, Luxembourg and Malta. As the Russian Ministry of Finance noticed, the DTT in force allows the Netherlands to transfer profits to their territory at the extremely low rates of 2 % and 3 %, whereas the applicable Russian rates to dividends and interests are 15 % and 20 % respectively. The DTT between Russia and the Netherlands was used to transfer profits overseas for many years. For example, about 457 billion RUB were transferred to the Netherlands in 2017 through Dutch companies. In 2018 and 2019, the amounts transferred through Dutch entities were 412 billion and 339 billion RUB respectively. Since the Netherlands did not agree to raise the applicable tax rates to the level stipulated by Russian law, the Russian Government has decided to dissolve the DTT.[22]

Unlike the Netherlands, countries such as Cyprus, Malta and Luxembourg have agreed to amend the respective DTTs. In September 2020, Cyprus and Russia signed the Protocol[23] that raised the tax rates in the current DTT for the transfer of dividends and interests up to the level established by the Russian Tax Code. It should be noted

[21] Russian Presidential Order No. Pr-586 dated 28 March 2020. Available at: http://www.consultant.ru/. (In Russ.). [Accessed 25.12.2021].

[22] The Ministry of Finance of Russia starts denunciation of the Double Tax Treaty with the Netherlands. Available at: https://minfin.gov.ru/ru/press-center/?id_4=37312-minfin_Rossii_pristupaet_k_denonsatsii_soglasheniya_ob_izbezhanii_dvoinogo_nalogooblozheniya_s_niderlandami. (In Russ.). [Accessed 16.06.2022].

[23] Protocol amending the DTT between the Russian Government and Cypriot Government dated 8 September 2020. Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

that the respective DTT with Cyprus was used as a traditional route for transferring funds overseas for many years. For example, in 2019 about 1.9 trillion RUB were transferred through Cyprus.[24] According to the new Protocol, both dividends and interests payable to Cypriot shareholders and lenders should be taxable in Russia at a 15 % tax rate, whereas previously the applicable rates for dividends were between 5 % and 10 %, and 0 % for interests. Russia has also signed protocols amending the respective DTTs with Malta[25] and Luxembourg,[26] with provisions similar to those stipulated in the new Protocol with Cyprus.

II.4. Transfer Pricing Rules and Controlled Transactions

As stipulated by the BEPS project (Action 8), countries are required to implement Transfer Pricing Rules (TPRs) which allow parties to apply market prices in transactions between interdependent companies (intragroup transactions) based on the arm's-length principle. These rules have been in force in Russia since the 1st of January, 2012, and they relate to intragroup transactions between domestic and offshore companies. The Tax Code specifies that transactions involving offshore companies be qualified as "controlled," and requires that they be reported to the tax authorities if they amount to 60 million RUB or more. The tax bodies may recognize the costs of goods or services included in these controlled transactions as non-market prices and calculate taxes based on the average market price.

It should be noted that Russia has followed international standards in development and implementation of TPRs, such as Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations of

[24] The Double Tax Treaties with Cyprus, Malta, Luxembourg and the Netherlands to be applied from 2021. Available at: https://www.audit-it.ru/articles/account/court/a56/1021507.html. (In Russ.). [Accessed 15.06.2022].

[25] Protocol amending the DTT between the Russian Government and Government of Malta dated 1 October 2020. Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

[26] Protocol amending the DTT between the Russian Federation and Luxembourg dated 6 November 2020. Available at: http://www.consultant.ru/. (In Russ.). [Accessed 05.06.2022].

2017, adopted by the OECD.[27] The recommendations contained in this document can be used both by OECD members and non-members since it is part of the BEPS action plan. Countries such as Russia, China and Brazil use the OECD Guidelines for improvement of their domestic legislation. For example, following the OECD Guidelines Russian law has established that the main principle of transfer pricing is the arm's length principle.[28] This principle has been applied by many countries from all over the world, such as Australia, China, Switzerland, the UK, Argentina, the USA, and others. According to this principle, transaction prices between interdependent entities should correspond to the average market prices between independent market players. In order to effectively implement TPRs, Russia acceded CbC MCAA in January 2017.

In addition, Russia has implemented rules about controlled transactions that should be reported to the Federal Tax Service. Transactions with offshore companies[29] are classified as controlled transactions provided that the income from them exceeds 60 million RUB per year for each company.[30] This mechanism of control over transaction prices between interdependent entities is aimed at preventing businesses from manipulating prices and stopping offshore capital flow.

II.5. Registers of Beneficial Owners

[27] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017. Available at: https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2017_tpg-2017-en#page1 [Accessed 15.06.2022].

[28] OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017, p. 38. Available at: https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2017_tpg-2017-en#page1 [Accessed 15.06.2022].

[29] The list of offshore jurisdictions, which includes 40 countries and territories, approved by the Ministry of Finance Order No. 108H dated 13 November 2007, as amended on 2 November 2017. Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

[30] Tax Code of the Russian Federation, Art. 105.14.

Russian anti-money laundering rules have established that legal entities should identify their beneficial owners, and document, update and store this information for a period of 5 years. In addition, they have to provide it to the authorised state authorities upon request.[31] The Russian Central Bank has outlined methods for the identification of beneficiaries.[32] However, unlike the legislation of some foreign countries, Russian law does not require the creation of public registers of such beneficiaries. Furthermore, all information about beneficial owners has to be collected and kept by the banks, rather than centralized.

In addition, Russian law obliges Russian legal entities to gather information solely about their beneficial owners, whereas offshore companies are not required to do so. Despite this, local court practice gives us an example of another approach. In a number of cases, it has been established that since information about the ownership of offshore companies was not publicly available, these entities had to bear the burden of proof on the circumstances that protected them in their business relationships with third parties. In particular, offshore companies have to disclose information about their ultimate beneficial owners.[33] If this information is not provided, the offshore company will experience legal complications.[34] For example, the courts will accept

[31] Art. 3, 6.1. and 7(1), Federal Law On Countering Money Laundering of Criminally obtained Incomes, and Financing of Terrorism No. 115-FZ dated 7 August 2001 (as amended on 20 July 2020). Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

[32] Bank of Russia's Informational Letter on Identification of Beneficial Owners by Organizations Operating with Money and other Properties No. 14-T dated 28 January 2014; Bank of Russia's Letter On Issues related to the Identification of Beneficial Owners No. 014-12-4/4780 dated 2 June 2015. Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

[33] Resolution of the Russian Supreme Arbitrazh Court No. 14828/12, case No. A40-82045/11-64-444. Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

[34] Resolution of the Arbitrazh Court of Volgo-Vyatskiy Circuit No. F01-1545/2018 dated 21 May 2018, case No. A43-30569/2015; Resolution of the Arbitrazh Court of Moscow Circuit No. F05-7221/2017, case No. A40-96862/2016 dated 29 March 2018; Resolution of the Arbitrazh Court of the Moscow Circuit No. F05-12062/2014 dated 20 January 2016, case No. A40-26432/12; Resolution of the 14th Arbitrazh Court of Appeal No. 14AP-2998/2018 dated 22 June 2018, case No. A13-10654/2016; Resolution of the 18th Arbitrazh Court of Appeal No. 18AP-4133/2017 dated 10 May

evidence submitted by offshore companies provided that the relevant information about the company's beneficiaries is disclosed.[35] Despite this, in some cases the courts have decided that due to the secretive nature of the beneficial ownership, it is difficult to provide information about a company's beneficial owners to the party to the proceedings. Therefore, the court's decision to dismiss the claim based upon the fact that the relevant evidence was not provided by the parties, would have been a breach of their right to a fair trial.[36] It should be noted that this approach means that Russian courts have implemented the Institute of Disclosure order from English law, which allows a claimant to get access to the necessary evidence. In cases where the party is not willing to provide the relevant information about the beneficiaries of an offshore company or trust, their refusal to do so could have adverse effects on the party itself, and on the offshore company.

II.6. Exchange of Financial Information

In order to effectively apply the CFC rules and implement other anti-offshore measures, Russia may use the international mechanisms on exchange of financial information stipulated by some DTTs, as well as the Convention on Mutual Administrative Assistance in Tax Matters No. 127 of 1988, as amended by the 2010 Protocol,[37] to which Russia has been party since 2015. However, this information exchange process is time-consuming and requires the completion of several formalities. Convention No. 127 stipulates three methods for the exchange of information — upon request, spontaneous exchange

2017, case No. A07-17994/2015. Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

[35] Resolution of the 17th Arbitrazh Court of Appeal dated 19 September 2017 No. 17AP-1083/2017-GK, case No. A60-27089/2016. Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

[36] Ruling of the Supreme Court of the RF No. 5-KG15-34 dated 7 July 2015. Available at: http://www.consultant.ru/. (In Russ.). [Accessed 25.11.2021].

[37] The Multilateral Convention on Mutual Administrative Assistance in Tax Matters. Available at: http://www.oecd.org/tax/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters-9789264115606-en.htm [Accessed 15.06.2022].

and automatic exchange. It is noteworthy that BRICs countries had exchanged financial information for a long time before 2015, when Russia acceded to Convention No. 127. For example, in the period 2009–2011 Russia received approximately 8,000 spontaneous requests, whereas China and India received less than 1,000 requests. Despite this, in relation to the automatic exchange of information both China and India made more than 10,000 exchanges annually between 2009 and 2012, whereas Russia has only tested the automatic exchange of information with OECD countries since 2013 (Wilson, 2018).

Russia is the Party to the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (CRS MCAA) of 2014[38] that provides an effective mechanism for the automatic exchange of information about non-residents' bank accounts. Nearly 100 countries carried out automatic exchanges of information in 2019, enabling their tax authorities to obtain data on 84 million financial accounts held offshore by their residents, covering total assets of EUR 10 trillion.[39] In September 2018, the Russian tax authorities received information about Russian residents' accounts in foreign banks from 58 countries,[40] including the BVI, the Caymans and other offshore jurisdictions. The mechanism provided by the CRS MCAA allows the Russian tax authorities to effectively implement CFC rules. Foreign banks collect information about Russian residents who have personal accounts or control company accounts in local banks, and transfer this information to their internal state authorities that, in turn, forward it to the Russian tax authorities. Therefore, Russian residents who have received income in their foreign bank accounts from offshore companies

[38] Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information. Available at: http://www.oecd.org/ctp/exchange-of-tax-information/multilateral-competent-authority-agreement.pdf [Accessed 15.11.2022].

[39] International community continues making progress against offshore tax evasion. Available at: https://www.oecd.org/tax/transparency/documents/international-community-continues-making-progress-against-offshore-tax-evasion.htm [Accessed 15.06.2022].

[40] Federal Tax Service of Russia website. Mikhail Mishustin summarizes the results of tax authorities work in 2018. Available at: https://www.nalog.gov.ru/rn77/news/activities_fts/8434593/. (In Russ.). [Accessed 15.11.2022].

to which residents are beneficiaries, have to be prepared to justify the sources of these funds.

In order to effectively implement CFC rules globally, it is recommended to create an international instrument, in the form of a convention, treaty or protocol for the introduction of public registers of the beneficiaries of offshore companies and trusts. This instrument could be effectively drafted into the OECD, FATF or G20 and offshore jurisdictions would be forced to implement its standards. However, so far, there have been no uniform rules adopted on an international level and most jurisdictions are not committed to creating public registers of beneficiaries. Some countries have created internal registers of beneficiaries, whereas others have established that these registers have to be formed by the companies themselves or by their incorporating agents. Finally, not all jurisdictions are prepared to make registers publicly available.[41]

II.7. Anti-Russian Sanctions of 2022 and the Russian Response to Them

So far, the EU, the UK, the USA and their allies have introduced 10,563 "sanctions" and 6,140 of which were imposed prior to 22 February 2022[42] when the Donetsk and Lugansk regions were officially recognized as independent countries by the Russian State. As it happens, most of these Western sanctions will help with the de-offshorization of the Russian economy. We will consider some of these below.

First, the EU authorities in Council Decision (CFSP) 2022/335 dated 28 February 2022[43] and Council Regulation (EU) 2022/334 dated

[41] U4 Anti-corruption Resource Center. Beneficial ownership registers: Progress to date. Available at: https://knowledgehub.transparency.org/assets/uploads/helpdesk/Beneficial-ownership-registers_2020_PR.pdf [Accessed 15.06.2022].

[42] Live monitoring of all sanctions against Russia. Available at: https://correctiv.org/en/latest-stories/2022/03/01/sanctions-tracker-live-monitoring-of-all-sanctions-against-russia [Accessed 13.11.2022].

[43] Council Decision (CFSP) 2022/335 dated 28 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022D0335 [Accessed 13.06.2022].

28 February 2022[44] prohibited any aircraft operated by Russian air carriers to land in, take off from, or overfly the territory of the EU. Russian airlines operate with 1,367 aircrafts in total. It has been revealed that 739 of all aircraft used by Russian airlines are registered in the Bermuda register[45] and 37 in Ireland (Levinskiy, 2022). Most of these aircraft are Boeings and Airbuses. In March 2022, the Bermuda Civil Aviation Authority (BCAA) *"provisionally suspended all Certificates of Airworthiness*" of aircraft operating under the "*agreement between Bermuda and the Russian Federation."* Russian airlines had registered their aircraft in the Bermuda Registry (VP-B** and VQ-B**) in order to have them accepted at airport worldwide. The certificates were suspended due to safety reasons, because "*BCAA is unable to confidently approve these aircraft as being airworthy."*[46]

As a result, on 14 March 2022, the Russian President signed Federal Law No. 56-FZ that allows aircraft from Bermuda and Irish registers to be re-registered on a Russian register along with the issuance of Russian *certificates of airworthiness,* provided that the aircraft meets Russian technical requirements.[47] Consequently, the EU sanctions have stimulated the de-offshorization of the Russian aircraft industry, since aircraft were forced to be re-registered on the Russian aircraft register. The aircraft are still able to conduct their operations, but only within Russian territory because their Russian certificates of airworthiness would not be recognized worldwide. In addition, even if they were able to fly abroad, the aircraft would certainly be seized by foreign authorities

[44] Council Regulation (EU) No. 2022/334 dated 28 February 2022 amending Council Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R0334 [Accessed 15.11.2022].

[45] Ministry of Transport of the RF disclosed the number of aircraft registered abroad. Available at: https://www.rbc.ru/business/11/03/2022/622b1c6f9a7947d280f3d1b9. (In Russ.). [Accessed 13.06.2022].

[46] Bermuda CAA suspends certificates of Russian aircraft. Available at: https://www.aviation24.be/miscellaneous/russo-ukrainian-war/bermuda-caa-suspends-certificates-of-russian-aircraft/ [Accessed 13.06.2022].

[47] Federal Law No. 56-FZ dated 14 March 2022 "On the Introduction of Amendments to the Air Code and Other Legislative Acts of the Russian Federation." Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

at the request of foreign leasing companies, because most of the aircraft were leased by Russian airlines, the lease agreements were terminated and the leasing companies demanded the return of the aircraft.

The EU has introduced another measure that helps the de-offshorization policy in Russia. Council Regulation (EU) 2022/576 dated 8 April 2022[48] stated that "It shall be prohibited to register, provide a registered office, business or administrative address as well as management services to, a trust or any similar legal arrangement having as a trustor or a beneficiary: (a) Russian nationals or natural persons residing in Russia; (b) legal persons, entities or bodies established in Russia." It shall be prohibited as of 10th of May 2022 to act as, or arrange for another person to act as, a trustee, nominee shareholder, director, secretary or a similar position, for a trust or similar legal arrangement (Art. 5m). It is suggested that this Regulation (EU) 2022/576 covers not only trusts, but also similar legal instruments such as Treuhand in Germany. However, it is obvious that the primary target of this Resolution is trusts created in Cyprus. For a long time, the creation of Cypriot trusts has been a widespread practice among wealthy Russian individuals and businesses.

The Regulation (EU) 2022/576 also states that it shall be prohibited:

(i) to accept any deposits from Russian nationals or residents, or Russian legal entities, if the total value of deposits exceeds EUR 100,000;

(ii) to provide above mentioned persons with crypto-asset wallet, account or custody services, if the total value of crypto-assets exceeds EUR 10,000;

(iii) to sell, supply, transfer or export to the persons as above the banknotes denominated in any official currency of an EU Member State (Art. 5b and 5i).

[48] Council Regulation (EU) No. 2022/576 dated 8 April 2022 amending Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. Available at: https://eur-lex.europa.eu/eli/reg/2022/576/oj [Accessed 13.06.2022]; *See* also: Council Decision (CFSP) 2022/884 dated 3 June 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022D0884&from=EN [Accessed 15.11.2022].

These initiatives also stimulate Russian businesses and individuals to move away from using any overseas offshore and quasi-offshore services.

In addition to the aforementioned sanctions, Russian companies were also de-listed from foreign security exchange markets. Their shares and other securities can no longer be traded. As a result, these companies have, until now, lost interest in their offshore structures.

The sanctions adopted by Western powers encouraged the Russian authorities to take counter-measures to preserve the stability of the Russian economy. Overall, life has proved that these counter-measures have been effective, timely and reasonable.

The Russian legislator introduced a concept of "unfriendly nations," and this list was approved by Russian Government Decree No. 430-r dated 5 March 2022.[49] It includes 48 countries and territories, including all EU countries, the USA, the UK, Australia, Canada and Japan. It should be noted that corporate management by Russian companies was usually conducted through such jurisdictions as the BVI, Jersey, Cyprus, Liechtenstein, the Netherlands and Switzerland, and all of these countries are included in the list. As will be shown below, the Russian laws contain certain restrictions for unfriendly nations, and therefore these restrictions concern offshore business as well.

As a response to de-listing the securities of Russian companies abroad, Federal Law No. 114-FZ dated 16 April 2022[50] prohibited Russian companies from listing their depositary receipts on foreign exchanges (Art. 6). Those receipts that had been listed prior to the date of the Federal Law, had to be de-listed by Russian companies from foreign exchanges and converted into local Russian securities in order to reduce foreign control over these companies. "Depositary receipts are certificates issued by a bank representing shares in a foreign company

[49] Government Decree No. 430-r dated 5 March 2022 "On the List of Countries and Territories which Introduced Unfriendly Actions against the Russian Federation, Russian Legal Entities and Individuals." Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

[50] Federal Law dated 16 April 2022 No. 114-FZ "On the Introduction of Amendments to the Federal Law on Joint-Stock Companies and Other Legislative Acts of the Russian Federation." Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

traded on a local stock exchange. They allow investors to dabble in overseas stocks in their own geography and time zone." There were more than "30 depositary receipts on Russian companies including Gazprom, Rosneft, Lukoil and Norilsk Nickel issued by BNY Mellon, Deutsche Bank, Citigroup, JPMorgan, among others, trading on U.S. and European markets" (Cruise and Mandl, 2022).

Specific counter-measures against residents from "unfriendly countries" were introduced by a number of decrees of the Russian President, in particular No. 79, 81, 95 and 126 adopted in February and March 2022 and further amended.[51]

Firstly, payments of dividends in excess of RUB 10 million per month to shareholders and bondholders who are non-residents from unfriendly countries can only be made in Russian roubles. These payments can only be made in special accounts opened in Russian banks in the name of these foreign shareholders or bondholders (Decree No. 95).

Secondly, if the amount of payment exceeds to non-residents who are from unfriendly nations under a credit or loan agreement exceeds RUB 10 million per month, it can be made only in Russian RUB. These payments can only be made in special accounts opened in Russian banks in the name of these foreign creditors or lenders (Decree No. 95).

In addition, non-residents from unfriendly states can buy or sell securities issued by Russian issuers if they have obtained permission to do so from the special governmental foreign investments commission (Decree No. 81). Thus, if a foreign resident wishes to buy or sell the shares of a Russian joint-stock holding company, this transaction requires permission from the aforementioned governmental commission, since

[51] *See* Decree of the Russian President No. 79 dated 28 February 2022 "On Application of Special Economic Measures in connection with the Unfriendly Actions on the Part of the United States and Foreign Countries and International Organizations which Supported them"; Decree of the Russian President No. 81 dated 1 March 2022 "On Additional Temporary Economic Measures to Ensure the Financial Stability of the Russian Federation"; Decree of the Russian President No. 95 dated 5 March 2022 "On the Temporary Procedure for the Fulfilment of Obligations to Certain Foreign Creditors"; Decree of the Russian President No. 126 dated 18 March 2022 "On Additional Temporary Economic Measures to Ensure the Financial Stability of the Russian Federation in the Field of Currency Regulation." Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

the shares are securities. However, a transaction regarding shares in a limited liability company (LLC) does not require the approval of the governmental commission and can be done freely, because a share in an LLC is not a security.

Furthermore, Russian residents may provide non-residents from unfriendly nations with loans in Russian rubles or foreign currencies provided that they have obtained permission from a special governmental commission on foreign investments (Decree No. 81).

Finally, until 31 December 2022 the following operations can be performed only by Russian residents provided that they obtain permission from the Russian Central Bank:

a) payment into the charter capital of a company or fund which was incorporated in the unfriendly state, and

b) contribution to non-residents from an unfriendly state in the course of the performance of obligations under non-contractual joint venture agreements (Decree No. 126).

Consequently, these measures introduced by the Russian authorities *de-facto* contribute to anti-offshore policy in Russia. Specifically, they restrict transfer dividends, interest and loan amounts from Russian subsidiaries to their offshore holding companies. In addition, the prohibition of Russian companies from listing their depositary receipts on foreign exchanges and the mandatory conversion of these receipts into company shares in Russia is also a serious measure against the offshore nature of the Russian economy. As can be seen from public sources, before the crisis started, legal entities who were non-residents owned approximately of 44 % of Sberbank JSC shares,[52] and up to 24 % of Gazprom JSC shares[53] in 2021. This created serious concern regarding the security of the national economy. Now, the situation has changed. The non-residents' share in Gazprom is only 16 %. Information about current Sberbank shares is not available, but there can be no doubt that non-resident shares in this bank have been also decreased significantly.

[52] Sberbank website. Structure of Shareholding Capital of Sberbank JSC. Available at: https://www.sberbank.com/common/img/uploaded/pdf/shareholder_structure_ru_2021.pdf. (In Russ.). [Accessed 13.06.2022].

[53] Gazprom. Shares. Available at: https://www.gazprom.ru/investors/stock/. (In Russ.). [Accessed 13.06.2022].

III. Perspectives regarding Anti-Offshore Regulation in Russia

For the effective implementation of anti-offshore measures, it would be advisable to take legislative action, such as:

a) restricting the capacity of offshore companies,

b) liberalization of the rules on the migration of offshore companies to Russia,

c) raising taxes on dividends for non-residents and for those individuals who have recently changed tax residence,

d) introducing the concept of centre of vital interests and exit tax,

e) improving the rules on indirect sales of immovable property.

It would also be necessary to adopt rules for the creation of public registers of beneficiaries of offshore companies and rules regarding the forced deoffshorization of strategic enterprises. We will analyse these legislative initiatives below.

III.1. Restriction of the Capacity of Offshore Companies

From the point of view of Russian law, an offshore company is a foreign company the legal status of which is determined by the law of the country of registration (Art. 1202 of the Russian Civil Code). However, Russian law restricts the capacity of offshore companies in certain areas. For example, offshore companies may not participate in public procurement tenders,[54] receive state loans, budget investments or state or municipal guarantees,[55] and acquire control over companies that play a strategic role in ensuring Russia's defence and state security without special permission from the state authorities.[56]

[54] Federal Law No. 44-FZ dated 5 April 2013 (as amended on 16 April 2022) "On Contractual System in the Sphere of the Procurement of Goods, Works and Services for State and Municipal Needs," Art. 31(1). Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

[55] Federal Law No. 23-FZ dated 15 February 2016 "On Amendments into the Russian Budget Code." Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

[56] Federal Law No. 57-FZ dated 29 April 2008 (as amended on 15 April 2022) "On Procedures for Foreign Investments in Business Entities of Strategic Importance

There are legislative initiatives to restrict the capacity of offshore companies in Russia. Below, we are considering three draft laws related to this issue.

Draft Federal Law No. 858074-7[57] proposes that an offshore company taking part in proceedings as a plaintiff or defendant, should disclose the identity(s) of their beneficial owner(s) and controlling person(s). In case the plaintiff refuses to disclose this information or provide the respective documents, such as trust deeds or contracts for the provision of nominee services, its claim will not be acted upon and consequently it will be denied judicial protection. Similarly, the defendant will experience legal complications in case it refuses to disclose the identity(s) of an offshore company's beneficiaries or controlling persons.

Another draft Federal Law No. 915223-7[58] proposes that offshore companies have to disclose the identity(s) of their beneficial owners and controlling persons. Without the disclosure of this information and its placement into the Unified Register of Legal Entities, an offshore company may not be a shareholder in any Russian legal entity. Furthermore, it will not be allowed to do business in the Russian Federation, including the signing of contracts with Russian organizations and individuals, acquisition of properties or participation in other commercial relations.

As Explanatory Notes to both drafts explain, in the past the disclosure of this information was problematic because the laws of offshore jurisdictions prohibited or restricted parties from doing so. It was further complicated because there were no international agreements on the exchange of information between Russia and the offshore jurisdictions. However, many of them have now acceded to Convention EST No. 127, to which Russia has been party since the 1st of July 2015.

to Russian National Defense and State Security," Art. 2. Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

[57] Draft Federal Law No. 858074-7 "On Amendments into the Russian Civil and Arbitrazh Procedure Codes" (version submitted to the Russian State Duma as of 10 December 2019). Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

[58] Draft Federal Law No. 915223-7 "On Amendments into the Russian Civil Code (version submitted to the Russian State Duma, as of 5 March 2020). Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

Therefore, Russian tax authorities now have the instruments to get access to information about the beneficiaries of companies registered in offshore jurisdictions. In addition, Russia and many offshore countries are parties to the CRC MSAA of 2014, which provides for the automatic exchange of financial information. Moreover, by using this mechanism, Russia can receive information from more than 90 countries about the accounts of offshore companies that are controlled by Russian beneficiaries.

III.2. Dividend-Stripping Rules, Centre of Vital Interests and Exit Tax

The effect of CFC rules is being undermined because many wealthy Russian people have left the country and have changed their tax residencies. According to a research done in 2017, 40 % of the wealthy Russian people who participated in the survey declared that they had decided to renounce Russian tax residency (Khachaturov, 2017); at the time of writing this paper three years later, this number has even increased.

In accordance with the law, individuals who live outside of the Russian Federation for more than 183 days a year are considered non-residents and the CFC rules do not apply to them. This means that these people do not have to report about their CFCs to Russian tax authorities or pay taxes from their income to the Russian State. Furthermore, these people can create economic substance for their overseas companies and continue to apply the reduced tax rates stipulated by the respective DTT with Russia. According to statistics, the implementation of CFC rules created additional treasury revenue amounting to 3 billion RUB in 2016, 6 billion in 2017 and 4.4 billion in 2019.[59] The number of notifications about CFCs for the period of 2015–2019 was 25,913. However, these figures would be many times greater if Russian residents followed the law in a strict way.

[59] Federal Tax Service's Response No. ED-17-13/265 dated 25 October 2019. Available at: http://www.consultant.ru/. (In Russ.). [Accessed 25.11.2020].

In order to raise the effectiveness of the CFC rules, legislators could rely on international experience and make the following amendments to Russian law:

a) The introduction of "dividend-stripping rules" which do not allow the application of reduced dividend tax rates under the applicable DTT in cases where a shareholder has just changed their tax residency to a foreign country.

b) The introduction of the concept of "centre of vital interests," which assumes that if the income source is located in Russia, the respective individual should still be regarded as a Russian tax resident, notwithstanding the fact that he or she is domiciled in another country.

c) The introduction of an exit tax for those individuals who have just changed, or intend to change their Russian residencies. These individuals have "continued deemed residence" and they will have to pay an exit tax based on the value of their business.

The aforementioned concepts of dividend-stripping rules, centres of vital interests, exit taxes and continued deemed residences can be found in US law (Gidirim, 2016, pp. 84–88), which could be used by Russian legislators as the international standard to follow.

III.3. Taxation of the Indirect Sale of Immovable Properties

The indirect sale of immovable property located in Russia is quite widespread. In order to avoid the payment of income tax, parties usually create an offshore company (a target company) that, in turn, holds shares of the Russian entity to which a real estate object belongs. Following this, parties conclude the sale and purchase agreement for the shares of the target company. Upon completing this deal, the purchaser gets control over the immovable property and the seller receives the purchase price abroad. As a result, the seller does not pay income tax under Russian law as it is common for the parties to complete the transaction in an offshore jurisdiction where transactions with companies' shares are not taxable. In addition to these tax benefits, the parties are released from registration formalities regarding the passing of property rights to a purchaser, since the subject matter of the sale is the shares of an offshore company, and not the real estate object itself. Furthermore, parties

may subject these transactions to a foreign law and the jurisdiction of foreign courts, which is an additional advantage for them. Finally, the beneficiaries of the transaction, i.e., the new owner(s) and seller of the immovable property are hidden from public view by their offshore companies.

The issues surrounding the taxation of indirect sales of immovable properties by way of offshore companies have been addressed on both the international and national levels. The current Russian tax rules on the indirect sale of immovable property[60] are similar to those stipulated by Article 13(4) of the OECD Model Convention with Respect to Taxes on Income and on Capital.[61] According to the Model Convention, gains derived by a resident of a Contracting State from the alienation of shares, may be taxed in the 2nd Contracting State if these shares derive more than 50 % of their value from immovable property situated there. These OECD Model Convention rules on the indirect sale of immovable assets have been replicated in one third of DTTs. In other words, currently most DTTs do not regulate the indirect sale of immovable property (Krasnobaeva and Blagova, 2017). The MLI also established that gains derived from the alienation of shares may be taxed in the jurisdiction where the immovable property is situated, provided that its value represents over a certain percentage of the value of the entity which owns it (Art. 9). However, the MLI does not stipulate a working mechanism for the taxation of gains in situations where both the seller(s) and buyer(s) of a target company are individuals or entities registered in non-contracting states to the MLI.

As it was noted in research prepared by the IMF, OECD, the UN and WBG which was released in 2017, the tax treatment of "offshore indirect transfers" (OITs), which refer to the sale of an entity which owns an immovable asset by the resident of a foreign country has emerged as a significant issue in many developing countries. It remains the case, however, that the relevant model Article 13(4) is found only in around 35 % of all DTTs and is less likely to be found when one party is a low-

[60] The Tax Code of the Russian Federation, Art. 309(1)(5).

[61] Model Tax Convention on Income and on Capital (Full Version). Available at: https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2017-full-version_g2g972ee-en#page1 [Accessed 08.01.2021].

income resource rich country. The MLI has increased the number of tax treaties that include Article 13(4) of the OECD Model Convention.[62]

The BRICs countries, such as India and China, have enacted legislation to allow the taxation of indirect share transfers made by non-residents. These countries are now seeking to enforce their tax laws and collect this tax (Cope and Jain, 2015). For example, according to the Indian Income Tax Act, all income arising directly or indirectly from any business activity, property or source of income connected with India, is subject to income tax. This issue was considered in the famous case *Vodafone Int'l Holdings B.V. vs Union of India*.[63] In 1992, Hong Kong company Hutchison Group ("Hutch"), formed a joint venture with an Indian multinational to operate a telecommunications business in India. Hutch owned approximately two-thirds of the joint venture directly and indirectly through a chain of holding companies. In 2006, Hutch entered into an agreement with Vodafone to sell its interest in the joint venture. This was accomplished by the sale of a single share of a Cayman Islands holding company to Vodafone. In 2007, the Indian tax authority issued a notice to Vodafone to explain why it did not withhold tax on payments made to Hutch when it purchased the single holding company share. The Supreme Court of India ruled in favour of Vodafone. Thus, in order to make such transactions taxable in the future, the Indian legislators then amended the tax rules and clarified the following. In the event there is a transfer of a share or interest in a company or entity registered or incorporated outside the country, and the value of the share or interest is derived substantially from assets located there, the transfer is taxable in India (Cope and Jain, 2015).

Russia has also tried to resolve the issue of the indirect sale of immovable assets. Thus, draft Federal Law No. 985268-7[64] suggests

[62] OECD website. The Taxation of Offshore Indirect Transfers — A Toolkit. Available at: https://www.oecd.org/ctp/PCT-offshore-indirect-transfers-draft-toolkit-version-2.pdf, 8 [Accessed 15.06.2022].

[63] Vodafone International Holdings, B.V. v. UOI (2012) 341 ITR 1/204 Taxman 408/247 CTR 1/66 DTR 265/6 SCC 613/Vol. 42.

[64] Draft Federal Law No. 985268-7 "On Amendments into Part Two of the Russian Tax Code Regarding the Taxation of the Indirect Sale of Immovable Property Through Offshore Companies" (version submitted to the Russian State Duma on 8 July 2020). Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

supplementing the Tax Code with a rule stipulating that income from the indirect sale of immovable property located in Russia should be regarded as income derived from Russian sources, which should be taxable at the standard income tax rate of 20 %. Therefore, if a foreign company receives income from the sale of shares in another foreign holding or sub-holding company, which in turn directly or indirectly owns immovable property located in Russia, then this foreign company has to pay income tax of 20 % of the value of the immovable asset. In case the foreign company does not have tax representation in the Russian Federation, the respective income tax should be withheld from the selling price of the immovable asset.

III.4. Redomiciliation of Offshore Companies into Russia

The Russian beneficiaries of offshore companies may redomicile these assets into special administrative areas in Russky and Oktyabrsky islands, in accordance with the Federal Law on International Companies and International Funds of 2018.[65] Redomiciled entities may continue their work in Russia as international companies, in the form of limited liability or joint stock companies. Furthermore, they may use the tax benefits stipulated by Russian law and apply a foreign law to their internal corporate relations, subject to certain conditions. However, the number of companies that have been redomiciled during the period of four years since the law came into force is relatively low — 85 companies in Octyabrsky Island[66] and 7 in Russky Island (with the potential migration of 15 other companies) (Kudrin, 2022).

There are various explanations for the ineffectiveness of this law. First, the jurisdiction from which a foreign company could redomicile to these Russian islands had to be a member of the FATF[67]

[65] Federal Law No. 290-FZ dated 3 August 2018 (as amended 26 March 2022) "On International Companies and International Funds." Available at: http://www.consultant.ru/. (In Russ.). [Accessed 15.06.2022].

[66] *See* Special Administrative Region on the Territory of the Oktyabsky Island (Kaliningrad Region). Available at: https://www.russiasar.com/tpost/5gkbnroz81-v-sar-na-ostrove-oktyabrskii-zaregistrir. (In Russ.). [Accessed 15.06.2022].

[67] FATF — Foreign Action Task Force (on Money Laundering).

or MONEYVAL.[68] As offshore jurisdictions such as the BVI, the Caymans, Bermuda and others, are not members of the aforementioned organizations, companies registered in these jurisdictions could not migrate to Russia. Subsequently, this provision was substantially amended in February 2021 when a number of other regional organizations were added. Second, the infrastructure in the Russky and Oktyabrsky islands is inappropriate for doing business and as such, the redomiciliation of companies to other places, which are closer to main centres of business, should be allowed. Finally, the requirement for a foreign company to invest not less than RUB 50 million in the Russian economy inhibits the migration of most small and medium-sized companies. As a result, once the law is changed the popularity of redomiciliation will grow substantially.

It is worth noting that the idea of redomiciliation of offshore companies into Russia, rather than the adoption of suppressive measures was an attempt to find a positive solution of the problem. It is not a secret that many Russian businesspersons use offshore companies and non-corporate structures purely for asset protection purposes, such as to prevent hostile or forcible takeovers. However, as one of the authors pointed out, "asset protection planning has been used as a cover for offshore tax evasion so often that many prosecutors automatically associate the two" (Adkisson and Riser, 2004, p. 17). Therefore, even those individuals and companies whose initial and primary goal was asset protection, eventually start to use offshore companies for other purposes, such as tax evasion. That is why in order to be successful, redomiciliation policy should go alongside the development of a business-friendly environment.

III.5. Public Registers of Beneficiaries of Offshore Companies and Trusts

In 2015, in order to support the international exchange of financial information and the transparency of the tax administration, the European Union adopted Directive No. 2015/249 on the prevention of

[68] MONEYVAL — Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism.

the use of the financial system for the purposes of money laundering or terrorist financing. It was amended by Directive No. 2018/843[69] in 2018. Both Directives contain rules on the mandatory disclosure of information about beneficiaries. According to Directive No. 2018/843, EU members should ensure that corporate and other legal entities incorporated within their territory are required to obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of any beneficial interests held. The EU members had to set up beneficial ownership registers for corporate and other legal entities by the 10th of January 2020, and for trusts and similar legal arrangements by the 10th of March of the same year. Central registers should be interconnected via the European Central Platform by the 10th of March 2021. Member States also had to set up centralised, automated mechanisms allowing the identification of the holders of bank and payment accounts and safe-deposit boxes by the 10th of September 2020.

In order to implement directives, some EU countries such as Austria, the Czech Republic, Germany, Ireland, Luxembourg and the UK have created registers of the beneficiaries of legal entities. Similar registers have been created in some non-EU countries, including Singapore, Switzerland, and the UAE. Some of these registers are publicly available, whereas others are not. However according to Directive No. 2018/843, the EU Member States shall ensure that any information on the beneficial ownership is accessible to the relevant authorities, obliged entities such as financial institutions, and the general public in most cases. However, there are some exceptions to this, for example, if the beneficial owner is exposed to disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or where the beneficial owner is a minor or otherwise legally incapable.

[69] Directive (EU) 2018/843 of the European Parliament and of the Council dated 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.156.01.0043.01.ENG [Accessed 25.11.2020].

As it has already been noted, Russian law currently does not contain rules about central registers of the beneficiaries of companies created in Russia. Considering the experience of foreign countries, it would be highly recommended to introduce these rules. Furthermore, these central registers should also contain information about Russian beneficiaries of offshore companies and trusts. This initiative would be more progressive than the EU rules in force, which only require the public disclosure of information about the beneficiaries of domestic companies and trusts. The main features of this prospective Russian law should be as follows:

a) Individuals — Russian residents who are the beneficiaries of offshore companies and trusts would have to submit information about themselves and their offshore assets to the public register, which would be created and managed by the Russian tax authorities.

b) The information contained in the public register should be accessible to any interested parties. However, access to the information could be restricted in cases where the beneficiary is a minor or disabled person. Access should also be limited in cases where the beneficiary provides evidence that he or she is under threat of identity fraud or other criminal activity.

c) Failure to provide the relevant information would entail administrative fines for the respective beneficiaries of not less than RUB 1 million.[70]

III.6. Forced Deoffshorization of Strategic Enterprises

The majority of large and medium-sized Russian companies, including key players in industries such as oil & gas, steel, telecoms and retail, have their holding companies registered abroad in offshore and quasi-offshore jurisdictions, i.e., Cyprus or the Netherlands. As it was correctly noted, "Today it is obvious to all that the Russian ministries

[70] This draft law, prepared within the framework of the Research Project "Deoffshorization as a Factor for the Development of National Economy: World Experience, Legal and Economic Aspects" performed in 2019 under the contract No. 01731000096190000910001, was submitted by the author and his co-authors to the relevant Committee of the Russian State Duma.

and state bodies do not manage the economy of the country but rather portray that they do. One of the reasons for this failure is the offshore character of the Russian economy. Today, the external management of the Russian economy exerts more influence than the internal administration. This external management is exercised by foreign states such as the US, as well as transnational companies and banks which manage do so in the interests of transnational moneylenders" (Katasonov, 2016, p. 173).

In order to change this situation, in 2018 the State Duma considered Draft Federal Law No. 554243-7 "On Organizations and their Subsidiaries considered as Strategic to the Russian Economy."[71] The Draft Law proposed the following criteria for companies that could be qualified as strategic enterprises:

a) Income for the previous year should not be less than RUB 10 billion (not less than 4 billion for agriculture),

b) Taxes paid for the last three years should not be less than RUB 5 billion (not less than 2 billion for agriculture),

c) The number of personnel should not be less than 4,000 people (not less than 1,500 for agriculture).

It was proposed that the strategic enterprises and their subsidiaries should be located in the jurisdiction of the Russian Federation. As stated in the Explanatory Note, the purpose of Draft Federal Law No. 554243-7 is to relocate strategic enterprises and their subsidiaries into the Russian jurisdiction.[72] These organizations generate more than 70 % of gross domestic product (the GDP) and employ more than 20 % of the people employed in the Russian economy and therefore, the location of these enterprises and their subsidiaries in foreign jurisdictions undermines the national security of the country.

Draft Federal Law No. 554243-7 received negative feedback and was rejected by the State Duma. According to the conclusion of the

[71] Version submitted to the Russian State Duma as of the 26th of September 2018. Available at: https://sozd.duma.gov.ru/bill/554243-7. (In Russ.). [Accessed 25.12.2020].

[72] Explanatory Note to Draft Federal Law No. 554243-7 "On Organizations and their Subsidiaries considered as Strategic to the Russian Economy." Available at: https://sozd.duma.gov.ru/bill/554243-7. (In Russ.). [Accessed 25.12.2020].

Committee on Natural Resources No. 138[73] dated 23 January 2019 there were a number of reasons for this rejection, in particular:

a) The criteria for the qualification of a company as a "strategic enterprise" has not been substantiated.

b) The concept of "being in the jurisdiction of the Russian Federation" is unclear and undefined.

c) The legal consequences for the recognition of an entity as a "strategic enterprise" have not been defined.

d) The procedure for the transfer of strategic enterprises into the jurisdiction of the Russian Federation has not been defined.

e) The legal consequences in case of a company's refusal to relocate into the jurisdiction of the Russian Federation have not been defined.

f) Several strategic enterprises that had been registered abroad and specifically created for overseas activities, e.g., foreign subsidiaries of Russian banks, would have been required to relocate into the jurisdiction of the Russian Federation without any clear reason.

Therefore, according to the Committee's opinion, this proposal for the relocation of strategic enterprises into the jurisdiction of the Russian Federation would have triggered substantial risks for the Russian economy. In particular, they felt that it would have had a negative effect on the obligations undertaken by these companies under international contracts that could have undermined their competitive advantage in the international market.

From the author's perspective Draft Federal Law No. 554243-7 should be approved. However, certain amendments would have to be made.

Firstly, it should be clearly stated that holding companies of strategic enterprises must not be located abroad and if they are, then they should be redomiciled into the jurisdiction of the Russian Federation within 6 months, in accordance with the Federal Law on International Companies and International Funds.

[73] Conclusion of the Committee on the Natural Resources, Property and Land regarding Draft Federal Law No. 554243-7 "On Organizations and their Subsidiaries considered as Strategic to the Russian Economy." Available at: https://sozd.duma.gov.ru/bill/554243-7. (In Russ.). [Accessed 25.12.2020].

Secondly, in case the respective foreign law under which the holding company of a strategic enterprise is registered does not allow redomiciliation, the strategic enterprise should take the necessary measures for the liquidation of the holding company within one year. If the holding company has not been liquidated voluntarily in the specified period, the strategic enterprise should take measures to acquire its shares from the holding company. If this is not completed, the Russian tax authorities should introduce amendments into the Unified State Register of Legal Entities, which certify that the shares of the limited liability strategic company have been transferred from the holding company to the strategic enterprise. Regarding the shares of a strategic enterprise in the form of a joint stock company, the relevant records should be entered into a register of shareholders that would be maintained by a share registrar or depositor.

Thirdly, the shares obtained by the strategic enterprise should be distributed between the rest of the Russian shareholders according to Russian law. In case there are no other Russian shareholders, the shares should be allocated to the Russian state.

Finally, all disputes and disagreements connected with the transfer of shares of strategic enterprises should be resolved exclusively by the Russian courts in accordance with Russian law.[74]

III.7. Influence of Post-Covid-2019 Theories on the Developments of Offshore Businesses

The impact of Covid-19 on all aspects of modern life has been enormous. Among other factors, Covid-19 has stimulated emerging theories regarding the future of economic development, such as Dr. Klaus Schwab's concept of The Great Reset (Schwab and Malleret, 2020) and

[74] All aforementioned provisions have been implemented into the Draft Federal Law "On Holding Companies of Strategic (Systematically Important) Organizations" that was submitted by the author and his co-authors to the relevant Committee of the Russian State Duma within the framework of the Research Project "Deoffshorization as a Factor for the Development of National Economy: World Experience, Legal and Economic Aspects" performed in 2019 under the contract No. 0173100009619000091000 1. *See* Analytic Notes. The State Duma's Publication, (2020). Moscow. Pp. 168–170. (In Russ.).

Lady de Rothschild's theory of Inclusive Capitalism.[75] As Dr. Klaus Schwab noted, "Whether espoused openly or not, nobody would now deny that companies' fundamental purpose can no longer simply be the unbridle pursuit of financial profit; it is now incumbent upon them to serve all their stakeholders, not only those who hold shares" (Schwab and Malleret, 2020). The recent trends in the development of the "Stakeholder Capitalism" (Klaus Schwab) or the "Inclusive Capitalism" (Ledy Rotchild) have lead us to the conclusion that offshore companies and trust arrangements can no longer be utilised for the enrichment of their beneficiaries only, but also for the development of society and national economies. For example, offshore companies can still be used, as they are convenient instruments for making investments in foreign economies or as flexible tools of corporate governance. Furthermore, as the traditional capitalistic economy shifts from the economics of shareholders to the economics of stakeholders, certain characteristics of offshore companies such as confidentiality or nominee service have lost their value. Today, as Klaus Schwab says, issues of worker safety, pay and benefits become more central and the agenda of stakeholder capitalism will gain in relevance and strength (Schwab and Malleret, 2020). Therefore, offshore businesses should either be rebuilt to satisfy the needs of the modern society, or become irrelevant.

IV. Conclusion

The participant countries introduced and started to implement the BEPS action plan due to the negative effect of offshore businesses on their economies. Russia has already implemented most of the measures stipulated by the BEPS action plan. For example, it has introduced CFC rules, transfer pricing rules, revised its double tax treaties and actively participated in the exchange of financial information with foreign countries. However, the implementation of anti-offshore policy in Russia would require the introduction of new rules and the further development of existing regulations and ratification of draft laws. In this

[75] Embankment Project for Inclusive Capitalism. Available at: https://www.epic-value.com/ [Accessed 02.01.2020].

regard, Russia could rely on the experience of foreign countries such as the US, which already have the relevant tax rules in place. Apart from the introduction of tax rules and rules regarding public registers of the beneficiaries of offshore companies and trusts, it would be advisable to use administrative measures, such as those provided by the draft law on the forced deoffshorization of strategic enterprises. The positive effect of these measures would be felt if both international and national efforts were made simultaneously and the countries' actions were coordinated.

References

Adkisson, J. and Riser, Ch., (2004). *Asset Protection: Concepts and Strategies for Protecting Your Wealth*. New York: McGraw Hill Professional.

Arakelov, S.A., (2017). Developing the concept of beneficial ownership for income: approaches of federal tax service considering relevant court decisions. *Zakon*, 5, pp. 45–56. (In Russ.).

Cope, Ch. and Jain, P., (2015). Taxation of Indirect Share Transfers: Recent Developments in India and Related Policy Considerations. *Tax Management International Journal*, 44, p. 12. Available at: https://www.copetax.com/siteFiles/6961/Taxation%20by%20India%20of%20Indirect%20Share%2)0Transfers.pdf [Accessed 15.06.2022].

Cruise, S. and Mandl, C., (2022). Exclusive Russian companies, banks could reap windfall from depositary receipt delisting. *Reuters*, 15 April 2022. Available at: https://www.reuters.com/business/exclusive-russian-companies-banks-could-reap-windfall-depositary-receipt-2022-04-14/ [Accessed 15.06.2022].

Deneault, A., (2011). *Offshore. Tax Havens and the Rule of Global Crime*. New York: New Press.

Gidirim, V., (2016). *The Fundamentals of International Corporate Taxation*. Moscow: Avtor Publ. Available at: https://www.researchgate.net/publication/311651777_Osnovy_mezdunarodnogo_korporativnogo_nalogooblozenia_Fundamentals_of_International_Corporate_Taxation#fullTextFileContent [Accessed 15.06.2022]. (In Russ.).

Katasonov, V., (2016). *World Cabala. Robbery*. Moscow: Alistorus Publ. (In Russ.).

Khachaturov, A., (2017). Billions have Gone Abroad. *Novaya gazeta*, 8 June 2017. Available at: https://www.novayagazeta.ru/articles/2017/06/08/72742-oshibka-patriota [Accessed 25.11.2020]. (In Russ.).

Kheyfets, B., (2008). *Offshore Jurisdictions in Global and National Economy*. Moscow: Ekonomika Publ. (In Russ.).

Krasnobaeva, A. and Blagova, R., (2017). Indirect Sale of Immovable Property: The Development of the Taxation Rules. *Prakticheskoe nalogovoe planirovanie* [Practical tax planning], Dec. 12. Available at: https://www.audit-it.ru/articles/account/court/a55/940546.html [Accessed 05.01.2021]. (In Russ.).

Kudrin, S., (2022). 15 Companies want to Become Residents of the SAR in Russkiy Island. *Agentstvo Bizness Novostey*, 8 June 2022. Available at: https://abnews.ru/2022/6/8/15-kompanij-zhelayut-stat-rezidentami-sar-na-ostrove-russkij [Accessed 15.06.2022]. (In Russ.).

Levinskiy, A., (2022). What airlines have gained from registering aircraft in Russia. *Forbes*, 22 March 2022. Available at: https://www.forbes.ru/biznes/459283-cto-vyigrali-aviakompanii-ot-registracii-samoletov-v-Rossii [Accessed 13.06.2022]. (In Russ.).

Magnusson, M., (2014). *Offshore Companies: How to Register Tax-Free Companies in High-Tax Countries*. York: Opus Operis.

Schwab, K. and Malleret, T., (2020). *Covid-19: The Great Reset*. Forum Publishing. Available at: http://reparti.free.fr/schwab2020.pdf [Accessed 03.02.2020]. (In Russ.).

Wilson, P., (2018). *BRICS and International Tax Law* Ch. 5. Wolters Kluwer.

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Article

DOI: 10.17803/2713-0533.2023.1.23.041-064

The Impact of Self-Regulation and State Regulation on Small Business Development: An Innovative Approach

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Abstract: Various factors affect the development of small business. Among these are self-regulation and state regulation. The authors focus on the impact that self-regulation and state regulation have on small business, study their interrelation, and interplay in the infrastructural support for the small business development. Both self-regulation and state regulation have their own objectives, guiding principles, inherent functions, and a set of methods and tools to influence the development of small businesses. The authors conclude that, in present day Russia, the focus is on shifting from state regulation to self-regulation without providing additional conditions for development, which reduces the social efficiency of self-regulation. Self-regulation as an alternative to state regulation should be chosen based on the level of the social relations development in general and in the regulated area, in particular. Currently, the development of innovative small businesses as drivers in the economic development attracts much attention. Without state regulation of innovative processes, sustainable socio-economic development of Russia is almost impossible. The economic mechanism of control over the innovative business should include the infrastructure to favor the conditions for the development and introduction of innovative products by small enterprises; the regulatory framework to create equal conditions for business operations, considering the specifics of production and its priority for the region it takes place in; the HR-related matters to plan

business activities considering the professional competence of specialists and the ability to improve their skills. The transition to the innovative development path should include the possibilities of both self-regulation and the need for state regulation to form the conditions for a favorable innovative environment.

Keywords: small business; self-regulation; state regulation; infrastructural support; innovative process; small innovative enterprises

Cite as: Zhura, S.E., Vorobyova, O.I., and Ershova, I.V., (2023). The Impact of Self-Regulation and State Regulation on Small Business Development: An Innovative Approach. *Kutafin Law Review*, 10(1), pp. 41–64, doi: 10.17803/2713-0533.2023.1.23.041-064.

Contents

I. Introduction

Small business occupies a special place in the economic system of developed countries. Small businesses do not require large startup investments and are able to promptly solve the problems of development and saturation of markets with consumer goods, help overcome monopoly abuse in the economy and promote competition. However, despite the key role small businesses play in the national economy, most often they are unable to ensure their development without external help since they lack both financial and non-financial support. Measures taken by the governments are not always effective and they are not always enough. That begs the questions: How far should the state intervene in the market process? Can market relations be a self-sufficient regulatory mechanism when it comes to small businesses? Can government intervention in solving problems of the small business development be justified? Most likely, it can be justified

if the problems are significant and cannot be resolved by the market on its own. Government intervention contributes to a positive effect compared to the situation in the absence of a regulator, which explains the advisability of such intervention. However, one should understand the limits and forms of government intervention in the economy and the functioning of small businesses. Alternatively, to ensure sustainable and cost-effective business development, states can decide on the need for self-regulation in a particular area and the transfer of functions performed by the state authorities to self-regulatory organizations. Therefore, interrelation and interplay of self-regulation and state regulation are key and of scholarly interest in terms of their impact on the small business development.

II. Literature Review

Russian and international researchers give much attention to the small business development issues due to the relevance of the topic. In their studies, they focus on interrelation between the state policy and business models and conclude that such interrelations are multiple (Wasserbaur, Sakao and Milios, 2022).

Much attention is given to the state funding of businesses, regulation and economic growth. In particular, a number of researchers write about the consequences of the Dodd-Frank Act (DF) adopted by the US Congress in 2008, which was intended to reduce the systemic risks that large banks create for the country's financial system. It is argued that DF has had an adverse effect on both the number and the size of loans issued by small banks to small businesses. This finding implies an inadvertent, counterproductive restriction on American entrepreneurship, especially in rural communities (Gamble et al., 2020). Other researchers consider the impact that state guaranteed loans to small businesses have on regional growth and draw an interesting conclusion that there is no significant impact of small business loans on employment or income growth (Lee, 2017).

Research is also carried out in the area of loan guarantees provided by the government to banks that give loans to small and medium-sized businesses (Wilcox and Yasuda, 2018).

Much attention is given to the state development of digital technologies, which are able to transform the economy of less developed regions. The authors focus on the key factors, with the provision of government incentives being of major importance (Aliu et al., 2019).

Self-regulation of business activities is also within the focus of attention. Researchers believe that the state can refuse excessive intervention in the economy only if businesses are able to independently create and ensure the effective functioning of mechanisms that maintain high standards of professional activities, customer relationships and dispute settlement (Bykova, 2017).

Russian scholars pay much attention to studying the self-regulation system in the Russian economy. They reveal the importance of self-regulation as an alternative to state regulation of the Russian economy, indicate the advantages of self-regulation and identify trends in the development of business self-regulation in Russia (Goleva, 2018).

Individual researchers focus on the study of basic economic and legal forms of interaction between the state and businesses and develop recommendations for their enhancement (Gadzhiev, 2019). Researchers study the impact of state regulation on the development of small and medium-sized businesses and identify the goals of state regulation of business activities (Gulyaeva, 2017).

State support for small and medium-sized businesses needs to improve the methods of assisting entrepreneurs. Entrepreneurs participating in government support programs often face the problem of bureaucracy related to document management. In this regard, researchers consider the advisability of developing the most concise list of documents, which would be as short as possible, necessary to ensure the functioning of small businesses (Akulich, 2019).

Some authors also study the developed countries' expertise in state regulation and support of small businesses. They consider the expertise of a number of countries (Germany, Japan, and the USA) in the field of state policy for the small business development. Based on their analysis, the researchers formulate the common principles and features of the economic policy of these countries aimed at improving the efficiency of small businesses (Gusev, 2018; Snitko, 2018; Makhova, 2018; Lagvilava, 2021).

However, we have revealed that the previous studies of the interrelation and interplay between self-regulation and state regulation and their impact on the development of small businesses are insufficient, which allows us to conclude that these processes need more research.

III. Methods

Various methods of economic research for the basis of this study, in particular, abstraction or selection of essential properties and features of economic phenomena and processes. This method was instrumental in analyzing individual properties, aspects, parts and elements of the whole (self-regulation, state regulation), creating, with the help of abstraction, specific economic concepts and categories (principles, methods, functions, etc.).

The logical method made it possible to apply the laws and forms of thought. They ensure that the judgments and conclusions expressed are true. The logical method helps better understand the cause-and-effect relationship in the economy. We noted that there are certain objective connections between the types of regulation, with a natural series of changes in time and space, which can be considered objective logic.

For our research, we also used the comparative analysis method, which helped identify elements and features (goals, principles, functions) common to all the systems under research and patterns of their development, and showed their differences with regard to self-regulation and state regulation.

IV. Discussion

Self-regulation and state regulation play an important role in the system of the small business development in Russia. There is a close relationship and interaction between the two (Fig. 1). Despite the fact that the impact on small businesses is based on common principles, functions, resources, methods and tools, each type of regulation can have its own specific elements. The principles of state regulation include the division of powers, equal access to state support and responsibility for creating favorable conditions.

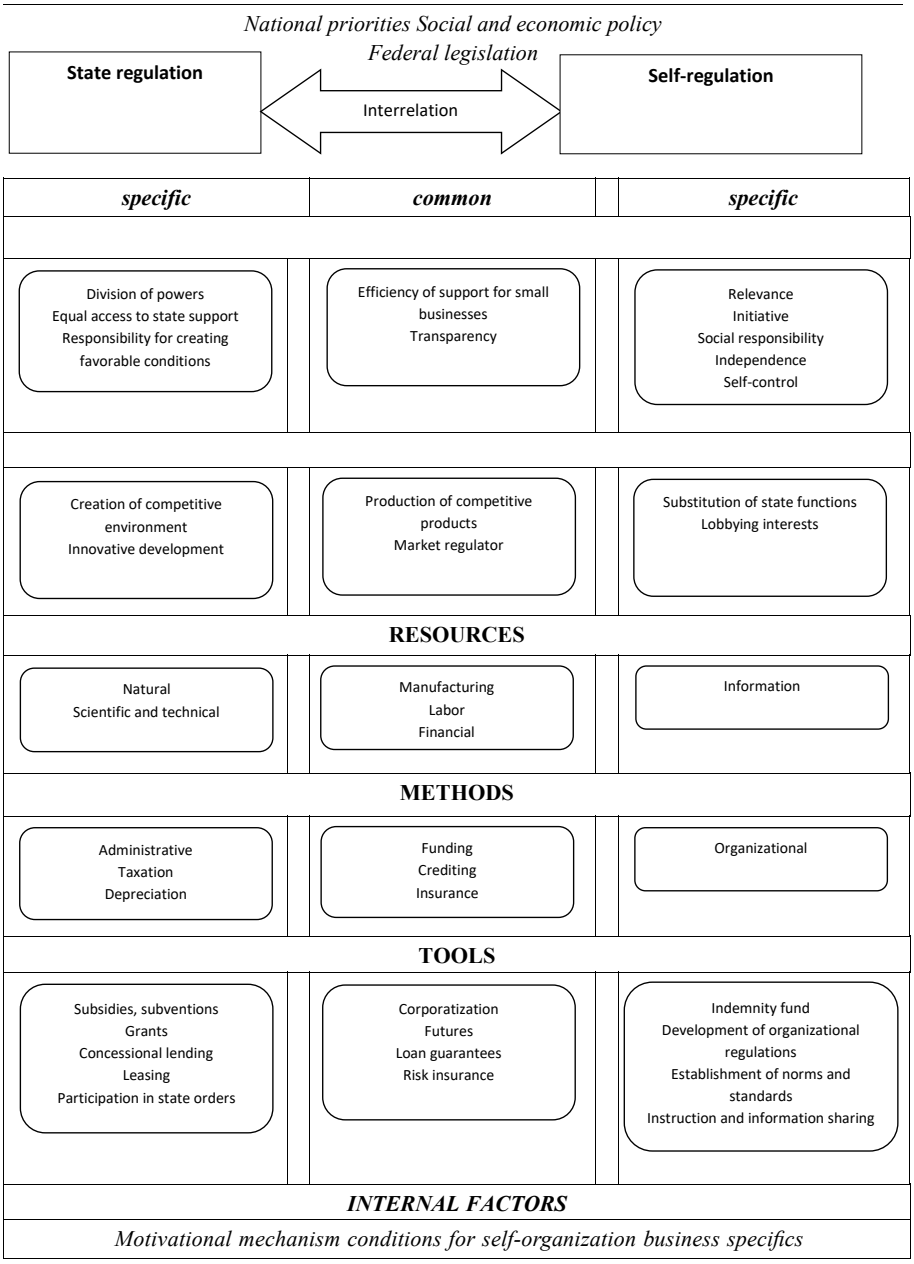

Figure 1. Interrelation and interplay of self-regulation and state regulation

At the same time, unified principles of self-regulation have yet to be developed. We suggest using the following principles: the principle of relevance, the principle of initiative, the principle of social responsibility, the principle of independence, the principle of transparency, the principle of self-control, which determine the basis for creation and development of business relations.

The principle of relevance means that self-regulation must meet the current demands of the market. The principle of initiative implies that small businesses are able to be proactive in creating various non-profit organizations aimed at protecting and promoting their interests.

— The principle of social responsibility should not rule out the principle of independence, which implies independence from the state in making decisions related to business activities. The principle of self-control lies in the ability and, in some cases, the need for control of self-regulatory organizations over its members' activities. The principle of transparency implies that the society has access to information about self-regulation and the activities of the state regulator.

— The common principles that are inherent in both state regulation and self-regulation include small business support efficiency, participation in decision-making, and transparency to the public. The principle of efficiency implies achieving the desired results with optimum use of means and time. The phrase "with minimal use of funds" is often used. However, minimal use of funds and resources does not always produce effective results. This is especially important for small businesses as their resources are limited. The principle of participation in decision-making ensures that small businesses are able to be part of the decision-making process with regard to the business development policy, including at the state level. The principle of transparency is also important, since it implies transparency in matters related to the development of small businesses, including support issues.

— State regulation of the infrastructure for the small business development is implemented through the following main functions:

— Creation of a competitive environment;

— Innovative development.

The key specific functions of self-regulation are the substitution function that implies actual legitimate substitution of state regulation

in certain forms and the lobbying function that makes it possible to defend and protect the interests of small businesses.

The common functions for both state regulation and self-regulation are the function of producing competitive products through increasing professional competences improvement of professional competences and certification of goods and the function of a market regulator that manifests itself in establishing the rules for small business activities on the market and monitoring their implementation.

With regard to resources, self-regulation uses information as a specific resource since it is possible to effectively organize a system for providing information to small business players through the Internet sites, publication of companies' newspapers and magazines that write about the development of small businesses, etc. State regulation and self-regulation can provide almost equal access to financial, manufacturing and labor resources. Small businesses have a specific opportunity to start their operations with a relatively small amount of financial and manufacturing resources, which gives them clear advantages over large businesses and makes them more flexible and ready to diversify their activities. Labor resources of small businesses can currently be represented either by highly skilled specialists, with higher education (in knowledge-intensive industries), or by employees without any special professional education but with special competencies (workmanship). In any case, programs to improve literacy, both financial and legal, are needed to ensure the development of small businesses.

Taxation methods, as well as funding and crediting methods are currently receiving quite a lot of attention. These methods are common for both state regulation and self-regulation. Funding instruments of state support are subsidies to small businesses provided on competitive base in the constituent entities of the Russian Federation.

The aim of state support is mainly to provide grants for starting a business and creating new business entities, including innovative ones. The priorities should be given to startup entrepreneurs and the development of social entrepreneurship with the help of leasing, microfinance organizations, guarantee funds, business incubators, and science and technology parks. Self-regulatory organizations can, in accordance with the law, create systems of personal and group insurance,

as well as form an indemnity fund, which significantly reduces the risks associated with doing a business.

At the level of state regulation, a truly effective mechanism for reducing innovation activity risks in Russia has yet to be created, which hinders the development of small business innovative activities. Corporatization and futures, which have not received sufficient development either, may be important ways of financial support. Corporatization can be actively used at the initial stage of starting a business, as well as to attract additional financial resources when expanding the activities of small businesses. Futures are especially relevant in the production of seasonal products, which makes it possible to attract additional funds and reduce the risks of doing a business. This method is of particular importance in the framework of the reform to ensure the country's food security, as well as import substitution of agricultural goods.

The organizational method that involves providing assistance to small businesses may be a specific method of self-regulation. Organizational methods ensure the efficiency of small business economic activities, normalize business processes in organizations, and contribute to the establishment of organizational ties between business entities. The tools of the organizational method can involve development of regulations, for example, on membership in self-regulatory organizations, members' responsibility, rules of interaction, etc. Establishing various norms and standards and, in particular, requirements for the quality of management at an enterprise, product certification, etc., can also serve as an organizational tool. It is possible to use both instructing and informing in order to affect small business activities and increase their efficiency.

Currently, much attention is given to the development of innovative small businesses as drivers in the economic development. Without state regulation of innovative processes, sustainable socio-economic development of Russia is almost impossible. Russia needs to move away from the strategy of raw material orientation and start making its own innovative products. The regions of Russia should also develop their activities in this direction in order to increase their competitiveness and efficiency. Small enterprises can become a factor in the development

of an innovative economy, since they are able to effectively and quickly respond to consumers' demand and develop considering the needs of the region they take place in. Much attention in the solution of this issue should be paid to improving infrastructure support of small enterprises, because the innovative directions require considerable investments and have increased risks.

The development of small innovative enterprises may be carried out in different ways. Initially, innovative enterprises may be created based on certain industries and areas of activity. Their functioning and development may lead to the positive experience that may be applied to small enterprises that function in other areas.

Another development option is to integrate small enterprises with large businesses to produce innovative goods. It allows us to diversify the risks for large enterprises in the development and testing of new products, since small businesses perform this function. If the goods have success on the market, large businesses carry out mass production. The relevance of integration may be increased significantly if institutions of scientific and educational activity are built into the scheme of interaction between the enterprises.

Thus, in order to stimulate entrepreneurial activity, it is necessary to use special measures and tools for infrastructural support of small businesses, reducing the high risks of innovative activity.

The innovation process is a purposeful activity of subjects aimed to create an innovative product, as well as a set of works for its commercialization. Innovation activity is greatly influenced by the innovative activity of subjects that is determined by the quantity and quality of research and the commercialization of innovation projects.

Currently, the Russian Federation has several negative trends that impede the innovative development of the economy: inflation, lack of planning at enterprises, lack of interest in the production of innovative goods from entrepreneurs, high risks of innovative activity, etc. The state should stimulate the development of innovative processes in the economy in different ways, including the risk minimization. Different states support innovative enterprises differently to increase their competitiveness, despite the possibility of self-regulation of the market for innovative products. At the federal level, the state must influence the

supply and demand for innovations. At the territorial level, the objects of influence should be determined in accordance with the Programs for the Development of the Territories.

Motivation in innovation activity has certain features. There can be team motivation (at enterprises) and individual motivation (of a particular citizen). It is not always necessary to use an economic component as the basis of innovative motivation; in some cases, the basis can be the desire for self-fulfillment. Small business entities can participate in different stages of the innovation process, such as the concept stage, the prototype stage, the stages of pilot production and then mass production.

The most expensive stage of the innovation cycle is the implementation stage. Therefore, the state should motivate the manufacturers by compensating part of the costs of innovation based on mutually beneficial cooperation, with the possibility of subsequent participation in the company's profits.

When influencing innovative development, various economic methods and forms are used. At the federal level, the state may use its influence through the demand for innovation, being the main buyer and consumer of innovative goods. Fundamental research support, fixed assets acquisition and creation of incentives to invest in innovations can also facilitate the demand. The financial support of programs aimed at scientific and technical development, as well as the creation of a favorable climate to invest in innovation may eventually influence the supply.

The priority of regional impact should be directed to the development of a specific territory and support for innovative projects to saturate the domestic market with the necessary products, as well as to enter interregional and international markets. It requires the production of competitive products.

The Russian Federation implements innovative development financing through special funds. The use of this mechanism has both positive and negative aspects. The positive side is that it makes it possible to reduce departmental barriers, to minimize regional disunity, to support high-priority projects. The negative side is that the allocation of funds is not systematic, and it has a short period, which does not create conditions for the sustainable development of innovative activity.

The system of scientific funds in Russia was established in 1995. The Russian Foundation for Basic Research (RFBR)[1] functioned until 2021; later it became part of the Russian Science Foundation (RSF).[2] The task of the foundations was to support research work in all areas of fundamental science, to promote the improvement of the scientific qualifications of scientists, and to develop international cooperation. Various small business support programs function in various areas. An interesting program (the so-called "seed fund") was adopted in 2003.[3] It is aimed at financial support for emerging "business ideas." Financing is carried out at the expense of the federal budget. The program was called "START,"[4] and its functioning is based on the American SBIR program. "START" is aimed to support scientists, young people who want to organize the production of an innovative product (technology) on their own. The program is designed for a 3-years' innovation cycle and involves the foundation of a science-intensive company or the provision of a separate service for already functioning small businesses. There are separate stages in the implementation of the program that are necessary to create a prototype of a product, obtain a patent for it (registration of intellectual property), and develop a business plan. This stage intends to evaluate the possibilities of commercialization of the project. If an innovative product is a success, the financial support of the project can be increased.

To involve young people in the innovation process and to develop technological entrepreneurship, the "Member of the Youth Research and Innovation Competition" (abbreviated in Russia as UMNIK

[1] Russian Foundation for Basic Research (RFBR) was created by decree No. 426 of the President of the Russian Federation "On urgent measures for preserving scientific and technological potential of the Russian Federation." (In Russ.).

[2] Russian Science Foundation was established on the initiative of the President of the Russian Federation to support basic research and development of leading research teams in different fields of science. Legal status, powers, functions, proprietary rights and governance of the Foundation are determined by the Federal Law "On the Russian Science Foundation and Amendments to Certain Legislative Acts of the Russian Federation." (In Russ.).

[3] The "Start" program. Available at: https://fasie.ru/programs/programma-start/. (In Russ.). [Accessed 01.03.2023].

[4] The "Start" program mimics the U.S. SBIR program that also supports small innovative businesses. Available at: https://www.epa.gov/sbir [Accessed 01.03.2023].

(SMART)) program was created in 2007.[5] The program's aim is to train young scientists in the issues of commercialization of developments. Young scientists from universities and research institutes, students, postgraduates in the direction of their scientific activity are the main focus of the program.

In pursuance of Federal Law No. FZ-217[6] that regulates the procedures for creating small innovative enterprises on the basis of budgetary institutions, the program of the Assistance Fund[7] includes various areas of research in the framework of environmental protection: medicine, computer science, etc. The Fund has financed over 100 enterprises in more than 20 regions of the Russian Federation. A significant problem of this program is the imperfection of the legislative framework. Issues on the results of intellectual activity remain unresolved. Since budgetary institutions do not have intangible assets, there are problems in the formation of authorized capital for small innovative enterprises. There is also lack of experience in organizing innovative business and there are also difficulties in attracting investments from the private sector to projects with a long payback period, since they are also high-risk.

The charitable foundations that provide financial support for scientific and technical developments should also be mentioned. In the 2000s, the first charitable foundations "Nauchniy Potentsial" (Scientific Potential) "Dinastiya" (Dynasty),[8] etc. were established. To develop this direction, it is necessary to revise the issues of taxation of profits of organizations. The foreign experience shows that tax incentives for the enterprises that provide grant funding of priority

[5] The UMNIK (SMART) program for talented youth. Available at: https://umnik.fasie.ru/. (In Russ.). [Accessed 01.03.2023].

[6] Federal Law No. 217-FZ dated 2 August 2009 "On Amendments to Certain Legislative Acts of the Russian Federation on the Establishment of Economic Companies by Budgetary scientific and educational institutions for the purpose of practical application (implementation) of the results of intellectual activity." Available at: http://www.kremlin.ru/acts/bank/29703. (In Russ.). [Accessed 01.03.2023].

[7] The Foundation for Assistance to the Development of Small Forms of Enterprises in the Scientific and Technical Sphere. Available at: https://fasie.ru/. (In Russ.). [Accessed 01.03.2023].

[8] Charitable foundations that support science — Charitable foundation "Nauchniy Potentsial" (Scientific Potential). Available at: http://russianfonds.ru/nayka/potencial.php. (In Russ.). [Accessed 01.03.2023].

projects can help considerably in the development of small enterprises, including innovative ones. Russian legislation also provides for income tax relief, but, considering its minimal level, it cannot influence this process significantly.

There are also foreign funds in the scientific and technical areas, but given the difficult political and economic situation currently prevailing in relations between Russia and a number of foreign countries, funding from foreign sources will probably be reduced in the near future.

An analysis of support for science and small innovative business in Russia revealed the following problems.

1. The Russian Federation lacks a unified approach to the concept of "grant." Thus, the Budget Code of the Russian Federation,[9] the Law on Science, tax and civil legislation all provide different interpretations of this concept. For example, the Budget Code uses the term "Subsidy." Subsidies are provided to legal entities, individual entrepreneurs, as well as individuals — producers of goods, works, services on a gratuitous and irrevocable basis in order to compensate for lost income and (or) financial support (reimbursement) of costs in connection with the production (sale) of goods, performance of work, provision of services (Art. 78 of the Budget Code of the Russian Federation). The term "grant" is also used in tax legislation, where finances or other properties are considered grants if their transfer (receipt) satisfies certain conditions (Subsec. 14, Para. 1, Art. 251 of the Tax Code). "Grant is a form of state support. This is money or other property that grant givers donate and irrevocably transfer to citizens or organizations on certain conditions (Comment to the letter of the Ministry of Finance No. 03-04-06/104189 dated 30 November 2020).

2. There are differences between the mechanisms for managing funds and providing support.

3. The taxation issues that could stimulate support for innovative projects have not been resolved.

To develop small innovative business, the mechanism of influencing innovative processes must function effectively. The foreign experience shows that this issue has received great attention in developed countries,

[9] The Budget Code of the Russian Federation No. 145-FZ dated 31 July 1998 (as amended on 28 December 2022) (as amended and supplemented, effective from 1 January 2023).

and their efforts to develop innovative business confirm that. The foreign mechanism is based on fiscal policy, assistance in the establishment of private innovative enterprises, the implementation of state orders for the production of high technology products, and the development of venture companies. The mechanism for the development of innovative processes in small businesses of the constituent entities of the Russian Federation is presented in the form of a set of various methods of influence with which the authorities can change the economic environment of the regions and achieve their goals (Fig. 2). To form the infrastructure for the development of innovation activity in the territory, it is necessary to make decisions based on the priorities of the socio-economic region and the directions of regional innovation policy that must be identified and monitored by the local authorities.

Over time, priorities may be changed to reflect internal and external factors. The external factors influencing the innovation policy of the region include the legislative framework of the federal level, the federal policy in the field of innovation, and the priorities for the development of the state economy. These factors create the country's investment climate in general, but they also have an impact on regional policy.

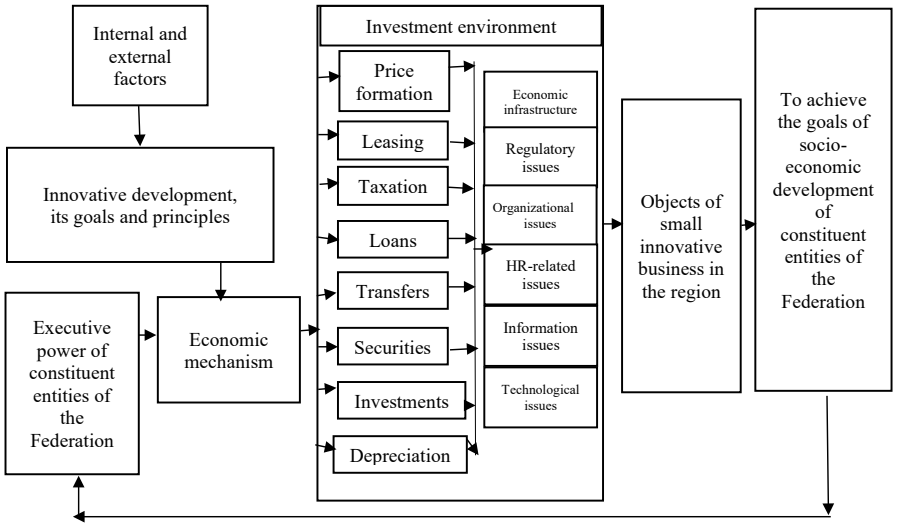

Figure 2. The mechanism of the impact of infrastructure support on the development of small innovative business

The internal factors that influence the formation of the region's innovation policy include the economic environment of the region, the motivation to conduct innovation activities, the development of the region's economic sectors, and the scientific, technical and innovative potential of the territory.

The development of innovations should be based on an economic model that includes the formation of economic incentives for innovative developments and their implementation, which should help create an innovative climate in the region. In the development of small innovative business, the organizational and economic mechanism should occupy a dominant place.

Let us dwell in more detail on the forms and methods of the organizational and economic mechanism for the formation of infrastructure support to develop innovative small businesses since in practical application they can be combined differently. To develop innovations, the following forms and methods can be used.

1. The state may support through the allocation of funds from the budget (subsidies, subventions) and their direction to create and develop small innovative businesses, which is relevant in times of crisis. This form of support receives quite a lot of criticism based on its low efficiency and its potential to create corruption schemes. It should be noted that we have presented the experience of foreign countries. While the efficiency of the state support is obvious, it is necessary to subject these financial flows to strict control by state structures. In addition, the state support should be of a smaller scale, should be aimed at import substitution and be export-oriented. The allocation of funds should be carried out in accordance with the established financing scheme based on the achievements and results of the company. It is necessary to use a scheme for partial financing from the budget, depending on the specifics of a project. The financing scheme may also include transfers to partially cover of the costs of the project, especially at the production stages, where costs increase significantly.

Financing can be aimed at upskilling to expand the entrepreneurs' abilities, and training should be phased and include several stages: from the initial preparation of a business plan to the stage of commercialization

of projects, since each stage of the investment process has its own characteristics.

2. The use of public-private partnerships is preferable, since many innovative projects require fairly large amounts of funding and small businesses alone will not be able to afford this, besides, the state may take on part of the risks in exchange for receiving part of the profit from the project. The partnership may be based on conciliation procedures by concluding agreements, using program-based methods of project financing.

To stimulate small innovative businesses, the conditions in the contractual form of financing should provide for the allocation of a certain part of financial resources from the regional budget to risky businesses, providing them with good starting opportunities. Since innovative projects have a long investment cycle, it makes sense to break down this cycle into separate small stages and make decisions on financing each stage from scratch, that is, to make a decision on financial support only after analyzing the results and assessing the possibility of achieving the goals basing the decision on existing opportunities. This will make it possible to minimize financial risks.

3. To develop innovative business, it is relevant to use debt and equity securities. Using the opportunities of the securities market will help innovative areas raise additional resources. The advantage of using securities is that they can be distributed to both private and public investors. Investors may participate in the project basing their decisions on the assessment of financial capabilities and the degree of risk. Shareholding may also be applied as a variation of the use of securities-based methods, especially at the initial stage of the project.

The use of venture capital investments when shares of young companies that are not yet listed on stock exchanges are acquired is also relevant. Generally, venture capital has a high degree of profitability and, unlike equity capital, venture capital is characterized by capital increase, not by an increase in dividends. It takes longer to implement venture capital. Shares will go to the stock market in 3–7 years. There is a distribution of risk between investors and initiators.

4. The method of leasing (financial lease) can be widely used to upgrade equipment and re-equip production facilities. Considering

that small enterprises practically do not have fixed assets, mainly using leased ones, especially at the initial stage.

Regional governments may partially cover the costs of leasing companies, partially offset either the cost of capital investments in the acquisition of new machinery and equipment, or the interest rates on lease payments.

5. Taxes are the most important instrument of indirect influence on many areas of the economy. Tax legislation is constantly updated and improved. For small businesses, various options for calculating and paying taxes have been created (traditional system, simplified system, unified tax on imputed income (abolished in 2021), unified agricultural tax, patent form). It should be noted that tax legislation has drawbacks: it does not provide for benefits for small innovative business, so it does not stimulate the development and production of innovative goods. In the short term, due to the benefits provided, there may be a shortage of money in the budget, but in the medium and long term, the budget will only benefit, since business development will fill this budgetary gap significantly.

6. The use of pricing is possible either because of the direct impact on the price of the investment product from the customer, i.e., regional authorities, or because of the reduction (subsidization) of costs for regional infrastructure services (communications, rent payments, training, etc.). The second option is more preferable and can be used for investment products that are more important and are included in the region's development programs.

In this case, both sides win. Customers (regional authorities) receive the necessary innovative goods at a fixed price, and manufacturers (small innovative businesses) have advantages over other types of activities, in addition, government orders are the least risky.

A method that has become widespread in Russia is a loan service. Various types of loans can be used: bank loans, consumer loans, budgetary loans. Loan services can be carried out in various forms: as guaranteed loans, as preferential loans, as compensation agreements, etc. Compared with budget transfers, loans are the most relevant form of providing financial resources, since it makes it possible to increase the responsibility of entrepreneurs for the results of their work. It can

be noted that, in general, problems with loans have been resolved in recent years, but there are still financing problems. The problem is the low level of transparency of small businesses. Unfortunately, tax evasion is still a negative trend in small businesses, which makes it impossible to confirm official income in a bank in order to obtain a loan. The lack of liquid assets from small businesses that may help obtain a loan remains a problem, since premises, vehicles, and equipment are most often rented.

One of the most important ways to fund the enterprise is depreciation. The depreciation fund is used to purchase new equipment, upgrade fixed production assets, which makes it possible to produce products that are more competitive. At the same time, at the present stage, depreciation is more of a tax-oriented nature, which requires a revision of regulatory legal acts on taxation. This is necessary to bring the laws in line with the rules of accounting methods for depreciation calculation. In particular, it is possible to allow the use of depreciation methods that would contribute to the speedy renewal of fixed production assets. Additional ways to encourage small businesses to use innovative equipment through accelerated depreciation should also be taken into consideration.

The economic mechanism of control over the innovative business should include the infrastructure to favor the conditions for the development and introduction of innovative products by small enterprises; the regulatory framework to create equal conditions for business operations, considering the specifics of production and its priority for the region it takes place in; the HR-related matters to plan business activities considering the professional competence of specialists and the ability to improve their skills.

Much attention should be given to the development of digital platforms and online infrastructure based on digital technologies, which has become most relevant in the context of the Covid-19 pandemic. The use of digital technologies in the business sector of the economy shows that the Internet coverage in developed countries is very high, in some countries (Finland, Denmark, Lithuania and the Netherlands), 100 % of the territory is covered. In recent years, the situation has not changed much. In the coming years, in those countries where the indicators

of the use of IT technologies are below the indicators of the leading countries, the introduction of new information platforms and services will probably continue. An analysis of business sector organizations in Russia has showed that the special software is most widely used (in more than 50 %) for electronic document management systems, for electronic financial settlements, for solving economic, managerial, organizational problems.

One form of coordination that makes it possible to combine sustainable and cost-effective development is business self-regulation. The development of self-organization and self-regulation of businesses can go in two ways. The first way is to create conditions for developing voluntary self-regulation — self-organization "from below," when businesses, without any pressure from the state, realize the need to unite and develop common standards of professional or entrepreneurial activities. The second way is to develop delegated self-regulation that implies a decision made by the state on the need for self-regulation in a particular area and the transfer of functions performed by the state authorities to self-regulatory organizations. This requires expanding the range and development of forms of cooperation between the state and businesses, expanding the sphere of participation of the business community in the formation and practical implementation of promising trends of the economic development including the innovative way.

It should be noted that the digital transformation of the economy is more and more obvious and it has an impact on the development of the business sector. The issue of the need to introduce high technologies into the business activities has been resolved in principle, but companies hesitate to go for digital transformation (to one degree or another), and those who refuse to take on the decisive role of innovation in the development of the business environment risk losing their place in the market.

V. Conclusion

The analysis outlined in the study shows that today in Russia the focus is on shifting from state regulation to self-regulation without providing additional conditions for development (the so-called

development of delegated self-regulation), which limits competition and reduces the social efficiency of self-regulation.

At the same time, implementing self-regulation is an effective measure. In addition to improving the quality of work (services), such issues as liability of businesses, loss indemnity, increased consumer rights guarantee, as well as efficient regulation in the process of development and approval of technical standards and rules are brought under control.

Self-regulation as an alternative to state regulation should be chosen based on the level of development of social relations, especially in the regulated area. The development of self-regulation should be gradual, from state regulation to self-regulation, with regard to the formation of relevant professional communities and expertise including the innovative direction of development.

Small businesses come to understand the need to move to an innovative type of development and the need to use new IT technologies becomes relevant due to the rapid exchange of big amounts of information over long distances. Digital transformation should be viewed in a broader sense as a set of measures that affect the business model of an organization, implying a new way of life for the company. Thus, things as big as the ways to interact with customers, the products and services and the way of their delivery need to be changed.

The use of IT technologies will make it possible for companies to find customers anywhere in the world, to assess the competitiveness of goods, to work with cloud storage of information, predictive analytics, machine learning, blockchain, etc., thus, it allows to radically change the approach to business activities in the financial sector. However, one should not build illusions that the introduction of an IT system will immediately solve all problems. This is just a tool that provides the ability to quickly obtain reporting, financial and management information, allowing to make the right decisions based on a comprehensive analysis of the situation. At the same time, during the Covid-19 pandemic, the development of digital platforms and technologies is the basis for the survival of enterprises in the market.

The transition to the innovative development path should include the possibilities of both self-regulation and the need for state regulation to form the conditions for a favorable innovative environment.

References

Akulich, V.G., (2019). Problems of efficiency of state regulation and support of small business. *Finansovaya ekonomika*, 8, pp. 117–120. (In Russ.).

Aliu, A., Stapleton, L., Metin, H., and Hajrizi, E., (2019). Web-enabled business in SMEs in less developed regions: An empirical study of the influence of government incentives, physical location and cost. *IFAC-PapersOnLine*, 52(25), pp. 29–34, https://doi.org/10.1016/j.ifacol.2019.12.441.

Bykova, T.P., (2017). Self-regulation of entrepreneurial activity as a condition for an effective dialogue between the state and businesses. In: *The economic growth of the Republic of Belarus: Globalization, innovation, sustainability*. Proceedings of the 10th International Scientific and Practical Conference. In 2 vol. Vol. 1. Pp. 297–298. Minsk: Belarusian State Economic University. ISBN: 978-985-564-152-1. (In Russ.).

Gadzhiev, N.G., Konovalenko, S.A., and Trofimov, M.N., (2019). Creation and development of new forms of interaction between the government and businesses. *Regionalnye problemy preobrazovaniya ekonomiki*, 11(109), pp. 7–13, https://doi.org/10.26726/1812-7096-2019-11-7-13. (In Russ.).

Gamble, E., Caton, G., Aujogue, K., and Teik Lee, Y., (2020). Problems with crisis intervention: When the government wants to restrain big banks but punishes small businesses instead. *Journal of Business Venturing Insights*, 14(2):e00185, https://doi.org/10.1016/j.jbvi.2020.e00185.

Goleva, O.G., (2018). Self-regulation systems in the Russian economy. In: *Innovative processes in science and technology of the 21st century*. Proceedings of the 15th International scientific and practical conference of students, graduate students, researchers, academic staff and practitioners. Nizhnevartovsk: Tyumen Industrial University, pp. 162–167. (In Russ.).

Gulyaeva, G.G., (2017). The role of state regulation in the process of creating favorable conditions for small and medium businesses. *Ekonomika i predprinimatelstvo*, 12-3(89), pp. 425–431. (In Russ.).

Gusev, A.K., (2018). Expertise of industrialized countries in state regulation and support of small business. *Vestnik Nacionalnogo instituta biznesa*, 34, pp. 66–72. (In Russ.).

Lagvilava, N.L., (2021). Foreign expertise in state regulation of small business: Case study of the USA. Sustainable development and cooperation: Promotion of innovation. In: *Proceedings of the scientific and pedagogical conference "Project-technological activity and interdisciplinary approaches in education."* Mytishchi: Russian University of Cooperation, pp. 184–189. (In Russ.).

Lee, Y. Suk, (2017). Government guaranteed small business loans and regional growth. *Journal of Business Venturing*, https://doi.org/10.1016/j.jbusvent.2017.11.001.

Makhova, A.V., (2018). State regulation and assistance to small businesses in Russia and abroad. *Nauka i obrazovanie: novoe vremya*, 3(26), pp. 123–130. (In Russ.).

Snitko, E.V., (2018). Features of state regulation of small business in the Russian Federation and Norway. In: *SPbPU Science Week*. Proceedings of a scientific conference with international participation. St. Petersburg: Peter the Great St. Petersburg Polytechnic University. Pp. 506–508. (In Russ.).

Wasserbaur, R., Sakao, T., and Milios, L., (2022). Interactions of governmental policies and business models for a circular economy: A systematic literature review. *Journal of Cleaner Production*, 337(3):130329, https://doi.org/10.1016/j.jclepro.2021.130329.

Wilcox, J.A. and Yasuda, Y., (2018). Government guarantees of loans to small businesses: Effects on banks' risk-taking and non-guaranteed lending. *Journal of Financial Intermediation*. Available at: https://faculty.haas.berkeley.edu/wilcox/Papers/Wilcox/JFI%20791%20proofs.pdf [Accessed 08.03.2022].

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Article

DOI: 10.17803/2713-0533.2023.1.23.065-087

The Concept of Public Association: Problems of the Concept Definition under the Civil Law of the Russian Federation

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Abstract: Non-profit associations of persons established to solve common social, charitable, cultural and other tasks take an important place in the economic, political, social life of society, along with profit associations. Thus, it is important to improve civil law regulation of relations with their participation. Current legal acts regulating non-profit organizations in general, and individual organizational and legal forms of associations of persons, including public associations, should be brought into compliance with the provisions of the Civil Code of the Russian Federation. The paper is devoted to the search for ways to solve the problem of defining the concepts used in the current legislation to designate associations of persons, the content of these concepts and relationships between them. The author substantiates that the category of a public association consolidated in domestic legislation requires clarification and determination of its relationship with the categories of an association of persons, civil-law community, legal entity and some other concepts used to designate formations performing joint activities of persons to protect common interests and achieve common goals (organization, corporation, association, etc.). The paper attempts to comprehend the concept of the public association and its relationship with other similar categories used in civil legislation. The author concludes that currently the category of public association is used in a rather narrow sense and does not cover all possible non-profit associations of persons, although it could be considered as a broader category, which would make it possible to determine the general principles of creation and operation of certain types of non-profit associations of persons, to

classify them and harmonize possible organizational and legal forms of their operation, giving legal certainty to the status, primarily to the civil-law status, of various types of associations of persons.

Keywords: public association; civil society; civil law; right to association; civil-law community; virtual community; legal entity; meeting decision; joint activities agreement

Cite as: Ayusheeva, I.Z., (2023). The Concept of Public Association: Problems of the Concept Definition under the Civil Law of the Russian Federation. *Kutafin Law Review*, 10(1), pp. 65–87, doi: 10.17803/2713-0533.2023.1.23.065-087.

Contents

I. Introduction

A person as a social being tends to interact with other individuals. In psychology, it is noted that "a social person creates numerous groups, collectives, parties, unions, corporations, states that are the result of his multifaceted activities" (Korneenkov, 2002, p. 112). The tasks of ensuring basic needs, including food, housing, life safety, cultural needs, are most effectively solved through association rather than alone.

Human society itself is a community of human individuals uniting to satisfy "social instincts," a historically developing form of human life (Ilyichev et al., 1983, p. 14).

Indeed, many social and economic needs are satisfied in a centralized way by means of state institutions vested with powers to distribute various benefits, to ensure protection of rights and interests of the most vulnerable groups, to ensure security and national interests, to protect citizens' health, etc. Under the Constitution, the Russian Federation is a social state designed to meet all social and economic needs in society.

However, these tasks cannot always be solved in a centralized way with the same degree of efficiency as they can be solved in decentralized human interaction. Decentralized interaction in society can be ensured by establishing local interaction (e.g., neighbors' networks) and reducing consumption (Bidwell, 2019, p. 19).

The very idea of the collaborative consumption economy is based on operation and interaction within a decentralized community open to an indefinite number of people: when people unite to achieve a common goal and jointly solve the problems and share resources: items, skills, time, etc. It is suggested that "networks for collaborative consumption can be created all over the world if local communities share the ideas of good neighborly interaction and respect for other people's property" (Bidwell, 2019, p. 19). However, a key problem for the sharing economy is also highlighted as related to trust in neighbors and the wider environment, which plays a critical role in the success of the platforms being created. After all, the models under consideration are based on interaction in the community and helping others, which cannot be implemented without trust and mutual respect (Bidwell, 2019, pp. 26–27).

All this allows us to conclude that determination of the legal framework for interaction within decentralized communities and associations of persons who do not always acquire the status of a subject of civil law is essential for solving social, economic, and political tasks the State and society are currently facing, which determines the socio-economic aspect of the relevance of the topic under consideration.

In connection with the above, it is important to determine the peculiarities of the legal status of emerging associations of persons, to find an answer to the question of whether these communities are civil, whether they should be created within the framework of organizational and legal forms of legal entities provided for by law.

II. Methodology

The study is based on a review and analysis of the provisions of the legal doctrine, philosophy, sociology, psychology, economics; the study of empirical material (constituent documents of public associations, judicial practice). The main research methods include general philosophical methods of deduction, induction, analysis, as well as special legal methods: historical-legal, formal-legal and the method of comparative law.

III. The Right to Freedom of Association and its Implementation in Associations of Persons: A Legal Framework

Subjects of civil law of the Russian Federation are currently recognized as individuals, legal entities and public-law entities. Associations that do not have the status of a legal entity do not acquire independent legal personality, nor do they become independent participants in civil turnover. Meanwhile, under Article 30 of the Constitution of the Russian Federation, everyone has the right to association. Freedom of public association shall be guaranteed. Following this provision that enshrines one of the fundamental freedoms of citizens, the definition of public associations was consolidated in relevant legislation. *A public association* is a voluntary, self-governing, non-profit formation established on the initiative of citizens united on the basis of common interests for the implementation of common goals specified in the charter (bylaws) of the public association.

The constitutional right to freedom of association is implemented both directly through the association of individuals and through legal

entities — public associations.[1] Thus, today associations of persons can be registered as a legal entity, but this requirement is not mandatory: it is actually possible to unite without creating a separate subject of civil law. In the legal literature, public associations are often referred to as the non-state element of the subjects of the political system (Kazannik and Kostyukov, 2015).

Associations that do not acquire the status of a legal entity are also listed in other federal laws. For example, Federal Law No. 125-FZ dated 26 September 1997 "On Freedom of Conscience and on Religious Associations"[2] (hereinafter referred to as *the Law on Religious Associations*) states that religious associations can be established in the form of religious groups and religious organizatiions, while a religious group is a religious association that does not acquire the rights of a legal entity (Art. 6, 7).

As a rule, these public associations are created by a decision made at the general meetings of their founders. Under Article 181.1 of the Civil Code of the Russian Federation (hereinafter referred to as the Civil Code of the Russian Federation), the decision of the meeting, with which the law binds civil law consequences, generates legal consequences, to which the decision of the meeting is directed, for all persons who had the right to participate in this meeting (participants of a legal entity, co-owners, creditors in bankruptcy, etc.), for members of the civil-law community and for other persons, if this is established by law or follows from the essence of the relationships.

The Civil Code of the Russian Federation distinguishes the category of civil law association, but does not explain the specifics of its civil status. Not being an independent subject of law, the specified association can carry out legally significant actions, namely, make decisions that incur legal consequences. Due to the high prevalence of public associations and the necessity for individuals to unite without registering a legal entity, especially in the context of digital platform

[1] Art. 5 of Federal Law No. 82-FZ dated 19 May 1995 "On Public Associations." Collection of Legislation of the Russian Federation, 1995, 21, Art. 1930 (hereinafter — the Law on Public Associations). (In Russ.).

[2] Collection of Legislation of the Russian Federation, 1997, 39, Art. 4465. (In Russ.).

economy and the economy for the collective use of goods and services (sharing economy), it is essential to solve the problem of determining the features of the civil status of associations that do not acquire the status of a civil-law community. From a theoretical point of view, it is important to determine the balance between the categories of the civil-law community and the public association that does not acquire the status of the legal entity. These circumstances determine the law-making, law enforcement and doctrinal aspects of the relevance of the topic of this study.

Thus, the purpose of this study is to determine the content of the concept of the public association, primarily of the public association not acquiring the status of an independent subject of civil law, in the current legislation, and the relationship between this concept and related categories, in particular, between the category of civil-law community and the category of associations of persons in a broad sense.

To achieve this goal, it is necessary to solve the following tasks: to determine the category of the public association and associations that do not acquire the status of a legal entity; to identify the balance between categories used in current legislation to designate forms of interaction between persons in the implementation of joint activities to achieve common goals; to identify problems and contradictions in the normative regulation of the relations under consideration and to determine possible solutions to the highlighted problems.

IV. Associations of Persons in Civil Law and their Types

According to the current legislation, subjects of civil law can unite to achieve common goals both through the creation of legal entities (profit and non-profit organizations) and through the conclusion of agreements primarily substantiating joint activities. For example, activities that are not purely related to commercial purposes can also be carried out within the existing organizational and legal forms of non-profit organizations. Nevertheless, despite the civil legislation reform, the legal regulation of relations with the participation of non-profit organizations cannot be considered perfect today. As Prof. Gongalo notes, the Civil Code

of the Russian Federation "formulated the basic provisions on the legal personality of legal entities; other laws and other legal acts may establish the specifics of the legal status of individual legal entities that, however, must comply with the Civil Code. Unfortunately, in some cases there is no such interrelationship" (Gongalo, 2021, p. 25).

In the conditions of digitalization, the existing procedure for creating and regulating activities of non-profit organizations does not allow for effective use of this form of organizing joint activities to achieve a common goal, since it does not provide mobility and speed of interaction, which is typical for transactions in the Internet.

According to sociologists, "achievements in the field of information technology were a prerequisite for the creation of a new form of social groups called 'virtual communities.' Despite common characteristics of a social group, virtual network communities have special socio-psychological characteristics inherent only to them. First of all, their difference from social groups lies in the replacement of the 'territorial' community by networks that are formed on the basis of the personal choice of individuals" (Semenova, 2020, p. 64).

In the economic literature, such a form of operation is distinguished as a "virtual enterprise" and it is defined as economic agents associated to achieve joint goals of increasing efficiency of activities performed in virtual space and operating via the Internet. As an example of such self-organization the author refers to virtual associations of agricultural producers-consumers of means of production (Kuznetsova et al., 2018, p. 72). Virtual communities are considered as a specific kind of a consumer cooperative — a virtual consumer cooperative — characterized by a short existence or a discrete form of functioning, targeted nature, non-commercial orientation, interaction between participants based on trust, functioning of the community mainly in the virtual information space (Kotlyarov, 2016, pp. 77–75). The features of the virtual cooperative also include the presence of a head or a governing body who ensures interaction between the members of the cooperative and an external counterparty and coordination of the activities of the cooperative members (Kuznetsova et al., 2016, p. 72).

Based on the dispositive civil law regulation and the essence of the relations that have emerged, users entering into a joint activity agreement can form such virtual communities that can be recognized as civil-law communities capable of making decisions at general meetings that have legal consequences for all members of the community in cases stipulated by the agreement. In this regard, it is proposed to supplement the provisions on decisions of the meetings with the rule that civil-law communities can be formed on the basis of an agreement concluded between its participants, also in electronic form, and in cases specified in the agreement, make legally significant decisions at their meetings for all participants of such a community.

The legal category of citizens' associations has been examined in the scientific literature. As noted, "In the doctrine of constitutional law, the concept of 'citizens' association' primarily includes political parties, mass socio-political movements, electoral associations and organizations. In labor law, a 'citizens' association' is the key to understanding the legal nature of trade unions, associations and employers' associations. From the standpoint of administrative law, a 'citizens' association' is a process that makes it possible to understand the essence of legal relations arising from the acquisition of the official status of a collective entity: a political party, a public organization. In turn, in civil law contexts, 'citizens' association' is considered as any form of non-governmental organization that promotes the development of civil initiatives in the State and implementation of private interest (from a charitable foundation to a commercial organization)" (Bondarchuk, 2017, pp. 182–183).

It should be noted that in this interpretation, the association of citizens is actually identified with the category of organization: foundations and commercial organizations are varieties of legal entities recognized as subjects of civil law. Under the Civil Code of the Russian Federation, it is a legal entity that is defined through the category of an organization.

However, associations of citizens, as noted above, do not always acquire the formal attribute of a legal entity required under modern Russian civil law, namely, they do not undergo the procedure of state

registration. Therefore, they cannot be considered independent subjects of civil law, nor do they acquire legal personality.

In this regard, associations of persons in domestic civil law can be divided into two types depending on acquisition of independent legal personality:

1) Associations that acquire the rights of a legal entity after state registration in accordance with the procedure established by law (associations of citizens and other persons that are organizations — legal entities);

2) Associations of persons that do not acquire independent legal personality.

A broad understanding of the category of a public association as an association of persons is given in the judicial practice of the Constitutional Court of the Russian Federation (decisions dated 17 February 2004 in Gorzelik and Others v. Poland[3] and dated 1 February 2007 in case Ramazanova and Others v. Azerbaijan,[4] dated 10 June 2010 in case Jehovah's Witnesses in Moscow and Others v. Russia,[5] etc.).[6]

Thus, as noted above, the right of citizens to associate is realized not only through the creation of legal entities, but also directly through the association of individuals who do not acquire the status of a subject of civil law. At the same time, the legal status of legal entities, despite the existing problems of legislation and law enforcement practice, is

[3] ECHR Ruling dated 17 February 2004 in Gorzelik et al. v. Poland (Application No. 44158/98) Available at: http://www.echr.coe.int [Accessed 19.02.2023].

[4] ECHR Ruling dated 1 February 2007 in Ramazanova et al. v. Azerbaijan (Application No. 44363/02). Bulletin of the European Court of Human Rights (2007).

[5] ECHR Ruling dated 10 June 2010 in Jehovah's Witnesses of Moscow et al. v. Russian Federation (Application No. 302/02). Russian Chronicle of the European Court, 2011, 2. (In Russ.).

[6] Resolution of the Constitutional Court of the Russian Federation No. 10-P dated 8 April 2014 "On Constitutionality of the Provisions of Para. 6 of Art. 2 and Para. 7 of Art. 32 of the Federal Law 'On Non-Profit Organizations,' Part 6 of Art. 29 of the Federal Law 'On Public Associations' and Part 1 of Arti. 19.34 of the Code of Administrative Offences of the Russian Federation in connection with Complaints Commissioner for Human Rights in the Russian Federation, Foundation 'Kostroma Center for Support of Public Initiatives,' citizens L.G. Kuzmina, S.M. Smirensky, and V.P. Yukecheva." Collection of Legislation of the Russian Federation, 2014, 16, Art. 1921 (published without dissenting opinion). (In Russ.).

still defined more specifically than the legal status of associations of citizens who are not legal entities, which, in practice, remains undefined in domestic legislation.

V. The Category of a Public Association and its Relation to the Category of an Association of Persons in the Current Legislation

To facilitate the provisions of Article 30 of the Constitution of the Russian Federation, Article 5 of the Law on Public Associations provides a general concept of a public association as a voluntary, self-governing, non-profit formation created on the initiative of citizens to implement common goals. The scope of this rule is limited only to such formations that are not created for systematic profit-making and are non-commercial in nature. Thus, at the level of federal laws, the legal regulation of relations involving profit and non-profit associations is clearly distinguished. At the same time, it should be recognized that the concept of an association of persons in the broadest sense can be used to refer to associations created both for profit-making and for achieving other goals not related to profit-making.

The current civil legislation provides for the possibility of creating associations to achieve profit-making goals, and at the same time not registered as a legal entity. For example, according to Article 1041 of the Civil Code of the Russian Federation, under a simple partnership agreement (a joint activity agreement), two or more persons (partners) undertake to combine their assets and act together without forming a legal entity to make a profit or achieve another goal that does not contradict the law.

The legislation on peasant (farmer) household defines them as associations of citizens related by kinship and (or) a connection by marriage, having property in common ownership and jointly carrying out production and other economic activities (production, processing, storage, transportation and sale of agricultural products) based on their personal participation.[7] A farm carries out business activities without

[7] Federal Law No. 74-FZ dated 11 June 2003 (as amended on 6 December 2021) "On peasant (farmer) household" (with amendments and additions, effective

forming a legal entity and is created on the basis of an agreement between citizens, if there are several of them.

In this regard, it is important to note that the current legislation, although it does not provide for a general definition of associations of persons, nevertheless, makes it possible to associate to achieve various commercial and non-commercial goals. At the same time, according to the current legislation, the categories of "association of persons" and "public association" are not identical. Associations of persons can be created both to achieve commercial goals (systematic profit-making) and to achieve non-commercial goals. Under the Law on Public Associations, a public association means a voluntary, self-governing, non-profit formation created on the initiative of citizens united on the basis of common interests for the implementation of common statutory goals.

It should be noted that a historical analysis of the development of the provisions on public associations allows us to conclude that earlier the concept of a public association, at first glance, was broader. A public association under the USSR Law No. 1708-1 dated 9 October 1990 (with amendments; dated 19 May 1995) "On Public Associations"[8] recognized a voluntary formation that was established as a result of free expression of the will of citizens united on the basis of common interests. In the previously existing legislation, when defining public associations, no emphasis was placed on the commercial or non-commercial nature of their creation. Nevertheless, a subsequent study of the norm indicates that the purpose of creating an association was important in determining the sources of normative regulation of their standing. The regulatory legal act on public associations mentioned did not apply to cooperatives and other organizations pursuing commercial goals or contributing to the extraction of profit (income) by other enterprises and organizations, religious organizations, bodies of territorial public local governments (councils and committees of microdistricts, house, street, quarter, village, township committees, etc.), public self-activity bodies (people's squads, community courts, etc.), the order of creation and activity of which was determined by other laws.

from 1 March 2022). Collection of Legislation of the Russian Federation, 2003, 24, Art. 2249 (hereinafter referred to as the Law on PFH). (In Russ.).

[8] Gazette of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1990, 42, Art. 839. (In Russ.).

Non-profit formations created for socially useful purposes can be attributed to public associations in the sense of the provisions of the Law on Public Associations. However, the study of its provisions allows us to conclude that it does not apply to all associations of persons pursuing non-profit goals.

In accordance with this normative legal act, public associations can be created in one of the following organizational and legal forms: a public organization, public movement, public foundation, public institution, public amateur activity body, political party, unions (associations) of public associations. It should be borne in mind that in accordance with the Law on Public Associations, most of them can be registered as a legal entity — the Civil Code of the Russian Federation names certain organizational and legal forms of legal entities, such as a public organization, a public movement, a foundation, an institution, an association — but this requirement is not mandatory. A body of public self-activity is not named as an independent organizational and legal form of legal entities in the Civil Code of the Russian Federation.

At the same time, non-profit associations, including associations without the status of a legal entity, can be created in other forms. In particular, the Civil Code of the Russian Federation specifies a large number of organizational and legal forms of non-profit organizations whose legal status is not determined by the Law on Public Associations and that do not fall under the list of types of public associations specified in the law (for example, consumer cooperatives, communities of indigenous minorities, Cossack societies, notary chambers, legal practices, religious organizations, etc.). Also, as mentioned above, the Law on Religious Associations provides for the possibility of creating a religious group as a voluntary association of citizens formed for the purpose of joint profession and dissemination of faith, carrying out activities without state registration and acquiring the legal capacity of a legal entity.

The Housing Code of the Russian Federation[9] defines the procedure for managing common property in an apartment building by means of

[9] Housing Code of the Russian Federation No. 188-FZ dated 29 December 2004 (amended 21 November 2022). Collection of Legislation of the Russian Federation, 2005, No. 1 (Part 1), Art. 14. (In Russ.).

decisions made by the meetings of owners of the apartment building premises.

Thus, the category of "public association" in the current legislation is not identical to the category of an association of persons as a whole, or an association of persons created not for the purpose of systematic profit-making (non-profit association of persons). The concept of a public association with a literal interpretation of the provisions of the current legislation turns out to be already a category of non-profit associations of persons.

VI. The Concept of a Civil-Law Community and its Relation to the Category of a Public Association

The current civil legislation also contains the category of a civil-law community. It seems that associations that are not endowed with the rights of a legal entity could be classified as civil-law communities that do not have legal personality under civil law, but have the opportunity to make decisions on a number of issues. As mentioned above, civil-law communities are not listed among the subjects of civil law.

According to the Clarifications of the Supreme Court of the Russian Federation,[10] a civil-law community is understood as a certain group of persons authorized to make at meetings decisions with which the law associates civil law consequences binding on all persons who were entitled to participate in the meeting, as well as for other persons, if this is established by law or follows from the essence of relationships.

It is noted in the literature that the law does not define which groups of persons are considered as civil-law communities, their list is not exhaustive. At the same time, in all the examples mentioned in the law, there is a connection in the community through a common counterparty, common property or other common elements (Filippova, 2014, p. 130).

[10] Resolution of the Plenum of the Supreme Court of the Russian Federation No. 25 dated 23 June 2015 "On Application by Courts of Certain Provisions of Section I of Part One of the Civil Code of the Russian Federation." Bulletin of the Supreme Court of the Russian Federation, 2015, 8. (In Russ.).

Thus, the civil society can be considered as a certain group of persons empowered to make decisions at meetings with which the law associates civil-law consequences binding on all persons entitled to participate in the meeting, as well as for other persons, if this is established by law or follows from the essence of the relationship.

According to the current Russian legislation, a group of persons must be legally empowered by law to make legally significant decisions. In the event that such a group of persons is not authorized by law, the decisions taken by it will not entail legally significant consequences.

Under the Law on Public Associations, public associations are created by the founders — individuals and legal entities — in the form of public associations that have convened a congress (conference) or a general meeting that adopts the charter of a public association and forms its governing and audit bodies. In the future, the management of the public association may be carried out by the highest governing body, namely, a congress (conference) or a general meeting of the public organization or public movement.

Thus, in fact, public associations that are not registered as a legal entity operate based on the decisions of the meetings, which allows us to talk about the proximity of the concepts of a public association and a civil-law community, but not about their full matching. Public associations today are understood in a narrow sense only as non-profit formations created in accordance with the Law on Public Associations, while in the case of state registration they can acquire the rights of a legal entity. Civil-law communities are not legal entities; they constitute a group that, by virtue of the law, has the opportunity to make legally significant decisions of meetings. Thus, not every public association can be considered as a civil-law community: in corporate legal entities, civil-law communities include only their highest collegial governing body — the general meeting of participants (members) of the organization, but not the legal entity itself. Rather, in public associations without independent legal personality, it forms a civil-law community.

Thus, civil-law communities capable of making decisions entailing legal consequences for all community members and for other persons play a great role at the present stage, primarily, for the development of a digital platform economy model of shared consumption. Therefore,

the rules governing interaction between all the community members and interaction with other persons need further improvement.

First of all, it is necessary to specify and determine the ratio between the concepts used in the current legislation, in particular, we are talking about the ratio between the concepts of the association of persons, civil community and public association.

A community in itself, in the usual sense of the word, is an association, a group of a certain number of people with a common goal. This concept is used as a synonym for the word association.[11] The community is also identified with the category of the commune and collective: in many foreign languages, this is how the word "community" sounds, for example, *community* (in English), *comunidad* (in Spanish), *collectivité* (in French).

In jurisprudence, the categories of groups of persons, communities, associations are not always identified. For example, the category of a community, a group of persons is used in criminal law to denote an association pursuing criminal goals. At the same time, a criminal association is a kind of a group of persons with the characteristics specified in the law.

In civil law, the category of civil-law community has recently appeared in connection with the reform of civil legislation. Federal Law No. 100-FZ dated 7 May 2013 "On Amendments to Subsections 4 and 5 of Section I of Part One and Article 1153 of Part Three of the Civil Code of the Russian Federation"[12] consolidated Chapter 9.1 "Decisions of Assemblies" that mentions the category of civil-law communities, but it does not disclose its concept and features. Thus, the civil-law community can be considered as a certain group of persons empowered to make decisions at meetings with which the law associates civil consequences binding on all persons who have the right to participate in the meeting, as well as for other persons if this is established by law or follows from the essence of the relationship. The Civil Code of the Russian Federation does not use the category of a group of persons to define the association.

[11] Ushakov, D.N. Explanatory dictionary. Akademik [website] Available at: https://dic.academic.ru/dic.nsf/ushakov/1035302. (In Russ.). [Accessed 23.12.2022].

[12] Collection of Legislation of the Russian Federation, 2013, 19, Art. 2327. (In Russ.).

VII. Interrelation between the Concept of a Public Association and some other Concepts Denoting the Form of Joint Activity of Persons to Achieve a Common Goal

For civil law, the concept of an association is much more significant. It is very often applied to define legal entities. For example, an association (union) is an association of legal entities and (or) citizens based on voluntary or, in cases prescribed by law, mandatory membership and created to represent and protect common, including professional, interests, to achieve socially useful goals, as well as other non-commercial goals that do not contradict the law (Art. 123.8 of the Civil Code of the Russian Federation). In the legal literature it is noted that "the term *association*, that is, in fact, an international analogue of the phrase 'association of citizens,' comes from the Latin word **association** — connection" (Bondarchuk, 2017, p. 183). For example, Article 20 of the Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948, proclaims that everyone has the right to freedom of peaceful assembly and association, no one can be forced to join any association.

Essentially synonymous concepts in domestic civil law are used in different meanings — the category "association" is identified with the category "union" and represents one of the possible forms of unifications that acquire the status of the subject of civil law — a legal entity of a specific organizational and legal form. Thus, the category of "community" in civil law is broader than the category of "association (union)."

As noted above, communities of persons in a broad sense can acquire civil legal personality and be registered as a legal entity. In this case, they constitute an organization that has an integral feature of organizational unity, in the legal context they are considered as a single subject of civil law that are not a community in themselves. At the same time, other unifications that do not acquire the status of a legal entity can also be included in the category of associations of persons that can function as a civil-law community making legally significant decisions at meetings of founders, participants, and members.

Among unifications of persons in general, narrower concepts of public associations and religious associations stand out. The Laws

on Public Associations and on Religious Associations, in particular, separately identify the relevant categories that in some cases, without being registered as a legal entity, do not acquire the appropriate status. It should be noted that in the Law on Religious Associations, the legislator has more consistently and internally uncontroversially defined the types of religious associations: a religious organization acquires the status of a legal entity, a religious group can function without this status.

The legal literature also distinguishes the category of corporate-type public associations. In particular, the principle of legality of public associations is explained as follows: "endowing a public association with legal personality as a general right, i.e., the capacity to perform its activities either as a social entity, without the rights of a legal entity, or as a civil law subject that after state registration becomes capable of having civil rights and obligations, acquiring them on its own behalf and exercising them. A unification as a whole and its members must comply with the legislation of the Russian Federation, generally recognized principles and norms of international law, as well as the norms provided for by its charter and other constituent documents" (Afanasyeva et al., 2017, Chapter IV).

In connection with this, it is necessary to determine the relationship between the concepts of a "community" and a "corporation."

A corporation is often defined as a large unification created for the purpose of economic activity in a certain area of the market.[13]

At the same time, a corporation is also defined as "a type of a legal entity whose founders (participants) have the right to participate (the right of membership) and form its supreme body (general meeting of participants, congress, conference or other representative (collegial) body) determined by the corporation's charter (bylaws) in accordance with the law" (Afanasyeva et al., 2017, Chapter I). This definition of a corporation in a legal sense is based on interpretation of the provisions of Article 65.1 of the Civil Code of the Russian Federation, according to which legal entities whose founders (participants) have the right to participate (membership) in them and form their supreme body constitute corporate legal entities (corporations). Thus, in modern domestic civil law, the term "corporation" is not identical to the term

[13] Corporation [Internet]. Available at: https://investments.academic.ru/1077Корпорация. (In Russ.). [Accessed 11.01.2023].

"association" and represents its specific case — corporations are certain types of legal entities that have the characteristics of corporate organizations specified in the law. In addition, modern law also knows one person corporations including those created on the basis of a sole decision of its founder.

VIII. Problems of Improving the Current Legislation on Public Associations

The Law on Public Associations contains quite a large number of contradictions and inconsistent terms. Firstly, it is unclear from the law itself which public associations should be registered as legal entities, which may not acquire such a status. This issue should be decided by the founders or members of the public association.

Secondly, the correlation between the categories used in the Civil Code of the Russian Federation and in this law raises questions. For example, in the Civil Code of the Russian Federation, public organizations and social movements are named as separate organizational and legal forms of non-profit corporate organizations. According to the Law on Public Associations, they may not acquire this status and function without being registered as a legal entity. The body of public amateur activity under the Law on Public Associations can be registered as a legal entity, while in the Civil Code of the Russian Federation such an organizational and legal form of a legal entity is not determined. The categories of institution and foundation are traditionally used to designate unitary non-profit organizations. The institution is created on the initiative of one founder and cannot be an association in its essence.

In addition, it should be noted that all public associations created on the initiative of citizens, with the exception of religious organizations, as well as commercial organizations and non-profit unions (associations) created by them, fall within the scope of Article 2 of the Law on Public Associations. Article 4 defines that specifics related to the creation, operation, reorganization and (or) liquidation of certain types of public associations — trade unions, charitable and other types of public associations — may be regulated by special laws adopted in accordance with the Law on Public Associations. Activities of the public

associations before adoption of special laws, as well as the activities of public associations not regulated by special laws are regulated by the Law on Public Associations. Thus, literal interpretation of these rules makes it possible to formally recognize all other non-profit organizations and civil-law communities created on the initiative of citizens to achieve non-profit goals as public associations and extend the application of the Law on Public Associations to them. However, based on the literal interpretation of the current norms of the Law on Public Associations, such a conclusion seems incorrect and contradictory, because the list of organizational and legal forms of public associations is much narrower than the list of existing organizational and legal forms of the same non-profit organizations, and the understanding of the category of the civil-law community is also quite broad in judicial practice and includes, for example, a collective of co-owners, bodies of a legal entity, etc. These contradictions must be eliminated in order to give certainty to the legal regulation of the relations under examination.

The issue concerning the relationship between the category of the public association and the public organization is not explained in Federal Law No. 7-FZ dated 12 January 1996 "On Non-Profit Organizations"[14] (hereinafter referred to as the Law on Non-Profit Organizations). Article 6 defines these concepts as voluntary associations of citizens "recognized as public and religious organizations (associations) that have united in accordance with the law on the basis of their common interests to meet spiritual or other non-material needs." However, the analysis of the provisions of the Civil Code of the Russian Federation, the Law on Public Associations, the Law on Religious Associations makes it clear that the terms "public association" and "public organization," as well as the terms "public association" and "religious association," "religious association" and "religious organization" are not completely identical.

In order to eliminate the identified contradictions, it is necessary to bring the terminology used in the regulations into line with each other. At a minimum, it is necessary to identify in the law organizational and legal forms of public associations that must acquire the rights of

[14] Collection of Legislation of the Russian Federation. 1996, 3, Art. 145. (In Russ.).

the legal entity and be registered accordingly. In this regard, public organizations could be recognized as a public association that should be registered as a legal entity, as well as public institutions and foundations. A public initiative body may be a public association without acquiring the status of a legal entity.

Distinguishing a public movement as an independent form of a nonprofit organization raises questions — it could form a public association without mandatory state registration as a legal entity. In the case of state registration, it would have to acquire the status of a public organization. This conclusion is related to the fact that when managing a legal entity, it is important to determine the composition of its bodies: for the formation of public movement bodies, as a rule, only those participants who are registered in the public movement and have submitted an application for this, and not any participants who support the public movement, are taken into account. Thus, most often in a public movement, the participants who have submitted an application and actually acquired membership rights are allowed to manage the organization, which contradicts the concept of a public movement that, in fact, turns into an analogue of a public organization.[15] Thus, for the public movement, the difference between the categories of "participant" and "member" of a public movement is actually leveled.

In this regard, it is important to note that the concepts of "founder," "member," "participant" of a public association given in the law also need clarification and comparison with similar concepts used in the Civil Code of the Russian Federation. In the Law on Public Associations, the categories "member of a public association" and "participant of a public association" are not identical, whereas in the Civil Code of the Russian Federation the categories of participation (membership) are used as identical.

IX. Conclusion

Thus, in a broad sense, associations of citizens include both legal entities and other associations without the status of a legal entity.

[15] All-Russian public movement "Volunteers of Victory" [website]. Available at: https://волонтерыпобеды.рф/docs. (In Russ.). [Accessed 18.01.2023].

Terminologically, in order to harmonize the use of various concepts, it is proposed to recognize associations of citizens registered as legal entities as organizations — legal entities. Under the Law on Public Associations, it should be clarified that a public organization is a public association registered as a legal entity acquiring the civil personality of an independent subject of civil law. This clarification will make it possible to bring the provisions of the Civil Code of the Russian Federation and the Law on Public Associations into line with the definition of their organizational and legal forms.

The procedure for creating associations of citizens — legal entities allow us to conclude that initially they pass the stage of the civil-law community. After registration, such an association cannot be considered a civil-law community, since it acquires organizational unity and is considered as an independent entity.

Associations of citizens not registered as a legal entity can be created through the adoption of a decision by the constituent founding meeting and approval of the charter of a public association or by reaching an agreement on implementation of joint activities, in fact, by signing a joint activity agreement. In the first case, an analysis of the provisions of the Civil Code of the Russian Federation, the Law on Public Associations, judicial practice allows us to conclude that such associations of citizens are created and continue to function as a civil-law community by virtue of the law making decisions with legal consequences. In the second case, there is no unambiguous understanding of the association of citizens as a civil-law community, since they are created based on an agreement.

It should also be borne in mind that the category of public associations based on the meaning of the current legislation, cannot be identified with the category of citizens' associations — these are different concepts, which ultimately leads to contradictions in the legal regulation of emerging relations, incomplete regulation of relations with the participation of citizens' associations and their complication.

Other organizational and legal forms of non-profit organizations that are not specified in Article 7 of the Law on Public Associations, as well as associations of citizens that can be created on the basis of a joint activity agreement, are not formally recognized as an organizational and legal form of public associations, while in essence they are an association of persons.

Thus, the relationship between the concepts of "public association" and "association of citizens" needs to be clarified by expanding the scope of the Law on Public Associations to any associations of citizens exercising their constitutional right to association. Exceptions from the scope of the said law also need clarification. Public associations need to be classified; possible organizational and legal forms of public associations should be clarified, bringing their list in line with the norms of the currently effective civil legislation.

The above allows us to conclude that various terms are used to designate associations of persons in civil law, in particular, legal entities as organizations, associations, cooperatives, public organizations, social movements, etc. as separate organizational and legal forms of legal entities, public associations, corporations, civil-law communities.

By itself, a variety of terms is acceptable. Nevertheless, in order to give certainty to the legal regulation of relations involving associations of persons, it is necessary to establish the exact meaning of each term used in different legal acts in order to avoid contradictions and ambiguity of interpretation.

Thus, it can be concluded that in the current legislation the category of the public association is used in a rather narrow sense and it does not cover all possible non-profit associations of persons, although in its content it could be considered as a broader category, which would make it possible to determine general principles of establishing and operating for all types of non-profit associations of persons and to classify them and harmonize possible organizational and legal forms of their operation. All these measures will contribute legal certainty to the status, primarily to the civil-law status, of various types of associations of persons.

References

Afanasyeva, E.G., Vaypan, V.A., Gabov, A.V., et al., (2017). *Corporate Law*: in 2 Vols. Moscow: Statut Publ. Vol. 1. (In Russ.).

Bidwell, J., (2019). *This is a breakthrough! 100 lessons of business innovation*. Moscow: Alpina Publ. (In Russ.).

Bondarchuk, I.V., (2017). Association of Citizens as a Legal Category: Judicial Constitutional Experience of the CIS Countries and Current

Trends in Legislation. *Aktual'nye problemy rossijskogo prava*, 4(77), pp. 182–190, doi: 10.17803/1994-1471.2017.77.4.182-190. (In Russ.).

Filippova, S.Yu., (2014). Civil Society: The Notion, Structure, Types, Dynamics of Legal Connection (Experience of an Instrumental Research). *Pravovedenie*, 6(317), pp. 128–142. (In Russ.).

Gongalo, B.M., (2021). *Legal Personality of a Legal Entity: Initial Provisions*. Selected works: in 5 Vols. Moscow: Statut Publ. Vol. 3. (In Russ.).

Ilyichev, L.F., Fedoseev, S.M., Kovalev, S.M., and Panov, B.G., (eds), (1983). *Philosophical Encyclopedic Dictionary*. Moscow: Sovetskaya Entsyclopedia Publ.; 1983. Available at: https://dic.academic.ru/dic.nsf/enc_philosophy/2866/ОБЩЕСТВО [Accessed 20.12.2022]. (In Russ.).

Kazannik, A.I. and Kostyukov, A.N., (2015). *Constitutional Law: University Course*: in 2 Vols. Moscow: Prospect Publ. Vol. 2. (In Russ.).

Korneenkov, S.S., (2002). Cooperation and competition in the socio-psychological and spiritual field of the self-developing system "man" (Psychological analysis). *Vestnik Dalnevostochnoy gosudarstvennoy akademii ekonomiki i upravleniya,* 2 (22), pp. 111–122. (In Russ.).

Kotlyarov, I., (2016). The phenomenon of virtual consumer cooperatives. *Obshchestvo i ekonomika [Society and Economics],* 12, pp. 75–82. (In Russ.).

Kuznetsova, N.A., Ilina, A.V., and Pukach, G.V., (2018). Development of virtual consumer agricultural cooperatives. *Vestnik SGSEU [Herald of Saratov State Socio-Economic University]*, 5(74), pp. 71–73. (In Russ.).

Semenova, Yu.A., (2020). Virtual Network Community Model. *Eurasian Union of Scientists (ESU),* 5 (74), pp. 63–68, doi: 10.31618/ESU.2413-9335.2020.10.74.803

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HUMAN RIGHTS, MODERNITY AND PROSPECTS FOR THE FUTURE

Article

DOI 10.17803/2713-0533.2023.1.23.088-109

Judicial Activism as an Essential Tool for the Protection and Expansion of Human Rights in India

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Abstract: The Indian judiciary has been the sentinel of democracy and assiduously upholds the values of Indian constitutionalism. Thus, the Court is the interpreter, protector, and guardian of the Indian Constitution. The active and trustworthy role of the judiciary makes it the country's only institution whose acceptability seems to be a national consensus. This paper discusses that judicial activism is a part of judicial review and does not violate the doctrine of separation of powers; instead, it protects and promotes constitutionalism. Further, this paper illustrates that judicial activism has played a vital role in protecting and promoting human rights in India.

Keywords: separation of powers; judicial review; judicial activism; human rights

Cite as: Singh, V.P., (2023). Judicial Activism as an Essential Tool for the Protection and Expansion of Human Rights in India. *Kutafin Law Review*, 10(1), pp. 88–109, doi: 10.17803/2713-0533.2023.1.23.088-109.

Contents

I. Introduction

The enjoyment of human rights is the most cherished value of human beings. Human life without human rights is nothing but a dead shell. Human rights are indispensable for the growth and development of human personality (Fahed, 2002). Therefore, after India got freedom from autocratic and exploitative British rule, the framers of the Indian Constitution enunciated the provisions related to fundamental rights. Further, the Directive Principles of State Policy (DPSP) in the Indian Constitution assures the faith in people for a better future by promising them to provide social, economic and political justice.

The judiciary was empowered to enforce and protect these rights under any circumstances to ensure that these rights should not remain just mere promises (Tope, 2010). The Indian judiciary, since its inception, diligently not only protected and enforced fundamental rights but also transformed certain directive principles into fundamental rights. The judiciary in India decided each case as justice demanded without any outside interference. The freedom of the press, right to livelihood, right to education, right to compensation, right to a clean environment, and many more as fundamental rights by the Indian judiciary through interpreting various provisions enshrined in Part IV of the Indian Constitution (Bhatia, 2016). Such an active and trustworthy role of the judiciary makes it the only institution in the country on whose acceptability there seems to be a national consensus. Although, the active role of the Indian judiciary is criticized by a few people

asserting that the judiciary is overstretching its jurisdiction. Despite such a critical assertion, one cannot deny that the independent and upright judiciary is the vital feature of any democratic welfare state, on which certainty of law and justice depends (Denning, 2005, p. 3).

This paper conceptualizes that judicial activism does not run afoul of the doctrine of separation of powers. Indeed, the application of this doctrine in the Indian Constitution emphasizes that judicial review and independence of the judiciary are indispensable to protecting democratic principles. Further, the paper espouses that the judiciary in India, through judicial activism, provides justice and has emerged as the custodian of fundamental rights as perceived by the makers of the Constitution.

II. Independence of Judiciary and International Perspective

The judiciary's independence can determine the predominance of the Rule of Law in a particular country. The United Nations Charter emphasizes the principle of the Rule of Law. The Charter's Preamble states, "We, the people of the United Nations, are determined... to establish conditions under which justice and respect for obligations arising from treaties and sources of international law can be maintained." Further, many other significant international instruments supported such endeavor of the United Nations. For example, the Universal Declaration of Human Rights, 1948 (UDHR) provides that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charge against him."[1] Further, Article 8 of the UDHR provides any person's fundamental right to seek effective remedy in case his rights are infringed before the competent adjudicative authority. The effective implementation of such fundamental rights highly depends on an independent judiciary.

The opening statements of the 1959 International Conference of Jurists, held in India, are noteworthy in this context. The message states, "The ultimate protection of the individual in a society governed

[1] Art. 10 of the UDHR, 1948.

by the Rule of Law depends upon the existence of an enlightened, independent and courageous judiciary and adequate provisions for the speedy and effective administration of justice." Similarly, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms provides: "In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal establish by law."

Furthermore, Article 14 of the International Covenant on Civil and Political Rights, 1966 also highlights the significance of judiciary independence in protecting an individual's rights.[2] Article 8 of the American Convention of Human Rights, 1969, states, "Everyone has the right to a hearing by an independent, impartial tribunal, previously established by law." In light of the above-mentioned international instruments, it can be reckoned that an independent judiciary is indispensable in protecting human rights and imparting justice. Furthermore, the UN General Assembly endorsed the Basic Principles on the Independence of the Judiciary.[3] It recommended that "member states should guarantee judicial independence and their constitution and laws should enshrine judicial independence."[4]

The Indian judiciary has upheld the ideals of India's Constitutional architects, who envisioned the protection and enforcement of fundamental rights and other democratic norms. The judiciary in India has played a significant role as the protector of fundamental rights. It has expanded the scope and content of fundamental rights by bringing the Directive Principles of State Policy (DPSP) within the ambit of justiciable rights. Consequently, the non-justifiable nature of the DPSP remains on the books only for academic purposes (Verma, 2004, p. 18).

The judiciary's activism has drawn criticism. Some have claimed that the judiciary has overreached its power and trespassed into the

[2] Art. 14 of ICCPR, 1966 provides' "All person shall be equal before the courts and tribunals. In the determination of any criminal charge against him [of her] rights and obligations in a suit at law, everyone shall be entitled to fair and public hearing by a competent, independent and impartial tribunal established by law."

[3] UNGA Resolution 40/146 of 13 December 1985.

[4] *See* Art. 2 of the UN Basic Principles, 1985.

domain of the executive and the legislative branches of government, violating the doctrine of separation of powers. The power of judicial review and its increasingly expansive sweep (described as judicial activism) has been compared by critics to a child who, given a hammer, believes everything under the sun is worth pounding (Ranjan, 2019, p. ix). Therefore, it is essential to discuss the separation of powers and judicial review under the Indian Constitution and whether the judiciary merely interprets existing laws or creates new ones.

III. The Concept of Separation of Powers and Independence of the Judiciary under the Indian Constitution

The doctrine of Separation of Powers was thought to be first enunciated by Montesquieu around three centuries ago. According to this doctrine, a government's powers to enact, administer, and enforce the law should be strictly delegated to distinct organs of government (Shukla, 1990, p. A36). The doctrine is based on the hypothesis that merging all powers under one body leads to autocracy and the negation of individual liberty (Jain, 2003, p. 218). Further, these branches of government should be co-equal, acting as checks and balances on the other branches. While Montesquieu articulated this ideal, the principle underlying the "Separation of Powers" doctrine, while widely embraced, has not been adopted strictly under any constitution, including that of India (Rao, 2005).

Disapproving of the strict implementation of the doctrine of separation of power, Justice Aharon Barak aptly observed that:

> *"An enlightened democracy is a regime of separation of powers. However, this separation does not mean that every branch is an authority unto itself, not taking the other branches into account. Such a perspective would profoundly harm the foundation of democracy itself since it means a dictatorship of every branch within its own sphere. On the contrary, the separation of power means reciprocal checks and balances among the various branches — not walls among the branches but bridges that balance and control"* (Reddi, 2019, p. 109).

In crafting India's particular system of government, the framers of the Indian Constitution studied other democratic constitutions and their operations. After reviewing the Constitutions of several democracies, the framers consciously designed a system that steers clear of a rigid separation of powers (Lok Sabha Secretariat, Government of India, 1989, p. 959).[5] To illustrate this, in the case of *Ram Jawaya Kapur v. State of Punjab*,[6] Chief Justice B.K. Mukherjee observed that

> *The Indian Constitution has not recognized the doctrine of separation of power in its absolute rigidity. The power and responsibilities of the various wings of the government have been reasonably separated. Thus, it can be alleged that the Indian Constitution does not contemplate the assumption by one organ or part of the State of functions that essentially belong to another.*[7]

This case and its progeny allocated responsibility for upholding the Constitution among the branches of government. However, in a different line of cases, the Supreme Court has drawn a more finessed definition of India's separation of powers doctrine. For example, In the case of *Chandra Mohan v. State of UP,*[8] The Supreme Court observed that

> *[t]he Indian Constitution, though it does not accept the strict doctrine of separation of powers, provides for an independent judiciary in the States... Indeed, it is common knowledge that there was a strong agitation to separate the judiciary from the executive and legislature in pre-independence India. It was apprehended that the independent judiciary would be a mockery at the power levels if not separated from the executive and legislators.*[9]

The Court has recognized the importance of the independence of the judiciary.

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[5] *See* Constituent Assembly Debates, Book No. 2, Vol. No. VII. Second Print 1989. P. 959.

[6] AIR 1955 SC 549.

[7] AIR 1955 SC 556. *See* also following cases to get the real position of doctrine of separation of powers prevailing in India. In re Delhi Law Act case (AIR 1951 SC 332); Ram Krishna Dalmia v. Justice Tendolkar (AIR 1958 SC 538); Jayanti Lal Amrit v. S M Ram (AIR 1964 SC 649).

[8] AIR 1966 SC 1987.

[9] AIR 1966 SC 1987, p. 1993.

While the executive, legislative, and judicial branches of the State each function independently in their spheres, the Constitution of India provides an independent judiciary to uphold constitutional principles exercising a broad jurisdictional mandate over the acts of the legislature and the executive (Shukla, 1990, p. A36). In the case of *S.P. Gupta v. Union of India*,[10] the Supreme Court observed that "the concept of Independence of judiciary is not limited only to independence from executive pressure or influence but a much wider concept that takes within its sweep independence from many others." The Supreme Court observed that "Under the Constitution, the Judiciary is above the administrative executive and any attempt to place it on par with the administrative executive has to be discouraged."[11] The views of Sir Francis Bacon support this observation of the Supreme Court.

Sir Francis Bacon, in "The Essays," while arguing the importance of the "Temple of Justice" observed that "Lions on both sides supported Solomon's Throne: Let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty."[12] Here "the expression 'Solomon's Throne' symbolizes the majesty of our justice system, and the word 'Lions' represents the Legislature and the Executive. In short, it means that the 'Majesty of Justice System' is supported by the Legislature and the Executive from both sides; nevertheless, these Legislature and Executive are under the control of the judiciary."[13] Indian jurisprudence has recognized this role distinguishing the judiciary's role in protecting the Constitution from the roles of the executive and legislative branches.

In this role, the judiciary acts as a *sentinel on the qui vive* when a branch of State exceeds its authorized power (Reddi, 2019, p. 113).[14] The Supreme Court observed that

[10] 1981 Supp. SCC 87.

[11] SC Advocates-On-Record Association v. Union of India, AIR 1994 SC 268 at p 338.

[12] Quoted in SC Advocates-On-Record Association v. Union of India, AIR 1994 SC 268, p. 301.

[13] Quoted in SC Advocates-On-Record Association v. Union of India, AIR 1994 SC 268, p. 301.

[14] *Supra n.* 6 at 113.

> *Justice has to be administered through the courts. Such administration of justice would relate to social, economic, and political as stipulated in the Preamble of the Constitution. Therefore, the judiciary becomes the most prominent and outstanding wing of the constitutional system for fulfilling the mandate of the Constitution. Further, it is the judiciary's responsibility to keep a vigilant watch over the functioning of the other constitutional functionaries within the commands of the Constitution. Therefore, the independence of the judiciary plays an important role in maintaining the democratic set-up of any country.*[15]

Moreover, the principle underlying an independent judiciary is not an absolute conception but arises from faith in constitutional values.[16] These principles are evident in the exercise of judicial review (Austin, 2008).

IV. Extent of Judicial Review under the Indian Constitution

The most crucial function of the judiciary under any written constitution is to keep authorities within constitutional limits by way of judicial review. In the literal sense, judicial review means reviewing the decree or sentence of an inferior court by a superior court. However, according to S.P. Sathe, there are two models of judicial review. One is a technocratic model in which Judges act merely as technocrats and hold a law invalid if it is *ultra vires* the legislature's powers. In the second model, a court interprets the provisions of a constitution liberally and in the light of the spirit underlying it keeps the Constitution abreast of the times through dynamic interpretation (Sathe, 2010, p. 6).

This second model is the basis for judicial activism. Thus, judicial review has more technical significance in public law in countries having written constitutions, meaning that the Court has the power to test the validity of legislative and executive actions on the touchstone of the Constitution. Essentially, courts determine the constitutionality of legislative acts. Accordingly, the fact that a constitution is a legal

[15] Subhash Sharma v. Union of India 1991 Supp (1) SCC 574.
[16] State of Tamil Nadu v. State of Kerala, (2014) 12 SCC 696.

instrument provides the basis for judicial review. The legal instrument is basic, superior, and overwhelming in status to the laws enacted by the legislature, which is itself establish by, and therefore subordinate to, the Constitution (Lakshminath, 2016, p. 22).

The Indian Constitution embodies the values of constitutionalism, which are not static but evolve along with changing times and mores of contemporary society. By conferring fundamental rights, constitutionalism in India established nationalism, independence, democracy, secularism, and limited government. The right to form its government through the universal adult franchise, liberty, equality, and unity of the nation are the catchwords of Indian constitutionalism. It is in this sphere that the judiciary emerges, duty-bound to uphold the values of Indian constitutionalism through judicial review (Lakshminath, 2016, p. 24).

The Constitutional Assembly members envisioned the Indian judiciary as defenders of rights and justice (Austin, 2008, p. 217). In their view, the judiciary is an extension of the Fundamental Rights that ensures the proper enforcement of these rights. Furthermore, they visualized the judiciary as a device to revolutionize Indian society by upholding equality and justice. Therefore, the Constitutional Assembly members went to great lengths to acknowledge judicial review as an essential element of fundamental democratic values upon which the constitutional edifice of India is based (Austin, 2008, p. 164).

In recognizing the judiciary envisioned by the constitutional assembly, Justice Bhagwati observed that the judiciary has to play a crucial role in preventing and remedying abuse and misuse of power, and also in eliminating exploitation and injustice. For this purpose, it is necessary to make procedural innovations to meet the challenges posed before the committed judiciary. The committed judiciary in India, keenly alive towards its social responsibility and accountability, has liberated itself from the shackles of western thought. It made innovative use of the power of judicial review and developed new tools, devised new methods, and fashioned new strategies to bring justice for socially and economically disadvantaged groups.[17]

[17] AIR 1993 SC 892.

As a result, the Indian judiciary has appeared in a new avatar yielding several beneficial developments over the last few decades (Shourie, 2018). Under this blanket of constitutional freedom, and to meet society's changing needs, a new trend has emerged through the conscious exercise of the power of the judicial review. This is the essential underpinning of judicial activism.

Judicial activism is an inherent feature of judicial review and has been exercised as a result of several factors. According to Antony Lewis, the progress of the judiciary in Britain towards judicial activism has been due to: (1) the other organs of the government not obeying their mandates and doing injustice to the public at large; (2) the arbitrariness and ambiguity nature of legislation; and (3) the view of the judiciary's role as beyond fixing rules and instead treating rules as ripe for future expansion (Lewis, 1961). These factors also have let to and supported a similar emergence of the activist role of the Indian judiciary.

V. Judicial Activism and an Expansion of Human Rights in India

The concept of human rights is based on the dignity and worth of the individual, the unit of creation and without reference to colors, race, sex, religion, etc. Human rights are essential for the realization of the true potential of every human being. The United Nations Charter of 1946 reaffirms faith in human rights, including dignity and worth of the person and equality of man and woman. The United Nations Charter promotes social progress and better standards of life and encourages respect for human rights and freedoms for all without distinction to race, sex, language or religion (Verma, 2004, p. 191). This was followed by the Universal Declaration of Human Rights (UDHR), adopted by the General Assembly on 10th of December 1948, which codified human rights. The UDHR was subsequently followed by a series of covenants and conventions related to human rights. All the member states of the UN were recommended to protect and enforce fundamental rights.

Nearly a year after the adoption of UDHR, independent India adopted the Constitution of India on 26th of November 1949. As a UN member, India incorporated the provisions guaranteeing basic freedoms

as Fundamental Rights and Directive Principles of State Policy in Part III and IV of the Indian Constitution and appointed judiciary to protect and enforce these inalienable rights.

This embrace of judicial activism has brought with it great strides in human rights in India. There has been a legislative vacuum in human rights in India and the judiciary has actively stepped into to fill that void (Dhawan, 2002, p. 326). Moreover, over the last three decades, the Indian judiciary has become a vibrant force in bringing the Constitution in line with the essential characteristics of constitutionalism (Lakshminath, 2016, p. 15). From its inception and soon after its inauguration in 1950, the Supreme Court has decided many cases involving human rights issues (Basu, 2005). These court decisions have essentially held that human rights are at the core of modern liberal democracy.

This trend began with decision in *AK Gopalan v. Madras,*[18] holding that this power of judicial review was ingrained in the written Constitution itself. According to Article 13, the State shall make no law that takes away or abridges fundamental rights. Referring to this article, the Supreme Court opined,

> *The inclusion of Articles 13(1) and 13(2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights are infringed by any legislative enactment, the Court always has the power to declare the enactment to the extent that it transgresses the limits invalid.*[19]

In other words, the Court shouldered the responsibility of judicial interpretation of the Constitution and judicial review of legislative enactments and recognized the preeminent role that such review has in protecting fundamental human rights.

The Indian judiciary has guarded this role to achieve the dream of great Indian leaders of making India an egalitarian nation, artfully interpreting several provisions of the Constitution to this end. Such judicial craftsmanship has not only protected the rights of the people but has also spawned the evolution of several rights protecting vulnerable populations. Justice Subba Rao argued that the majority of

[18] AIR 1950 SC 27.

[19] AIR 1950 SC 34.

the population in India is economically downtrodden and educationally unenlightened and hence, politically ignorant of their fundamental rights. These vulnerable populations cannot therefore stand against any instrumentality of State. It is therefore incumbent on the Court, in such circumstances, to protect their fundamental rights.[20] Consequently, the Indian Court has propounded various fundamental rights including the right to education, the right to live with dignity, and the right to live in a clean environment, by construing several clauses framed in Parts III and IV of the Indian Constitution (Tope, 2010, pp. 225–234).

This construction in furtherance of human rights, prompted the Supreme Court of India, in the *UPSE Board's* case,[21] to observe that the judiciary should propagate, declare, and approve rules of interpretation in order to promote and achieve the objectives specified in Chapter IV of the Indian Constitution. In this line, Justice Ahmadi emphasized that when non-observance of constitutional responsibilities and grave violations of human rights are brought to the knowledge of the Supreme Court, it cannot be expected to split hairs to maintain the delicate balance of power between the organs of government. But it must act and act in a positive manner that will provide relief, which is real and not imaginary, to the parties who exercise their fundamental right in invoking its jurisdiction (Ahmadi, 1996).

The Court has the authority to grant relief, and it should always be ready to utilize its judicial review tools and devise innovative principles for protecting valuable fundamental rights. Perhaps, the judiciary, like an explorer, must always be prepared for future advents.[22]

This evolution of the judiciary from a positivist court to an activist one has been painfully slow (Sathe, 2010, p. 6). In the beginning, the Supreme Court of India was essentially technocratic in nature. This all changed during the 1970s, however, when some exceptional judicial decisions were handed down that liberally interpreted the term "personal liberty" as enshrined in Article 21, transforming the entire notion of what personal liberties embody. The Supreme Court's liberalization was

[20] Waman Rao v. Union of India, (1980) SCC 587.

[21] AIR 1979 SC 65.

[22] State of Bengal v. Committee for Protection of Democratic Rights (2010) 3 SCC 57.

mobilized by recognizing socio-economic realities. Through its strong-willed interpretation of constitutional provisions, particularly those provisions guaranteeing fundamental rights emerged as the savior of fundamental freedoms of the (poor) people.

After shedding its conventional role, the Indian judiciary has consciously exercised the power of the judicial review to meet the changing needs of society by protecting and enlarging the spectrum of fundamental right (Salve, 2008, p. 367). In this vein, not only has the Court broadened the scope of fundamental rights through judicial activism, but it has also ventured into unknown territory where no law previously existed (Bhatia, 1988).

This human rights jurisprudence was not haphazard or intellectually lazy, but rather developed assiduously through judicial craftsmanship. Several unwritten and unspecified rights have been extracted from the enumerated fundamental rights, especially Article 21 of the Constitution, by deploying the purposeful interpretation and a rights-oriented approach. Recognizing the judiciary's willingness to embark on the exploration of judicial activism for the sake of protecting fundamental rights, public interest litigation (PIL) has emerged as a procedural tool for judicial creativity. Further, the Indian judiciary has discovered a roadmap of the directive principles of state policies (DPSP) to amplify the scope and content of the fundamental rights to promote the public good.

In taking this judicial mandate out for a ride, in the case of *Chandra Bhavan v. State of Mysore,*[23] Justice Hegde observed that the provisions of the Constitution are not erected as the barriers to progress. On the contrary, they provide a plan for orderly progress towards the social order contemplated by the Preamble to the Constitution. They do not permit any slavery, social, economic, or political. While rights conferred under Part III are fundamental, the directives given under Part IV are fundamental in the governance of the country... They are complementary and supplementary to each other. The mandate of the Constitution is to build a welfare society. The hopes and aspirations aroused by the Constitution will be belied if the minimum needs of the lowest of our citizens are not met.

[23] AIR 1970 SC 2042.

Thus, Directive Principles were used as the Rosetta Stone for and expansive interpretation of Fundamental Rights (Reddy, 2010, pp. 262–274).

The notion of equality under Article 14 and the definition of terms like "life," "liberty," and "law" mentioned under Article 21 have been substantially broadened by the judiciary (Jaswal, 2002). However, equality and liberty have not been the only focus of the Court's concern; other individual rights have also been expanded or created anew as the Court became even more sanguine in its reading of the Constitution. From the day of inauguration until now, many cases can be cited, demonstrating that the Indian judiciary has emerged as a dynamic force in expanding human rights.

The judiciary has, through judicial interpretation expanded the pantheon of fundamental liberties. For instance, privacy, as a fundamental right, is evolved through the expansive construction of Article 21.[24] Expressive freedoms have also been bolstered, for example, the freedom of speech and expression provided under Article 19(1)(a) was further construed to include "Right to know."[25] By interpreting Article 19(1)(a), the Court broadened the right of freedom of Press/ Media.[26] Even further, the rights granted in Articles 14 and 21 of the Indian Constitution were made applicable to non-citizens.[27] The Court held that child labor is an infringement of fundamental rights and further directed that the State must abolish child labor.[28] Also, to protect the citizenry from exploitation, the Court abolished bonded labor by construing Article 24 of the Constitution and directed the State

[24] Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295; Govind v. State of Madhya Pradesh, AIR 1975 SC 1378; State of Maharashtra v. Madhukar Narayan Madikar, AIR 1991 SC 207.

[25] Lily Thomas v. President of India, AIR 1982 SC 149.

[26] Express Newspaper (P) Ltd. v. Union of India, AIR 1958 SC 578; Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India, AIR 1986 SC 515; Sakal Papers (P) Ltd. v. Union of India, AIR 1962 SC 305; Express Newspapers Pvt. Ltd. v. Union of India, AIR 1986 SC 872.

[27] National Human Rights Commission v. State of Arunachal Pradesh, AIR 1996 SC 1234.

[28] M.C. Mehta (Child Labour Matter) v. State of tamil Nadu, AIR 1997 SC 699. See also Peoples' Union for Democratic Rights v. Union of India AIR 1982 SC 1473.

to rehabilitate those harmed.[29] Importantly, the judiciary has expanded these fundamental rights to include many vulnerable and cast-aside populations.

The judiciary has also shown the temerity to stand up for the rights of the least sympathetic members of society. For example, the right to speedy trial has become ensconced as a check on power of the government.[30] Additionally, the State now must safeguard the fundamental right of every person, even offenders, by facilitating medical care.[31] An accused person has a right to the bare necessities of life, such as adequate nutrition, clothing, shelter, and meeting his family members and relatives but within the limitation of the prison regulations.[32] The Court in addressing the dignity of even the accused further laid down strict guidelines regarding the handcuffing of an under-trial or prisoner when commuted to a court.[33] The Court held that an accused person was entitled to free legal aid as part of the right guaranteed by Article 21.[34] In the case of *Joginder Kumar v. State of UP*,[35] the Court held that Article 21 and 22 of the Constitution has a built-in provision requiring the police to inform a person and his relative or friend of his arrest and inform them the place of detention. These demonstrate the Court's willingness to adhere to basic principles of human rights.

The right to live in a healthy environment has also been interpreted as a facet of the right to life.[36] The Supreme Court stated that the

[29] Banhua Mukti Morcha v. Union of India AIR 1984 SC 802; Neeraja Chaudhary v. State of Madhya Pradesh, AIR 1984 SC 1099.

[30] Common Cause v. Union of India, (1996) 4 SCC 33; AIR 1996 SC 1619; Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1360; Saraawati Seshgiri v. State of Kerala, AIR 1982 SC 1165.

[31] Paramanand Katara v. Union of India, AIR 1989 SC 2039.

[32] Francis Coralie Mullin v. Union Territory of Delhi, AIR 1981 SC 746; A.K. Roy v. Union of India, AIR 1982 SC 710.

[33] Prem Shanker v. State of Delhi, AIR 1980 SC 1535. See President, Citizens for Democracy v. State of Assam AIR 1996 SC 2193; State of Maharastra v. Ravikant S. Patil (1991) 2 SCC 1675.

[34] Khatri v. State of Bihar, AIR 1981 SC 928.

[35] (1994) 4 SCC 260.

[36] Buffalo Traders' Welfare Association v. Smt. Maneka Gandhi, (1996) 11 SCC 35; T.N. Godavarman Thirumulkpad v. Union of India, 1997 (2) SCC 267; Research

right to education is concomitant to fundamental freedoms and rights enshrined under Part III of the Constitution. The Court also has imposed restrictions and prohibitions on the manufacturing and selling of drugs that are detrimental to human health and life.[37] It is clear that through judicial activism the Court expanded human rights by liberally construing the bare text of the written Constitution.

The Supreme Court of India also applied the provisions of international conventions and treaties in cases where domestic law provides no remedy. Thus, it has stretched the spectrum of fundamental rights. The Court ordered compensation as a legal remedy and acknowledged it as a mechanism for executing the fundamental rights provided in the Constitution.[38] Consequently, in several cases, the Court awarded compensation in cases of infringement of fundamental rights, including victims of rape.[39] In the context of sexual harassment, the Supreme Court acknowledged and relied to a great extent on international conventions that have not been transformed into municipal law and norms in CEDAW.[40]

VI. Judicial Activism and Human Rights: Recent Development

The recent past Supreme Court's judgements, transformed Indian democracy and redefined our fundamental human rights and which highlights the way and manner in which the judiciary in India has performed its role and protected the fundamental liberties of millions of citizens throughout India. For example, the Court defended the rights

Foundation for Science v. Union of India (Hazardous Waste Matter) Writ Petition (Civil) No. 657 of 1995; M.C. Mehta v. Union of India, AIR 1987 SC 1086.

[37] Drug Action Forum v. Union of India (Drugs Ban Matter) Writ Petition (Civil) No. 698: (1997) 9 SCC 609.

[38] Nilabati Behera v. State of Orissa, AIR 1993 SC 1960; T.C. Pathak v. State of U.P. (1995) 6 SCC 357; GulabBai v. Nalini Narsi Vohra (1991) 3 SCC 482.

[39] Delhi Domestic Working Women's Forum v. Union of India, 1994 (4) SCALE 608. Chairman, Railway Board v. Chandrima Das (2000) 2 SCC 465.

[40] Vishaka v. State of Rajasthan, AIR 1997 SC 3011; Apparel Export Promotion Council v. A.K. Chopra, AIR 1999 SC 625; D.S. Grewal v. Vimmi Joshi (2009 2 SCC 210).

of Muslim married women by declaring triple *talaq* unconstitutional. The Apex Court observed that it was manifestly irrational and arbitrary that a marital tie could be allowed to be broken so capriciously and whimsically and observed that such a form of divorce pronounced by a Muslim husband on his wife violated Article 14 of the Constitution.[41]

While entertaining a Public Interest Litigation (PIL) Supreme Court said that life and liberty as envisaged in Article 21 of the Constitution were meaningless unless they encompassed within it "individual dignity" and adopting the principles applied by courts around the world, the Court held that though "the right to die was not a fundamental right, but the right to live with dignity as envisaged in Article 21 included necessarily the smoothening of the process of dying in case of terminally ill patients with no hope of recovery and thus recognized the concept of passive euthanasia."[42]

The Court has marched to decriminalize homosexuality between consenting adults. The Supreme Court, in the case of *Navtej Johar v. Union of India*,[43] observed that the LGBTQ community deserves equal rights as everyone else, and discriminating against someone because of their sexual orientation is incredibly disrespectful to that person's dignity and sense of self-worth.

While scraping the crime of adultery,[44] Justice Deepak Misra observed that any system treating a woman with indignity, inequity and inequality, or discrimination invites the wrath of the Constitution. Any provision that might have, a few decades back, got the stamp of serene approval may have to meet [its own] epitaph with the efflux of time and growing constitutional precepts and growing perception. A woman cannot be asked to think like a man or how society desires. Such a thought is abominable, for it slaughters her core identity. Moreover, it is time to say a husband is not a master. Equality is a governing parameter. All historical perceptions should evaporate, and their obituaries should be written.

[41] Shayara Bano v. Union of India, 2017 (9) SCC 1.

[42] Common Cause v. Union of India, 2018 (4) SCALE Pages 1.

[43] National Legal Services Authority v. Union of India, (2014) 5 SCC 438; 2014 SCC OnLine SC 328.

[44] Joseph Shine v. Union of India, 2018 SCC OnLine SC 1676.

Further, in the case *Independent Thought v. Union of India*, the Supreme Court of India observed that Exception 2 of Section 375 should apply to a married child below the age of 18 years. The Court stated that the exception clause arbitrarily and unreasonably discriminates between a married and an unmarried girl child. The Court noted that such discrimination is against the spirit of the Constitution and emphasized the significance of the right to self-determination, privacy and bodily integrity. The Court's observation, in this case, may turn out to be a significant step in the battle against marital rape.

The judiciary opened the doors of Sabarimala shrine to women of all ages. The Court held that Article 25 of the Indian Constitution provides the right to religion to every person, irrespective of gender or sex. Thus, a discriminatory customary practice that denies women entry at religious places infringes on women's right to enter a public temple, practice Hinduism freely, and demonstrate devotion to Lord Ayyappa.[45] Further, in the Hadiya case, the Supreme Court recognized the right to change faith as a fundamental right of choice.[46]

While acting as a savior of fundamental rights and constitutionalism, the Supreme Court of India, in the Aadhaar case, struck down several exasperating implementations of this concept while reading it down.[47] On whether the Aadhaar Act violated the right to privacy, the Court referred to the 2017 decision in Puttaswamy I, where privacy was declared a fundamental right.[48] The Court stated that any invasion of the right to be justifiable must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of legitimate State interest; and (iii) proportionality, which ensures a rational nexus between the object and the means adopted. In the Court's opinion, the existence of the Aadhaar Act, coupled with the aim of delivery of welfare benefits, passed the first two prongs of the test. Thus, Section 139AA of the Income Tax Act, which provided for mandatory Aadhaar-PAN linkage, was upheld; the mandatory linkage of Aadhaar with bank

[45] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC 1690.

[46] Shafin Jahan v. Asokan, K.M, 2018 SCC OnLine SC 343.

[47] K.S. Puttaswamy v. Union of India, 2018 SCC OnLine SC 1462.

[48] K.S. Puttaswamy (I) v. Union of India, (2017) 10 SCC 1.

accounts was held not to satisfy the test of proportionality and was struck down. Similarly, the mandatory linkage with mobile numbers was not upheld. The Court expounded with elocution the contours as well as nuances of the conceptual framework of right to privacy under the Indian Constitution.

The Court took a savior's stand, protecting freedom of speech, and refused to ban the Malayalam novel *Meesha*.[49] Former Chief Justice Deepak Misra quoted Voltaire's famous dictum: "I may disapprove of what you say, but I will defend to the death your right to say it."[50] In the case of *Shreya Singhal v. Union of India*,[51] the Supreme Court struck down Section 66A of the Information Technology Act 2000 and protected freedom of speech and expression provided to the people under Article 19(1)(a) of the Indian Constitution. Thus, restricting the irrational application of power by the country's executives. Additionally, it has given the government crystal-clear rules for how to pass laws pertaining to freedom of speech and expression with some enforceable limitations. In each case, the individual's right was upheld over the dissenting demands of the wider community.

VII. Conclusion

The cornerstone of the rule of law in India has been the independence of the judiciary. It is the only way in which we make a perfect separation of powers. There is no rigid separation between legislature and executive. Still, judicial power is separate in a true sense, as no government member can influence any court decision. Judicial independence, a *sine qua non* for the protection of human rights. However, it must not be equated with judicial showmanship in striking down laws whose policy and objectives judges disapprove. As a word of caution, Lord Justice Stephen Sedley remind us in his 1998 Hamlyn Lectures titled *Freedom, Law and Justice* that: "Aspiring village Hampdens sometimes forget it that the protection of good government is as much the High Court's job as the castigation of misgovernment" (Soarbjee, 1999). If the rule of law

[49] N. Radhakrishnan v. Union of India, 2018 SCC OnLine SC 1349.

[50] N. Radhakrishnan v. Union of India, 2018 SCC OnLine SC 1349.

[51] (2015) 5 SCC 1.

is the keystone of the Welfare State, then the judiciary is an essential body that provides certainty and justice to the people.

In a nation that respects the Rule of Law, the judiciary has enormous responsibilities, and people have great expectations. In India, where the other two parts of the government cannot perform their functions in a manner expected by the people, the judiciary is preserving the fundamental human rights of the people, especially vulnerable sections of society. The courts have pushed not only back attempted sabotage but also direct subversion from the other branches of the government. It has struck down arbitrary laws violating Fundamental Rights and thus protected the people's basic human rights. At the same time, by interpreting the various provisions of Part III and Part IV of the Constitution of India and even applying international instruments in cases where domestic laws are silent, the judiciary is protecting and preserving the rights of the people of India.

A review of the decisions of the Indian judiciary concerning human rights indicates that the judiciary is playing the role of savior in crisis. Where the executive and legislature failed to address the people's genuine problems, the Court came forward to take corrective measures and provide necessary directions to the executive and legislature. However, while taking note of the contributions of the judiciary, one must not forget that judicial pronouncements cannot be a protective umbrella for inefficiency and laxity of the executive and legislature. It is the foremost duty of a democratic society and all its organs to provide justice and correct institutional and human errors affecting the basic needs, dignity and liberty of human beings. Fortunately, India has a proactive judiciary, which aspires that in the times ahead, people's rights will be strengthened further.

Sir Gerard Brennan emphasized that an independent and active judiciary should exist. He declared, "As the wind of political expediency now chills Parliament's willingness to impose checks on the executive, and the executive now has a large measure of control over Legislation, the courts alone retain the original function of standing between the government and the governed" (Nariman, 2018). This, perhaps, is judicial activism. With the rise of the new avatar of the Indian judiciary, human rights have found fertile fields throughout the nation.

The achievement of the Indian judiciary in expanding human rights represents the highest fulfilment of the democratic system. With its course already well set, the advancement of human rights will endure as the greatest attainment of the Golden Age of Indian history.

References

Ahmadi, A.H., (1996). Judicial Process: Social Legitmacy and Institutional Viability. *Supreme Court Cases.*

Austin, G., (2008). *The Indian Constitution: Cornerstone of a Nation.* New Delhi: Oxford University Press.

Basu, D., (2005). *Human Rights in Constitutional Law*. Nagpur: Wadhwa & Co.

Bhatia, G., (2016). Directive Principles of State Policy. In: S. Choudhary, M. Khosala & B.P. Mehta, eds. *The Oxford Handbook of the Indian Consitiution.* New Delhi: Oxford University Press. Pp. 644–661.

Bhatia, R.P., (1988). Evolution of Judicial Review in India. *Journal of Indian Law Institute,* pp. 262–274.

Denning, A., (2005). *The Changing Law*. 2nd ed. New Delhi: Universal Law Publishing.

Dhawan, R., (2002). Judges and Indian Democracy: The Lesser Evil? In: *Transforming India: Social and Political Dynamics of Democracy.* New Delhi: Oxford University Press. Pp. 314–352.

Fahed, A.-E., (2002). The Role of Judiciary in the Protection of Human Rights and Development: A Middle Eastern Perspective. *Fordham International Law Journal,* 26(3), pp. 761–770.

Jain, M., (2003). *Indian Constitutional Law*. Nagpur: Wadhwa & Company.

Jaswal, P.S., (2002). Public Accountability for Violation of Human Rights and Judicial Activism in India. *Supreme Court Cases,* Vol. 3.

Lakshminath, A., (2016). *Judicial Process and Precedent*. Lucknow: Eastern Book Company.

Lewis, A., (1961). The Supreme Court and Its Critics. *Minnesota Law Review,* pp. 305–332.

Lok Sabha Secretariat, Government of India, (1989). *Constitutional Assembly Debate*. New Delhi: Lok Sabha Secretariat, Government of India.

Nariman, F.S., (2018). *God Save the Hon'ble Supreme Court*. 1st ed. Mumbai: Hay House Publishers.

Ranjan, S., (2019). *Justice vs Judiciary*. New Delhi: Oxford University Press.

Rao, P.P., (2005). Separation of Powers in a Democracy: The Indian Experience. *Peace Research,* 37(1), pp. 113–122.

Reddi, V.P., (2019). Separation of Power and the Power of Judicial Review. In: *Alladi Memorial Lectures — 2 : Debates on Constitutional and other Matters*. New Delhi: Tulika Books. Pp. 96–126.

Reddy, C.O., (2010). *The Court and the Constitution of India*. 1st ed. New Delhi: Oxford University Press.

Salve, H., (2008). Justice Between Generations: Environmental and Social Justice. In: *Supreme but not Infaliable*. New Delhi: Oxford University Press. Pp. 360–380.

Sathe, S.P., (2010). *Judicial Activism in India*. New Delhi: Oxford University Press.

Shourie, A., (2018). *Courts and their Judgements*. Noida: Harper Collins.

Shukla, V., (1990). *Constitution of India*. Lucknow: Eastern Book Company.

Soarbjee, S., (1999). Role of Judges: The Promotion of Constitutional Government. *The Statesman*, 24 September.

Tope, T., (2010). *Constitutional Law of India*. 3rd ed. Lucknow: Eastern Book Company.

Verma, J.S., (2004). *The New Universe of Human Rights*. 1st ed. New Delhi: Universal Law Publishing Co.

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Research Article

DOI: 10.17803/2713-0533.2023.1.23.110-136

Irreversible Choices and Future Generations' Rights[1]

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Abstract: The article revolves around the question whether, given some very "fundamental threats" to future generations' living, their very conditions of survival can be construed as rights. The issue has to tackle the problem of the non-existence of the presumptive holders of such a right, as well as with the problem of their (non-)identity. The article shows the reasons for separating what we owe to future persons under the challenge of some fundamental threats for humanity from our will to hand down our cultural and ethical ideas of the good information and eventually from paternalistic or selfish imposition upon future generations of our irreversible choices. The framework refers essentially to a conceptual grammar of justice. Moreover, it is suggested to articulate rights through the lens of "disposability" and "non-disposability" principles.

Keywords: future generations; present generations; human rights; rights' theories; justice theories; paternalism; solidarity; irreversible choices; global warming; nuclear threat

Cite as: Palombella, G., (2023). Irreversible Choices and Future Generations' Rights. *Kutafin Law Review*, 10(1), pp. 110–136, doi: 10.17803/2713-0533.2023.1.23.110-136.

[1] This article draws on a Working Paper hosted in the EUI LAW WP Repository http://hdl.handle.net/1814/6746. It is a revised and amended version of it.

Contents

I. Setting the Scene. A Matter of Rightness

The "Declaration on the responsibilities of the present generations towards future generations,"[2] expresses this "responsibility" both as a precondition and as an objective.[3] A number of international documents highlight the extent of such responsibilities. International law takes future generations into account in the many provisions concerning the protection of the environment and of human rights, so much so that one might think as Richard Falk wrote, that the rights of future generations have reached the "status of international law customary rules" (Falk, 2000, p. 193).

Behind a general convergence towards the dignity of human beings and future generations,[4] we are recurrently wondering about the ground and the moral status of such a responsibility. Being "responsible" spans

[2] 29th session of the General Conference of the United Nations Educational, Scientific and Cultural Organization meeting in Paris from 21 October to 12 November 1997.

[3] "[...] Recalling that the responsibilities of the present generations towards future generations have already been referred to in various instruments (...) Bearing in mind that the fate of future generations depends to a great extent on decisions and actions taken today, and that present-day problems, including poverty, technological and material underdevelopment, unemployment, exclusion, discrimination and threats to the environment, must be solved in the interests of both present and future generations. Convinced that there is a moral obligation to formulate behavioral guidelines for the present generations within a broad, future-oriented perspective (...)."

[4] Article 3 of the UNESCO Declaration, entitled "Maintenance and perpetuation of human kind," states: "The present generations should strive to ensure the maintenance and perpetuation of humankind with due respect for the dignity of the human person. Consequently, the nature and form of human life must not be undermined in any way whatsoever."

a number of different interpretations. It ranges from being liable and accountable for (not) damaging someone up to some thicker (and proactive) sense of caring for the well-being of someone else. While the second falls in the category of beneficiality (Engelhardt, 1996, pp. 109–110), including commitments of altruism, solidarity, the first should be considered under the duty of non-interference (and wrong-doing) in the sphere of others, that is, the Roman law canon of *neminem laedere* (Zanuso, 2005). *Respecting this "negative" duty* amounts to the first and most basic condition of justice among individuals. It should be emphasized, however, that such a route concerns the right, not the good or happiness. It is important to understand this argument conveying the positivity of law. It overcomes shortcomings of unilateral views over what is "right" and controls the inevitably relational coexistence among peers. In Kant's view, law and justice are resorted to conceptually in order to avoid the (state of nature) condition in which the abuse of personal liberty and external control is unobjectionable. With him, even if the state of nature need not be unjust, it is devoid of justice, so that men "do one another no wrong when they feud among themselves" (Kant, 2003, § 33, 42, 86). Nonetheless, "in general they do wrong in the highest degree by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence" (Kant, 2003, ibid). For that reason, man "ought above all else to enter a civil condition," and accordingly "each may impel the other by force to leave this state and enter into a rightful condition" (Kant, 2003, ibid). Thus, there is a fundamental reason for law to be established; that is, the necessarily public nature of justice, that cannot be predicated from unilateral, self-referential positions, but relates to the equal liberty of all and independence of each from the will of the other.

If we take this very path in understanding whether future generations have rights, we will focus on whether the basic justice related respect for the sphere of others is to be granted. That means that we are going to locate the problem outside the idea of a duty of solidarity or beneficiality *vis-à-vis* others. In other words, we are not assuming to be responsible for the well-being of future generations, whatever it might mean, and we are not in the position to superimpose some kind

of conception of what the "good," for them, should be. However, we should ask whether the basic condition of rightness towards others is to be satisfied. Thus, the path taken would be formally and substantively legal, in other words, it should rest on the idea that legal fundaments are, as in the Kantian insights, a pre-condition for the conceivability of justice, first and foremost, meant as preventing wrong-doing which would encroach upon the sphere of others, unjustly interfering against it.

Of course, if we do not want to deal with the normative issue of justifications, we might prefer to rely on factual circumstances, without asking questions of justice: human beings have repeatedly shown that they have a stable, "natural" impulse to protect future generations. As Richard Epstein (1992, p. 89) wrote, a genetic connection induces us to protect them. It is certainly what evolutionary biologist Richard Dawkins defines a genetic interest, a "selfish gene" that tends to be widespread in the natural world and that ensures the survival of our DNA (Dawkins, 1989, pp. 19–20; Dawkins, 1995, p. 10; Sato, 2002).

However, the question of whether there are indeed issues of justice to deal with cannot be answered in factual terms (which include both our biological interests and our historical sentiment). Secondly, these interests explain our behavior towards our successors in biological terms, but cannot provide a solution to problems of equity or define the terms of our responsibility; moreover, their strength, just like our sensitivity, tends to halve with every subsequent generation.

On the other hand, upholding the debate on our responsibility at large would entail to step into vagueness and unended controversies. I will analyze the issue of whether there are, in fact, issues of justice. I do not intend to provide a conclusive analysis, but I shall put forward three main ideas. First, that it is possible, although not necessary or "exclusive," to define our responsibility towards future generations by justifying it in terms of rights. Secondly, our thinking can profit from two guiding principles, which I call the principle of disposability of the present and of non-disposability of (other people's) future. Thirdly, the issue of justice has its own defining features and helps to refrain from the ethical paternalism that leads us to impose some of our choices upon our descendants. As regards the first point, I build on the general premise I developed elsewhere (Palombella, 2002) according to which

rights are concerning the interests of individuals which are recognized as a reason for our responsibilities. In treating the idea of future generations' rights, though, I share and recall some views of Aaron-Andrew P. Bruhl (2002, p. 393), as far as they opted for the "interest theory" of rights as the best suited to address future generations and defend the rights' theory against objections resulting from the so called "non-identity" problem (essentially by separating the two concepts of "well being" of a person and the wrongful act of harming someone else's right). This line of reasoning is nonetheless here adopted within a slightly different framework: I focus on some very fundamental threats to future generations' leaving, and consider the right of future persons that their most essential interests not be harmed as a basic human right: the latter in turn cannot be considered structurally nor morally divisible from that of the present persons. The framework therefore refers essentially to a conceptual grammar of justice. As regards the second point, the disposability and non-disposability principles I suggest are defined in order to make available a first general criterion for us to respect future persons' human rights. As regards the third point, I essentially separate what we owe to future persons under the challenge of those threats for humanity, i.e., a matter of justice, from our right to hand down our cultural heritage, and eventually from paternalistic (if not worse) imposition upon future generations of our irreversible choices.

II. Time and Justice

Although we admit our responsibilities towards our descendants, when it comes to future generations, we tend to minimize the issue, often on account that our influence is uncertain and that it decreases proportionally to the time distance that separates us from them. This hypothesis is clearly untrue. We must take into account, at least, our capacity to generate irreversible situations.[5]

The albeit immense distance in time does not hamper our capacity to condition the future (though it may seem far). On the contrary, it even

[5] With reference to the risk of irreversibility, its catastrophic consequences, the principle of precaution *see* Sunstein, 2006; with reference to the "Catastrophic Harm Precautionary Principle," *see* Sunstein, 2006, p. 846).

renders this capacity more evident and dramatic. If in the Pleistocene native Americans had not caused the extinction of certain mammals, the course of Incas civilization, 12,000 years later, might have been different (Seto, 2001, p. 238). At least if it is true, as Jared Diamond (1997) wrote, that the easy victory by Pizarro, the Spanish conquistador, in 1532, was favored by bacteria, diseases, horses, steel weapons and vessels.[6] In general, the future goes far beyond our close descendants. Today, in particular, it manifests itself in three fundamental threats for mankind: the risk of pervasive and catastrophic environmental damage caused by global warming, the greenhouse effect and the depletion of the ozone layer; the risk of mass extinctions or massacres, going as far as the annihilation of our civilization, due to the desertification caused by nuclear energy; the alienating development of bioengineering and genetic manipulation or the creation of an artificial man.[7] An acknowledgment of these fundamental threats does not only allow for an answer to the issue of the time extent of our responsibility, but it also defines the most concrete starting point from which we can discuss the issue of future generations.

These three fundamental challenges lead us first of all to face the problem of the minimum we owe, in moral terms, to human beings: a matter of justice, which places itself prior to ethics and before its borders, if we assume that ethics incorporates the values and visions of the "good," related to our different perceptions of posterity, of the public good, of private happiness and so forth. These challenges are priority issues, concerning the elementary respect for human beings as such. Indeed, the point is not whether something is good or acceptable in our scale of values, but whether it is fair towards other human beings, even when they belong to generations that do not exist yet; it is not a question of whether something is demanded by our philosophies of the good, but regardless of the controversies they generate, of whether it is necessary in terms of justice, whatever doctrine of virtue or happiness we assume today. Indeed, it is not a problem considered urgent only in

[6] The author won the Pulitzer Prize with this book, in the general non-fiction category, in 1998.

[7] These are threats discussed by F. Cerutti, in his book *Global Challenges for Leviathan: A political philosophy of Nuclear Weapons and Global Warming* (2007).

a given cultural environment,[8] but it is an issue that concerns the very existence of mankind itself or the "dignity" of its members. Hence, in my view issues of justice have a status that differs from that of the values defining our personal happiness: they imply taking the others into account with the duty of abstaining from injustice, and involve thresholds of equilibrium and reasons for respect, whose distinguishability from ethical issues (in their strictest meaning) follows an uninterrupted path from Aristotle to Kant's pure practical reason, to Mill's harm principle, to John Rawls' priority of the right, to Ronald Dworkin's equal concern and respect, just to mention a few examples.

However, it is not sufficient to declare that future generations have rights to a decent life, because what should be proven in the first place is indeed *if and how they have rights*. Even the general discourse of the respect to which human beings are entitled risks failing because of certain characteristics that distinguish future generations from present ones, first of all their invisibility, or rather their current non-existence. It is not sufficient to invoke a general concept of intergenerational equality when we talk, for example, about the danger of global warming,[9] because the point is in a different issue: under which circumstances and with which means future generations could play the hypothetical role of accusers of present generations, since the latter have equally urgent and vital needs. Nor it is sufficient to invoke the issue in purely generic terms: many people are willing to admit that we might accept some moral ties, in terms of beneficence[10] or solidarity towards future generations, but not in the stricter and owed terms of "justice."

[8] We could apply a distinction similar to Michael Ignatieff's with reference to the ethically neutral nature of human rights: "Human rights are universal, not in the sense of being a vernacular of cultural prescriptions, but rather as a language for the bestowal of moral power. Their role is not that of endowing culture with a substantive content but of seeking to condition all actors in such a way that they can liberally fashion that content" (Ignatieff, 2001, p. 75).

[9] For example, James Wood's *Intergenerational Equity and Climate Change* (1995) contains also a definition of the greenhouse effect and illustrates the thesis according to which future generations must be entitled to be represented in court and at negotiating tables when protocols for environmental protection are under discussion.

[10] As recalled in the above, cf. H.T. Engelhardt Jr. (1996, pp. 109–110). He believes that this is an attitude that cannot be imposed, because the others are entitled

While beneficence or solidarity are ethical sentiments and depend upon the totally free and variable choices and purposes we set for ourselves, acts of justice cannot depend on our preferences, but should be able to prevail over them as well. We should, as Brian Barry wrote, be aware of the fact that what we do for future generations does not represent optional benevolence on our part, but is demanded by elementary considerations of justice (1999, p. 117).[11]

While solidarity or beneficence presuppose a particular willingness, justice implies necessarily an obligation; while ethical-political choices range within several possible alternatives at our disposal, issues of justice are not at our disposal. In conclusion, I will therefore support the thesis that, through this perspective, fundamental issues concerning future generations are by us "non-disposable" issues.

III. Justice and Reason

Issues of justice are independent upon our contingent interests. Ideal deciders who find themselves in the procedural condition of an "original position," as defined in his thought-experiment by John Rawls, behave as rational beings: although their personal motivations are self-interested, they are unaware of which would be their interests, in the original position; thus, they are rationally likely to think with a fair concern for each and all persons. In this situation, Rawls acknowledges that the issue is not reaching a "consensus" (Rawls, 2001, pp. 16–17) and in fact there is nothing to negotiate (Pontara, 1995, p. 77), but it is rather a matter of identifying rational principles, taking common intuitions into account (the so-called "reflective equilibrium") (Rawls, 1996, p. 8; 1999, p. 18).

Rawls dealt relatively marginally with the issue of future generations (1999, Para. 44, pp. 251–258). In order to take our sense of common

neither to beneficence, nor to solidarity, which cannot be numbered among justice issues.

[11] "It is surely at least something to be able to assure those who spend their days trying to gain support for measures intended to improve the prospects of future generations that such measures do not represent optional benevolence on our part, but are demanded by elementary considerations of justice" (Barry, 1999, p. 117).

responsibility towards future generations into account, Rawls integrates the original position theory with the assumption that individuals do know that they are contemporaries, but they do not know to which generation they belong, as well as with the principle that each generation "saves something" in order to preserve future generations, according to the criteria or measure that individuals of the same generation would like the previous ones to have followed. It is therefore a mental experiment that shapes and justifies our beliefs. The extent of "just savings" can be determined in different ways, according to the different stages of economic development. This principle relates essentially to primary goods, given its dependence upon Rawls' central thesis of justice that sees the equal distribution of primary goods as freedoms, opportunities and standards of self-respect as well as the non-equal distribution of income and wealth, if it benefits those who are less favored.[12]

In any case, this mental experiment teaches us, evidently, that the rational discourse cannot consider the futureness of generations as a justification to exclude future generations from our rational concerns of justice. In fact, it is morally absurd that indeed this circumstance (the fact that someone will only be in the future) is morally relevant. The value of the rational discourse lies in the possibility to universalize it — to human beings in this case — thereby placing ideal deciders in an indefinite position in time: they cannot be influenced by their position in time (and in the original position they do not know which one it is) when making choices, both with reference to themselves and to future generations.

The principle of time irrelevance is not just in Rawls's contractarian theory, also it features in utilitarianist theories. Indeed, it was the teaching of Henry Sidgwick to exclude that "the time when a person exists" can play a moral role as far as questions of general happiness are concerned (Sidgwick, 1907, p. 381; Pontara, 1995, pp. 36–37).

[12] In any case, these theses do not make reference so much to each individual's fate, but to the way in which the social structure must be organized, which means that fairness is to be referred to the role of institutions. Rawls' two principles of justice were reformulated in the essay *The Basic Liberties and their Priority* (Rawls, 1982) and developed in *Political Liberalism* (Rawls, 1996, chap. Lesson 1).

The moral irrelevance of the futureness of generations is also supported by common intuitions. In truth, we know that harming someone is a wrong even if targeting future persons only. If we trigger a bomb that will only explode in thirty years' time, this does not mean that we are less responsible towards the children who will be hit by the explosion, even though they are not born or known to us at the time being. Rawls wrote that the simple position in time gives no reason to prefer a given moment to another (1999, p. 420).[13] Therefore, if it is true that the time of birth is only a haphazard, then this event cannot exclude or even limit our responsibility on the argument that the latter should decrease with the growth of the distance between us and future generations.

Economists do resort to the concept of decreasing responsibility to distribute and define our commitments towards future generations for reasons of equity, so as to reduce the burden of our present sacrifices to the benefit of those who will only live in a distant future: we create a balance between our current sacrifices and the subsequent benefits for future generations by defining a "discount rate" proportional to the time distance.[14] But a distinction must be made: if futureness does not relieve us from our responsibilities, which sacrifices, which means, which limitations to our lives must be chosen from time to time remains an open issue: it is a matter of means, indeed, of task sharing, which however must be distinguished from, and does not affect at all the responsibility assumption.

Justice cannot be subordinated to differences based on the time when each of us lives and therefore it must be considered independently

[13] *See* also Rawls (1999, p. 294): "There is no reason for the parties to give any weight to mere position in time. (…) Although any decision has to be made now, there is no ground for their using today's discount of the future rather than the future's discount of today. The situation is symmetrical and one choice is as arbitrary as the other."

[14] *See* Bazelon and Smetters (2001, p. 277): "Discounting addresses the problem of translating values from one time period to another. The larger the discount rate, the more weight an analyst places on costs and benefits in the near term over costs and benefits in the future. When evaluating policies that span generations, choosing a discount rate can have an overwhelming effect on the analysis. That choice, in turn, reflects the analyst's beliefs about the distant future." *See* also Portney and Weyant (1999).

of it. This does not mean that we can ignore the many problems raised by the time distance of future generations, but it shows that we should face such issues by assuming that the entitlement of future generations to justice cannot be different from ours and cannot lead us to exclude them from what applies to us, just because of their "futureness."

IV. Rights of Future Generations?

According to Thomas Jefferson a generation has no right to bind the succeeding generation to its laws, because each generation has the right to define their own laws autonomously, without depending on a people of the dead; each generation should recognise a self-evident truth: "that the earth belongs in usufruct to the living": consuming that usufruct means depriving future generations of their share of natural resources, something that no authority or right of other people can justify. In the same way, forcing them to pay a long term debt would be an unacceptable "taxation without representation." These matters concern the rights of posterity on natural resources, the autonomy of each generation from the paternalism of previous generations, the equity of the relationship between the living and future generations with reference to "debts" and "improvements" received.

Can we therefore assume that the issues of justice may be settled in terms of rights? First of all, it is necessary to clarify that rights are relevant to justify what we owe to future generations. We could assume, for example, that some global common goods (Riordan, 2016) have a value in themselves, which implies contingent and consequent obligations even absent a theory of a right of future generations to them. At the same time, we can surmise that if something has a value (as a common good, like the biodiversity, for instance), then we should preserve it also as a value that can benefit future generations. However, our duty may have many justifications, which might not coincide with, and not depend upon the fact that others have a right to it. Indeed, as Onora O'Neill (1996, pp. 136–153)[15] wrote, our ethics is impoverished by our exclusive focus on rights and it misses most of its traditional

[15] Raz also insisted upon our duties, our common values and a "pluralistic" ethics (Raz, 1986, pp. 193–216).

contents. Although this is true, a plural, not reductionist view can include justifications relating to rights, although it is not monopolized by them. A right-based justification places our duties directly upon the sustaining correlative right. The reason why we must assist our children, as Neil MacCormick wrote (1976, p. 313), is simply that it would be unfair to deny to them what they are entitled to: they have a right to be assisted by adults and that right is the reason why adults have an obligation to assist them. This holds true regardless of controversies about which obligations should follow and by whom they should be fulfilled.

Accordingly, the fundamental threats to (the dignity of) life for future generations lead us to the essential safeguards of justice towards future persons, they help highlighting our responsibility not (just) in terms of our possible duties (that other theories might suitably justify) but on the grounds of "their" rights. As Rawls aptly wrote, rational human beings would think it fair to treat subsequent generations the same way as they would like to have been treated by previous ones. However, when we deal with fundamental threats for humanity, a different issue emerges, which does not relate exclusively to the conditioned logic of equity, to the relative balancing in intergenerational relations. The issue becomes simply whether human beings are entitled, like us, to the elementary conditions for survival and dignity, those very conditions we tend to jeopardise because of our destructive choices. The question is whether those rights are thinkable, and whether we are in position to violate them; or rather, whether we can only assume more or less general obligations for the living, since a conceptual limit of moral doctrines or legal constructions prevents us from conceiving of human rights for future persons.

A first general remark is that rights often protect people's choices and so entitle them to receive benefits that correspond to their actual interests: therefore the identification of interests appears both an indispensable and, unfortunately, a non-existent precondition in case of future persons whose preferences and needs are unknown to us. A possible reply to this concern is that when human rights — to a healthy environment, for instance, i.e., to goods concerning the survival of human beings — are at stake, the very "interests" of future persons easily emerge and are indisputable: the basic and essential nature

and content of such a right is even more fundamental and precedes the possibility of choice: it is an elementary condition for life and accordingly for creating values, as well as a precondition for defining any further interest.

From this viewpoint, also the objection that the attribution of rights to future generations is a form of ethical *paternalism* is not acceptable: of course, choosing the interests of future generations is in principle a paternalistic attitude if it reduces their faculty of choice by arbitrarily attributing specific interests to future persons.[16] Nonetheless, with reference to fundamental threats and their direct effect on the elementary conditions for human survival, granting "human" rights to future generations cannot presuppose any ethical paternalism, since it expresses, rather, the opposite option, i.e., the concern to afford and safeguard the essential preconditions for future persons to exercise their autonomous "agency:" that is, to be able to speak an ethical language, define preferences, interests and values.

Many believe, moreover, that speaking of rights is not appropriate, that future generations cannot have rights now (strictly speaking) but only when (and if) they come into existence, and that even if they could be entitled to rights, they would be unable to exercise them: this would make such rights empty and senseless. Eventually, even if we admitted that they do have rights, certainly these rights would not be provided with any judicial protection.

However, this is in contrast with the common intuition mentioned before: according to the above principle of time irrelevance, there should be no difference, from a moral viewpoint, if the individuals in question exist now or in a hundred years' time. Again, the event of unavailability of judicial protection is never considered a sufficient reason to deny that all persons have a right not to be tortured, as international *jus cogens* law prescribes. Finally, we normally presume that even individuals

[16] According to J.S. Mill the ruling principle which prevents us from "paternalism" is the following: "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self protection. (...) the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (Mill, 1962, p. 135). *See* also the discussion on John Stuart Mill anti-paternalist position by G. Dworkin (1972).

who cannot claim their rights autonomously are entitled to them, such as certain categories of disabled, children or insane subjects. In these cases, we admit that other people may seek judicial protection on their behalf. Therefore claiming that future generations cannot have rights because they cannot invoke them against us in court is not a conclusive argument. There are many ways for them and their interests to be represented today, as it really happens, say, in some international agreements. And fairly so: conversely, in fact, we are actually able to put future persons in danger, deliver to a planet so different that it would be almost impossible to live in, if compared to the conditions enjoyed by the previous generations on earth.

In theoretical *legal* terms, the issue of the rights of future generations is related predominantly to the conception of rights we support: what does having a right mean? Certain definitions of rights are incompatible with the hypothesis that future generations may be entitled to them. Let us think, for example, of one of the theories of rights that derives from the natural law doctrine of 1600 and 1700; rights are defined through the paradigm of the "sovereignty of the will' of its holder: a definition centered upon the freedom and power to act in order to safeguard one's interests, according to the logic that characterizes private law, at its peak of modern development. Another example is that of the choice or will theory, supported by Herbert Hart in the last decades of last century. In a way generally considered illuminating, Wesley Hohfeld had written (1917) that the term "right" refers in fact to one or more individual positions (and relations) (claim, liberty or privilege, power and immunity), or groupings of atomic relations, thereby contributing to clarify the general notion of individual rights. Hart, on the contrary, focused on the unifying element that characterizes rights, something that cannot be traced back to one or more of the relations analysed by Hohfeld and that represents the deep meaning or the raison d'être of rights themselves. In this way, Hart identified the rationale of having a right in the fact that the holder of a right is in a position to have the control and the choice over the juridical situations that are connectable to rights, in particular, "over another person's duty so that in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed" (Hart, 1982, pp. 183–

184).[17] Naturally, considering the holder of a right as an individual endowed with power to decide, and thus a sort of small-scale sovereign, means relating the same idea of rights to the affirmation — and to the exercise — of autonomy. From this viewpoint, the rights that future persons have (towards us) appear inadmissible. Attributing rights to future generations cannot mean granting a decisional and choice power on our corresponding behavior.[18] It would be a conceptual path clearly prevented by the insuperability of a "natural" obstacle.

Since it is all too evident that future generations cannot be attributed rights in this sense, the same fate holds for contractual conceptions of future generations entitlement, often under the formula of the "pact between generations," a contract between us and our descendants. What is hidden here is an undeclared paternalism, which presupposes an autonomy that presently does not exist. Furthermore, the idea itself of a "pact between generations" (which is even unconceivable with reference to remote generations) recalls a wrong and misleading category of rights: those created by bilateral relations. The (possible) rights of future generations are rather those that are not created by contract and are therefore not negotiable between the parties.

On the other hand, coming back to Hartian theory, Hart admitted, without hesitation, that his thesis is not all inclusive, since it cannot encompass rights related to primary human needs, human rights or more in general, fundamental rights. Therefore, we need more suitable tools. However, several theories of rights could be used to overcome the difficulties encountered by referring to the criterion of autonomy and to rights as "choice" (or will). In the European continental area, the theory of law developed by Rudolf von Jhering shifted the focus on the interests protected by the legal order (Wagner, 1993, p. 319). This traditional conception can be connected, albeit with highly innovative

[17] *See* also Waldron (1984).

[18] From this specific viewpoint, assumption does not change also if we take Hans Kelsen's pure theory into account. A similar shortcoming can be found in Hans Kelsen insisting upon reducing individual rights to their technical and legal characteristics, to what he calls the subjectivation of law with reference to individual rights. Such subjectivation consists in identifying the holder of a right as the person who can express the will to bring a legal action to claim the fulfilment of a corresponding obligation (Kelsen, 1961, p 83).

elaborations, to the theses according to which when we recognize a right — especially rights considered as priorities in our constitutional systems — we intend to protect a good, or an interest attributed to individuals, safeguarded by the legal order not only through the acknowledgement of fixed claims and of corresponding obligations, but also through a range of evolving individual active or passive positions, which allow for an evolutionary protection or implementation of that interest and the achievement of that "good." This thesis is defined in the terms of a "dynamic conception" and was developed by Joseph Raz (1986, chap. 7; 1995) and Neil MacCormick (1976, pp. 305–317). In a further contest, related to constitutional principles, the idea of fundamental rights itself[19] shows such evolving potential, becomes a principle of "optimisation" under circumstances relevant from time to time, as writes Robert Alexy (2002, ch. 3, p. 47ff) (in the context of the German system). In other words, the interest we are talking about concerns "goods" granted to individuals that relate not only to their autonomy and their freedom of choice, as Hart highlighted, but are to protect also any other substantial good of an economic or social nature (MacCormick, 1976, pp. 309, 313; 1984, pp. 145, 148).

Giving up the belief that rights are "only" a recognition of autonomy paves the way to the idea that rights exceed the capacity of their holders to decide about other people's obligations or to claim legal protection. This evidently leads to an extension of the concept, and the latter thus does not exclude at all the possibility that future generations' fundamental interests may be vested into rights.[20] As far as the adequacy of the Interest Theory as a theoretical reference for the "rights" of future generations is concerned, it can be said that the "Interest Theory separates rights from powers of enforcement, clearing the way for the attribution of rights to beings unable or un-authorized to press their own case. Just as children and the insane can have representatives enforce their rights for them, so can future persons" (Bruhl, 2002,

[19] I have developed a conception of fundamental rights in terms that I consider "dynamic" and related to the "good" that they safeguard, in my book *L'autorità dei diritti [The Authority of Rights]* (Palombella, 2002).

[20] The application of the "dynamic" theory of rights to address the rights of future generations. to which I refer was made by Bruhl (2002, p. 393).

p. 425). It also becomes clear that some basic rights legally ought to be protected, through corresponding obligations or subsidiary guarantees which should be dynamically open, i.e., not necessarily those doctrinally defined once and for all in advance. Rights are often expressed in terms of norms of principle that identify an interest or a category of goods and subjects, without necessarily defining the rules of fulfilment, or the individual relations that should enable the concrete safeguard of that interest, or the primary guarantees (the corresponding obligations) or the auxiliary guarantees (the legal remedies). This situation emerges in many of the so-called fundamental rights. From this point of view, it also applies to cases where law itself somehow affirms future generations' rights: their interest does not necessarily correspond once and for all to certain predefined obligations, nor is it the subject who bears that obligation identified in advance — if not in merely abstract terms. This does not mean, however, that future generations cannot have interests (and therefore rights) in juridical terms.

In fact, future generations' rights often come to the fore through normative principles, generally identifiable within the framework of the higher law of constitutional systems, and international documents. This circumstance, i.e., the presence of commitments legally assumed as principles of justice and "rights" for future generations, remains in any case legally meaningful. It is equally important to acknowledge that the structure and definition of rights do not contain any real conceptual obstacle to the attribution of rights to persons belonging to future generations. Indeed, the "substance" of a right cannot be found in the contingent measures adopted to protect it and these same measures are just a consequence to be promoted and adjusted for the pursuit of rights' guarantee and optimisation.

V. Identity and Rights

However, although no apparent obstacle exists from the point of view of a general definition of rights, there are other hindrances external to such definitions. A classic problem, raised with unprecedented clarity by Derek Parfit, referred to the non-identity of subjects. Whoever comes into existence does only exist because the generations that

preceded her made certain choices, which brought to her conception and determined her identity. Those choices do not enrich or deprive a "presupposed" individual of anything, but create "another" person. With different choices, there would be other individuals and other identities. This prevents us from assuming that we can worsen the fate of someone (individually taken), who otherwise would simply not exist (Parfit, 1984, chap. 4 and pp. 351–379): future victims of the depletion of resources could only exist in this way; therefore we cannot violate their rights to live in different conditions (even if we assumed that they have such a right) because future persons would not be there nor be themselves under different conditions. Protecting future persons from the genetic consequences of radioactive waste, or conceiving persons who are as healthy as possible, neither means safeguarding the right of a person nor not harming it, but simply leads to the creation of "other" individuals.

The argument is evidently disarming, although it cannot be discussed thoroughly in this essay. That notwithstanding, we can recollect the idea that human beings have a right to a life that is worth living and that we would deprive them of something if we gave birth to persons in conditions of degradation or diseases and disabilities in which their rights (under the conditions that have emerged) cannot be safeguarded. This idea[21] points to our responsibilities towards the generations that come immediately after us. As far as my consideration of justice is concerned, focus should be shifted in order to include far away generations as well.[22]

Evidently, as Aaron-Andrew P. Bruhl pointed out, the issue of non identity refers to the overall wellbeing of persons, which we cannot worsen (given the non-identity notion, we cannot worsen the overall

[21] For the concept that there are (would be) persons created whose rights cannot be protected, see M. Tooley's *Abortion and Infanticide* (1984). As far as Parfit is concerned, see James Woodward (1986, 1987). Of the many issues relating to this problem, I would mention those dealt with by Dan W. Brock (1995; Buchanan et al., 2001, chap. 6) and by Roberts (1998).

[22] G. Pontara (1995) addresses the contrast between theories of rights and Parfit's objections. As to distant (in time) persons, again Pontara (1995) and A.-A.P. Bruhl (2002). See generally the essays included in Sikora and Barry (1978) and especially the essay by M. Warren, *Do Potential People Have Moral Rights?* (1978).

life of someone who will otherwise not exist). Therefore, we can only compare life obtained to the alternative of non-existence. Through these examples, we end up neglecting, in fact, the foundation of our common intuition: the fact that we can harm persons, even if they will come to life in the future.[23]

The right not to be harmed can be seen as independent upon any assessment of the ability of someone's behavior to worsen our overall wellbeing: A right does not necessarily concern a general and unidentifiable, elusive "whole" like the wellbeing of a person, but rather a specific interest or good. The safeguard of a right, hence the unlawfulness of a specific harm, is the central issue, regardless of the fact that others can consider the harm irrelevant for the harmed person, or not existent, when they deem it incapable of worsening the overall well-being of that person taken as a whole.

In any case, it may be true that a final theory, capable of resisting objections, cannot be formulated, as Parfit himself was aware of. I suggest we should analyze facts from the viewpoint of present generations: future persons have a right to prevent us from behaving in such a way as to cause the desertification of the planet, eliminating resources that as human beings they are equally entitled to, or causing genetic harm to them, without this being subordinated to our (paternalistic) assessment of the possible worsening of their overall well-being.

The issue of justice does not relate to the ethical appreciation of what is good for someone, i.e., of what is preferable in life and of the conditions in which a life worth-living fulfils itself. These issues, concerning the evaluation of an overall well being, "good life," are naturally dependent upon legitimately different evaluations, therefore if they were imposed upon somebody, they would be, in turn, an undue interference, and in principle a potential source of injustice. Likewise,

[23] With reference to a conception made despite the certainty that the child would be seriously disabled, see P.J. Markie's *Nonidentity, Wrongful Conception and Harmless Wrongs* (2005, pp. 302–303): "In wrongful conception cases, the necessary connection between the mother's action and the son's existence keeps her act from being straightforwardly harmful. It is not the case that if she had acted differently, his life would have been substantially better. Yet, her act still harms him obliquely by creating a wrong that makes him worse off. If he had not been disabled and lacking in opportunities, his life would have been substantially better."

the relation between generations (seen in terms of justice) should focus on the minimum elements of a universal definition of what is needed for the survival of human beings, both present and future, and should aim at limiting, as much as possible, the paternalism that marks all efforts to determine which values are important and what is the good for future persons. The issue at stake only concerns what we have the obligation to preserve, because future persons have an essential right not to be deprived of it by us. I therefore agree that "we cannot know future persons" interests in much detail at all, which can make representation more difficult. Instead, we have to fall back on the most general knowledge about what is usually good for humans, much as we do in the case of infants" (Bruhl, 2002, p. 426). This answer can be considered a general guideline.

VI. Concluding Remarks and a Principle of (Non) Disposability

Future generations demand that present generations should identify, from time to time, admissible limits for their intervention on the future: it is essential that present generations are warned and aware of their influence, because such awareness is part of their responsibility. If we consider fundamental threats to posterity, like global warming and nuclear desertification, measures to reduce those risks tend to preserve goods that are fundamental for humanity, instead of conditioning its existence with irreversible choices.

While our efforts to protect goods threatened by global warming or nuclear desertification aim at preserving the minimum conditions for survival, many other choices and many other issues could be characterized, instead, by a high degree of paternalism, thereby provoking an evident conditioning effect, which consists in imposing a defined set of values, dictated by our prevalent contemporary ethics.

Think of the puzzle of preserving the cultural heritage of mankind: one can also question the limit that our society must respect when passing over its ethical, political, cultural and social goods. Our influence over the future provides future generations with all that represents our ideas of the good: however, the logic of this beneficial vision remains a delicate

issue. If preserving the cultural heritage of human kind amounts to a recognized common value, nonetheless our interventions implementing our ethical and religious irreversible choices should be limited. This holds true, for example, in preventing the Taliban from destroying the ancient monumental testimonies of previous civilizations. It is not our own, contingent and particular notion of the good that deserves to survive at the expense of the wider heritage of our predecessors.

This general normative assumption might be better articulated. We could deal with the characters of our actions aimed at conditioning the future by referring to two principles, which I propose to call the principle of the disposability of one's present and the principle of the non-disposability of (other people's) future, in the reasonable forms they may assume from time to time.

With reference to the threats I previously mentioned, the principles of disposability of the present and non-disposability of the future lead to a series of relatively consistent corollaries: the disposability of the present rests on our rights, but at the same time it also prescribes something with reference to future generations: it prescribes that also the future generations — as we are allowed to do — can dispose of their present to an extent which in principle is not qualitatively different from ours; the universalization of the principle of disposability, in fact, cannot be stopped by the "futureness" and as such it bases on time irrelevance. It implies that our attitude towards our present takes account of the availability of one's present extended to our descendants as well. This conceptual frontier is a question of justice, which is less exposed to discretionary ethical orientations when it concerns the fundamental threats for humankind survival.

Of course, this does not mean that all problems are solved. The disposability of the present is in fact a relative concept, for which no trans-temporal control parameters can be used. Each generation has the disposability of the present it received by chance. This principle risks being redundant: after all, it is not clear what it means to have or not to have the disposability of one's present, since we would lack some universal measure of an ideal kind.

However, when we speak of the nuclear threat or of global warming such threats have a potential that signals a qualitative and extreme

point of non-return. It is rather a radical deletion of the essential and elementary possibility to live, it is about the conditions of residual species on the planet. As I said, since the principle of the disposability of the present is not conditioned by time, it can be universalized and it prescribes that each generation should dispose of its present. This principle may reveal its weakness for the fact that any generation obviously has the disposability of a present, whatever it is. Indeed, as we have already stressed, it is essentially counterintuitive to claim that a world threatened by the catastrophe of global warming or by the effects of nuclear disasters is such that "one can dispose of it." I believe that it is correct to assume that, here, the principle of the disposability of the present would be radically violated. It does not demand, in this case, some nuanced specification of which qualities a decent idea of our and future "present" should have, according to preferences and different conceptions of the good life. The point concerns the possibility that individuals will be born in conditions impossible or aberrant to our notion of natural living of human beings on the planet: such a notion incorporates an open relation between human life and nature's potential, it implies standards of eco-compatibility that were shaped by the evolution of world's own laws, over the past thousands of years.

However, the principle of disposability of the present should better have a reverse side, one that emerges as the negative part of it. I would take it as the principle of non-disposability of (other people's) future: it can define a sort of frontier, which reinstates the independence from other individuals, and the basic idea of justice that as mentioned supra resembles the Kantian *raison d'être* of justice. The principle of non-disposability of the fate of someone in the future is treated extensively by Jürgen Habermas (2003), in discussing the applications of "positive eugenetics."[24] Here Habermas concluded that any individual has a right to the contingency of her/his origin, something that should not be

[24] Habermas makes reference to the "external or alien determination of the natural and mental constitution of a future person, prior to an entry into the moral community. Intervention into the prenatal distribution of genetic resources means a redefinition of those naturally fixed ranges of opportunities and scope for possible decision within which the future person will one day use her freedom to give her own life its ethical shape" (2003, p. 79).

seized since it should be not at the disposition of others. In this frame, human artificial positive eugenetic intervention represents, for him, an insidious form of ethical paternalism. However, the discourse on the nature of this good and on the limits to artificial intervention through genetic biotechnologies cannot be treated here. Non disposability of someone else's future also resembles the full-fledged idea of liberty as non-domination that was explained some decades ago by Philippe Pettit (1997; 2009): our liberty does not only mean being free from arbitrary interference into our own sphere of life, it also requires that no one else be put in the position to potentially choose to do so. For a justice oriented conception of our duties to future generations, then, we need compliance with moral and legal norms that have to make such dominating whim not permissible (that is, illegal).

Issues of justice, in the meaning explained, should not be overlooked. They are not in the disposability of the sovereigns or of the will of the People. They should be granted a non-disputable legal protection. If we see our relation with future generations in terms of human rights, then issues of justice shall get protection against the prevalence of other principles, against the contingencies of value choices and the powers of political majorities. If the safeguard of future generations is seen simply as a matter of solidarity or care for fellow human beings, then it would compete, in a position of weakness, with all other expectations of happiness on the part of the contemporaries. If we think that future individuals are holders of rights, our obligations towards them are not abstractly lower or higher than the ones we have towards our contemporaries. Of course, this does not support considering human rights of future generations more important than those of present generations. Rather, it defines mankind as an indivisible whole, in which the past and the future affect priorities and forms of intervention, but not the substantial elements of our responsibilities. In this way, however, we succeed in extending the minimum content of human rights not only to the present, but also to the future: it is an effect provoked by their rational universality, because since they refer to the whole of mankind, they cannot be discriminated against, from a moral viewpoint, for "time" reasons.

References

Alexy, R., (2002). *A Theory of Constitutional Rights*. Translated by J. Rivers. Oxford: Oxford University Press.

Barry, B., (1999). Sustainability and Intergenerational Justice, in A. Dobson (ed.). *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice*. Oxford: Oxford University Press.

Bazelon, C. and Smetters, K., (2001). Discounting in the Long Term. *Loyola of Los Angeles Law Review*, 35(1), pp. 277–292, doi: https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2312&context=llr.

Brock, D.W., (1995). The Non-identity Problem and Genetic Harms: The case of Wrongful Handicaps. *Bioethics*, 9, pp. 269–275, doi: http://hdl.handle.net/10822/527933.

Bruhl, A.-A.P., (2002). Justice unconceived: how posteriority has rights. *Yale Journal of Law and the Humanities*, 14, pp. 393–439, doi: http://hdl.handle.net/20.500.13051/7328.

Buchanan, A., et al., (2001). Reproductive Freedom and the Prevention of Harm, in *From Chance to Choice: Genetics &Justice*. Cambridge: Cambridge University Press. Pp. 204–257, doi: https://doi.org/10.1017/CBO9780511806940.007.

Cerutti, F., (2007). *Global Challenges for Leviathan: a political philosophy of nuclear weapons and global warming*. Lanham and London: Lexington Books.

Dawkins, R., (1989). *The selfish gene. II*. Oxford — New York: Oxford University Press.

Dawkins, R., (1995). *River out of Eden: a darwinian view of life*. London: Basic Books.

Diamond, J., (1997). *Guns, Germs, and Steel: The Fates of Human Societies*. New York: Norton&C.

Dworkin, G., (1972). Paternalism. *The Monist,* 56(1), pp. 64–84, doi: https://doi.org/10.5840/monist197256119.

Engelhardt, H.T., (1996). *The Foundations of Bioethics. II*. Oxford: Oxford University Press.

Epstein, R., (1992). Justice across the generations, in P. Laslett and J.S. Fishkin (eds). *Justice between age groups and generations*. New Haven. Pp. 84–106.

Falk, R.A., (2000). *Human Rights Horizons: The Pursuit of Justice in a Globalizing World*. New York — London: Routledge.

Habermas, J., (2003). *The Future of Human Nature*. Cambridge: Polity Press.

Hart, H.L.A., (1982). *Legal Rights, in Essays on Bentham: Jurisprudence and Political Philosophy*. Oxford: Oxford University Press, doi: https://doi.org/10.1093/acprof:oso/9780198254683.003.0008.

Hohfeld, W.N., (1917). Fundamental Legal Conceptions as Applied in Judicial Reasoning. *The Yale Law Journal*, 26(8), pp. 710–770, doi: https://doi.org/10.2307/786270.

Ignatieff, M., (2001). *Human Rights as Politics and Idolatry*. Princeton: Princeton University Press.

Kant, I., (2003). Metaphysical first principles of the doctrine of right, in M.J. Gregor (ed.). *The Metaphysics of Morals*. Cambridge: Cambridge University Press.

Kelsen, H., (1961). *General Theory of Law and State*. Translated by A. Wedberg. New York: Russel&Russel.

MacCormick, N., (1976). Children's Rights: a test case for theories of right. *Archiv* für *Rechts- und Sozialphilosophie,* 62(3), pp. 305–317. Reprinted in: MacCormick, N., (1982). *Legal Rights and Social Democracy. Essays in Legal and Political Philosophy*. Oxford: Clarendon Press.

MacCormick, N., (1984). *Taking the "Rights Thesis" Seriously, in Legal Right and Social Democracy: Essays in Legal and Political Philosophy*. Oxford: Clarendon Press.

Markie, P.J., (2005). Nonidentity, wrongful conception and harmless wrongs. *Ratio*, 18(3), pp. 290–305, doi: https://doi.org/10.1111/j.1467-9329.2005.00291.x.

Mill, J.S., (1962). On Liberty, in M. Warnock (ed.). *Utilitarianism and On Liberty*. London: Wiley-Blackwell.

O'Neill, O., (1996). *Towards Justice and Virtue: a constructive account of practical reasoning*. Cambridge: Cambridge University Press.

Palombella, G., (2002). *L'autorità dei diritti [The Authority of Rights]*. Bari: Laterza. (In Italian).

Parfit, D., (1984). *Reasons and Persons*. Oxford: Oxford University Press.

Pettit, P., (1997). *Republicanism: a theory of freedom and government*. Oxford: Oxford University Press.

Pettit, P., (2009). Law and Liberty. In: S. Besson and J.L. Marti (eds). *Legal Republicanism*. Oxford: Oxford University Press. Pp. 39–60.

Pontara, G., (1995). *Etica e generazioni future [Ethics and Future Generations]*. Bari: Laterza. (In Italian).

Portney, P.R. and Weyant, J.P. (eds), (1999). *Discounting and Intergenerational Equity*. 1st ed. London: Routledge.

Rawls, J., (1982). *The Basic Liberties and Their Priorities*. Salt Lake City: University of Utah Press (Tanners Lectures on Human Values).

Rawls, J., (1996). *Political Liberalism*. New York: Columbia University Press.

Rawls, J., (1999). *A Theory of Justice*. Revised Edition. Oxford: Oxford University Press.

Rawls, J., (2001). *Justice as Fairness: a* Restatement. Edited by E. Kelly. Cambridge, Massachusetts — London, England: Harvard University Press.

Raz, J., (1986). *The Morality of Freedom*. Oxford: Oxford University Press.

Raz, J., (1995). *Legal Rights, in Ethics in the Public Domain: Essays in the Morality of Law and Politics*. Oxford: Clarendon Press.

Riordan, P., (2016). *Global Ethics and Global Common Goods*. Bloomsbury Publishing.

Roberts, M.A., (1998). *Child versus Childmaker: Future Persons and Present Duties in Ethics and the Law*. Lanham: Rownman & Littlefield Publ.

Sato, S., (2002). Sustainable development and the selfish gene: a rational paradigm for achieving intergenerational equity. *New York University Environmental Law Journal*, 503(11), pp. 503–530.

Seto, T.P., (2001). Intergenerational decision making: an evolutionary perspective. *Loyola of Los Angeles Law Review,* 35(1), pp. 235–276. Available at: https://digitalcommons.lmu.edu/llr/vol35/iss1/6.

Sidgwick, H., (1907). *The Methods of Ethics*. New York: Macmillan and Co, Ltd.

Sikora, R.I. and Barry, B. (eds) (1978). *Obligations to Future Generations*. Philadelphia: Temple University Press.

Sunstein, C.R., (2006). Irreversible and Catastrophic. *Cornell Law Review*, 91(4), pp. 841–898. Available at: https://scholarship.law.cornell.edu/clr/vol91/iss4/2/.

Tooley, M., (1984). Abortion and Infanticide. New York: Oxford University Press.

Wagner, G., (1993). Rudolph von Jherings Theorie des subjektiven Rechts und der berechtigenden Reflexwirkungen, Archiv für die civilistische Praxis, 193(vol. 4), pp. 319–347.

Waldron, J., (1984). Are there any Natural Rights? In: *Theories of Rights*. Oxford: Oxford University Press (Oxford Readings in Philosophy).

Warren, M.A., (1978). Do potential people have moral rights? in R.I. Sikora and B. Barry (eds). *Obligations to Future Generations*. Philadelphia: Temple University Press, pp. 14–30.

Wood, J.C., (1995). Intergenerational equity and climate change. *Georgetown International Environmental Law Review,* 293. Available at: https://heinonline.org/HOL/Page?handle=hein.journals/gintenlr8&div=18&g_sent=1&casa_token=&collection=journals.

Woodward, J., (1986). The Non-Identity Problem. *Ethics*, 96(4), pp. 804–831, doi: http://0-www.jstor.org.serlibo.essex.ac.uk/stable/2381100.

Woodward, J., (1987). Reply to Parfit. *Ethics,* 97(4), pp. 800–816, doi: https://www.jstor.org/stable/2381210.

Zanuso, F., (2005). *Neminem Laedere. Verità e persuasione nel dibattito bio-giuridico* [Neminem Laedere. Truth and persuasion in the bio-juridical debate]. Padova: CEDAM. (In Italian).

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Article

DOI: 10.17803/2713-0533.2023.1.23.137-156

The Application of International Humanitarian Law in the Resolution of a Complex Humanitarian Crisis: A Case Study of the Tigray National Regional State of the Federal Democratic Republic of Ethiopia

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Abstract: The subject of the study is the specifics of the application of international humanitarian law (IHL) to the resolution of the humanitarian crisis in the Ethiopian state of Tigray. Crimes against humanity committed by Ethiopian and Eritrean troops in the conditions of warfare have been studied. It is argued that according to Article 3 of the II Additional Protocol to the Geneva Convention on the Protection of Victims of War, the federal center of Ethiopia, which protects the sovereignty of the State, acts correctly by suppressing the rebels of Tigray. However, this is in contradiction with the UN Security Council resolution on the situation with human rights and the human situation in Ethiopia and the 2021 Human Rights Council resolution S-33/1 "The situation of human rights in Ethiopia" indicating Ethiopia's violation of its international legal obligations with respect to civilians in armed conflict and IHL norms. Thus, the operation of IHL on the territory of the state is objectively suspended. The provisions and priorities of Refugee Law are considered separately in relation to the specifics of the refugee situation in Ethiopia, in particular the specifics of the Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa of 2009. It was found that both the federal authorities

and the opposing belligerents controlling the settlements of internally displaced persons on the territory of Ethiopia, do not fulfill their obligations under the Convention, which refers to the need for urgent further development of regional international treaties on assistance to forced migrants.

Keywords: Ethiopia; Tigray; ethnonational conflict; humanitarian catastrophe; international humanitarian law; legal status; refugees; internally displaced persons

Acknowledgements: The work was supported by the Russian Science Foundation, grant No. 23-28-01626 "Theology and war: Traditional values and innovations in the context of post-secular changes."

Cite as: Glaser, M.A., Yastrebova, A.Yu., and Ivleva, M.L., (2023). The Application of International Humanitarian Law in the Resolution of a Complex Humanitarian Crisis: A Case Study of the Tigray National Regional State of the Federal Democratic Republic of Ethiopia. *Kutafin Law Review*, 10(1), pp. 137–156, doi: 10.17803/2713-0533.2023.1.23.137-156.

Contents

I. Introduction

I.1. Internal Factors of Instability in African States: A Case of Ethiopia

Today, for most unstable countries of the world, one of the key threats to national security remains problems provoked, despite all their differences from each other, by internal factors.[1] The dominance of ethnic and fundamentalist forces in the conditions of the complex ethnic and religious composition of the population of these countries destroys their delicate social composition.

Long before the pandemic, the agencies of the UN cluster humanitarian system warned of a possible crisis, already in 2018 they worked with an unprecedented number of refugees and internally displaced persons, providing emergency assistance to almost 98 million people.[2] Of course, the SARS-CoV-2 coronavirus pandemic and measures to combat it have deepened the inequality separating the developed and marginalized States of the world: approximately 270 million people are at risk of starvation, hundreds of millions of people have lost their jobs, and global labor income has decreased by 10 %.[3] According to the World Bank, in 2021 there was a decrease in remittances by 14 %, which significantly reduced household incomes.[4] The global humanitarian system remains stable for the time being, but the ethical obligations of States to each other are increasing dramatically.

[1] Poorest Countries in the World 2022. World Population Review. Available at: https://worldpopulationreview.com/country-rankings/poorest-countries-in-the-world [Accessed 04.03.2022].

[2] United Nations refugee agency, UNHCR, Global Report — 2018. Available at: https://reporting.unhcr.org/sites/default/files/gr2018/pdf/GR2018_English_Full_lowres.pdf [Accessed 04.03.2022].

[3] ILO Monitor: Covid-19 and the world of work. Sixth edition. (2020). International Labour Organization. Available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_755910.pdf [Accessed 05.02.2023].

[4] Ong, R. Covid-19: Remittance Flows to Shrink 14 % by 2021. Available at: https://www-worldbank-org.translate.goog/en/news/press-release/2020/10/29/covid-19-remittance-flows-to-shrink-14-by-2021?_x_tr_sl=auto&_x_tr_tl=ru&_x_tr_hl=ru [Accessed 04.03.2022].

In the countries of East Africa and the Horn of Africa, an extremely dangerous situation has developed in recent years: the combination of ongoing conflicts with climate change, which caused the worst drought and lack of water in the last 40 years, the invasion of locusts, Covid-19 economic afterwords and a sharp rise in prices, the conflict in Ukraine led to an unprecedented high level of regional humanitarian crisis. It is expressed in the catastrophic situation with food security, in the fantastic number of refugees and internally displaced persons who come into conflict with the people who sheltered them, in the absence of unhindered, guaranteed humanitarian access.

The Federal Democratic Republic of Ethiopia (FDRE) is a country at the epicenter of events. In the state of Tigray, the ethnopolitical conflict between local authorities and the federal government, which began almost two years ago, resulted in a humanitarian catastrophe. Thousands of people have been killed or migrated since November 2020.[5] There is evidence that federal troops and their allies, the Eritrean armed forces, committed mass atrocities against the civilian population, gang violence and ethnic cleansing.[6] UN partner aid agencies have repeatedly called for an immediate cease-fire in the region for humanitarian reasons. Back in June 2021 Mark Lowcock, UN Deputy-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, said at an informal meeting of the Security Council that famine had already set in in some areas of the region after federal troops deliberately destroyed crops and livestock.[7] Today, the conflict has not stopped, there has been a return to the starting point. Despite all the efforts of humanitarian organizations, including the World Food Program, there is practically no humanitarian access to Tigray, which means that there is no humanitarian aid. The conflict is affecting the rest of Ethiopia, which is experiencing the worst drought in four decades. The conflict in

[5] Conflict in Ethiopia. Global Conflict Tracker. Available at: https://www.cfr.org/global-conflict-tracker/conflict/conflict-ethiopia [Accessed 04.03.2022].

[6] The Tigray War & Regional Implications (Vol. 1). Oslo Analytica. Available at: https://eritreahub.org/wp-content/uploads/2021/07/The-Tigray-War-and-Regional-Implications-Volume-1.pdf [Accessed 06.0.2023].

[7] Besheer, M., (2021). UN: Deaths From Starvation Reported in Ethiopia's Tigra. US news. Available at: https://www.voanews.com/africa/un-deaths-starvation-reported-ethiopias-tigray [Accessed 06.02.2023].

Tigray reflected all the key problems of the country in East Africa and the Horn of Africa as a whole. Its specificity lies in the phenomenon of the fundamental opposition of humanitarian aid and the political process by all its actors. The analysis of the conflict from the point of view of international humanitarian law suggests that, firstly, the probability that in the near future the world community will have to reconsider the UN approach to the entire architecture of humanitarian development, in order, secondly, to propose options for strengthening the effectiveness of IHL norms in the settlement of humanitarian conflicts in the conditions of complex interaction of their actors and external factors. Assessments of the application of IHL norms in this situation contribute to understanding the humanitarian foundations of the legal status of civilians and the prospects for providing them with stable protection. The explanation and interpretation of the features of the events taking place in Ethiopia and the actions of their key actors from the point of view of international humanitarian law helps to understand the true meaning of social phenomena and extrapolate it to real political practice. The effectiveness of the latter, a reasonable choice of betting on the "internal principle of consensus or on the external principle of humanitarian intervention" depends on this.

I.2. Methodology, Sources and Historiography of the Study

The authors used qualitative methods of data analysis due to the peculiarities of the subject of the study. The empirical material is analyzed using the frame theory, which defines a "framework analysis" of the situation. Framing involves choosing a number of important events and problems in order to identify the relationship between them, interpret them, and evaluate them (Druckman, 2001, p. 227). The article highlighted the following frames: of conflict — emphasis on disagreements between ethno-regional elites; content and assessment of applicable norms of international humanitarian law; of responsibility — the definition of persons or groups responsible for the problem; of morality — the assessment of the event from the standpoint of the value system, which is the platform of modern humanitarianism. An important method of research was process tracing — a technique

for checking the causal mechanism, the historical-genetic method, etc. Among the applied methods of law are comparative legal, formal legal and the method of legal modeling.

The primary sources of the study were the official documents of the FDRE, statistics collected from various resources such as Statista, World Population Review, Doctors Without Borders, the UN, etc., the contents of the Geneva Conventions on the Protection of Victims of the War of 1949 and Additional Protocol II thereto of 1977, UN Security Council Resolution 2573 and UN Human Rights Council Resolution S-33/1 "The situation of human rights in Ethiopia," adopted in 2021, the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 and the Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa of 2009, applicable at the regional level. The sources are interconnected according to the principle of complementarity, which allows the researcher to get reliable information about both key events and their context.

Secondary sources are represented by an extensive list of scientific papers directly devoted to the topic under study. The analysis of the elements of this list makes it possible to identify the degree of research interest in the subject under study, summarize the scientific results obtained, and see the existing gaps in the literature. Historiographical sources can be "put" into the following main groups:

— works on IHL are presented by the scientific positions of legal specialists M. Sassoli and S.K. Khamari, who study the system of special principles and sources of IHL. Separately, in the context of the implementation of international legal regulation of the movement of the population, mention is made of a monograph by D.V. Ivanov and N.A. Bobrinsky "The legal status of asylum seekers in modern international law," which outlines the specifics of granting temporary asylum to such categories of forced migrants;

— on modern humanitarianism (Maxwell and Gelsdorf, 2019);

— works on the peculiarities of Ethiopian federalism and its influence on the formation of ethno — national conflicts in the country (Ismagilova, 2018, Vestal, 1996; Merera, 2009).

Finally, the last group of works relates to the research of the political system of the Tigray state itself (Fiseha, 2020) and to the analysis of the events taking place there today (James and Alihodzic, 2020; Tsehay and Chekol, 2021).

The key research question is whether there are features of the effect of IHL norms in a humanitarian crisis in the conditions of non-international armed conflicts? The issue is considered on the example of the humanitarian crisis in the Ethiopian state of Tigray, which arose as a result of the conflict between the authorities of the state of Tigray and the federal government in 2020–2022.

II. The Effect of IHL Norms in a Humanitarian Crisis in the Conditions of Non-International Armed Conflicts

The legal sources of IHL are fairly stable, and the definition of the type of an armed conflict in the context of an intra-State armed confrontation of the parties belongs to the State itself, on whose territory it takes place. In our opinion, we may be talking about the application of Additional Protocol II to the Geneva Conventions of August 12, 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, 1977. Its content contains legal norms that directly relate to the settlement of the humanitarian crisis in such an armed conflict. Special attention is paid to the regional international legal aspects of assistance to refugees and internally displaced persons in Africa.

In a non-international armed conflict (see further on the legal qualification of the armed conflict in Ethiopia), the protection of the civilian population and civilian objects from the dangers of hostilities is ensured by Articles 13 and 14 of Additional Protocol II to the Geneva Conventions. With the consent of the State-party to the Protocol, in conditions of excessive deprivation of the civilian population and lack of food and medical supplies, humanitarian operations are carried out to provide such assistance; they are carried out without any adverse differences (Part 2 of Art. 18). In addition, the principle of non-discrimination on the grounds of race, skin color, sex, language, religion, political or other beliefs, national or social origin, property status, birth or other status is established in relation to the victims of

such conflicts by Part 1 of Article 2 of the Protocol and must be respected by all belligerents. The belligerents are prohibited from using starvation among the civilian population as a method of conducting military operations, and for this purpose "to attack, destroy, export or render unusable objects necessary for the survival of the civilian population" (Art. 14). These include food stocks, agricultural areas that produce it, crops, livestock, facilities that supply the population with drinking water, its reserves and irrigation systems. The forced displacement of civilians for reasons unrelated to ensuring their security and military necessity is also a ban for the belligerents (Art. 17).

M. Sassoli defines IHL as "the right protecting victims of war from States and all other participants in hostilities" and believes that during an armed conflict "persons from the armed forces are always considered in the line of duty and never act as exclusively private persons." (Sassoli, 2002, pp. 163, 170). It seems that a more precise formulation of the principle of humanity in IHL today is associated with the humanization of the conditions of armed conflicts. As it is known, international human rights law applies both in peacetime and in wartime. The observance of human rights and freedoms in this situation is viewed as obligations of the belligerents, which are not subject to cancellation. Humanization is aimed, among other things, at limiting the consequences of armed conflicts against civilians and objects excluded from the sphere of military operations in accordance with their legal status and requiring certain protection. S.K. Khamari also notes that IHL is designed to "limit damage," and the principle of humanity is more relevant to the protection of victims wars.[8]

III. Humanitarian Catastrophe in the Tigray Region in 2020–2022

III.1. Ethnic Cleansing

The war in Tigray caused enormous damage to the civilian population. Since the beginning of hostilities, the federal authorities have cut off electricity, telephone and Internet in the Tigray area. Air

[8] Khamari, S.K., (2020). Fundamental principles of International Humanitarian Law. IPleaders: Intelligent Legal Solutions. Available at: https://blog.ipleaders.in/international-humanitarian-law/ [Accessed 06.02.2023].

travel and other means of transportation were also banned, because many civilians who had nothing to do with the conflict were trapped in the epicenter of events (Degiorgis, Pochettino, and Alfaro, 2020). In February 2021, Amnesty International stated in its report that in November 2020 Eritrean military killed hundreds of unarmed civilians in the town of Axum located about 187 km north of Mekelle, as a result of indiscriminate shelling, extrajudicial executions and violent acts, which, according to the human rights organization, amounts to a crime against humanity. Not only firearms were used, but machetes.[9] The Eritrean authorities deny the Amnesty International data, but the videos, photos and documented confessions of eyewitnesses are convincing.[10] So in the CNN investigation, based on interviews with 12 eyewitnesses, more than 20 relatives of survivors and photographic evidence, one of the episodes of terror is described in detail.[11] A group of Eritrean soldiers opened fire on the Maryam Dengelat Orthodox Church, in the village of Dengelat, where hundreds of parishioners gathered for the service. People tried to escape by climbing paths in the rocks to neighboring villages. They were pursued by soldiers, shelling the mountainside. The massacre lasted for three days, the soldiers killed everyone indiscriminately — locals, visitors, pilgrims — as a result of the attack, more than 100 people were killed. The military forbade burying bodies in accordance with Orthodox tradition, forcing them to dig mass graves instead. US Secretary of State Anthony Blinken described the military campaign in western Tigray, where the military forces of Amhara and Eritrea were most active during the fighting, as "ethnic cleansing."[12]

[9] Ethiopia: The Massacre in Axum. Amnesty International 2021. Available at: https://www.amnesty.org/en/documents/afr25/3730/2021/en/ [Accessed 06.02.2023].

[10] Atanesyan, G., (2021). The year of the war in Ethiopia. How dreams collapsed in the country and hunger returned. BBC News. Available at: https://www.bbc.com/russian/features-59122656 [Accessed 06.02.2023].

[11] Arvanitidis, B., Elbagir, N., Feleke, B., Mackintosh, E., Mezzofiore, G., and Polglase, K., (2021). Massacre in the mountains. CNN. Available at: https://edition.cnn.com/2021/02/26/africa/ethiopia-tigray-dengelat-massacre-intl/index.html [Accessed 11.02.2023].

[12] Hansler, J., (2021). Blinken: Acts of 'ethnic cleansing' committed in Western Tigray. CNN news. Available at: https://edition.cnn.com/2021/03/10/politics/blinken-tigray-ethnic-cleansing/index.html [Accessed 06.02.2023].

In April — May 2021, the humanitarian organization *Médecins Sans Frontières* (MSF), or "Doctors without Borders" formed several medical volunteer centers due to the fact that hundreds of thousands of people needed humanitarian assistance. However, as early as March 2021, the organization reported that "Medical facilities in the Tigray region of Ethiopia were looted, vandalized and destroyed as a result of a deliberate and large-scale attack on the health system. Prior to the outbreak of the conflict, Tigray had one of the best health care systems in Ethiopia: medical centers in villages, medical centers and hospitals in cities, as well as an operating information system with ambulances. This healthcare system has collapsed almost completely."[13] The Director General of the organization, Oliver Ben, stressed that "all this has catastrophic consequences for the population, in addition, medical institutions and medical personnel themselves must be protected during the conflict in accordance with international humanitarian law, which clearly does not happen in Tigray."[14] The UN High Commissioner for Human Rights, Verónica Michelle Bachelet called for an independent investigation into violations of international humanitarian law, war crimes and crimes against humanity in the Tigray region.[15]

III.2 Food Security

Another important aspect in the humanitarian crisis is the food catastrophe. Many citizens do not have constant access to sufficient quality and quantity of products. The military simply took cattle and crops from farmers. The UN Food Program put forward the idea of

[13] Hotchkiss, M., (2021). Widespread destruction of health facilities in Ethiopia's Tigray region *MSF:* Doctors Without Borders. Available at: https://www.doctorswithoutborders.org/what-we-do/news-stories/news/widespread-destruction-health-facilities-ethiopias-tigray-region [Accessed 06.02.2023].

[14] Hotchkiss, M., (2021). Widespread destruction of health facilities in Ethiopia's Tigray region *MSF:* Doctors Without Borders. Available at: https://www.doctorswithoutborders.org/what-we-do/news-stories/news/widespread-destruction-health-facilities-ethiopias-tigray-region [Accessed 06.02.2023].

[15] The UN called for an investigation into reports of mass killings in the Ethiopian Tigray. (2020). UN News. Global perspective. Human stories. Available at: https://news.un.org/ru/story/2020/12/1392952. (In Russ.). [Accessed 06.02.2023].

helping the victims, a large amount of money was allocated for the purchase and delivery of food to the Tigray area.[16] Humanitarian aid supplies to Tigray are carried out through the neighboring Afar region. However, the road between Afar and the Tigray region through Semera, the capital of the Afar region, was restricted for security reasons.[17] This made it impossible to deliver food, fuel and other humanitarian supplies to Tigray, although the Ethiopian authorities deny this. At the same time, not only Tigray suffered, but also Afar and Amhara. In January 2022, the leader of the Tigray People's Liberation Front (TPLF), Debretsion Gebremichael, in an interview with the BBC, said that indirect negotiations with the government allowed them to hope for the best and the TPLF wanted a peaceful solution to the conflict.[18] But the path to peace is complicated by Amharic land claims to Western Tigray and the desire of Eritrean President Afwerki to destroy the TPLF. Nevertheless, on March 24, 2022, the federal government announced the introduction of an indefinite humanitarian truce. During this time, significant progress has been made, food aid has been delivered to Mekelle, and a number of other settlements. However, having lasted for only five months on August 24, 2022, the truce was violated and the conflict escalated again. Michael Dunford, Regional Director for Eastern Africa, World Food Program reports that food cannot be delivered to people not because there is no food, but because of the position of the Ethiopian authorities. "You have food that is ever so close to people, but it's not delivered to people who are in desperate need of it. Not because the food is not available. Not because the expertise are lacking. But because of a slow burning tactic from the Ethiopian authorities,

[16] The Ethiopian authorities said that the way to the Tigray region is now free. (2021). IA Red Spring. Available at: https://rossaprimavera.ru/news/9b4d13a8 [Accessed 22.02.2023].

[17] Chouhfeh, L., (2021). Tigray Situation. UNHCR — The UN Refugee Agency. Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR%20Ethiopia%20Tigray%20Update%20%2311_30%20July%202021.pdf [Accessed 21.02.2023].

[18] Ross, W., (2022). Some progress in Ethiopia diplomacy — Tigray leader. BBC News. Available at: https://wardheernews.com/some-progress-in-ethiopia-diplomacy-tigray-leader/[Accessed 06.02.2023].

federal authorities, to deny these people food."[19] "For the Ethiopian government for the last two years, this is a tactic of war. Food is a tactic of war" — Abdullahi Boru Halakh Senior Advocate for East Africa, Refugees International agrees with him.[20] On this basis, The World Health Organization Director General Dr. Tedros has said that "nowhere on Earth" were the health of millions of people more under threat than in Ethiopia accusing the federal authorities of organizing the blockade of Tigray.[21]

III.3. Refugees and Internally Displaced Persons

Since the beginning of the confrontation between the Federal Government of Ethiopia and the former authorities of the Tigray region, the number of refugees has increased dramatically. The flow of refugees from Tigray to Sudan is especially large, almost half of them belong to the minor age group. One of the most vulnerable groups is Eritrean refugees. Their situation is complicated by the fact that Eritrea is one of the parties to the conflict. People were forced to leave for other regions from the border areas, but they were transported back against their will, including to Amhara, and this makes them incredibly vulnerable. "I was in northern Amhara about two, three weeks ago. I met Eritreans who had been displaced first from Tigray — first from Eritrea to Tigray where they'd been for an extended period of time; now having to be relocated. And in many ways they are starting over again. And, you know, the plight of the Eritreans is desperate, as is the plight of the

[19] Dunford, M., (2022). Overcoming Barriers to Humanitarian Access in Northern Ethiopia. Center for Strategic and International Studies. Available at: https://www.csis.org/analysis/overcoming-barriers-humanitarian-access-northern-ethiopia [Accessed 06.02.2023].

[20] Dunford, M., (2022). Overcoming Barriers to Humanitarian Access in Northern Ethiopia. Center for Strategic and International Studies. Available at: https://www.csis.org/analysis/overcoming-barriers-humanitarian-access-northern-ethiopia [Accessed 06.02.2023].

[21] Nowhere on earth are people at greater risk than Tigray. (2022). The Times on ru. Available at: https://thetimeson.ru/2022/08/18/nigde-na-zemle-ludi-ne-podvergautsia-bolshemy-risky-chem-tygrai-govorit-glava-voz/. (In Russ.). [Accessed 06.02.2023].

population across that region. Anyone impacted by the conflict as it continues is feeling the brunt of it."[22]

At the beginning of the conflict, many centers were formed for refugees located at the entry points to the border of Ethiopia and Eritrea, but most of them were destroyed in the first two months. More than 10,000 people began to live in the centers, although their maximum capacity is about 300 hundred. In the context of the pandemic, local authorities made attempts to introduce certain security protocols into the management of the camps, but due to the overcrowding of the camps, maintaining protocols became almost impossible.

The main problem is that today all the warring parties put military and political calculations above humanitarian ones. The range of unresolved problems in Ethiopia is growing every day, and their scale can lead to disastrous consequences for many African countries.

IV. Features of the Application of International Humanitarian Law in the Context of the Armed Conflict in Ethiopia

At the meeting of the UN Security Council on the situation in Ethiopia, which took place on October 6, 2021, UN Secretary-General A. Guterres called it a real humanitarian disaster.[23] He listed the following factors aggravating the crisis: hunger among 7 million citizens in Tigray, Amhara and Afar; difficulty in accessing humanitarian organizations in these regions; constant outbreaks of hostilities that make it impossible to provide vital services to the population. As it is known, the absence of a special resolution on the situation in Ethiopia is due to a discrepancy in the position of Western countries considering the separatist armed forces of Tigray as a defense force or militia, and the position of Ethiopia, according to which the situation in the country

[22] Dunford, M., (2022). Overcoming Barriers to Humanitarian Access in Northern Ethiopia. Center for Strategic and International Studies. Available at: https://www.csis.org/analysis/overcoming-barriers-humanitarian-access-northern-ethiopia [Accessed 06.02.2023].

[23] The absence of peace in Ethiopia may lead to the destabilization of the entire Horn of Africa region. (2021). UN News. Available at: https: // news.un.org/ru/ story/2021/10/1411372 [Accessed 06.02.2023].

should not be the subject of discussion by the UN Security Council, as it relates to its internal competence. The position of the Russian Federation is also determined by the effect of Ethiopia's sovereignty on its territory. A separate UN Security Council Resolution 2573,[24] adopted on April 27, 2021, called upon all parties to armed conflicts to "engage immediately in a durable humanitarian pause to facilitate safe, unhindered and sustained delivery of humanitarian assistance, provision of related services by impartial humanitarian actors, consistent with humanitarian principles of humanity, neutrality, impartiality and independence, and medical evacuations, in accordance with international law, including international humanitarian law and refugee law"(Art. 7).

The basis for the qualification of an armed conflict, as is known, is the content of Additional Protocols I and II of 1977 to the Geneva Conventions on the Protection of Victims of War of 1949. According to it, armed conflicts can be international and non-international. Additional Protocol II to the Geneva Conventions (Additional Protocol II)[25] defines a non-international armed conflict as a classic civil war, which implies actions of government forces and armed opposition (rebels) as opposing belligerents; rebel control over a certain part of the territory of the State; a military hierarchy and a responsible command among the belligerents (Part 1 of Art. 1). In accordance with Article 3 of the said Protocol, the sovereignty of the state where such a conflict takes place and the duty of its government "to maintain or restore law and order in the state by all legal means" and to protect its "national unity and territorial integrity are put in the first place." The Protocol excludes the justification of "direct or indirect interference for whatever reason in an armed conflict" or in the internal or external affairs of the party on whose territory it occurs. Thus, Ethiopia's position when considering the situation in the UN Security Council seems quite legitimate.

[24] UN Security Council Resolution S/RES/2573 (2021) "Protection of civilians in armed conflict." Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/104/98/PDF/N2110498.pdf?OpenElement [Accessed 06.02.2023].

[25] Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977. Geneva Conventions of August 12, 1949 and Additional Protocols thereto (2011). 5th ed., supplement Moscow: ICRC. Pp. 284–294.

On December 17, 2021, the UN Human Rights Council at a special session adopted resolution S-33/1 "The situation of human rights in Ethiopia,"[26] Paragraph 2 of which calls for "an immediate halt to all human rights violations and abuses and violations of international humanitarian law and international refugee law and for the strict observance of all human rights and fundamental freedoms." Paragraph 3 of the resolution urged all parties to the conflict "to refrain from direct attacks against civilians as such, including on the basis of their ethnicity or gender, and against objects, in particular those indispensable to the survival of the population, including crops, livestock and medicines, to refrain from incitement to hatred and violence, to avoid further damage to critical civilian infrastructure, and to end any measures that may exacerbate the already acute humanitarian crisis, in particular, by allowing and facilitating the full, safe, rapid and unimpeded passage of humanitarian relief."

The text of resolution S-33/1 also contains a provision for the appointment of an International Commission of Human Rights Experts on Ethiopia to conduct a thorough investigation of reports of violations of human rights and IHL. The basis for its creation was the report of the Joint Investigation Team, which revealed numerous violations and abuses, including killings and extrajudicial executions, torture, gender-based and sexual violence, violations of the rights of refugees and forced displacement of civilians. The authors of the report concluded that during the conflict in the Tigray region, all the warring parties are responsible for the horrific violations committed during the fighting. The Permanent Representative of Ethiopia expressed disagreement with the adoption of the above-mentioned resolution due to the politicization of the activities of the HRC session, the need for the country's authorities to protect its sovereignty and territorial integrity from internal aggression and silencing of the outrages carried out by militants of the rebel forces of the Popular Front for the Liberation of Tigray.

[26] 21 Human Rights Council member States voted for the adoption of the resolution, 11 countries abstained and 15 voted against its adoption, including the Russian Federation, China and Cuba. Resolution S-33/1 "The situation of human rights in Ethiopia," 2021. A/HRC/S-33/2. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/470/49/PDF/G2247049.pdf?OpenElement [Accessed 06.02.2023].

Ethiopia has been a party to the four Geneva Conventions for the Protection of War Victims of 1949 (including Geneva Convention IV relative to the Protection of Civilian Persons in Time of War) since 1969 and Additional Protocol II since 1994. It seems that these provisions are a significant part of its international legal obligations with respect to the civilian population in armed conflicts, the fulfillment of which must be ensured at the domestic level. Taking into account the position expressed by Ethiopia, this could be done while strengthening the effectiveness of its national legislation and measures to prevent serious violations of IHL by all belligerents.

As for the situation with forced migration, there are two significant regional international treaties adopted within the framework of the Organization of African Unity and the African Union: the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 and the Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa of 2009 (the Kampala Convention of 2009) that entered into force in 2012.[27] The OAU Convention of 1969 contains an expanded definition of the concept of a "refugee": it includes any person who, due to a well-founded fear of being persecuted on the basis of race, religion, nationality, belonging to a certain social group or political beliefs, is outside the country of citizenship or habitual residence and cannot or does not want to use its protection due to such fears; The term "refugee" is also applied to a person who has left the State of citizenship or habitual residence for reasons of external aggression, occupation, foreign domination or events seriously disturbing public order in some part of the country of origin or in the whole country (Parts 1 and 2 of Art. I). In this complex definition, the universal international legal norm of the UN Convention on the Status of Refugees of 1951 occupies the first place, and the second is its own regional approach to recognizing the legal status of migrants who were forced to leave the State of origin in armed conflicts. The

[27] The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201001/volume-1001-I-14691-English.pdf; The Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa of 2009. Available at: https://au.int/sites/default/files/treaties/36846-treaty-kampala_convention.pdf.

specifics of the situation in Ethiopia presupposes the application of a regional legal position regarding the status of refugees. When deciding on the recognition of such a legal status, the host African States may use the content of Part 2 of Article I, defining the situation of an internal armed conflict as an additional basis for its provision.

Another achievement of Refugee Law at the level of the African Union is the consolidation of the institution of temporary asylum in Part 5 of Article II: if a refugee has not received the right to reside in any country of asylum, he "may be allowed to temporarily stay in any state where he first declared himself a refugee, from now on, until the issue of his relocation" (Ivanov and Bobrinsky, 2009, pp. 55–57). The OAU Convention was adopted in Addis Ababa, Ethiopia signed it in 1969 and ratified it in 1973. It should be noted that even in the conditions of an internal armed conflict, it was able to fulfill its international legal obligations and in 2021 it received 386,800 asylum seekers from South Sudan bordering it[28] As for the flow of asylum seekers from Ethiopia, by the middle of 2022 in the territory of neighboring Sudan, it amounted to 73,448 people.[29]

Article VII of the Kampala Convention of 2009 provides for the provision by States-participants of the protection of internally displaced persons[30] during armed conflicts, in accordance with the norms of international law and, in particular, IHL (Part 3). Here, the provisions on the operation of sovereignty and the responsibility of the government to protect territorial integrity and national unity by all legal means are fundamental (Part 2). Members of armed groups are responsible for violations of the rights of such persons under international and national law (Part 4). At the same time, the Convention makes a basic distinction between the armed forces of the participating States and

[28] Global trends: Forced displacement in 2021. (2022). Copenhagen: UNHCR. P. 17. Available at: https://www.unhcr.org/globaltrends.html [Accessed 06.02.2023].

[29] Global trends: Forced displacement in 2021. (2022). Copenhagen: UNHCR. P. 5. Available at: https://www.unhcr.org/globaltrends.html [Accessed 06.02.2023].

[30] The term "internally displaced persons" is applied to persons or groups of persons who have forcibly left their places of residence or ordinary residence, in particular, for reasons of armed conflict, situations of general violence, human rights violations, natural or man-made disasters and have not crossed the internationally recognized borders of the State (Para. "k" of Art. I of the Kampala Convention of 2009).

opposition armed groups (Para. "e" of Art. I). Part 5 of Article VII imposes prohibitions on members of such groups arising from the above norms of Additional Protocol II of 1977 and the Geneva Convention IV on the Protection of Civilians of 1949. These include prohibitions on arbitrary forced displacement; obstacles to the provision of assistance and protection to internally displaced persons; denial of their rights to live in satisfactory conditions, with respect for dignity, safety, hygiene, food and water, health care, and the right to family unity; involvement of children in hostilities; forced recruitment, abduction of children, hostage-taking, sexual slavery or human trafficking, especially women and children; obstructing the provision of humanitarian assistance, attacking humanitarian personnel and causing harm, confiscation or destruction of humanitarian materials; violation of the civil status of the settlements of these persons.

In our opinion, the Kampala Convention of 2009 sets an additional goal of containing the military escalation of numerous intra-State conflicts on the African continent and strengthening the norms of IHL that are in force at the universal level. Ethiopia, like most member States of the African Union, participates in this Convention, ratified it in 2020). According to the Office of the United Nations High Commissioner for Refugees (UNHCR), the number of internally displaced persons on its territory in 2021 amounted to more than 3.6 million people.[31] The main issue of implementing the norms of the Convention is related to which of the belligerents controls the settlements of internally displaced persons on the territory of Ethiopia and, accordingly, assumes the fulfillment of these obligations and whether representatives of international organizations (UNHCR) and observers of the African Union can access them.

V. Conclusion

We investigated the causes of the humanitarian crisis in the state of Tigray, which are a complex interaction of objective and subjective factors that find themselves in an unstable equilibrium.

[31] Global trends: Forced displacement in 2021. (2022). Copenhagen: UNHCR. P. 25. Available at: https://www.unhcr.org/globaltrends.html [Accessed 06.02.2023].

The political elites of the states of Ethiopia understand that due to the internal division along ethnic lines, it is difficult for the country to survive as a single state. The situation requires the creation of a special political mechanism, currently absent, reconciling the interests of regional ethnic groups so that centralization (but in the future, perhaps, authoritarianism), on the one hand, and federalization and regionalization (in the future, perhaps, democratization), on the other, enter into an equilibrium state. The transition from a situational reaction to processes to a responsible strategic policy is a challenge for the Government of Abiy Akhmet. Another challenge is the imposition on this government by the majority of the world community of responsibility for the blockade of people trapped in Tigray — denying them access to food, water and medical care. In the situation of a humanitarian crisis of this magnitude, the significance and features of IHL, in addition to the struggle of the world community for the introduction of its direct effect, consists in a reassessment, in the conditions of armed conflicts of the 21st century, of the possibility and effectiveness of the application of the legal norms of the Geneva Conventions for the Protection of Victims of War of 1949 and Additional Protocol II to them of 1977, in developing, jointly with regional authorities, international agreements on assistance to forced migrants.

References

Degiorgis, P., Pochettino, P., and Alfaro, T., (2020). Edición Especial/ Guerra civil en Etiopía: ¿el principio del fin? *Observatorio de* África. Available at: http://repositorio.ub.edu.ar/handle/123456789/9135. (In Span.).

Druckman, J.N., (2001). The implications of framing effects for citizen competence. *Political Behavior,* 23, pp. 221–236.

Fiseha, A., (2020). Local Level Decentralization in Ethiopia: Case Study of Tigray. *Regional State Law and Development Review*, 13(1), pp. 95–126.

Ismagilova, R.N., (2018). *Ethiopia: Features of Federalism*. Moscow: Institute of Africa, RAS. (In Russ.).

Ivanov, D.V. and Bobrinsky, N.A., (2009). *The legal status of asylum seekers in modern international law*. Moscow: Statut Publ. (In Russ.).

James, T.S. and Alihodzic, S., (2020). When Is It Democratic to Postpone an Election? Elections during Natural Disasters, Covid-19, and Emergency Situations. *Election Law Journal*, 19(3), pp. 344–362.

Maxwell, D. and Gelsdorf, K.H., (2019). *Understanding the Humanitarian World*. Routledge, London, doi: https://doi.org/10.4324/9780429279188.

Merera, G., (2009). *Ethiopia: Competing Ethnic Nationalisms and the Quest for Democracy, 1960–2000*. Addis Ababa: Chamber Printing House.

Sassoli, M., (2002). State responsibility for violations of international humanitarian law. *International Journal of the Red Cross: a collection of articles,* 84, pp. 163, 170.

Tsehay, Y.M. and Chekol, Y.G., (2021). The 2020 Tigray People's Liberation Front (TPLF) Regional Election in Ethiopia: Legitimacy and Motivatins. *Journal of Somali Studies: Research,* 8(1), pp. 87–105.

Vestal, T.M., (1996). An analysis of the new constitution of Ethiopia and the process of its adoption. *Northeast African Studies*, 3(2), pp. 21–38.

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LEGAL PROTECTION OF VULNERABLE GROUPS

Research Article

DOI: 10.17803/2713-0533.2023.1.23.157-178

The Need for the Development of a Constitutional and Legal Model for Ensuring the Information Security of Minors

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Abstract: Based on the analysis of the main risks of the information environment for minors, the authors substantiate the need to form a constitutional and legal model for ensuring the information security of minors. The authors represent their understanding of the concepts of "threat," "challenge," "danger," which are close in a categorical series with the concept of "risk," is presented, and propose their definitions of the concepts of "information security," "security worldview." The main goals for ensuring the information security of minors are both security and the creation and maintenance of the most favorable conditions for the adaptation of a minor to the information environment of modern society, which contributes to his personal development, improvement of spiritual, moral, intellectual, creative abilities and self-realization, subject to minimization (and exclusion) of possible risks and threats to life, health and its comprehensive development. The elemental composition of the constitutional and legal model of information security of the child is presented, the formation of which is associated with the national model for the protection of the rights and freedoms of minors. The right to information security of minors comes from the meaning

and spirit of the Constitution, as it ensures the implementation of other constitutional rights and freedoms of minors.

Keywords: law; the right to safety; constitutional model; legal modeling; information security of a minor; constitutional rights and freedoms of minors

Cite as: Rybakov, O.Yu. and Rybakova, O.S., (2023). The Need for the Development of a Constitutional and Legal Model for Ensuring the Information Security of Minors. *Kutafin Law Review*, 10(1), pp. 157–178, doi: 10.17803/2713-0533.2023.1.23.157-178.

Contents

I. Introduction

Minors are active participants of information relations. It is difficult to imagine a child's development outside of information that acts as a source of knowledge, a means of a mindset development, a condition for his socialization, intellectual, spiritual, psychological development, promotes various forms of communication. On the one hand, the information space carries a positive impulse for the development of minors, on the other, it can have a negative impact.

The global information space provides an opportunity for unlimited access to a wide range of information resources, thereby ensuring the realization of the human right to free access to information.

According to Illaria Bachilo, information is "a characteristic of the surrounding world perceived and understood by a person in all its diversity that arises in the process of cognition of the latter and allows, on the basis of cognition and measurement of the properties of objects,

phenomena, processes, facts and their reflection in various forms of perception, to distinguish their signs, elements, meanings and establish connections and the dependence of the whole variety of manifestations of the material, spiritual, ideological world" (Bachilo, 2016, p. 25).

Information, from the point of view of its essential characteristics, is a reflection of the existing reality in the human mind, expressed in symbolic form for the purpose of further orientation and adaptation in life (Kuznetsov et al., 2020, p. 37). In our opinion, information is the data about the surrounding reality, conditioned by human existence that changes in the process of human life. In other words, information is a collection of data about the surrounding reality, reflected in the mind of the individual. For an individual participant in information relations, only the information that is received and perceived (or not perceived) by his consciousness matters. Thus, the value of the information received is determined based on the characteristics of a particular subject of its consumption. The same information can be useful for one person and negative or even harmful for another.

The information that a minor receives is the overall data about the reality surrounding him, perceived by his consciousness matching his mental and intellectual capabilities, which, as a result, influences the further formation of his consciousness, mental state, development, and determines his models of behavior. It should be noted that, on the one hand, children adapt to the information space more easily than adults adapt, master it for various purposes. On the other hand, minors, due to their age characteristics, are the most vulnerable audience to the impact of a powerful information flow. Lacking the maturity of thinking skills, a child is not always able to differentiate the information received in a correct and adequate manner.

Plunging into the information space of modern communications, a child becomes an open target for all sorts of risks and threats (Rybakova, 2020, pp. 65–67; Bukalerova, Ostroushko, and Shagieva, 2021). Over the past year, we have noted with regret that many foreign media run a hybrid war against Russia, through the imposition of an alien ideology, the dissemination of false information, the distortion of historical truth, facts about the role of Russia in shaping the modern world order.

Children become unwitting targets of various kinds of information attacks. Due to the age and characteristics of the emerging personality, a child is not always able to objectively perceive such information, adequately respond to it, and establish its reliability. In this connection, the aim of ensuring the information security of minors is relevant.

II. Safety and Informational Security of Minors

Safety is a general social value. Security, as a quality of life, as the state of social and personal environment for a minor, where there are threats, dangers, risks, should have cumulative indicators.

Security is commonly understood through the idea "protection." At the same time, security is a subjectively perceived assessment of the position of the subject, who, according to his assumption, is out of danger. Security may or may not be the same as safety. Security integrates both objective indicators (presence of normative, procedural, organizational, etc.) conditions, as well as subjective ones, involving, in particular, the person's own assessment of his state as safe and contributing to the preservation of such a state. In our opinion, *security* is the quality and state of social environment, relevant and desirable for a person due to the absence of signs of threats, dangers, and risks. The *worldview of security* is a system of views on the interaction of a person and the surrounding world, the social environment regarding the provision of conditions for preserving his life, health, and dignity.

Information security is of particular importance in the conditions of information and technological society. Anna Chebotareva defines information security of a person as the state of safety determined by mitigation of external and internal risks and challenges for an individual in the global information society. Safety implies the ability to resist these risks and challenges through the information security culture development, as well as through the formation of state policy aimed at creating conditions for the realization of information rights and freedoms provided that information security is ensured (Chebotareva, 2017).

The study of the information security of minors becomes topical due to the peculiarities of age, psychological characteristics, the state of

consciousness, the nature of interaction with society. Sergey Budanov proposes one of the first definitions of information security of minors in his dissertation research. There it is defined as "a set of organizational and legal means regulating the rights of minors in the information environment, ensuring their protection from the influence of harmful (negative) information that entails a danger to their life and health, or that can harm normal moral spiritual, mental and physical health" (Budanov, 2006). Sergey Ivanov defines the information security of a minor as "a state of protection for children, which guarantees the exercise of their constitutional rights to search, receive, store, produce, disseminate information, to the inviolability of information about private life, and the absence of a risk associated with causing harm to their health and (or) physical, mental, spiritual, moral, intellectual development" (Ivanov, 2011, p. 66). In this definition, the scientist considers the category of security through the protection of a minor from the negative impact in the information space. Exploring the problems of legal regulation of information security of minors Larisa Efimova announces the formation of a new institution of information law--the institution of legal support of information security for children (Efimova, 2019, p. 134). We suppose that the main goal of ensuring the information security of minors is not only security, but also the creation and maintenance of the most favorable conditions for the adaptation of a minor in the information environment of modern society. This contributes to his personal development, improvement of spiritual, moral, intellectual, creative abilities and self-realization, subject to minimization (and exclusion) of possible risks and threats to life, health and its comprehensive development.

III. Risk Classification of Information Security of Minors

It is necessary to distinguish between the concepts of "risk," "threat," "challenges," "danger," "probability of danger." Risk is an ontologically expressed component of human activity. It can be realized in a variety of forms and scales, being one of the components and factors of human life, accompanying its evolution. Risk is inherent in man as a generic being, is invariably present in various types of his activities and is associated with uncertainty. The presence of risk does not mean the

presence of an immediate threat and danger. It is danger that appears as a quality that can manifest itself in a situation of risk.

Risk as a result of human activity is associated with ontological risk, expressed as potential and completely unpredictable consequences, which have a mostly negative result. Risk implies a possible discrepancy between the goal and the result and the presence of danger. Danger is the qualitative side of risk, its refinement, assessed by a person based on any criteria, signs, measurements. The probability of danger is the sum of conditions, factors that transform the risk into a specifically expressed danger.

Threat is a negative directed action or inaction of any subject who has the goal of achieving the desired results with the help of his action. Challenges are factors, conditions, circumstances that are signs, characteristics of a particular stage in the development of a society, state, person. The challenges today are the consequences and results of scientific and technological transformations. The concept of "challenge" means an assessment by a thinking, rationally developing person of new factors that change, correct the existing way of life. Thus, historical challenges were transitions from an archaic, traditional society to an industrial and post-industrial one, the invention of weapons of mass destruction, environmental and technological disasters, and so on.

The challenge generates a situation of the necessary solution of emerging globally expressed problems. Mankind, armed with a stock of social systematized experience, scientific theories, changes in their paradigms, creates many challenges itself, believing that it is following the correct general path of development. Not all challenges are generated by intentional human activity. But people should respond to all challenges, both preventively and upon the manifestation of the initial stage of the challenge. We would like to correlate this conceptual series in connection with the realization of the rights and freedoms of minors.

There is a risk of formation and global development of information and communication technologies with a focus on the "values" of artificial intelligence that has become a factor of the general social level and is a challenge. It is able to weaken the traditional value bases of respect for a person, ensuring his dignity, the loss of control by adults over the

state of a favorable environment for a child, which creates a threat of universal social discrimination and the presence in the life of a child of a constantly reproducing danger of his degradation. The risk in the current projections of technological development is unavoidable, since it requires a change in the paradigms of the value-theoretical plan and the approval of the same standards for different states of ideals and ideas of goodness, justice, dignity, philanthropy, implemented mainly as natural rights in the state-legal life in the world level.

Technological risks for the first time in the history of humankind become social for the modern information society. Today, there is a possibility that the main risk of a futurological nature will be the departure of a natural person into the development of a partially artificial person, which is facilitated by modern robotic technologies. With the advent of new digital forms of interaction within the information space, the likelihood of new risk situations for a minor as a participant in information relations increases.

Earlier in our works, we have given classifications of the most probable risk situations that may arise in connection with the uncontrolled immersion of a minor child in the information environment, proposed by domestic and foreign scientists, have already been presented (Rybakova, 2020, p. 68; Rybakov and Rybakova, 2019).

The classification proposed in 2012 by the Organization for Economic Cooperation and Development still deserves some interest (OECD):[1]

1. *Internet-technology risks* that include content-risks, involving viewing prohibited information (pornography, racism, aggression, hatred, including harmful advice (suicide) and contact-risks, cybergrooming, cyberbullying, online harassment, cyberstalking.

2. *Consumer-related risks* that include online marketing, over spending risks and fraudulent transactions.

3. *Information privacy and security risks*. Russian experts offer five groups of on-line risks for minors (Soldatova et al., 2012):

[1] Recommendation on the OECD Council Report on risks faced on children online and policies to protect them. Pp. 24–30. Available at: https://www.oecd.org/sti/ieconomy/childrenonline_with_cover.pdf [Accessed 03.09.2022].

1) *content risks* arising from the use of materials located on the Web (texts, pictures, audio and video files, links to various resources), and containing "illegal, unethical and harmful information (violence, aggression, erotica or pornography, hateful content, obscene language, information inciting racial hatred, propaganda of anorexia and bulimia, suicide, gambling, drugs, etc.);"

2) *communication risks* that arise in the process of communication and interpersonal interaction of users on the Web (among the examples, scientists name cyberbullying, illegal contacts (for example, online grooming, sexual harassment), online dating and subsequent meetings with online acquaintances in real life);

3) *consumer risks* arising from the abuse of consumer rights on the Internet (among the risks of this group, scientists name: the risk of purchasing low-quality goods, various fakes, counterfeit and counterfeit products; loss of funds without purchasing a product or service; theft of personal information for the purpose of fraud);

4) *technical risks*, which are determined by the possibility of implementing threats of damage to computer software, information stored on it, violation of its confidentiality or theft of personal information through malicious programs (viruses, worms, Trojan horses, spyware, bots, etc.);

5) *the risks of acquiring Internet addiction* or an irresistible craving for excessive use of the Internet, which in minors manifests itself in the form of passion for video games, an obsessive need to communicate through instant messengers, social networks and forums, online watching videos, movies and series. Among the main symptoms of Internet addiction, among scientists mention loss of control over the time spent on the network, withdrawal syndrome, replacement for reality.

The analysis of the above studies allows us to conclude that the main group of risks for the development of a minor are risks that have a direct impact on the formation of the worldview of a minor (worldview risks) — *the first group of risks*.

These risks can be attributed to the so-called primary threats, the meeting with which has a direct impact on the further formation and development of the minor. The emergence of risks in this group is

associated with the minor's access to excessive information that they are not ready to adequately perceive due to objective reasons: peculiarities of age psychology, an unformed system of personal values, the influence of various motivations on the child's consciousness, the immaturity of thinking as an insufficient result of experience and knowledge, an imperfect system goal setting, etc.

According to the classification proposed by Aleksey Chesnokov and Elena Akimysheva, all information that is redundant for children's perception could be divided into the following categories:

1) information harmful to health (high-frequency radiation, increased noise level and fire hazard, damage to eyesight, arthritis of the wrist joints, etc.);

2) information promoting ideas prohibited in society (terrorism, fascism, racial intolerance, sectarianism, drugs, cruelty to people, etc.);

3) information that causes sexual deviations (pornography, homosexuality, various perversions);

4) games that immerse in the virtual world, promote violence, develop gambling addiction, and do not contribute to the development of intelligence;

5) social networks that contribute to the creation of computer addiction, the risk of access by adults with criminal intent, conditions for the acquisition of prohibited goods (spice, other narcotic and psychotropic substances, stolen goods, weapons);

6) various kinds of fraud, online casinos, theft, inducement to purchase expensive information products (Chesnokov and Akimysheva, 2015).

The above classification names information that is essentially destructive for the child's consciousness, which, according to psychologists, can cause psychological or mental trauma for the child, which refers to disturbances in the normal functioning of the psyche, including cognitive processes (memory, attention, thinking, speech). Scenes of cruelty, violence, pornographic images, information of an extremist, terrorist nature, other illegal acts distributed through television, on the Internet, including in computer games, lead to an unconscious desire by a minor child to imitate what they see.

Exploring the influence of media, television and Internet content on the psychological characteristics of a minor, Olga Makhovskaya and Fedor Marchenko propose the term "screen homeless children." Thus, they refer to such cases of uncontrolled immersion of a child in the media space, "when the child is alone with the screen, and there is no adult nearby who could comment on the content and warn of danger, they put in a vulnerable position not individual children or groups, but entire populations of young viewers and users" (Makhovskaya and Marchenko, 2017). Of course, viewing such information content, in the absence of an adult "guide" nearby (parent, educator, teacher, etc.) who is able to competently present the seen stories to the minor and evaluate the behavior of the characters, the child may believe that the behavior patterns seen are acceptable and in real life.

Plunging into the information environment, minors perceive information through the reflection in mind, differentiate the received information into interesting (uninteresting), useful (useless), positive (negative), reliable (unreliable), etc. according to their intellectual, moral, cognitive capabilities.

There is an opinion of teachers, psychologists that in order to normalize the child's socialization and adequate perception of negative information, a minor child, in accordance with his age and level of development, should receive a certain amount of "negative information." Thus, they become aware of the existence of antisocial behavior, aggression and evil, but such information should not be presented as encouraged behavior, but on the contrary, it is required to express censure of such behavior, to speak of it as deviant from the norm (Ambalova, 2019; Golubeva, 1985; Saltykova-Volkovich, 2016).

We believe that such information should be presented only when children are together with adults. In this case, the role of a "guide" in the information flow is assigned to parents, teachers, educators who are able to set the right moral guidelines, thereby contributing to the formation of a positive model of behavior of a minor. In the absence of competent support, due to their age, psychological, physiological characteristics of personality development, a child is not able to independently adapt to the modern information and communication society. This leads to the transformation of the moral and moral attitudes of the child, which can

further lead to the formation of an aggressive behavior model, and, as a result, an increase in the number of children with various forms of social maladaptation and deviant behavior.

The *second group of risks* is the risks associated with the involvement of a minor in illegal activities through the Internet. It should be emphasized that the risks of this and subsequent (third) groups are secondary in relation to the first group of risks, derived from them.

Taking into account the age characteristics, the child gradually expands the volume of interaction with the information Internet environment, the search queries for information are supplemented by the possibility of establishing new contacts with virtual interlocutors, including through social networks (*VKontakte, Odnoklassniki*, etc.). Communication of minors with each other and the outside world takes place in virtual reality. Psychologists confirm that the space of social networks for a teenager is simultaneously associated with autonomy from adults and with a sense of the possibility of manifesting one's own activity and freedom in choosing the content and forms of communication (Sobkin and Fedotova, 2019). In other words, the Internet is an alternative communication platform for minors, where, in the absence of visualization of the interlocutor, they have the opportunity to communicate, exchange information, express an opinion, count on the support of the virtual community (interlocutor), and therefore, feel full, confident and comfortable.

In itself, virtual communication on the network does not pose a danger, if the rights of a minor are not violated, and neglect of the norms of what is permitted is not allowed. On the one hand, virtual communication is convenient for minors themselves. Features of the child's and adolescent psyche are characterized by the presence, to one degree or another, of certain complexes and phobias, low self-esteem, self-doubt (appearance, knowledge, social status, etc.), which often prevents full communication with peers outside the virtual space. Thus, virtual communication is preferable to offline interaction. According to the study "Children of Russia Online," almost a third of the children and adolescents surveyed admitted that they introduced themselves online as another person at least once (Soldatova et al., 2012). Thus,

a minor prefers virtual self-realization rather than traditional ways of interacting with peers.

Virtual communication becomes dangerous in cases where it goes beyond ordinary communication, contains elements of behavior unacceptable in society (aggression, illegal mental and (or) emotional pressure on a minor, blackmail, etc.). We must agree with Illaria Bachilo that all the complexity of regulating relations in this area is explained by the fact that the so-called "virtual subject" operates in the Internet space, which is "poorly tangible" (its signs and characteristics are unstable), but it is capable of action and participates in relations on a par with others" (Bachilo, 2016). This statement is still relevant today. The anonymity of social network participants complicates the manageability of this type of legal regulation.

New forms of interaction and ways of building relationships with a virtual community (interlocutor) determine the emergence of communicative skills on the network, which together determine the rules, values, and ultimately the subculture of the virtual community. In this case, there is a risk of deviation from the moral values generally accepted in society, which can manifest themselves in various forms of antisocial behavior. Modern forms of asocial behavior of minors are characterized by their diversity, ranging from deviant and addictive behavior to delinquent, manifested in the commission of offenses. As a rule, antisocial behavior is manifested not only externally, but is also accompanied by a change in the internal moral and value attitudes of the minor. The antisocial behavior of minors is one of the most significant among the problems of modern society that need to be addressed.

Taking into account the fact that juveniles are characterized by immaturity of thinking as a result of insufficient experience and knowledge (Feldshtein, 2004; Golubeva, 1985), a tendency to imitate (Rean, 2012), a certain susceptibility to the negative influences of the microenvironment, the desire for extreme behavior, then getting into the Internet space, the child finds himself in a zone of special risk. Uncontrolled unlimited presence in the network has a traumatic and sometimes corrupting effect on minors, facilitates their involvement in illegal activities.

Indeed, through immersion in virtual reality, a minor, without suspecting it, can be involved in illegal activities (including extremist, terrorist activities), any other direction, for example, dissemination of prohibited information, violation of public order and public safety, etc. Not all children in adolescence know that such activities are punishable, and punishment may be applicable to them (or legal representatives). Many of the minors believe that "hiding behind a nickname" and being in virtual reality can go unnoticed and unidentified. At the same time, minor children, without suspecting it, bear responsibility (administrative and criminal) starting from the age established by law.

The *third group of risks* presents the risk to become a victim of unlawful (including criminal) actions. It should be noted that the following list of possible illegal actions against minors is not exhaustive. Let us name the most common cases of violation of the rights of underage users of various Internet search engines.

Internet information deception, which manifests itself in the risk of obtaining "inaccurate information" due to the fact that a minor, in the absence of filters, has access to an unlimited number of information resources. Modern schoolchildren and students get most of the information from the network by entering an appropriate search query, where, along with reliable official sources (reference search engines, library resources, etc.), there are so-called unreliable *Yandex-Google* sources. Receiving a *Yandex-Google* answer to a question asked, a minor is not able to critically evaluate the information received, he accepts it as the truth.

We agree with Aleksey Minbaleev, that ensuring information security always involves ensuring the integrity, reliability and accuracy of information, respectively, the implementation and protection of the right to reliable information, scientists are invited to consider as a factor in ensuring information security (Minbaleev, 2019). In this case, we are talking about information as an object of consumption.

Minors may be victims of Internet crimes. Due to their inexperience, a minor child may face other types of violation of his rights as a consumer of various products, goods and services, if they are provided in poor quality, or if they are not provided at all after the on-line payment is made. A much greater danger for minors is the possibility of becoming a

victim of various crimes, including those committed using the Internet, the variety of which is increasing every year, starting with account hacking, e-mail, cyber fraud, etc. The minor does not have the special knowledge and sufficient experience to resist this.

In the past few years, one of the most common types of destructive behavior among minors has become Internet harassment of peers using threats, an expression of aggression. Aggressive behavior of minors towards peers occurs in the form of intimidation, usually using personal information about the victim.

The suggested classification of information risks is certainly not exhaustive. The overloading of the modern information environment raises the question of the need to protect minors from excessive information that is negative for perception and not intended for the child's psyche.

New forms and methods of illegal interaction of the criminal community with minors, which are implemented through the Internet, unfortunately, are constantly "improved" and modified, which requires the development of new approaches to solving the problems of ensuring the information security of minors. We are talking about the need to form a national model for ensuring the information security of a minor that best meets the challenges and threats of the modern information space, providing optimal conditions for the upbringing and development of a minor.

IV. Discussion on the Necessity for the Constitutional and Legal Model Development for Ensuring the Information Security of Minors

The information security of minors should be considered in the system of building a national model of the constitutional and legal maintenance of their rights and freedoms. We are talking about such inalienable constitutional rights of the child as the right to full development (physical, spiritual, moral, intellectual), the right to health protection (mental, physical), the right to information, the right to education, the right to access cultural values and to join in culture, etc.

The information security of the child is part of his personal security, which, according to Madlena Vorontsova, is an objective (natural-legal) level of security, which is initial and allows the child to exist as a living organism (Vorontsova, 2017, p. 40). Thus, the child's right to information security includes a whole range of rights and freedoms, primarily the right to life and health, full development. The rights of every child are constitutional values, embody the interests of future generations, the entire nation, and form the basis of the national security of our state. The implementation of the indicated rights ensures the comprehensive spiritual, moral, physical, intellectual development of the minor, his social integration, contributes to his self-expression, and provides an opportunity to exercise other constitutional rights.

The information security of children should be considered as a complex category that takes into account all the risk groups listed above. The child is integral as a person, specific as an individual, and valuable in itself as a person and must be protected from possible negative influences on him in the information space. The Constitution of the Russian Federation establishes a special status for a child (a person under the age of 18) as a subject in need of special protection. This approach is due, first of all, to the age, emotional-volitional, psychological characteristics of the child's personality, which justifies the need for special protection measures from society and the state. Ensuring the safety of the child in the context of constitutional and legal values involves the creation of a favorable environment for the life of the child.

There is a special information security regime in place for minors. Federal Law No. 124-FZ "On the basic guarantees of the rights of the child in the Russian Federation" establishes the basis for ensuring the basic constitutional guarantees of the rights and legitimate interests of the child, based on the principles of prioritizing the preparation of children for a full life in society, the development of socially significant and creative activity in them, the education of high moral qualities in them, assigns the state authorities are obliged to take measures to protect the child from information, propaganda and agitation that harm his health, moral and spiritual development (Para. 1 of Art. 14). It should be emphasized that the assignment of this duty to the state

does not exclude, but complements the duty of parents to protect and educate their children, taking measures aimed at the healthy spiritual and moral development of the child. It should be noted that there have been positive developments in the development of federal legislation to ensure the information security of children and adolescents, including on the Internet, since 2010 (Federal Law No. 436-FZ of 29.12.2010 "On the protection of children from information harmful to their health" were adopted; The Concept of Information Security of Children, 2015; Strategies for the development of the Information Society in the Russian Federation, 2008 and 2017).

The model of constitutional and legal regulation of relations in the field of ensuring the information security of a child assumes the presence of the following main elements: goals, objectives, principles of functioning, a system of subjects that provide this model, a system of guarantees, criteria and forms for fixing its effectiveness. The latter is necessary, since the goals cannot be absolutely identical to the result, and it is necessary to diagnose the success of the model. It should be taken into consideration that the legal modeling of the information security of minors is an activity scheme for achieving goals, which expresses its social significance.

As the Constitutional Court of the Russian Federation pointed out in its Judgment that "legal regulation in the field of state protection of the rights of minors implies, in particular, the existence of legislative measures aimed at ensuring the safety of each child both directly from criminal encroachments and from an adverse effect on his morality and psyche, which can significantly affect the development of his personality, even without being expressed in specific illegal acts."[2] The same goals, according to another Judgment of the Constitutional Court of the Russian Federation, necessitate the use of optimal legal tools in legal regulation, which, taking into account the requirements of Articles 17 (Part 3) and 55 (Part 3) of the Russian Constitution, "to protect child from exposure to information that can harm his health and development, in particular information associated with the aggressive

[2] Judgment of the Constitutional Court of the Russian Federation No. 19-P dated July 18, 2013. Available at: http://doc.ksrf.ru/decision/KSRFDecision135892.pdf. (In Russ.). [Accessed 13.10.2022].

imposition of specific models of sexual behavior, the formation of distorted ideas about socially recognized models of family relations that correspond to moral values generally accepted in Russian society in their constitutional and legal expression."[3]

Based on constitutional principles and priorities, the legislator, forming the main directions of legal policy, sets himself the task of ensuring the safety of minors in the information sphere, which are aimed at minimizing and eliminating the risks of the information space, at preventing the commission of illegal acts against minors through the use of Internet technologies. The safety of minors in the information space is ensured by the norms of various branches of law — constitutional, informational, civil, criminal, administrative, etc., which together form the legislative framework for legal regulation in this area.

The dynamics of the development of public relations in the digital environment in the Russian space has necessitated the adoption of a whole array of regulatory legal acts and policy documents in the field of ensuring human security as a participant and the main subject of information relations. For twenty years, Russian legislation has formed a fairly large array of legal acts aimed at ensuring the security of technological information systems, information itself as an object, as well as subjects of information legal relations as the main participants in these relations.

Despite the measures taken in the field of ensuring the safety of minors in the information environment, at present it cannot be argued that the situation in this area has been fully resolved and the problems have been exhausted. With the advent of new digital forms of interaction within the information space, the likelihood of new risk situations for a minor as a participant in information relations increases.

It should be noted that the model of constitutional and legal regulation of information security of minors is at the stage of its formation. National Security Strategy of the Russian Federation (hereinafter — the Strategy), approved by the President of the Russian Federation on July 2, 2021, Decree No. 400, calls information security one of the priorities of

[3] Judgment of the Constitutional Court of the Russian Federation No. 24-P dated September 23, 2014. Available at: http://doc.ksrf.ru/decision/KSRFDecision173469.pdf. (In Russ.). [Accessed 27.10.2022].

the national security of our state. The Strategy defines national security threats as "external cultural and informational expansion (including the distribution of low-quality mass culture products), propaganda of permissiveness and violence..." This approach is fully consistent with the constitutional principle of ensuring the information security of an individual, society, state and is dominant.

Today we should talk about the creation of the Russian model of information security of minors. It is necessary to implement the domestic model since the relationship of the safe life of the child fits into the conditions of a specific socio-cultural environment of a society built on domestic traditions, historical, spiritual and cultural values. The condition for creating a national model is the existence of constitutional provisions that determine the vectors for the development of legislation in the field of ensuring the information security of children.

The main principles of ensuring the information security of minors are:

1) *principle of the most complete provision of the rights and freedoms of a minor in the information space*, which involves the creation of favorable conditions for the development of the personality of a minor, which is implemented by recognizing a minor as an equal participant in the information space, which corresponds to international standards in this area and constitutional principles for ensuring information and related rights of a minor;

2) *principle of systematic state-legal regulation*, which involves legislative, law enforcement, executive-administrative and control activities of the state to ensure the safe implementation of the rights and legitimate interests of minors in the information environment, by pursuing a unified state policy in the field of information security;

3) *principle of complexity*, which implies the interaction of legal, organizational, economic, preventive, educational, educational and other measures to create an optimal mechanism for protecting a child in the information space;

4) *principle of continuity*, which implies the implementation of the mechanism for the protection of minors in the information space on an ongoing basis.

We believe that it is on the above principles that the constitutional and legal model for ensuring the information security of minors should be built.

V. Conclusion

The complex of existing problems in the field of ensuring the information security of minors leads to the need to form a legal model based on constitutional values. It is necessary to talk about the constitutional and legal model, which is proposed in this article and which fits into the national model of ensuring the constitutional rights and freedoms of a minor. A minor, proceeding from the spirit and meaning of the Constitution, has a constitutional right to security in the information environment, which directly affects the implementation of his other constitutional rights. The information security of a child should be considered in the national security system. We are talking about generations of young people who are able to assess the quality, reliability, integrity of information from a humanistic legal standpoint, have the ability and ability to correlate the information received with other arrays of it.

The trinity of law, governance and organization forms the basis for ensuring the information security of minors. Regulatory prescriptions presuppose public administration in the field of information management and the existence of organizational efforts by both the state and civil society institutions to achieve the goals of information security of minors. It is advisable to implement the constitutional and legal model of information security of minors taking into account the following priorities:

— legislative consolidation of the system of guarantees for the realization of the rights and freedoms of minors in the information society;

— legislative and organizational provision of protection against risks and threats to the information environment in the following areas: 1) protection of children from access to unfavorable (destructive) information; 2) protection of information about a minor from unlawful dissemination and use by third parties; 3) protection of minors from

crimes and other illegal actions committed against them with the help (through) information and communication technologies; 4) protection of minors from offenses committed by them through information and communication technologies;

— legislative and organizational support for the formation of the information culture of children and adolescents, which is the most important element of ensuring information security;

— control and supervisory provision of information security of minors.

References

Ambalova, S.A., (2019). Psychological causes of deviant behavior of adolescents: prevention and correction. *Azimut nauchnykh issledovaniy: pedagogika i psikhologiya*, 8(3)(28), pp. 317–319. (In Russ.).

Bachilo, I.L., (2016). *Information law: A textbook for academic undergraduate studies*. 5th ed., rev. and suppl. Moscow: Prospect Publ. (In Russ.).

Budanov, S.A., (2006). *Legal support of information security of minors*. Cand. Sci. (Law) Diss. Voronezh Institute of the Ministry of Internal Affairs. Voronezh. (In Russ.).

Bukalerova, L.A., Ostroushko, A.V., and Shagieva, R.V., (2021). Counteraction to Dangerous Infringements on Children's Rights and Interests in the Information Sphere in the Context of the Digital Transformation of Management in Russia. In: *Socio-economic Systems: Paradigms for the Future*. Collection of Articles, 314, pp. 1239–1247.

Chebotareva, A.A., (2017). *Legal support of personal information security in the global information society*. Dr. Sci. (Law) Diss. Institute of State and Law of the Russian Academy of Sciences. Moscow. (In Russ.).

Chesnokov, A.A. and Akimysheva, E.S., (2015). The role of the internal affairs bodies in the mechanism of ensuring the information security of the child. *Altaiskiy yuridicheskii vestnik*, 3(11), pp. 139–142. (In Russ.).

Efimova, L.L., (2019). Legal regulation of information security of children in the UK. *Pravo i gosudarstvo: teoriya i praktika* [Law and State: Theory and Practice], 11(179), pp. 121–131. (In Russ.).

Feldshtein, D.I., (2004). *Psychology of growing up: Structural and content characteristics of personality development*. Selected Works: 2nd ed. Moscow: Moscow Psychological and Social Institute: Flint Publ. 672 p. (In Russ.).

Golubeva, L.M., (1985). Causes of offenses among youth and measures to eliminate them. In: Golubeva, L.M. *Offenses among youth and measures to prevent them*. Kirgiz SSR Case. Frunze: Ilim Publ. Pp. 42–60. (In Russ.).

Ivanov, S.V., (2011). Information security of children (theoretical and legal aspect). *Vestnik Ekaterininskogo instituta* [Bulletin of the Catherine Institute], 2(14), pp. 62–66. (In Russ.).

Kuznetsov, P.U., et al., (2020). Information technologies in legal activity. 3rd ed., rev. and suppl. Moscow: Urayt Publ. (In Russ.).

Makhovskaya, O.I. and Marchenko, F.O., (2017). The influence of educational media on the development and viability of children. *Institut psikhologii Rossiiskoy Akademii nauk. Organizatsionnaya psikhologiya i psikhologiya truda. [Institute of Psychology of the Russian Academy of Sciences. Organizational psychology and psychology of work]*, 2(2), pp. 201–224. (In Russ.).

Minbaleev, A.V., (2019). The impact of constitutional rights and freedoms of man and citizen on the development of information law in the context of the digitalization of modern society. In: *Legal education and legal science in Russia: Current trends and development prospects (To the 15th Anniversary of the Faculty of Law of Kursk State University)*, pp. 204–212. (In Russ.).

Rean, A.A., (2012). Teen subculture is a zone of potential risks. *Psikhologicheskaya nauka i obrazovanie [Psychological science and education],* 17(4), pp. 5–10. (In Russ.).

Rybakov, O.Yu. and Rybakova, O.S., (2019). Principles of information security of a child on the Internet. *Studies in Computational Intelligence*, Vol. 826, pp. 427–433.

Rybakova, O.S., (2020). Safety of minors in the information society: analysis of cyber risks and threats. *Monitoring pravoprimeneniya* [Monitoring of Law], (35), pp. 65–73. (In Russ.).

Saltykova-Volkovich, M.V., (2016). Causes and features of deviant behavior. *Vestnik Polotskogo gosudarstvennogo universit*eta. *Seriya* E. *Pedagogicheskie nauki*, 15, pp. 24–28. (In Russ.).

Sobkin, V.S. and Fedotova, A.V., (2019). Adolescent aggression in social media: Perception and personal experience. *Psikhologicheskaya nauka i obrazovanie [Psychological science and education]*, 24(2), pp. 5–18, https://doi.org/10.17759/pse.2019240201. (In Russ.).

Soldatova, G., Rasskazova, E., Zotova, E., Lebesheva, M., and Roggendorf, P., (2012). *Children of Russia Online: risks and safety. Results of the international project EU Kids Online in Russia*. Available at: http://psypublic.com/assets/files/EU-Kids-Online-II-inRussia.pdf [Accessed 12.10.2022].

Vorontsova, M.A., (2017). Personal safety of minors as a constitutional value. *Probely v rossiyskom zakonodtelstve [Gaps in Russian Legislation]*, 5, pp. 40–43. (In Russ.).

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Article

DOI: 10.17803/2713-0533.2023.1.23.179-198

International Legal Mechanisms for the Protection and Promotion of Women's Rights in Latin America and the Caribbean

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Abstract: At both universal and regional levels, women are identified as a vulnerable category of individuals, as they are at the increased risk of becoming victims of human rights violations. Historical experience points to practices and traditions that have purposely limited women's rights, resulting in entrenched stereotypes against women. The most acute form of violation of women's rights is gender-based violence. In 2021, at least 4,473 women in Latin America and the Caribbean were victims of feminicide,[1] an extreme and deadly form of gender-based violence. The purpose of this article is to analyze the Inter-American international legal mechanisms for the protection and promotion of women's rights. Both universal international legal instruments and regional Inter-American agreements provide mechanisms that enable individuals, whose rights were violated as a result of discrimination or violence, to submit individual communications. In addition, both universal mechanisms and regional Inter-American mechanisms promote the gender agenda in Latin America and the Caribbean, as well as the implementation of international law in national legislation. The in-depth analysis of Inter-American mechanisms for the protection and promotion of women's rights reveals both the system's unique features and its shortcomings. In particular, the two-level system of individual

[1] ECLAC. Gender affairs. Press release. ECLAC: At Least 4,473 Women Were Victims of Femicide in Latin America and the Caribbean in 2021. Available at: https://www.cepal.org/en/pressreleases/eclac-least-4473-women-were-victims-femicide-latin-america-and-caribbean-2021 [Accessed 15.01.2023].

communications submission means that not all cases, which deal with the protection of women's rights against violence, reach the Inter-American Court of Human Rights. Moreover, the insignificant number of cases of women's rights violations heard before the Court points to the weak law enforcement practice within the existing Inter-American mechanisms. In addition to the Inter-American regulation within the framework of the OAS, this article examines the activities of integration sub-regional unions, such as Mercosur and the Andean Community. In particular, these integration unions, as well as ECLAC — the Economic Commission for Latin America and the Caribbean, contribute to gender equality and the empowerment of women within the region.

Keywords: women's rights; protection and promotion; vulnerable groups; Organization of American States (OAS); international treaties; Inter-American mechanisms; Inter-American Commission of Women; Inter-American Commission on Human Rights; Inter-American Court of Human Rights; sub-regional level; Mercosur; Andean Community; Economic Commission for Latin America and the Caribbean (ECLAC)

Cite as: Bekyashev, D. and Sheremet ***N.***, (2023). International Legal Mechanisms for the Protection and Promotion of Women's Rights in Latin America and the Caribbean, *Kutafin Law Review*, 10(1), pp. 179–198, doi: 10.17803/2713-0533.2023.1.23.179-198.

Contents

I. Women as a Vulnerable Category of the Population in International Law

There is a global understanding that women are among the most vulnerable populations. The norms of modern international law do not establish the concept of "vulnerability" and do not provide an exhaustive list of criteria by which individuals could be identified as a vulnerable

group. As a rule, the basis for defining the concept includes a factor that predetermines vulnerability. According to the definition provided by the World Health Organization (WHO), a "vulnerable population" is a group or part of a society, which is at a greater risk than other groups, or the rest of the society to be subjected to discriminatory measures, violence, natural disasters or economic crises (Wisner and Adams, 2002, p. 20).

It is obvious that in defining the legal nature of the concept of "vulnerable groups" it is necessary to take into account that such legal insecurity is predominantly observed among certain categories of people. However, according to V.A. Kartashkin, the group does not arise on its own due to physical features of an individual. Its creation is also influenced by "widespread violations of democratic norms and human rights." It should be emphasized that we should talk about the fulfilment of the whole range of rights, both civil and political as well as social, economic and cultural (Kartashkin, 2011, pp. 8–10).

The essence of the concept of "vulnerable populations" provides an exhaustive list of persons who on the basis of their intrinsic characteristics can be placed in a particular group. Their individual physical or mental characteristics, being under the influence of external factors beyond their control, different degrees of vulnerability of each of them serve as a basis for including them in vulnerable groups. Such populations are known to the entire global community and their varying degrees of vulnerability and they are recognized by each state. Vulnerability of an individual or population group means, first of all, a higher risk of becoming a victim of violation of human rights and freedoms, including being limited in their ability to exercise the rights and freedoms guaranteed to everyone, compared to others due to objective external factors and/or existing physical or psychological characteristics (Alisiyevich, 2012, pp. 16–27). For example, some authors refer to women and girls as a vulnerable group on the basis of gender. This category of people is most often subjected to violence, which undermines their social, physical and psychological well-being (Taus, 2014).

The term "vulnerable groups" emerged in international law in the second half of the 20th century. Gradually, with the development of

international law, such categories as women, children and adolescents, migrant workers, refugees, stateless persons, persons with disabilities, national minorities and indigenous populations came to be singled out as separate vulnerable groups. It should be noted that before this term was mentioned in international documents, the international community had not included these persons specifically in vulnerable groups. Currently, this term is increasingly being used in international legal sources devoted to human rights, and is also actively used in various documents of the UN and other international organizations, as well as in the reports of international conferences (Mikrina and Bekyashev, 2019). In the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (the 2018 Escazú Agreement) the term "vulnerability" applies to indigenous peoples and environmental advocates, who require special measures of protection (Solntsev and Otrashevskaya, 2020).

It is noteworthy that until the early twentieth century, women's rights were seen as part of the rights conferred on men. For example, some rights were acquired by women upon marriage. Women also enjoyed a limited range of rights that did not include the right to vote. This state of affairs led to the historical exclusion of women and discrimination against them (Badilla, 2004, pp. 91–95).

The UN General Assembly organized the first World Conference on Women in 1975 as part of the International Year of Women in Mexico City, Mexico. On the recommendation of the Conference, the period from 1976 to 1985 was declared the United Nations Decade for Women.

In 1979, the UN General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women, often referred to as the international bill of rights for women. The Fourth World Conference on Women, held in 1995 in Beijing, China, adopted several documents that called for the advancement of women. In particular, the Beijing Declaration and Platform for Action covered twelve areas of concern for women: poverty, education and vocational training, health, violence, armed conflict, the economy and power, human rights.[2] According to the Declaration, girls are the most "vulnerable" among females.

[2] UN Women. Beijing Declaration and Platform for Action. 2014. P. 35–38.

The Nairobi Forward-Looking Strategies for the Advancement of Women,[3] which were adopted at the World Conference on Women to review and appraise the achievements of the United Nations Decade for Women in 1985, identified a group of vulnerable women and included in it young women, elderly women, women living in arid areas, poor urban women, abused, trafficked, physically and mentally disabled women, migrant women.[4]

The UN Commission on the Status of Women, which was established by the Economic and Social Council (ECOSOC) in 1946, is the main intergovernmental body at the universal level whose activity is dedicated exclusively to the promotion of gender equality and the empowerment of women. It plays an important role in promoting women's rights, documenting the situation of women around the world, and setting global standards for gender equality and women's empowerment.

There is a structural unit within the UN called "UN Women," created in 2010 by the UN General Assembly to promote the elimination of gender inequalities and the empowerment of women in all spheres of public life. It brings together four UN entities: the UN Development Fund for Women, the Division for the Advancement of Women, the Office of the Special Adviser on Gender Issues and Advancement of Women and the United Nations International Research and Training Institute for the Advancement of Women.

It should be noted that all UN efforts are currently focused on the Sustainable Development Goals (SDGs). In each of the seventeen SDGs, women have a critical role to play, with many of the targets directly aimed at recognizing women's equality and contributing to their empowerment, both as a goal and as actors in achieving it. For example, Goal 5 explicitly deals with gender equality and the empowerment of all women and girls. However, despite all the efforts,

[3] The Nairobi Forward-looking Strategies for the Advancement of Women (excerpts). Report of the World Conference to Review and Appraise the Achievements of the United Decade for Women: Equality, Development and Peace. Nairobi, 15–26 July 1985. Available at: https://www.un.org/unispal/document/auto-insert-207862/ [Accessed 15.01.2023].

[4] World Conference to review and appraise the ahcievements of the United Nations Decade for Women: Equality, Development and Peace. A/CONF.116/28/Rev. 1985. P. 3.

there are serious difficulties in achieving this Goal. The UN released The Sustainable Development Goals Report 2022, which highlights the most challenging issues in achieving this Goal 5 and the changes that have taken place. In particular, it is stated that the world is not on track to achieve gender equality by 2030, and the social and economic fallout from the pandemic has made the situation even bleaker. Progress in many areas, including time spent on unpaid care and domestic work, decision-making regarding sexual and reproductive health, and gender-responsive budgeting, is falling behind. Women's health services, already poorly funded, have faced major disruptions. Violence against women remains endemic. And despite women's leadership in responding to Covid-19, they still trail men in securing the decision-making positions they deserve.[5]

Under the 2030 Global Agenda for Sustainable Development and Inclusive Peace, the UN is assisting many states on the vulnerabilities of different groups. In particular, the Joint Programme on Integrated Local Development in the provisions of Community Mobilization for the Empowerment of Vulnerable Women and Men states that vulnerability is often linked to "fault lines" in society. Fault lines are conventional boundaries that formally divide society into groups based on certain characteristics, such as language, social status, income, gender and age. Sometimes the characteristics of groups separated by fault lines are transformed into vulnerability criteria, and such groups are subsequently defined as vulnerable.[6] We should emphasize that the UN is currently paying close attention to the problem of combating violence against women, considering it one of the most acute violations of women's rights and freedoms. Among the current issues a special place belongs to the phenomenon of harassment, understood both in a narrow sense (as sexual harassment) and in a broader sense (foul language, insulting remarks, psychological harassment, etc.) (Tarusina et al., 2022).

The 1993 UN General Assembly Declaration on the Elimination of Violence against Women contains a definition of violence against women and a clear statement of rights to ensure the elimination of

[5] The Sustainable Development Goals Report 2022. United Nations, 2022. P. 36.

[6] Joint Integrated Local Development Programme. Community Mobilisation for the Empowerment of Vulnerable Women and Men. Moldova. 2012. P. 9–10.

violence against women in all its forms. The Declaration reflected the determination of states to fulfil their obligations and the commitment of the international community as a whole to eliminate violence against women. In addition to the United Nations, the International Labour Organisation (ILO) has also focused on this issue at a universal level. Above all, the ILO focuses on eliminating gender-based violence in the workplace, and it is clear that women tend to be more affected by it. In June 2019, the ILO adopted the Convention concerning the elimination of violence and harassment in the world of work No. 190, which entered into force on 25 June 2021. This international legal instrument introduces a definition of violence and harassment in the world of work for the first time. An essential prerequisite for eliminating violence and harassment in the workplace is the recognition that gender-based violence and harassment disproportionately affect women. In this case, an inclusive, comprehensive and gender-sensitive approach would help to address the root causes and risk factors of this phenomenon at work (Mikrina, 2021, pp. 10–23).

II. Protection of Women's Rights within the OAS

The protection and promotion of women's rights has been a focus of attention not only at the universal level, but also at the regional level, including the Inter-American level. The Organization of American States (OAS), which was established in 1948, has made significant progress in the legal regulation of these issues. The legal framework for the protection of women's rights within the OAS is the American Declaration of the Rights and Duties of Man, 1948; the American Convention on Human Rights, 1969; the Inter-American Convention on Political Rights for Women, 1948; the Inter-American Convention on Civil Rights for Women, 1948; and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, 1994 (the Belém do Pará Convention).[7] The Inter-

[7] *Convención* Interamericana para prevenir, sancionar y erradicar la violencia contra la mujer, *"Convención de Belem do Para"* Hecha en la ciudad de Belem do Para, Brasil, el nueve de junio 1994. Available at: https://www.oas.org/juridico/spanish/tratados/a-61.html [Accessed 15.01.2023].

American system for the protection of women's rights began to take shape in 1928, when the Inter-American Commission of Women was established (CIM). In subsequent years, the OAS also established the Inter-American Commission on Human Rights in 1959 and the Inter-American Court of Human Rights in 1979.

The Inter-American Commission of Women has the status of a specialized entity of the OAS. It is a forum for discussing issues and developing policies related to women's rights and gender equality. The Commission's functions are to provide advice and technical support to member states in their implementation of international, universal and Inter-American commitments in the area of women's rights, gender equality and equity. The Commission helps member states to provide full and equal opportunities for the participation and representation of women in the civil, political, economic, social and cultural spheres of society. This body participates in the development of international and Inter-American legal and institutional regulation of issues related to women's rights and gender equality. The Commission also promotes the adoption and amendment of national legislation to combat all forms of discrimination against women.

Throughout its history, the Inter-American Commission of Women has been active in recognizing women's rights in the region. It was through its efforts that treaties on women's rights and protection against violence and discrimination were negotiated at the Inter-American level (Suchkova, 2018). At the Seventh International Conference of American States in 1933, the Inter-American Commission of Women promoted the adoption of the Inter-American Convention on the Nationality of Women, which was the first legal instrument for the protection of women's rights. In 1948, the Ninth International Conference of American States adopted the Inter-American Convention on the Granting of Political Rights to Women and the Inter-American Convention on the Granting of Civil Rights to Women, the texts of which were drawn up by the Commission. In the 1990s, the concept of the protection of women's rights against discrimination and violence became universal. In this context, the Inter-American Women's Commission participated in the development of a regional instrument aimed at protecting women's rights, the Belém do Pará Convention of 1994. In addition to its normative work, the

Inter-American Commission of Women has contributed significantly to ensuring that women have access to civil, political, economic, social and cultural rights on equal terms with men. In addition, the Commission is mandated to seek an advisory opinion from the Inter-American Court of Human Rights on the interpretation of the Belém do Pará Convention (Salvioli, 2013, pp. 276–285).

It should be noted that the Commission consists of the Assembly of Delegates, one candidate representing each of the OAS Member States. The Assembly of Delegates elects a Coordination Committee, which consists of nine members and meets twice a year. During the last session of the Assembly, which took place on 25–26 May 2022, a Declaration on a Framework for a New Social and Economic Compact Developed under the Leadership of Women was adopted. At the initiative of the Commission, ministers from OAS member states have met several times to discuss policies aimed at protecting women's rights and relevant legislation in these states. One of these meetings resulted in the adoption of the Draft Inter-American Program for the Promotion of Women's Rights and Gender Justice and Equality, which was approved by the OAS General Assembly in June 2000.

It is also important to note the meetings that the Commission holds with civil society representatives. One of the most recent meetings took place on 3 November 2022, which included a high-level dialogue with women human rights defenders from international, national and civil society organizations. It resulted in the adoption of the Pathways to Peace and Security Forged by Women: An Agenda for the Americas.

The work of the Special Rapporteur on the Status of Women plays an important role in the protection of women's rights in the Inter-American system. This mandate was created by the Inter-American Commission on Human Rights in 1994 to analyze, report and make recommendations to states on their legislation and practices regarding the protection of women's rights. In addition to engaging with states, the Special Rapporteur plays an important role in the Commission's reporting on the human rights situation in OAS member states from a gender perspective. In addition, the Rapporteur conducts field visits to collect information, which he includes in his reports, and also assists the Commission in developing relevant recommendations.

An important role in the protection of women's rights in the OAS is also played by the Inter-American Commission on Human Rights, which has been the main body of the Organization for the protection and promotion of human rights since its establishment. It is responsible for field visits to monitor the human rights situation, preparing annual and special reports to be submitted to the OAS General Assembly, adjudicating complaints (since 1979), and then transmitting them to the Court. In the early decades, the Commission's law enforcement practice was aimed at protecting the civil and political rights of OAS member states due to the tense political situation in the region. In the 1980s, the Commission actively monitored economic, social and cultural rights. In the 1990s, this body started to pay particular attention to vulnerable groups, including women. Achieving gender equality through women's rights was one of the Commission's priorities (Abashidze, 2012, pp. 297–321). For example, in 1996 the Commission included for the first time in its report on the human rights situation in Brazil a section on the situation of women's rights in that state, due to the entry into force of the Belém do Pará Convention in 1995. Since 1996, each OAS member state has devoted a separate section to the protection of women's rights in its annual human rights report.

It should be noted that prior to the entry into force of the 1994 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women also known as the Belém do Pará Convention, the Inter-American Commission on Human Rights and the Human Rights Court could make decisions that affected women's rights based on the 1969 American Convention on Human Rights (Pact of San José) (Instituto Interamericano de Derechos Humanos, 2004, pp. 107–124). At the same time, it lacks specific provisions to protect women's rights as a separate category of persons.

Another component in the OAS mechanism for the protection of women's rights is the Inter-American Court of Human Rights. However, there is currently little case law on the protection of women's rights in the Inter-American system (Bautista, 2018). The first decision in which the Inter-American Court ruled that Peru was internationally responsible for failing to fulfil its obligations to protect women from sexual violence was in the case of *Castro v. Peru* in 2006. The case

of *Maria De Peña v. Brazil*[8] is also worth noting. It came before the Commission in 1998, and it was is the first case in the history of the Inter-American human rights protection system in which a person invoked a violation of the Belém do Pará Convention. The individual was a victim of domestic violence. In 2001, the Inter-American Commission on Human Rights issued a ruling in the case of *Maria De Peña v. Brazil* condemning impunity for acts of domestic violence against women and pointing to its pervasive nature as a result of the state's inaction. It is important to emphasize that protection against domestic violence in the Inter-American system is provided by the Belém do Pará Convention. Nevertheless, in a similar case[9] the Court ruled that the American Convention on Human Rights had been violated because the state had failed in its obligation to investigate in good faith violations of rights protected by this Convention. This is not the only situation that points to a discrepancy between the positions of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (López Vega, 2002).

In addition to the above, the case of *Loayza Tamayo v. Peru*[10] should also be mentioned. In this case, the Court held that Peru had violated the provisions enshrined in the American Convention on Human Rights concerning personal liberty, security of the person and judicial guarantees (Art. 1.1, 7, 25). However, at the stage of examination of the case, the Inter-American Commission on Human Rights ruled that the state was responsible for rape, which is qualified as a form of torture. Nevertheless, the Court did not find rape to be proven.

[8] La Corte Interamericana de Derechos Humanos. Caso *Maria da Penha Maia Fernándes contra Brasil*. Informe Final de la CIDH nº 54/01 Caso 12.051. Available at: http://web.justiciasalta.gov.ar/images/uploads/Caso%20Maria%20Da%20Penha.pdf [Accessed 15.01.2023].

[9] La Corte Interamericana de Derechos Humanos. *Caso Velásquez Rodríguez vs. Honduras*. Sentencia de 29 de julio de 1988 (Fondo). Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_04_esp.pdf [Accessed 15.01.2023].

[10] La Corte Interamericana de Derechos Humanos. *Maria Elena Loayza Tamayo contra Perú*. Sentencia sobre el fondo del asunto, 17 septiembre 1997, Serie C, nº 33. Available at: https://corteidh.or.cr/docs/casos/articulos/seriec_47_esp.pdf [Accessed 15.01.2023].

The advisory opinions of the Inter-American Court of Human Rights play an important role in protecting women's rights. The first Gender Advisory Opinion was issued in 1983[11] and dealt with unequal marriage conditions for foreigners in Costa Rica. It is worth noting that both the OAS member states themselves and the Inter-American Commission of Women and the Inter-American Commission on Human Rights may request advisory opinions regarding the interpretation of the provisions of the 1969 American Convention on Human Rights and other instruments in the field of human rights protection in the OAS, as well as regarding provisions of national legislation of member states.

It is reasonable to note that the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights are independent monitoring bodies of the Inter-American system, while only the Inter-American Court has jurisdictional functions. The Inter-American Court has the power to review the Commission's conclusions not only on questions of law but also on the facts of the case (Kon, 2011).

Among the existing OAS international legal instruments on women's rights, the previously mentioned 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (the Belém do Pará Convention) is worth highlighting. This is the first international treaty within the OAS to address the protection of women's rights against all forms of gender-based crimes, discrimination and violence. The Convention provides obligations for the OAS member states to take certain measures to prevent, punish and eradicate violence. Violations by states of their obligations under this Convention entitle individuals and non-governmental organizations to file a petition against the state through the petition mechanism of the Inter-American Commission on Human Rights, invoking Article 7 of the Convention. Under this article, state parties condemn all forms of violence against women and agree to take without delay all appropriate means and measures to prevent, punish and eradicate such violence, and to refrain from any act or practice of violence against women and to ensure that authorities, officials, personnel, agents of the state and

[11] La Corte Interamericana de Derechos Humanos. Opinión consultiva OC-4/84 del 19 de enero de 1984. Available at: https://corteidh.or.cr/docs/opiniones/seriea_04_esp.pdf [Accessed 15.01.2023].

institutions conduct themselves in conformity with this obligation; to act with due diligence to prevent, investigate and punish violence against women; and to incorporate in their national legislation such legal measures as are necessary to prevent, punish and eradicate violence against women.

In order to effectively implement the provisions of the Belém do Pará Convention, in 2004 a permanent and independent monitoring mechanism was established to monitor the implementation by state parties of their obligations under the Convention, called the Follow-up Mechanism to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (MESECVI in Spanish — Mecanismo de Seguimiento de la Convención de Belém do Pará; ME — Mecanismo, SE — Seguimiento, C — Convención, VI — Violencia). The Mechanism is a forum for the ongoing dialogue and technical cooperation between state parties to the Convention and the Committee of Experts. It reviews states' efforts to implement and enforce the standards of the Belém do Pará Convention in national law (Araya, 2018). The main purpose of the Mechanism is to identify persistent challenges that hinder effective action against violence against women.

The mechanism is based on the work of the Committee of Experts and the Conference of state parties to the Convention. The Committee is responsible for preparing three types of reports on women's rights to life without violence and the implementation of the Belém do Pará Convention: national reports, that is, reports on the protection of women's rights in states parties to the Convention; hemispheric reports (Informes Hemisféricos in Spanish), which include all national reports; and reports on the implementation of the Committee's recommendations. The Inter-American Commission of Women acts as the Secretariat of the Commission of Experts. The Conference of State Parties to the Belém do Pará Convention hosts sessions of representatives of States that have signed and ratified the Convention. They discuss national reports and recommendations prepared by the Committee of Experts, endorse and adopt hemispheric reports, review current issues regarding the functioning of the Mechanism and exchange ideas on the implementation of the provisions of the Convention. Both the Committee of Experts and the Conference of State Parties meet in sessions.

III. Protection of Women's Rights at the Latin American and Sub-Regional Level

The Inter-American system for the protection of women's rights has also been influenced by the activities of integration unions such as the Common Market of the South (Mercosur) and the Andean Community, which represent a subregional level of cooperation among South-American states. Mercosur is not an international intergovernmental organization. It brings together Argentina, Brazil, Uruguay, Paraguay, Venezuela and Bolivia. It includes the Mercosur Cities Network Gender Sector, which works in partnership with the UN Human Settlements Program (UN-Habitat) to ensure the full participation of women in the democratic process in Mercosur member countries, and through this, to broaden the scope of this process by involving all citizens. To achieve this goal, the partnership is developing tools to integrate a gender perspective into public policy, particularly at the municipal level. At the same time, women's capacity for local leadership is being strengthened and women's participation in decision-making at the local level is increasing. In its turn, the Andean Community is an international intergovernmental organization comprising Bolivia, Colombia, Ecuador and Peru. It has accumulated integration potential and is undoubtedly one of the most dynamic integration organizations (Bekyashev and Bekyashev, 2020). With regard to women's rights, in 2003 the Andean Community adopted Guidelines for an Integrated Social Development Plan, which aim to promote social development goals and objectives, including those aimed at promoting the rights of women and girls.

In addition to these integration associations, the work of the Economic Commission for Latin America and the Caribbean (ECLAC) cannot be overlooked. It was created by the ECOSOC in 1948 and it has 46 member states. ECLAC was founded to promote the economic development of Latin America and the Caribbean, to coordinate actions towards this objective and to strengthen economic relations between countries and other peoples of the world. ECLAC organizes and hosts regional conferences on women's rights in Latin America and the Caribbean in various member states. To date, fifteen conferences have been held, the most recent one took place in November 2022. In 2010,

for example, the Eleventh Regional Conference adopted a document entitled "The Brazilian Consensus." It calls for women's economic empowerment and equality in the workplace, greater participation of women in political processes and the elimination of all forms of violence against women. This document also calls on Latin American and Caribbean states to adopt preventive and punitive measures as well as measures of protection and care for women subjected to violence and to guarantee effective access to justice and legal assistance for women in violent situations. It also urges an increase in women's civic position and participation in decision-making. Furthermore, ECLAC member states should seek to exchange and disseminate experiences in order to develop public policies to promote gender equality.

IV. Conclusion

In international law, women are considered as a vulnerable group. For historical reasons and on the basis of their gender, women and girls are subjected to physical, sexual and psychological abuse. This category of individuals faces discrimination in both the private and public spheres.

At the Inter-American level, the OAS has adopted international instruments, both general and special, aimed at the protection and promotion of women's rights. A system of mechanisms for the protection of women's rights, including three bodies — the Inter-American Commission of Women, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights — has been established and it is functioning nowadays within this Organization. In addition, the role of the Special Rapporteur on the Status of Women, who works closely with the Inter-American Commission on Human Rights to prepare country reports, should be noted.

Certainly, the Inter-American Commission of Women has a key place in the system of institutions. In particular, it is directly involved in the drafting and adoption of international legal instruments and recommendatory instruments that relate to gender equality and the protection of women's rights. A comparative legal analysis of the Inter-American Court of Human Rights and the Inter-American Commission

on Human Rights reveals a lack of uniformity in cases which deal with women's rights, in particular, on the prevention of violence. This is reflected in the fact that the Court refers to the 1969 American Convention on Human Rights as a source when examining cases on the merits, while the Commission refers to the 1994 Belém do Pará Convention. In addition, according to several authors, non-compliance with the decisions of these monitoring bodies is a serious problem. States in the region should enact domestic legislation to enforce the decisions of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (Kheyfets and Khadorich, 2015).

It is extremely important to stress that the OAS special bodies for the protection of women's rights contribute greatly to the protection of women against violence by promoting the codification and progressive development of international law in this field. The Inter-American Commission of Women and the Follow-up Mechanism to the Belém do Pará Convention jointly draft model laws,[12] action plans, and agendas for the protection of women's rights in the region. In addition, these bodies cooperate with the N and prepare joint thematic reports. In particular, the "Report on Discriminatory Civil and Family Law Provisions in Latin America"[13] prepared by the two aforementioned OAS mechanisms together with UN Women in 2022 should be noted.

At the same time, despite the abovementioned achievements of the Inter-American system for the protection and promotion of women's rights, it should be said that the system has its shortcomings. First, an analysis of the activities of the Inter-American Commission of Women and the Follow-up Mechanism to the Belém do Pará Convention points to overlaps in certain functions. Second, the OAS women's rights monitoring mechanisms lack dynamism in the area of law enforcement.

[12] Ley Modelo Interamericana para Prevenir, Sancionar y Erradicar la Violencia contra las Mujeres en la Vida Política. CIM, MESECVI, 2017. Available at: https://www.oas.org/es/cim/docs/LeyModeloViolenciaPolitica-ES.pdf [Accessed 15.01.2023].

[13] Informe Derecho Civil y Familiar Discriminatorio en América Latina. Análisis de legislación civil y familiar en relación con la obligación de prevenir, atender, sancionar y reparar la violencia contra las mujeres por razones de género. Available at: https://belemdopara.org/wp-content/uploads/2022/11/Informe-Derecho-Civil-y-Familiar-discriminatorio-en-AL.pdf [Accessed 15.01.2023].

In carrying out their monitoring functions, they provide an in-depth analysis of the policies and national legislation of the OAS member states to ensure the protection of women's rights, but they do not adequately address the mechanism of individual communications. As a result, petitions submitted by women alleging violations of their rights are dealt with by the Inter-American Commission on Human Rights and are rarely brought before the Inter-American Court of Human Rights, as evidenced by the low number of decisions issued in such cases.

References

Abashidze, A.Kh., (2012). *Regional systems of human rights protection*. Moscow: RUDN Publ. (In Russ.).

Alisiyevich, E.S., (2012). *Promotion and protection of vulnerable groups in international law*. Moscow: RUDN Publ. (In Russ.).

Araya, M.V., (2018). El derecho internacional frente a la violencia de género [International law in the face of gender-based violence], *Revista IIDH (Instituto Interamericano de Derechos Humanos)*, 68, pp. 111–140. (In Span.).

Badilla, A.E. and García, I.T., (2004). *La protección de los derechos de las mujeres en el Sistema Interamericano de Derechos Humanos [The Protection of Women's Rights in the Inter-American Human Rights System]*. Instituto Interamericano de Derechos Humanos. (In Span.).

Bekyashev, K.A. and Bekyashev, D.K., (2020). The legal nature of international integration associations. *Vestnik Tomskogo gosudarstvennogo universiteta*, 455, pp. 199–207, doi: 10.17223/15617793/455/27. (In Russ.).

Instituto Interamericano de Derechos Humanos, (2004). *Los derechos humanos de las mujeres: Fortaleciendo su promoción y protección internacional [Women's Rights: Strengthening their Promotion and International Protection]*. San José, C.R.: Instituto Interamericano de Derechos Humanos. (In Span.).

Kartashkin, V.A., (2011). *Human Rights: International Protection in the Conditions of Globalization*. Moscow: Norma: Infra-M Publ. (In Russ.).

Kheyfets, V.L. and Khadorich, L.V., (2015). Dostizheniya i problemy mezhamerikanskoy sistemy zashchity prav cheloveka v novom regional'nom kontekste [Achievements and challenges of the Inter-American human rights protection system in the new regional context]. *Vestnik Sankt-Peterburgskogo universiteta*, 6(3), pp. 99–112. (In Russ.).

Kon, G.I., (2011). *Organizatsionnaya struktura i poryadok funktsionirovaniya Mezhamerikanskogo suda po pravam cheloveka [Organizational structure and procedures of the Inter-American Court of Human Rights].* PhD Thesis. Moscow: Moscow State Institute of International Relations (University) Publ. (In Russ.).

López Vega, L.C., (2002). Mecanismos de protección de los derechos humanos de las mujeres en el sistema interamericano [Mechanisms for the protection of women's rights in the Inter-American system]. *Revista IIDH (Instituto Interamericano de Derechos Humanos),* 36, pp. 75–102. (In Span.).

Mikrina, V.G. and Bekyashev, D.K., (2019). Osobennosti zashchity uyazvimykh grupp naseleniya v mezhdunarodnom prave [Features of protection of vulnerable groups in international law]. *Advances in Law Studies,* 7(1), pp. 46–50. (In Russ.).

Mikrina, V.G., (2021). *Zashchita trudovykh prav naiboleye uyazvimykh grupp naseleniya v mezhdunarodnom prave [Protection of the labour rights of the most vulnerable groups in international law].* Moscow: Prospekt Publ. (In Russ.).

Mora Bautista, M.I., (2018). La violencia contra la mujer. Una Exploración de los Pronunciamientos de la Corte Interamericana de Derechos Humanos referente a la Convención Interamericana para Prevenir, Sancionar y Erradicar la Violencia contra la Mujer desde 2006 hasta 2018 [Violence against Women. An Exploration of the Decisions of the Inter-American Court of Human Rights on the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women from 2006 to 2018]. *Revista de la Facultad de Derecho de Mexico*, 1, pp. 461–488. (In Span.).

Salvioli, F., (2013). La competencia consultiva de la Corte Interamericana de Derechos Humanos marco legal y desarrollo jurisprudencial [The advisory jurisdiction of the Inter-American Court of Human Rights — legal framework and jurisprudential development].

El Debido Proceso Legal. Instituto de Derechos Humanos, Universidad Nacional de la Plata, 1. (In Span.).

Solntsev, A.M. and Otrashevskaya, A.M., (2020). Soglasheniye Eskasu kak novyy etap v razvitii mekhanizmov zashchity ekologicheskikh prav cheloveka v regione Latinskoy Ameriki i Karibskogo basseyna [The Escazú Agreement as a New Stage in the Development of Mechanisms for the Protection of Environmental Human Rights in the Latin America and the Caribbean]. *Zhurnal zarubezhnogo zakonodatelstva i sravnitelnogo pravovedeniya* = Journal of Foreign Legislation and Comparative Law, 6, pp. 146–161, doi: 10.12737/jflcl.2020.058. (In Russ.).

Sovmestnaya programma integrirovannogo mestnogo razvitiya. Mobilizatsiya soobshchestv dlya rasshireniya prav i vozmozhnostey uyazvimykh grupp zhenshchin i muzhchin (2012). [Joint Integrated Local Development Programme Community Mobilisation for the Empowerment of Vulnerable Women and Men]. Moldova. (In Russ.).

Suchkova, I.I., (2018). Deyatelnost Mezhamerikanskoy komissii zhenshchin po prodvizheniyu prav zhenshchin i gendernogo ravenstva v Latinskoy Amerike [Activities of the Inter-American Commission of Women for the Promotion of Women's Rights and Gender Equality in Latin America]. In: *Sbornik materialov vserossiyskoy molodezhnoy nauchnoy konferentsii "Gumanitarnaya diplomatiya: lichnost, sotsium i mir"*. Ekaterinburg: Izdatel'stvo Uralskogo universiteta. Pp. 359–365. (In Russ.).

Tarusina, N.N., Ivanchin, A.V., Isaeva, E.A., Koneva, E.V., and Simonova, S.V., (2022). Women in the Domain of Law in Russia: Emancipation and Counter-Emancipation. *Kutafin Law Review,* 9(4), pp. 740–773, doi: https://doi.org/10.17803/2313-5395.2022.4.22.740-773.

Taus, P.A., (2014). La igualdad de género y el acceso a la justicia de las mujeres víctimas de violencia en la región dentro del sistema interamericano de protección de los derechos humanos [Gender equality and access to justice for women victims of violence in the region within the Inter-American system of human rights protection]. *Revista del Instituto de Ciencias Juridicas de Puebla*, 34, pp. 21–41.

Wisner, B. and Adams, J., (2002). *Environmental health in emergencies and disasters*. A Practical Guide. Malta.

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Article

DOI: 10.17803/2713-0533.2023.1.23.199-216

Trafficking in Women and Girls on a Global Level under International Law

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Abstract: Human trafficking as a term is often used in everyday life. As a manifestation of organized crime, it is a form of modern slavery and affects all states, both developing and developed, highlighting the seriousness of the problem for the entire international community. Human trafficking is a gross violation of human rights, such as the right to life, freedom of movement, etc. All people can become victims, regardless of gender, age, social status, skin color, but often victims are the most vulnerable groups of the population. In the framework of this study, we will analyze the international legal mechanisms that are designed to counter human trafficking. Women and girls are particularly vulnerable to the challenge of human trafficking, and we will pay special attention to this category in our analysis of legal protection. Protection of human rights is certainly one of the most important aspects of the development of each country. The United Nations treaties on human rights are the foundation of the international system for the promotion and protection of human rights.

Keywords: human trafficking; international law; organized crime; international community; human rights violation; vulnerable groups; population; women; children; girls; United Nations; Sustainable Development Goals (SDGs)

Cite as: Solntsev, A.M. and Popovic, M., (2023). Trafficking in Women and Girls on a Global Level under International Law. *Kutafin Law Review*, 10(1), pp. 199–216, doi: 10.17803/2713-0533.2023.1.23.199-216.

Contents

I. Introduction

Trafficking of human beings is a criminal activity that affects all spheres of life and brings serious negative consequences for people, but also the entire society (Pajic, 2017). As a form of crime and victimization of people, it could be understood as an organized criminal activity to the detriment of others to obtain material benefits, which consists of several different and interrelated actions aimed at achieving the same goal. Human trafficking means selling and buying, arresting a person to exploit him, as well as all other activities that may be part of this process, such as recruitment, transportation, transfer, harboring or receipt of people. In such cases, there is always an issue of exploitation. It is maintained through force, fraud, threats, kidnapping, or otherwise.

"*Human trafficking has historically been linked with sexual exploitation of women and children*" (Murray, 2020). "*According to statistics, 35 million are victims of sex trafficking every day. Worldwide, almost 20 % of all victims are children. However, in some parts of Africa and the Mekong region, children are the majority (up to 100 %). The "industry" has never been larger — It has an estimated 99 billion $ market value. To put it into perspective the sex trafficking industry is larger than the global cocaine market and almost as big*

as the global PC market. Also, if you aggregated the yearly revenue of McDonald's, Netflix, Wall Disney, and Best Buy we have the same value." (Jacob, 2022).

UN Office on Drugs and Crime adopted a Global report on trafficking in persons 2022 last year in January.. According to the official data, the number of victims of human trafficking in 2020 decreased by 11 %. The experts pointed out that the Covid-19 pandemic was one of the obstacles for human traffickers to reach the victim, which certainly affected the percentage reduction. The report contains data related to 141 countries for the period from 2017 to 2021. If we pay attention to the statistics, it is indicated that 41 % of the victims managed to escape on their own and turn to professional bodies for help; competent authorities identified 28 % of victims, while 11 % of victims were saved by activities undertaken by civil organizations. During the pandemic, human trafficking for the purpose of sexual exploitation decreased, but the report underlined the negative effect of armed conflicts on this problem, primarily in African and Middle East countries. It was also mentioned that human traffickers expose women to physical violence twice as often as men and children twice as often as adults.[1]

Serbia ratified the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children in 2001. Article 388 of the Criminal Code of the Republic of Serbia (2005) covers all forms of trafficking of human beings, which are included in the Protocol. The report mentioned some progress and reduction in offenses of trafficking in persons by the year 2019 compared 2018, but the number is larger in 2020 compared to 2019. Besides, the data presented in the report show that the main goal of human traffickers in Serbia is sexual exploitation, then forced labor, and then other forms of exploitation. Women and girls are much more exposed to this problem and especially vulnerable.[2]

[1] Global report on trafficking in persons 2022, United Nations Office on Drugs and Crime, 2023.

[2] Global report on trafficking in persons 2022. Country profiles, Central and South-Eastern Europe, United Nations Office on Drugs and Crime, 2023. Pp. 51–54.

II. Sources and Methods

The work of the United Nations (further UN) is of great importance in the fight against human trafficking in the international community, as well as documents that have been adopted within the organization. These document include International Convention for the Suppression of the Traffic in Women of Full Age (1933); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956); The Convention on the Elimination of All Forms of Discrimination against Women (1979); The Convention on the Rights of the Child (1989); Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000); the UN Convention against Transnational Organized Crime (2000) supplemented by three Protocols (the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (2001), the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2003, Palermo Protocol); the Protocol against the Smuggling of Migrants by Land, Sea and Air (2004)). It is important to note the contribution of other international organizations. For instance, the International Labor Organization (further ILO) contributes to the fight against human trafficking through Convention Concerning the Abolition of Forced Labour (1959);the regional organization Council of Europe which adopted such treaties as the Council of Europe Convention on Action against Trafficking in Human Beings (2005); Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007).

It should be noted that, since 2010, the European Court of Human Rights (ECHR) has been actively developing judicial practice on cases related to human trafficking, despite the fact that the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 unlike, for example, the Charter of Fundamental Rights of the European Union of 2000, does not contain a direct prohibition of human trafficking. Article 4 of the Convention for the Protection of Human Rights and

Fundamental Freedoms only prohibits slavery, servitude, and forced or compulsory labor (Sakaeva, 2017). However, regional sources and practice will not be analyzed in detail within this scientific study, the emphasis will remain on the universal level.

The methodological bases of the study are general scientific and special legal methods. During the preparation of this scientific article, the following methods were used: systemic and functional general scientific research methods, and general logical techniques, such as analysis, synthesis, etc. To achieve the set goals, comparative legal, historical legal, classification and formal legal methods were used. For the interpretation of provisions of universal and regional international treaties, as well as documents of Human Rights Treaty Bodies, a formal legal method was used.

III. Results and Discussion

III.1. International Legal Basis

In the field of international treaties adopted under the auspices of the UN, the United Nations Convention against transnational organized crime[3] and The Protocol to prevent, suppress and punish trafficking in persons, especially women and children,[4] are certainly of the greatest importance in the fight against child and women trafficking.

In the field of documents of UN and specialized agencies dealing exclusively with children, the most important are: the Convention on the Rights of the Child,[5] the Optional Protocol to the Convention on the Rights of the Child, the Sale of Children, Child Prostitution, and Child Pornography[6] and the International Labor Organization Convention 182 on Child Labor.[7]

The Convention on the Rights of the Child is the most important document in the field of protection of children's rights. The adoption

[3] https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html.
[4] OHCHR. Protocol to Prevent, Suppress and Punish Trafficking in Persons.
[5] OHCHR. Convention on the Rights of the Child.
[6] OHCHR. Optional Protocol to the Convention on the Rights of the Child.
[7] ILC87 — Convention 182 (ilo.org).

of this Convention was preceded by two declarations, one from 1924 and the other from 1959. However, given their non-binding factor, in the international community it was necessary to adopt a document that could be binding on member states, thus in 1989 the Convention on the Rights of the Child was adopted. In particular, we could underline the Articles 19, 32, 34, 36, and 39 of the Convention, which protect children from all forms of exploitation, including sexual, as well as prostitution and pornography. The Optional Protocol to the Convention on the sale of children, child prostitution and child pornography was adopted in 2000.

The Convention on the Elimination of All Forms of Discrimination against Women[8] was adopted by the United Nations General Assembly on December 18, 1979, and entered into force on September 3, 1981. The central ideas of this Convention are the concepts of equality and non-discrimination, on which other international agreements are based. Its provisions define and defend women's rights, the principle of non-discrimination and equality of men and women in society, which indicates that it is a fundamental, most comprehensive, and most important universal international instrument that guarantees gender equality.

Both mentioned conventions have the same purpose: preventing and combating trafficking in human beings, with special attention to women and children; protection and assistance to victims of such trafficking, with full respect for their human rights; improving cooperation between the signatory states to achieve these goals, which is necessary because we are talking about the part that belongs to the domain of organized crime (Vorkapic, 2006).

III.2. Women and Girls as a Vulnerable Group

Children. When considering the perspective of the protection of children victims of trafficking in human beings within the protection of victims of trafficking in human beings in general, we must keep in mind that until recently the international law has not recognized children

[8] OHCHR. Convention on the Elimination of All Forms of Discrimination against Women.

as a particularly sensitive and specific category for whose protection the usual mechanisms provided by human rights law are not sufficient. More precisely, childhood as a special phase in the development of human life is a social construct, a human creation of the 17th century in Europe. Until then, people did not view children as beings with special features or nature. In the 17th century, the child began to be treated as a particularly sensitive being, and it can be considered that there is an awakening of awareness of childhood as a concept. Thanks to developmental psychologists, the characteristics and existence of the autonomy of the child's personality and the necessity to respect, normatively shape, and guarantee or to create an environment in which the rights of the child are truly recognized and realized (Vorkapic, 2006).

Today, the rights of the child are a fact, a reality recognized by international law. There are constant changes, additions, and adoptions of new documents within various international and regional organizations, and to more completely and adequately protect the child from various possible abuses (Vorkapic, 2006).

Women and girls. Traffickers often find their potential victims in women and girls in countries where socio-economic conditions are difficult. On the one hand, unequal market conditions leave women with minimal choice. However, many of them suffer both physical and psychological torture through the violence they suffer in the family and marriage.

The most common way of recruiting women is by appearing in an advertisement that offers a well-paid job abroad (most often the job of a nurse, hairdresser, babysitter, waitress, model, dancer, etc.). Although it seems unlikely, in many cases the role of the trader (or mediator who brings the victim into contact with the trader) is presented to the victim by a familiar and close person — family member, friend, partner (Wijers and Lap-Chew, 1997). It is not uncommon for women who have previously been trafficked and sexually exploited to join their traffickers and recruit new victims with them (Babovic, 2001).

Various agencies can often play the role of seducers, such as modeling agencies, business escort agencies, and agencies for marriages abroad. Behind all these agencies is a well-organized criminal network that is very difficult to track down (Mihic, 2003).

According to reports available to the Council of Europe, most victims of trafficking in Europe are women and girls who are exploited for sexual purposes. In practice, certain forms of trafficking in human beings have been observed, when it comes to trafficking in women, namely: trafficking in women for sexual exploitation, trafficking in women for exploitation (domestic) work, and trafficking in women for forced marriage (Corovic, 2018).

III.3. Key Factors Contributing to the Increase in Human Trafficking in the 21st Century

The Committee on the Elimination of Discrimination against Women (further CEDAW Committee) is the body of independent experts, established in 1982, that monitors the implementation of the Convention on the Elimination of All Forms of Discrimination against Women.[9] Under Article 21 of the Convention on the Elimination of All Forms of Discrimination against Women, the CEDAW Committee "*may make suggestions and general recommendations based on the examination of reports and information received from the states parties*."[10] In General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration, adopted by Committee CEDAW (further General recommendation No. 38) many factors increasing the risk of human trafficking, including trafficking in women and girls, are mentioned and through this scientific article some of them will be analyzed.

III.3.1. Socio-Economic Injustice. Migration as a Key Factor Contributing to the Increase in Human Trafficking

"*Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women sets out the legal obligation of States parties to take all appropriate measures, including legislation, to suppress all forms of trafficking in women and exploitation of*

[9] OHCHR. Committee on the Elimination of Discrimination against Women.

[10] The Convention on the Elimination of All Forms of Discrimination against Women, United Nations General Assembly, 1979, Art. 21.

the prostitution of women."[11] Most authors point to poverty and unemployment as the main predictors of human trafficking. While some authors consider poverty to be the key and even the only cause of human trafficking, others criticize such simplified explanations, emphasizing that economic factors play a very important role in shaping human vulnerability to human trafficking, but that they are necessarily and inextricably linked to other factors, especially social and political (Pajic, 2017).

"*Violations of all rights under the Convention on the Elimination of All Forms of Discrimination against Women may be found at the root of trafficking in women and girls and must be addressed as part of a transformative approach that empowers women and girls by promoting gender equality and their civil, political, economic, social and cultural rights, in line with Sustainable Development Goals 1, 3, 4–5, 8, 10–11, 13 and 16.*"[12]

One of the key reasons that can lead to trafficking in children, including trafficking in girls, is their physical impotence but also mental immaturity. As it is mentioned in General recommendation No. 38, the victims are often people from lower social classes, women and girls from the countryside or areas far from the cities, those who do not have access to work or education, but also to state institutions to which they could turn for help.[13]

Migrant women are in a particularly difficult position. "*Women can face particular vulnerabilities during the migratory process such as significant levels of gender-based violence including attacks, robbery, and rape by scouts who collect bribes to get them across the border"* (Murray, 2020). Trafficking of women and girls violates specific provisions of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[14]

[11] General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration, Committee on the Elimination of Discrimination against Women, 2020, p. 2.

[12] General recommendation No. 38 (2020), p. 6.

[13] General recommendation No. 38 (2020), pp. 7–8.

[14] Available at: https://www.ohchr.org/en/professionalinterest/pages/cmw.aspx [Accessed 12.12.2022].

and must therefore be recognized as a legitimate basis for international protection in law and practice.[15] Poverty is inextricably linked to the problem of unemployment and displacement as a consequence of the inability to find work in the immediate area (Pajic, 2017). Although migration opens up new social and economic opportunities for women and girls, it often increases their vulnerability, especially if they have to move illegally, when it comes to violations of basic human rights, human trafficking, sexual or labor exploitation, violence, and the like.[16]

The situation of migrant women is further aggravated by various stereotypes, discrimination laws, discrimination in employment, as well as the fact that migrant women are more likely to work in seasonal or temporary jobs. Limited access to information about their rights and freedoms, as well as to education, is one of the key factors that put them at risk to be victims of violations of fundamental human rights.[17]

Culture and customs further reinforce deep-rooted gender and social stereotypes, which make certain categories of people very vulnerable. In many societies, girls are considered less valuable than boys, so it often happens that the family decides on their destinies, both in terms of education and marriage. Women and girls are treated as goods, burdens, without the right to choose or freedom of action. In many communities, it is customary for very young girls to marry (or rather to be sold) older men, thus reducing the family's economic problems (Pajic, 2017).

III.3.2. Medicine and Organ Transplant

The demand for human organs intended for transplantation has been constantly increasing since the first successful kidney transplant performed in Boston in 1954 between identical twins (Banovic, 2017). On the one hand, advances in medicine and organ transplants give severely ill people a chance to recover and to survive. However, the serious shortage of human organs and the failure to address the legal

[15] General recommendation No. 38 (2020), pp. 6, 25.

[16] General recommendation No. 38 (2020), pp. 6–7.

[17] General recommendation No. 38 (2020), pp. 6–7.

responsibility of those in supply and demand chains contribute to the unregulated and often forced removal of organs.[18]

Having been promised to be paid a large amount, poor people thus are tricked into selling their organs. At the same time, the promised amounts are rarely paid in full. Many of the victims are not given information about the consequences of transplant surgery. Debt slavery and extortion are used as forms of coercion. Victims suffer physical and psychological harm and social exclusion because they were not provided with adequate post-operative care (Kozlova, 2019).

Considering that the trade in human organs is prohibited by the relevant international regulations and the largest number of national legislations, we can only talk about the "black market" of human organs. That market functions, like legal ones, according to generally known economic principles, except that, instead of state authorities and international organizations, that is, regulations and good business practices, it is regulated and directed by other actors, as a rule from the criminal milieu, and according to many opinions, criminal organizations (Banovic, 2017).

An important measure in the field of combating illegal trafficking in human organs was the inclusion of the terms "servitude or the removal of organs" in the definition of exploitation contained in the Palermo Protocol. In accordance with Article 5 of the Palermo Protocol, human trafficking, including for removal of organs, is a criminal offense (Kozlova, 2019). The Palermo Protocol is the first document at the universal, international legal level that criminalized the removal of human organs, but as one of the forms of exploitation, within the broad criminalization of human trafficking. On a global level, we also should mention the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, along with the UN Convention on the Rights of the Child, which requires signatory states to criminalize the offering, delivery or acceptance, by any means, of a child in the context of the sale of children for the purpose of transferring a child's organs for profit, regardless of

[18] General recommendation No. 38 (2020), pp. 8, 32.

whether such acts are carried out domestically or transnationally, i.e., on an individual or organized basis (Art. 3(1)(a) and (b)).

Considering the example of Serbia, about it is important to discuss the case of Zorica Jovanovic v. Serbia before the European Court of Human Rights. This case concerns a statement made by Ms. Zorica Jovanovic, a citizen of Serbia, which is based on Article 34 of the European Convention on Human Rights, which has been ratified by the Republic of Serbia. On 28 October 1983 the applicant gave birth to a healthy baby boy at the Medical Center in Chupriya (Serbia), which is a public institution. As a mother, she saw her son regularly between 28 and 30 October 1983. The mother was with her son until 11 pm on October 30, 1983, and the doctors told her that she and her son would be discharged from the hospital the next day. On 31 October 1983 at about 6.30 am the doctor on duty informed the applicant that her child had died. The management of that hospital did not allow the applicant to see her child, so she went home from the Medical Centre. She and her family received assurances from the Media Center that the child's autopsy would be performed in Belgrade. Allegedly, for this reason, it was not possible to bury the body of the baby. The body of the applicant's son was never handed over to her or her family. After exhausting all domestic remedies, she turned to the European Court of Human Rights. The court found that the defendant state violated the provisions of Articles 8 and 13 of the Convention (Cmiljanic, 2015). Bearing in mind that this is not a unique situation and that the issue of "missing babies" in Serbia is open to this day, we rightly wonder if all of this is connected to the topic we are dealing with in this scientific work.

III.3.3. Conflicts and Humanitarian Emergencies

Armed conflicts further increase the risk of human trafficking, bearing in mind that they also increase forced migration, which puts both women and children at a disadvantage and puts them at additional risk of violating their fundamental rights. The connection between human trafficking and armed conflicts can be direct or indirect. A direct link arises from violence or hostilities by armed forces and includes human trafficking in conflict-affected areas. An indirect connection is

manifested in the wider region and outside the area affected by the armed conflict when migrants or other persons fall under the influence of traffickers. These are most often refugees and persons in formal or informal camps, on migration routes, when moving or returning home, detained persons, or those escaping from detention or captivity (Djukic, 2020).

Human trafficking in armed conflicts is influenced by a large number of factors — those that operate in peacetime conditions and those that are characteristic of armed conflicts. The factors that act in peace are numerous because each case of human trafficking is special. They are usually classified into two basic groups: push factors and pull factors. Push factors refer to challenges faced by the population in a certain area, such as lack of employment opportunities, poverty, the economic imbalance between regions, corruption, gender and ethical discrimination, political instability and transitions, internal conflicts, social and cultural factors, and natural disasters. The pull factors encourage the demand and exploitation of individuals, and among the most important are the increased demand for labor and higher wages in industrialized countries and the possibility of a higher standard of living. Pushing and pulling factors, as a combination of economic, social, and political factors, interpenetrate and complement each other so that human trafficking is the result of their mutual connection. Factors that act on human trafficking in peace, in conditions of conflict, become more complicated and increase the risk of human trafficking, and additional factors create additional vulnerability of the population. The most significant factors affecting the development of human trafficking in armed conflicts are a) the decline of the state and its institutions, the collapse of the rule of law and the impunity of perpetrators of criminal acts; b) forced displacement of the population; c) poverty and shortage of basic resources, lack of humanitarian aid and emergence of socially and economically stressful situations and d) social fragmentation and collapse of families. Regions with corrupt governments and a power vacuum favor the development of organized crime that uses human trafficking as a means of control and profit (Djukic, 2020).

Various armed groups, by coercion or deception, induce civilians to move from the territory where they live, when they become very

sensitive and vulnerable to human trafficking. Particularly vulnerable population groups such as unaccompanied women and children and forcibly displaced persons are emerging. As a significant supporting factor, the phenomenon of prostitution appears in the zones where armed formations are located, which encourages the bringing of prostitutes and the spread of trafficking in women and girls from the region or its surroundings. Armed conflicts influence the strengthening of existing tendencies to remove undesirable ethnic or religious population groups from a certain area. The marginalization of these groups contributes to their victimization for a long period even after the end of the conflict, which can cause the strengthening of the mutual connection of its members and strengthen the internal structure of the community. Individuals, families, and communities are forced to change their usual way of life and create new survival strategies, which often lead to criminal activities and human trafficking, usually expressed through forced marriages, the sale of sexual services, or child labor.

Characteristic types of exploitation in armed conflicts are sexual exploitation, sexual slavery, forced labor, organ harvesting, and recruitment to engage in combat, in which children are often used who arm themselves and engage in various tasks related to combat operations and even directly participate in them. Although some forms of exploitation are specific only to certain regions, such as the involvement of children in armed conflicts or trafficking to harvest organs for the treatment of wounded combatants, in most other regions human trafficking has the same or similar characteristics. The main actors of human trafficking are armed and criminal groups, but "benevolent" individuals, friends, or family members also appear as actors. Through human trafficking, armed groups make profits for their own financing, strengthen military capacities through forced recruitment, and create fear among the population in order to control the occupied area.

The category of vulnerable persons in armed conflicts includes children, who are subjected to various forms of exploitation and serious crimes. According to the Paris Principles, the term child associated with an armed force or armed group refers to any person under the age of eighteen who is or has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys

and girls, who are used as fighters, cooks, porters, couriers, spies or for sexual purposes. Trafficking in children mainly occurs as a result of economic difficulties experienced by their families. Children are usually exploited in areas of work that do not require special expertise, such as agricultural work, street sales, and the like, but they are also used in armed conflicts as suicide bombers or human shields (Djukic, 2020). Girls are also recruited and used in armed forces and groups. Their increased vulnerability is conditioned by their gender and general place in society, and they suffer specific consequences, including rape and sexual violence, complications related to pregnancy, morality, and rejection from family and community.

The use of children as armed combatants has been thoroughly documented in sub-Saharan and central Africa, the Middle East, and other regions of Asia, with known cases of exploitation to finance armed groups. Trafficking and exploitation of children are linked to serious crimes that include killing, maiming, recruitment, rape and abduction of children, and attacks on schools. In the context of serious crimes, both labor exploitation and other employment of children, sexual abuse, or abduction for exploitative purposes constitute human trafficking. In addition to various types of violence and the general suffering of the population, usually deprived of basic resources, human trafficking in armed conflicts has a particularly negative impact on human rights violations.

For example, trafficking in human beings appeared in the Western Balkans in the late 1980s and has been present throughout the 1990s, although efforts have been made to combat the problem and to build a national referral system in Serbia ten years ago. In that period, Serbia was mostly a destination country for victims of human trafficking. However, the situation changed significantly in the early 1990s. The country's disintegration, economic collapse, armed conflicts, and the arrival of foreign troops led to an increase in the number of victims of human trafficking, with Serbia being a transit country for victims from Bulgaria, Moldova, Russia, and Ukraine to Bosnia and Herzegovina from where they were transferred to Italy, Spain, France or Macedonia, from where they were transferred to Greece and further to the countries of the Middle East (Mihailovic and Dacic, 2011).

IV. Conclusion

Trafficking of human beings is a global phenomenon that is present in all countries, in almost every region of the world, in countries that are enrolled in political and economical transition, as well as the economically developed countries. It has an absolutely negative impact on the entire corpus of human rights, and there is even a negation of basic human rights. Women and girls certainly belong to the group of the most vulnerable parts of the society in this social phenomenon appeared as the most extreme form of human rights violations.

Human trafficking is a multifaceted social phenomenon, and its causes are numerous, such as economic differences both within and between countries, gender inequality, lack of equal opportunities, corruption and ineffective judicial and police systems, civil unrest and the inability of states to protect their citizens and provide them with a good life. To this contribute the demand for cheap labor and cheap production as well as commercial sexual services. The special vulnerability of girls and women in post-conflict countries requires special attention of the international community and bearing in mind this vulnerability they need more sensitive protection against human trafficking.

Most countries have defined human trafficking as a separate crime within their legislation and have adopted procedures and strategies to combat it. As it can be underlined from this scientific article, there has also been reaction at the international level. Very important international documents have been adopted and they are being implemented. There are several conventions at the universal and regional levels that should synergistically increase the effectiveness of combating trafficking in women and girls. The first complete definition of the phenomenon of human trafficking was given by the United Nations Protocol to prevent, suppress and punish trafficking in persons especially women and children, supplementing the United Nations Convention against transnational organized crime. After its adoption, there was intense activity by the states to regulate this phenomenon with their national legislation.

Today, millions of people around the world are trapped in "modern slavery," which is called human trafficking. Human trafficking is a form of violence against people, primarily against women and girls. Over time, this trade crossed the national borders of countries and areas of wider regions and thus became an international problem. Intensifying international cooperation in order to combat human trafficking is imperative, bearing in mind necessity of being well organized and ready to confront one of the most serious forms of organized crime and protect those who really need our help.

References

Babovic, B., (2001). *People Smuggling: Women and Children Smuggling*. Bucharest: Centre for Advanced Legal Studies, Belgrade, and Centre for Legal Resources and Ministry of Internal Affairs of the Republic of Romania, Vol. 3. (In Serb.).

Banovic, B., (2017). Normative framework for combating trafficking in human organs. Belgrade: *Annals of the Faculty of Law in Belgrade, LXV, 3/2017*, Faculty of Law in Belgrade, Vol. 28. (In Serb.).

Cmiljanic, B.M., (2015*). Human trafficking in the light of international law and the regulations of the Republic of Serbia*. Belgrade: Digital repository of the University of Belgrade, Vol. 310. (In Serb.).

Corovic, E., (2018). *The criminal offense of forced marriage from Article 187a of the Criminal Code of Serbia*. Novi Pazar: Department of Legal Sciences, State University in Novi Pazar, Vol. 14. (In Serb.).

Djukic, A., (2020). Human trafficking in armed conflicts. *Vojno delo,* 1, Vol. 15. (In Serb.).

Jacob, B., (2022). *Sex trafficking statistics 2022. Across nations*. BedBible, doi: https://bedbible.com/research-sex-trafficking-statistics/.

Kozlova, A.A., (2019). The ratio of crimes related to illicit trafficking in human organs and trafficking in persons for the purpose of removing human organs in the norms of international law. *Russian justice*, 4(3), pp. 26–28. (In Russ.).

Mihailovic, V. and Dacic, T., (2011). *Intersectoral and regional cooperation in the prevention and protection of victims of human*

trafficking. Belgrade: Law Faculty, University of Belgrade, Vol. 28. (In Serb.).

Mihic, B., (2003). *Overview of previous research into trafficking in women and children*. Belgrade. (In Serb.).

Murray, J.P., (2020). Beyond the "Women-and-children" Bias in Human Trafficking: A Study of Haitian Migrants in the Dominican Republic. *Oxford monitor of forced migration*, 16, pp. 132–146, doi: https://www.oxforcedmigration.com/post/beyond-the-women-and-children-bias-in-human-trafficking.

Pajic, N., (2017). Human trafficking: socioeconomic and cultural factors. *Yearbook of the Faculty of Security*, 1(19), pp. 237–256. (In Serb.).

Sakaeva, O.I., (2017). Concepts of labor and human trafficking in the practice of international law bodies. *Journal of Russian Law*, 11(9), pp. 110–119. (In Russ.).

Vorkapic, S., (2006). *Child trafficking in Serbia, threat and reality*. Belgrade: Center for Children's Rights, Vol. 104. (In Serb.).

Wijers, M. and Lap-Chew, L., (1997). *Trafficking in Women: Forced Labor and Slavery-like, Practices in Marriage, Domestic Labor and Prostitution*. Utrecht: Foundation Against Trafficking in Women, Vol. 213.

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PHILOSOPHY OF LAW

Article

DOI: 10.17803/2713-0533.2023.1.23.217-236

The Concept of a Holistic Development Constitution in Light of Plato's Theory of Gradual State Decline

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Abstract: Today, society faces a number of challenges driven by excessive consumption and extreme proliferation of utilitarian and radical individualistic ideals. This study is focused on searching for new constitutional models that would mitigate social and environmental risks of the consumerist era. To this end, the author has conducted a comprehensive review of relevant Ancient Greek concepts. In the 5th and 4th centuries BC, Greece put forward the first abstract notions of the ideal and material realms, as well as of individualism and collectivism. Particular attention is given to Plato's theory of inevitable constitutional decline, its causes and potential solutions. Re-examining the classical holistic methodology — where the whole is larger than the sum of its parts — now seems as essential as ever before. Although such an approach is foreign to contemporary world steeped in division and individual's alienation from nature, society and other individuals, classical holistic principles remain quite relevant, as they are largely aligned with the 20th century notion of sustainable development, which sees economic, social and environmental challenges as intrinsically linked, without dividing them into separate realms. Due to this perspective, the author has been able to come up with a general normative framework that also

takes the fields of ethic and aesthetic — separate, but linked by a complex interrelation system — into account.

Keywords: holistic development constitution; holistic approach; Plato; constitutional and legal decline; risks of consumerist society; legal anomie; methodological holism

Cite as: Likhter, P.L., (2023). The Concept of a Holistic Development Constitution in Light of Plato's Theory of Gradual State Decline. *Kutafin Law Review*, 10(1), pp. 217–236, doi: 10.17803/2713-0533.2023.1.23.217-236.

Contents

I. Introduction

The extreme individual nature of consumption coupled with the shift towards objects as status symbols, has turned consumption from something one does to fulfil their needs into an infinite self — sustainable process. The rise in inequality, the transformation of trade and financial sector and environmental risks connected with this shift have necessitated changes in the basic government and legal institutions.

Legislation and law enforcement have to adapt to regulating the nascent phenomena of the consumer society, e.g., planned obsolescence (designing product flaws in order to increase the replacement rate), affluence (delinquency linked to urge to consume), astroturfing (deceptive advertising used to increase sales), new types of intellectual property, cult brands, etc. (Zakharova and Przhilenskiy, 2020, pp. 901–918). Unfair sellers in the field of digital technologies, consciously and arbitrarily, will be able to change the natural behaviour of a

person, deliberately shape only a unilaterally advantageous decision, induce decisions and actions disadvantageous to the person, etc. This demonstrates the fundamental need for more active interaction between lawyers and IT specialists in order to identify all possible transformations of the legal content itself and the meanings of legal regulation, to assess the relationship between legal goal-setting and the capabilities and limits of digital technology, to identify in advance possible legal, moral and other social risks that technology is capable to generate, but which can and must be stopped by man through, among other things, law (Voskobitova and Przhilenskiy, 2022, p. 261).

Such trends result in a social framework where individual satisfaction and individual rights come to the forefront. This value system has become dominant in many areas of Western societies since the end of the 20th century. This is due to both objective economic forces and to the ideological paradigm change: stifled expansion of social rights and proliferation of neo-liberal and radical individual concepts. It may seem as though a new, unprecedented moral and legal framework is now coming into being. However, that is not quite the case. Challenges connected to inequality, greed and environmental exploitation have been known since ancient times. Ancient Greek philosophers were the first thinkers to tackle the essential challenges of excessive egoism in the context of shaping the ideal political and legal institution were.

II. The Meaning of Plato's Theoretical Legacy for Jurisprudence

Plato was one of the first to investigate the relationship between one's true needs, actual consumption and happiness, as well as the constitutional questions connected to it. As noted by Paul Shorey, Plato's key ethical and legal topics include the definition of virtues, the problem of hedonism and, subsequently, Plato's attempt to prove a causal link between virtue and happiness (Shorey, 1971, p. 7). This is quite easy to demonstrate based on the Republic. Happiness here is interlinked with an ideal state in a sense that an ideal state is a happy state of happy people. Their individual values constitute a continuation of their political virtues, while happiness is seen as both an individual

and political ideal. This ideal can only be attained if both the individual soul and the political *mega* — the soul of the State — are seen as multiplicities. In Book 4 of the Republic, Plato posits that since "...it cannot be, we say, that the same thing with the same part of itself at the same time acts in opposite ways about the same thing" (Plato, 2007, 436b) psychological confusion can only be explained if we assume that there are indeed more than one aspect to soul. This is not to say that the soul is not one; it is, similarly to many other things, both one and multiplicity at the same time.

First, the philosopher distinguishes between incorporeal and earthly souls. While the former is a pure reason, the latter, being immersed into a mortal body, is split into three components dominated by (1) reason, (2) spirit (temper, passion) or (3) consumption (appetite, desire).

Thus, a clear hierarchy is built, becoming the foundation for *is* and *ought* in individual behaviour. The first component — reason — reflects the supreme ideal of the good and permanently strives towards it. The spirited part is corrupted by the will to distinctions and has to constantly be reigned in by reason. Finally, the consumerist (appetitive) part is the most base, as it is the farthest from Plato's ideal of good. Professor Ted Brennan elegantly calls this separation "a response to the crisis of incorporation" (Brennan, 2012, p. 102). When the immortal soul is immersed into a mortal body and has to face the imperfect world of degradation, it has to first segregate off a *consumerist* part in order to satisfy the basic needs of food, shelter, safety, etc., i.e., to maintain harmony with its environment. That said, the rational soul sees this as a threat, as human desires are manifold and some of them — greed, for one — are boundless. The need to mitigate the destabilising effect of this part gives rise to the spirited soul that guards internal balance. The reasoned soul relies on the spirited soul for protecting itself from both internal and external threats. It is indeed the spirited soul that should serve as an arbiter in consumption — related interactions with other individuals: it exercises moderation in setting the reasonable amount of goods required to satisfy one's own needs and it makes it possible to identify the excess amount of resources that one might sacrifice for the common good (Brennan, 2012, p. 105).

However, this tripartite interaction within a human soul is compounded by the fact that reason and spirit both initiate their own

different desires. For Plato, Kant's *pure reason* is impossible. For some individuals, spirited desires prevail: their innate urge towards immaculate reputation triumphs both over the universal reason and basic animal instincts, e.g., fear of death. Others are defined by the desires of the consumerist part of the soul that trump reason, honour and dignity. Ultimately, a soul of a mortal is a realm where desires interact — and sometimes conflict — both horizontally and vertically at three different tiers.

Plato believes that the same is true for the super-soul of the ideal state. Its political structure includes three classes: (1) philosophers (rulers), (2) auxiliaries (military, security) and (3) the so-called economic class (merchants, farmers). Together, these three classes form the constitution (structure of the soul) of Kallipolis, the ideal state, where the first class corresponds to the reasoned soul, the second to the spirited and the third to the consumerist one.

At the same time, it is obvious that philosopher — kings will cease to represent the ideal of reason as soon as one attempts to implement this utopia in reality. After all, philosophers are human and, as any humans, cannot behave completely rationally. Under the tripartite soul theory, philosophers must have the spirited and appetitive aspect. However, as long as the reasoned element is dominant in their behaviour, proper harmony exists in the soul. Thus, Plato basically admits that the idea of decline is already embedded into any ideal constitution.

If we were to significantly simplify Plato's typology, we could roughly represent it as the following framework: "philosopher — manager — hedonist." That being said, we need to keep in mind that for Plato, each part of the human soul also includes opinions, emotions and desires at its own level. To properly balance both individual soul and the structure of the state, one's dedication to justice is crucial. Moreover, individual urge for Plato's internal justice is harder to define than the psychological drive for external social justice.

This is indeed the cornerstone of Plato's Constitution. Note that his notion of what internal justice is must be clearly separated from the legal notion of external justice. Gregory Vlastos notes that dikaiosyne (Greek δικαιοσύνη) denotes a wide range of notions, but primarily meant a rejection of excessive egoism (pleonexia), i.e., obtaining goods

by capturing something that belongs to someone else (Vlastos, 1971, p. 71).

Thus, within the Greek tradition, it is possible to interpret *suum cuique* (to each his own) — the classical Latin principle of justice — as "leave to each his own," i.e., refrain from claiming something that clearly belongs to somebody else. Following the principle of justice involves, first and foremost, the negative act of abstaining from capturing someone else's possessions. This is an act of meritorious moderation, of reigning in one's consumption. This psychological inhibition of one's own egoistic impulses represents justice as a goal and value of social behaviour.

The same is also important for individual internal harmony, where no part of the human soul encroaches on the domain of the other. To the contrary, when there is discord within the soul of an individual representing the ideal society, constitutional and legal decline are bound to follow.

Thus, the aristocratic constitution fell when reason was trumped by the ambitious spirit: the commands of reason had been relegated to mere optional recommendations in the soul of a citizen of timocracy. In other words, the spirited soul captured what did not belong to it: the position of supreme arbiter due only to reason.

Moving further along the road of constitutional and legal decline, we see the timocratic citizen side — lined by a new type of citizen, an oligarch. His soul has declined even more and is relegated so servicing hedonistic desires.

The third (democratic) and the fourth (tyrannical) stages of constitutional and legal decline are connected with gradual degeneration of desires. A representative of an oligarchic constitution is primarily focused on greed. For Plato, an oligarch is not someone we saw in Russia in the 1990s, but rather Pushkin's Miserly Knight or Balzac's Gobseck. On the contrary, Plato's democrat is a psychological type prone to any and every type of desire and, unlike an oligarch, tends to favour the basest hedonism over pure greed. An oligarch cannot afford high — living because of his focus on greed, while a democrat often equates life with debauchery. In other words, Plato's democrat creates little and saves even less, but gladly squanders his inheritance and often the livelihood of his children on alcohol and feasts.

At the final stage of decline, the democratic constitution disintegrates under the assault of license and loss of any public and legal virtues, while a former democrat becomes a dominant psychological type of a citizen. In essence, he becomes a slave, sacrificing his freedom to a demagogue tyrant who promised to restore law and order. Both the soul of a citizen of a tyranny and the soul of the tyrant himself manifest a complete corruption of the proper interaction between the parts of the soul. Here, the battle is not waged between soul's different aspects (i.e., on the vertical axis of values), but between natural and unnatural desires.

All along this downward spiral, a single mechanism is at play. Let us call it the principle of constitutional and legal decline, where each corrupted constitution falls due to the excess embedded into its very nature and it is destroyed by the thing that used to feed into it. Thus, a timocratic regime falls because of the conflicting ambitions within the political class. The oligarchic regime crumbles under the pressure of the *democrats* who demand an end to the ideology of excessive moneymaking. A democratic regime falls because of excessive freedom, where a desire for a strong leader brings a tyrant to power (which happened, for instance, in Weimar Republic in 1933). A tyrant, in turn, exercises arbitrary power and intimidation over everyone, including honest and reasonable citizens, ultimately becoming dependent on the people who eventually depose him, often taking their lives in the process. However, the root cause of decline is always pleonexia — desire to consume more than necessary or possess something one has no right to.

III. International Community Approaches to Preventing State Decline

The history of the 20th century and contemporary events confirm that Plato's notions of constitutional and legal decline and justice remain relevant, and have even gained new importance due to the threat of a large-scale environmental crisis (Egorova et al., 2022), rising inequality and other consumption-related challenges. The key question put forth by Plato's theory of decline has not changed during 2,400 years and is

still being discussed by a wide range of researchers: how to change the soul's downward trajectory and stop the decline?

Plato believed that states become what they are due to the dominant personality type that they represent. Thus, restoring the soul of the representative of a state to proper balance would also balance the super-soul of the political community as a whole. Here, there are two paths: internal (upbringing, education) and external, where restrictions (laws) are imposed on individual freedom in social interactions.

Theoretically, laws are powerful tools that can halt degradation of people's souls and prevent them from becoming a flock of consumers. However, for this to happen for reasons other than fear of punishment, legal regulations should rest on a hierarchy of constitutional values that reflect existing social and cultural basis of society and its historical background.

It is possible to tackle the challenges of the consumerist era at a national level through a comprehensive transformation of the framework of constitutional and legal values, goals and principles. What is required for that is a shift from widespread liberal free-market constitution to a holistic development constitution that is more focused on social and environmental flourishing.

This model is based on the concept of sustainable development that took shape in the 1970s after "*The Limits to Growth*" Report commissioned by the Club of Rome that examined the impact the humanity has on the environment (Meadows et al., 1972). In view of obviously limited supply of natural resources, the objective of the Report authors was to identify economic and demographic limits of modern civilization at a modern consumption rate. Five of the scenarios of humanity's development, including the most probable one, indicated the increase in population to 10–12 billion people with subsequent catastrophic decline by a factor of ten and disintegration of all the crucial areas of society. In 2004, a revised Report entitled "*The Limits to Growth: The 30-Year Update"* (Meadows et al., 2004) was published. That time, the authors indicated that the situation had deteriorated since the first Report was published and that the humanity had squandered the opportunity to steer towards a positive scenario because of overconsumption and disregard for the Earth's ecosystems.

"The Limits to Growth" Report influenced a number of policy documents of international organisations, culminating in the Rio Declaration on Environment and Development[1] adopted at the UN Conference in 1992 that institutionalised the concept of sustainable development.

This principle involves imposing reasonable limits on human consumption to uphold values that are crucial for this and future generations. Here, sustainable development is divided into economic, social and environmental progress.

The economic aspect of sustainable development is based on Hicks-Lindahl concept of the maximum flow of income, where consumption of non-renewable resources needs to be limited to conserve the fixed capital required for production. The goal of the environmental aspect is to preserve the integrity of natural systems. The social aspect of sustainable development involves combating inequality. Aligning these three aspects is the key goal of implementing sustainable development principles in practice (Voronina and Milovidova, 2021, p. 199).

How these three concepts interact is also quite important. Sustainable development implementation is based on the holistic approach that formed in Ancient Greece in 5th and 4th centuries BC. It manifests in new solutions of such challenges as pricing and internalising negative environmental externalities (uniting the economic and environmental aspects), setting just rules for trade and economic activities when addressing the needs of poorer individuals (economic and social aspects), broad discussion of a number of environmental challenges and intergenerational equity (social and environmental aspects), etc.

The concept of sustainable development was subsequently refined in the UN Millennium Declaration dated 8 September 2000,[2] the *Transforming our world: the 2030 Agenda for Sustainable Development* document,[3] etc.

[1] UN Commission on Human Rights, Human rights and the environment., 9 March 1994, E/CN.4/RES/1994/65.

[2] United Nations Millennium Summit. 2000. United Nations Millennium Declaration. New York: United Nations, Dept. of Public Information.

[3] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

IV. Consequences of Law Subjectivity and Methodological Holism

Today the core of legal ideology in the countries of the so-called golden billion involves neoliberalism and individualism. In Russia, it is formalized in Article 2 of the Constitution that declares the man to be the highest value, his rights and freedoms. Initially the developers of the Constitution proposed milder formulations concerning the priority of human rights, regardless of nationality and residence. However, the adopted version contains a non-alternative hierarchy of values. In this way, the norm of the legal doctrine under consideration is interpreted in the textbooks on the constitutional law of Russia in the following way: "The emphasis is not on the collective use of rights, as was characteristic of a totalitarian state, but on an individual choice of the way of life. Collectivism is able to suppress the initiative and abilities of an individual, lead to the kingdom of grayness and mediocrity" (Ballou and Srivastava, 2007, p. 118). Subjectivity of constitutional axiology violates the balance of the components of legal elements.

Emil Durkheim called the state of reality in which disintegration of a certain system of established values occurs and the contradiction between objective ideals and formal norms of behavior as "Anomie" (Durkheim, 1897). The prerequisites for the occurrence of anomie in the society are the conflicts at different levels of legal reality. An increase in crime, nihilism, apathy becomes a usual reaction of ordinary people to distorting the Aidos of Law and Justice.

Overcoming anomie is connected with building the hierarchy of constitutional and legal principles:

1) dichotomy of the principle of economic activity freedom as well as the principle of social equity is connected with social stratification;

2) dichotomy of the principle of its formal equity with a special status of state property is connected with ownership;

3) dichotomy of the transparency principle as well as the principle of state and trade secrets compliance is connected with an information gap;

4) dichotomy of the principle of economic actor equity with a special status of a state as a civil law actor is connected with economic development;

5) dichotomy of the principle of market openness and state manufacturer protection is connected with globalization.

The choice of competitive ideas affects the priority of some principle implementation — humanist principles, law abuse prohibition, public interests regard, etc. Axiology prescribed by the Constitution inevitably influences all the aspects of public relations that in their turn affect individual legal awareness.

Constitutional law is a special branch because its legal acts make up the image of a future society. In this context, it can be used for ideological and practical needs. The paradigm of extreme individualism can be changed if the value of labor, education, science, social equity is set up in law. It is important that constitutional principles be not only fixed but also operate if public interests are under threat.

The legislative proclamation of irrelevant incentives gives rise to the internal contradiction of the entire legal system. It is possible to overcome it at the expense of a methodology that reinforces the priority of the whole over the parts, social interests over an individual. Holism (from ancient Greek. Ὅλος — whole, entire) in modern conditions can become an important tool for the study of legal reality. It proclaims the ontological independence of the whole and its irreducibility to the additive sum of the parts (legal objects and subjects), the functions they perform. The use of a holistic method in jurisprudence involves rejection of the determining meaning of the opinions and desires of an individual. Objective values and ideals related to taking into account the interests of the state, society, and the collective consequently come to the fore.

Following the holistic method, one should distinguish the following purposes of constitutional development:

1) steady rise in people's wealth;

2) preserving the environment for future generations;

3) overcoming social differentiation;

4) formalizing the ethics of duty rather than that of consumerism in basic state laws;

5) placing the values of labor, science and art as a principal factor to overcome consumerism at the top of hierarchy.

It is necessary to shift the focus to the wider use of some public legal instruments as well as to go deeper into the problems of social responsibility so that the aforementioned aims could be achieved. The spheres of the holistic method application in law are quite numerous and they take into account multilevel task interrelation. However, the most important is process of integrity and its unity is given the priority.

Methodological holism is important for the study of legal reality as a whole taking into account the relationship of its essential and phenomenal components. In jurisprudence, holistic methodology will help to perceive its elements, preventing the reduction of their complexity to the level of substantiation of any problem with the legal consciousness of an individual. The object is primarily subject to the study as part of the whole (a citizen, a member of the society, etc.). Such features characterize holistic law enforcement as integrity, rejection of a narrow-industry solution to the problem, the priority of public interests over the private ones as well as critical thinking.

Law always represents a complex structure, inside which "everything flows." Phenomena flow into each other according to the rhythm of mutual transition and legislativeness. The complexity of these processes confirms the importance of studying the relationship between various legal elements taking into account the feature that Hegel called the law of struggle and the unity of the opposites. It is important in the context of holism due to the presence of the idea of interdependence in legal science: any phenomenon, any value, any "object" and "subject" of law are connected with everything else.

This position implies at least two questions. How can opposite objects of constitutional law in principle interact? Moreover, can the possible results of such interaction be predicted?

The answer to the first question may be the idea of a balance or (according to Heraclitus) Logos, in which opposition to various elements of the system ensures their mutual deterrence. At the same time, the interaction between opposites determines at least the following tasks:

1) many values, such as equality, are subject to identification only through their opposite, that is, inequality;

2) some opposites are an inextricable continuum, that is, they constantly flow into each other (for example, day and night).

The objects of legal reality "flow" into each other, remaining a single continuum. Every thing claims and delimits itself through the struggle, through resistance to its obvious opposites. A similar conflict cannot stop, since after the establishment of the final dominance of antinomic values or ideas, the system will cease to exist as a whole. The imbalance of some elements contains the risks for the development of the entire system. That is why unambiguous priority of the interests of an individual and degradation of the social sphere are destructive for the dynamic and complex system of law.

Methodological holism helps to identify changeable characteristics of individual elements due to the installation that everything is an indivisible whole that combines rival opposites. This approach involves rejection of perception of legal reality as a set of discrete fenced off parts.

As a result, the structural functions of unification and knowledge remain behind the holistic methodology. They enable us to establish the goals of mutual transition and the formation of basic law institutions. "It, in its turn, contributes to the search for a proportion that supports the optimal "combustion of the conflict" between the opposing components of constitutional law.

V. Modelling a Holistic Development Constitution

As noted above, Plato saw laws that limit excessive egoism and individual pleonexia as powerful tools to prevent constitutional decline. Proper laws, however, can only be adopted within the framework of proper constitutional and legal principles and ideals that have been internalised by society.

One of the potential constitutional models that would address the challenges of consumerism is a Holistic Development Constitution based on the theory of sustainable development and a number of philosophical theories of Ancient Greece, including Plato's theory of justice. Based on these theories, a number of methodological tools — mechanisms of legislation and law's operation — can be created. These tools can be used to effectively stop the decline of state institutions and the souls of the members of society. One of such tools is holistic

methodology (from Ancient Greek ὅλος — whole, entire) that was used as a foundation for the theory of sustainable development and can be used to further develop various specialised and interdisciplinary approaches into cohesive paradigms. This approach proclaims the ontological independence of the whole that cannot be reduced to an additive sum of its parts (sub — institutions or functions). The holistic approach is comprehensive, rejects area-specific solutions, prioritises public interests over private, praises critical thinking, etc.

The benefits of holistic methodology for constitutional law are as follows: (1) integration of different methods; (2) applicability at different levels (from general research to solving specific legal goals); (3) scientific congruence (terminology, etc.) together with a wide range of constitutional and legal phenomena described by it; (4) focus on comprehensive research which makes it possible to build hierarchical models (e.g., hierarchy of constitutional values) and multidisciplinary connections.

In the light of the application of the holistic method, the following goals of constitutional development should be highlighted: steady growth in the welfare of the population; preservation of the environment for future generations; overcoming social differentiation; formalization in the fundamental normative acts of the ethics of duty, not the cult of consumption; the position at the top of the hierarchy of values of labor, science and art as an important factor in overcoming the cult of consumption, etc. To achieve these goals, it is necessary, on the one hand, to shift the emphasis to a wider use of a number of public legal instruments. On the other hand, it is necessary to carry out a deep study of issues of social responsibility. The problem of rethinking the balance of private and public interests is caused by threats to social disunity, environmental and consumer safety. The current state of legislative regulation of public relations does not always ensure effective counteraction to global challenges. Application of exclusively sectoral measures is becoming insufficient.

The integrative approach is of particular importance, since it makes it possible to fuse the economic, environmental and social components in order to achieve its main goals. Given the obvious connections between economic, environmental, social and constitutional norms, it is

pertinent to employ systems theory to study the variety and complexity of basic aspects of society, seeing them as relatively separate components with complex interrelations. The axiological ideology is key here, as it determines the nature of the links between various subsystems.

Currently, individualism is enshrined in the constitutions of a number of countries, serving as the core of their legal ideology. For instance, a major factor perpetuating the risks of consumerist society in Russia is Article 2 of the Constitution that enshrines individual rights and liberties as its fundamental principle. This wording means there can be no values on par with individual human rights. However, Russia has not traditionally embraced the values of boundless individualism, utilitarianism or consumerist egoism.

In 2020, there was an attempt to correct the constitutional values: Article 75.1 was introduced to the Basic Law of Russia. The Article proclaims providing conditions "for country's steady economic growth and rise in people's wealth, for the mutual trust between people and the state, guarantees protecting people's dignity and respect to the working man, provides people's rights and duties balance, social partnership, economic, political and social solidarity."[4] However, the amendments to the Constitution of 2020 cannot drastically edit the balance between public and private concerns as they do not involve the chapters on the constitutional system and human rights. It is these chapters that have controversial statements on the correlation between the personal consumerist values priority over the efficient work values. Thus, Article 7 of the Russian Constitution proclaims the right to "decent life" (Clause 1) and then it proposes the statements on social protection (Clause 2). Article 37 proclaims the right to rest, but does not state the right to work. Article 8 guarantees freedom of economic activity, but does not take into account public concerns. Moreover, there is no concept "common good" in the Constitution of the Russian Federation.

In fact, the examples of constitutional legal polyphony result in judgements that confirm the priority of private concerns and freedom of

[4] On improvement of regulation of some aspects of public authority structure and operation: Law of the Russian Federation on amendment to the Constitution of the Russian Federation of 14.03.2020 No. 1-FCL. Collection of Legislative Acts of the Russian Federation. 16.03.2020. No. 11. Art. 1416. (In Russ.).

individual economic activity. The same examples cause social disbalance growth.

That is why the constitutional regulation strategy should include — beyond the three sustainable development pillars (economic, environmental and social) — the ethical and aesthetic foundations of constitutional axiology that reflect the social and cultural basis of a certain stage in country's development.

Given the risks of the consumerist society, ethical questions come to the forefront of constitutional and legal regulations. It is different understandings of those questions that have led to diverging constitutional paths. For instance, the US enshrined the freedom of economic activity — one of the pillars of utilitarianism — in the Constitution due to Bentham's prominence. As a result, the US Constitution protected freedom of contract and property rights a few hundred years ago, but still lacks any references to social justice. In Europe, the influence of Kant and a number of Classical philosophers limited the drive for effectiveness in legal ethics.

It is no coincidence that the most cited legal scholar in the US is still Richard Posner (Shapiro, 2000, p. 409), whose wealth maximization theory can be seen as the capitalist concept of justice. From the first edition of his magnum opus, the scholar posits that economic analysis is fundamentally based on utilitarianism and arrives at a telling conclusion: "Bentham's utilitarianism, in its aspect as a positive theory of human behaviour, is another name for economic theory. Pleasure is value, and pain cost" (Posner, 1972, p. 357). As a practicing judge, Posner realised that this approach had a defining impact on constitutional, criminal and civil law. His notion of wealth maximization is exclusively about money, as he defines wealth as "the value in dollars or dollar equivalents (...) of everything in society." In other countries, however, other values may play the key motivating role, including the common good, charity, empathy, compassion, trust and social justice.

Different ethical foundations influence both economy, society and constitutional law. Thus, the constitution is bound to become a battleground for values of different origins: the principle of economic freedom comes from economy, while the social welfare state comes from ethics. In case of a collision between principles of constitutional law,

one should not only weigh those principles in isolation, but also pay attention to the areas of human activity that inform such principles. This is something that we need to keep in mind as we turn to the last component of a holistic development constitution — the aesthetic one. This component flows from the origins of Western civilisation in Ancient Greece that still remain a powerful influence for countries of Western and Eastern Europe.

It was indeed aesthetics that informed the Classical devotion to moderation, regularity, symmetry, rhythm and harmony (Losev, 2000, p. 452). An ideal of a concerted balance of all elements of nature and social institutions is something that is true for Plato and other Ancient Greek philosophers. The ideas of harmony and moderation were subsequently absorbed by the Christian culture through Saint Augustin, who was under Plato's influence, and Aristotle's follower Thomas Aquinas.

Classical thinkers tended to see the world as a balanced organism or universal cosmos governed by specific laws (Heraclitus's logos, Anaxagoras's nous, Plato's supernal eidoi). Thus, Classical aesthetic was not just about beauty, but about being in line with universal principles, and that is precisely why the era of consumption does not fit the Classical aesthetic framework. The Classical understanding of aesthetic also includes crafts: medicine and woodworking, but also law and politics, as we can create both physical items, thoughts, images and ideas. That is why the Ancient Greek had a single word for art, craft and science: *techne*. Placing crafts and sciences at the top of value hierarchy is a major development principle important for constitutional law, that has, however, been neglected by the consumerist society. Looking back at the Classical tradition, it is clear that crafts, arts and nature are inseparable, and are actually the essence of life (Losev, 2000, p. 242).

This is something that is reversed in the era of consumption, or the third stage of constitutional decline according to Plato, with its division and individual's alienation from nature, society and other individuals. This is a reflection of a fundamental difference in the frameworks used to process the world: Classical thinking tends to holistically unite the areas of life that are generally seen as separate by a contemporary

person. In Ancient Greece, human is not the master of nature and is not separate from it, but is seen as its part.

Legal institutions (first of all in constitutional axiology and in the system of human rights) are settled down in the most cardinal principles of existence. On the contrary, other elements undergo self-disintegration being involved in the logic of a necessary non-existence. For example, the value of unlimited consumption is delusive because it eventually can result in a global environmental and man-caused crisis able to influence the development of the humanity.

These Classical notions are not only relevant for subsequent development of European civilisation, but also for one's understanding of constitutional axiology, the law itself, as well as the fundamental nature of the interaction between state, society and individual. On the other hand, this perspective is valuable both for looking into individual legal institutions and for studying the abstract notions and different phenomena in their entirety, from the point of view of social development of states and environmental development of the Earth.

VI. Conclusion

Challenges connected to inequality, greed and environmental exploitation have been known since ancient times. Plato was one of the first thinkers to study them. According to his theory, constitutional decline stems from pleonexia in the souls of the individuals and the mega — soul of the state. To prevent it, proper balance should be restored to the soul of an ideal citizen and the principle of justice — which Classical thinkers saw differently from modern notions — be implemented. Plato offers at least two tools to prevent such decline: an internal (education) and external (laws) one. Plato's theory remains relevant to the modern world where constitutional decline is hastened due to consumerist ideals. To counteract these essential risks, a theory of sustainable development has been developed, bringing together a set of social, economic and environmental measures aimed at rational resource use for the benefit of future generations. Since some aspects of sustainable development clash with the consumerist economics, there needs to be an implementation of new purposes of constitutional

development: steady rise in people's wealth; keeping the environment for future generations; overcoming social differentiation; formalization of the ethics of duty rather than that of consumerism in basic state laws; placing the values of labor, science and art as a principle factor to overcome consumerism at the top of hierarchy. A shift from liberal market models to a holistic development constitution is possible through implementation of its successive economic, environmental, social, ethical and aesthetic components. The essence of holistic development constitution lies in prioritising the values of common good, labour, science and justice. It can be achieved with the use of dedicated methodological tools, and the holistic approach aimed at bridging contemporary division and alienation plays a key role among them.

References

Ballou, R.H. and Srivastava, S.K., (2007). Business Logistics: Supply Chain Management: Planning , Organizing and Controlling the Supply Chain. India: Dorling Kindersley Publishing.

Brennan, T., (2012). *The Nature of the Spirited Part of the Soul and its Object*. Cambridge University Press.

Durkheim, E., (1897). *Suicide: A Study in Sociology*. London: Taylor & Francis.

Egorova, M.A., Zhavoronkova, N.G., Shpakovsky, Yu.G., Ponomareva, D.V., and Shmeleva, D.V., (2022). Climatic Aspects of Ecological and Legal Protection of Forests in the Russian Federation. *Kutafin Law Review*, 9(3), pp. 415–436, doi: 10.17803/2713-0525.2022.3.21.415-436. (In Russ.).

Losev, A.F., (2000). *History of Classical Aesthetics in 8 Volumes*. Vol. 1. Early Classical Period. Moscow: Folio Publ. (In Russ.).

Meadows, D.H., Meadows, D.L., et al., (1972). *The Limits to Growth*. New York: Universe Books.

Meadows, D.H., Meadows, D.L., et al., (2004). *The Limits to Growth: the 30-Year Update. White River Junction*. Vt.: Chelsea Green.

Plato, (2007). *The Republic*. Penguin Classics.

Posner, R.A., (1972). *Economic Analysis of Law*. 1st ed. Boston.

Shapiro, F.R., (2000). The Most-Cited Legal Scholars. *Journal of Legal Studies,* 29(1), pp. 409–426.

Shorey, P., (1971). Plato's Ethics. In: Vlastos, G., editor. *Plato. A Collection of Critical Essays. Vol. II: Ethics, Politics and Philosophy of Art and Religion*. London, Basingstoke: Macmillan.

Vlastos, G., (1971). Justice and Happiness in the Republic. In: Vlastos, G., editor. *Plato. A Collection of Critical Essays. Vol. II: Ethics, Politics and Philosophy of Art and Religion*. London, Basingstoke: Macmillan.

Voronina, N.P. and Milovidova, A.I., (2021). Sustainable Development of Rural Areas of the Russian State as a Strategic Task and its Legal Support. *Kutafin Law Review*, 8(2), pp. 199–225, doi: 10.17803/2313-5395.2021.2.16.199-225.

Voskobitova, L.A. and Przhilenskiy, V.I., (2022). Transformation of Legal Reality under the Impact of Digitalization. *Kutafin Law Review*, 9(2), pp. 251–276, doi: 10.17803/2713-0525.2022.2.20.251-276.

Zakharova, M.V. and Przhilenskiy, V.I., (2020). Precariat in science and research: legal and philosophic comprehension of the issue in the global challenges perspective. *RUDN Journal of Law*, 24(4), pp. 901–918, doi: 10.22363/2313-2337-2020-24-4-901-918.

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