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EDITORIAL

Dear Readers and Authors,

We are proud and privileged to present to your attention the 3rd issue of our Journal in 2023. This issue contains a noteworthy selection of articles under the heading "Philosophy and Theory of Law." In papers united by an appeal to general theoretical issues, one can, at the same time, detect concerns associated with the most pressing problems of today. This general quality is reflected both in the titles of the submitted papers and in their content.

Andrey V. Polyakov and *Iya I. Osvetimskaya* in the article entitled "Moral Foundations of Legal Communication" thematized and problematized the moral foundations of the legal discourse presented in the context of the communicative theory of law. The authors conclude that ideas about law often diverge from ideas about justice due to the fact that in everyday life people evaluate legal theory according to *dominant intuitive values* rather than to scientific and theoretical criteria of law, such as consistency, evidentiary standards of proof, or effectiveness of law.

Vladislav V. Denisenko, Elena N. Trikoz, and *Elena E. Gulyaeva, Vladimir I. Przhilenskiy, Ilia L. Chestnov* and *Ekaterina G. Samokhina* also turned to theoretical and legal understanding of the role of communication in the functioning of legal institutions in various social practices. Using specific empirical material, the authors scrutinized the formation processes that have great social significance, namely, the Digital State, legal transplants, biobanking practices, etc., which allowed them to demonstrate the work of legal systems in the digital and molecular eras.

The other articles in the issue are also related to the topics of scientific and technological progress and global problems of our time. *Balakrishnan Suresh* and *Asha Sundaram* turned to the issues of embedded relationship nature of human rights, industrialization, environment, sustainable development goals, Constitution, Legislation, and Judiciary, combining legal and technical aspects of the development of modern society in a unified logic determining the functioning of sociotechnical systems.

Tatiana I. Otcheskaya, Tatiana I. Afanasyeva, Polina D. Zhukova, Nadezhda V. Mishakova, Kristina A. Orkina, and *Daniil I. Shtefan* analyzed the interrelationship between caring for health of the nation and rule-of-law state

formation, defining it as the determinant of innovations in law enforcement and judicial activities.

Tareq Al-Billeh demonstrated his concerns about cases of judges' misuse of social media and compared the disciplinary measures provided for relevant cases in Jordanian and French legislation.

Beniamin A. Shakhnazarov examined specific cases and general patterns of action regarding implementation of international principle of exhaustion of rights in cases of parallel imports.

We would like to express our deepest gratitude to researchers and practicians for their dedication and incredible contribution to our Journal.

Vladimir I. Przhilenskiy
Dr. Sci. (Philosophy)
Editor-in-Chief

PHILOSOPHY AND THEORY OF LAW

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Article

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Moral Foundations of Legal Communication

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Abstract: The article is founded on the position that social communication as an evolutionary option for the development of communication of all living beings must also include legal communication. In this existential context, legal communication is not reduced only to the transfer of symbolic (textual) information determining the behavior of subjects of law. It is also considered as a vital option for adapting to the environment, which allows both individuals and society to survive, develop and self-realize. Legal communication involves not just cooperation and interaction between legal subjects, but also the observance of the necessary conditions for the implicit and explicit goals of legal communication to be achieved and realized. Implicit (universal, transcendental, evolutionarily necessary) goals are reflected at the sociobiological level in the reciprocal altruism (ego-altruism) of communicants, at the philosophical (rational) level — in the principle of mutual legal and moral recognition, at the religious level — in the commandment "love your neighbor as yourself." The authors reveal the connection between these concepts and the concept of communication by J. Habermas and the principle of mutual recognition by A. Honneth, on the one hand, and the idea of intuitive law by L.I. Petrażycki and the ideal of "free all-unity" by P.I. Novgorodtsev, on the other hand. It is shown that the findings of

these scholars lie at the heart of the communicative theory of law and are supported by neuroscience data. According to the position put forward in this research, the rejection of mutual recognition inevitably entails the assertion of parochial altruism, the ideology of tribalism, the ideological justification of authoritarianism, violence as a universal political method, the neglect of human rights and, as a result, the deformation and destruction of legal communication.

Keywords: legal communication; mutual legal recognition; egoism; altruism; neuroscience; L. Petrażycki; P. Novgorodtsev; J. Habermas; A. Honnet

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Contents

I. Introduction

It is well known that the problem of identifying and justifying the universal value basis of law is one of the oldest problems and unresolved one even nowadays. This paper reviews whether there are values that underlie both law and morality and that can be consistently recognized by all as fundamental to our conceptions of the justice and morality of law. And if so, how can we identify and justify them?

As a rule, legal scholars conduct their research in almost complete isolation from the data of the natural sciences. The premise of this

methodological decision is usually the belief that human consciousness is a "blank slate" on which the family, society, and the state make entries.

Cognitive science meanwhile rejects the very possibility of unprecedented knowledge and its "pure" spirituality. According to evolutionary epistemology, which develops these questions, there are innate cognitive structures, innate mechanisms of learning, predispositions to behave in certain ways, "genetically programmed dispositions, prejudices, expectations… there is an innate preference of some cultural genes (cultural units) for others" (Knyazeva, 2012, p. 23).

Throughout many thousands of years of human history biological, cognitive and cultural evolution have been highly correlated and mutually reinforcing (Merkulov, 2000, p. 7). On this basis the modern theory of genetic and cultural co-evolution was formed. As noted in the literature, this theory has refocused from the biological, genetic level to the relatively autonomous cognitive level in solving the issue of the mechanisms of human culture generation. It directs science towards the study of the human cognitive system and evolutionary changes at the cognitive level (Merkulov, 2000, p. 10). Such an approach is based on the premise that all human knowledge is adaptive in nature and is meant to improve our ability to survive. This adaptive process involves the specialization of living organisms and the selection of content meaningful to them. This kind of specialization through cognition of the world is a demonstration of the ability to "survive in the environment" and "get along with others" (Merkulov, 2000, p. 30). In this article, the authors attempt to demonstrate the relationship between law and morality by analyzing the data presented by contemporary cognitive research, evolutionary epistemology, and neuroscience and communicative theory of law.

II. Neuroscience and Communicative Foundations of Law

It seems that modern studies in the field of evolutionary theory, sociobiology, cognitive research, and neuroscience[1] in a certain sense

[1] Among the scientists dealing with this problematic in the perspective we are interested in the works of J. Bauer, F. de Waal, M. Gazzaniga, A. Damasio, D. Dennett, R. Dawkins, D.I. Dubrowski, T. Insel, D. Kahneman, V. Klucharev, K. Lenman,

confirm both the existence of irrational foundations of law and the possibility of a rational approach to the universal value basis of law. Today it can be considered proven that the process of evolutionary development of human society has been associated with the formation of such adaptive and protective mechanisms, which are necessary for adaptation to external conditions and for survival in a changing environment. They include both moral intuition and moral grammar (Hauser, 2007; Mikhail, 2007, 2011, 2012), which in its basis also contains legal grammar close in its meaning to what L.I. Petrażycki called "the axioms of intuitive law" and P.I. Novgorodtsev — the ideal of "free all-unity," as we will show below.

Modern neuroscience relies on special methods of human brain research, including neuroimaging methods, to explain the origin and interdependence of mental, emotional, and rational ideas about law and morality (Klyucharev, Schmids, and Shestakova, 2011). Neuroscientific research conducted all over the world leaves no doubt that the understanding of human behavior, and thus the understanding of law, depends among other things on our knowledge of the patterns of functioning of the human brain, which were formed in the course of evolutionary development. The meaning of all such studies from the point of view of the question of universal values that interests us can be revealed by referring to one of the works of the neurobiologist J. Bauer. According to his testimony, neurobiological studies conducted in recent years have shown a new vision of man and his social nature. A human being appears as a creature whose main motivations are aimed at communication and development of positive interpersonal relations (Bauer, 2006, p. 9). "We are social animals," de Vaal writes, "who rely on each other, need each other — therefore, helping others and sharing with others, we get pleasure" (Vaal, 2014, p. 95).

According to Bauer these findings in recent decades have been staggering even to specialists. It turned out that the natural goal of biologically fixed human motivational systems turned out to be social community and positive, established relationships with other

M. Lieberman, K. Lorenz, T. Metzinger, J. Mikail, S. Pinker, K. Popper, R. Wright, V.S. Ramachandran, D. Rizzolatti, R. Sapolski, D.F. Swaab, E. Wilson, J. Hyde, M. Hauser, N. Chomsky, D. Chalmers, P. Churchland, D. Edmonson, M. Iacoboni.

individuals in all forms of social interaction. Thus, not only the goal, but also the essence of any human motivation is the establishment of mutual recognition, respect, affection, and sympathy. From a neurobiological point of view, Bauer argues, we are creatures made for social interaction and resonance. All the goals that we pursue within our daily lives regarding education, profession, finances, acquisitions, etc., according to Bauer have a deep, usually unrecognized "meaning" from our brain's perspective, because focusing on these goals we ultimately seek interpersonal relationships, that is, we want to create or maintain them. Therefore, "the human desire to be recognized as a person is, according to popular opinion, even higher than the instinct for self-preservation" (Bauer, 2006, p. 25).[2]

III. Claims as the Basis of Law

By virtue of its evolutionary programming for cognition of the surrounding world to adapt to the environment, man is a claiming being, because claims constitute an adaptation complex. But claims are fundamentally different not only from the appropriation of useful properties of the external world, but also from voluntaristic arbitrariness. A legal claim is always an invitation or even a demand for recognition of what a person is claiming. It is always an invitation to communication. The starting point of any legal claim is an implicit claim for recognition of the right to life and security of the claimant. Such a claim makes sense only when it is addressed to a person capable of understanding and recognizing the claim as just and necessary to fulfill it. It is based on the need for recognition of the bearer of the claim, recognition at the level of society.

[2] A separate question that arises in this connection and requires reflection is the explanation of possible situations of non-recognition, aggression, war of all against all, etc. It seems that the answer can be given from different positions. J. Bauer, for example, sees the reasons for such behavior, first, in the deficit of the very relations of recognition (Bauer, 2006, pp. 45–56). K. Lorenz looks at it differently (Lorenz, 1966); E. Wilson sees the causes of asociality in the vestiges of the instinct of tribal consciousness (tribalism, clannishness) (Wilson, 2015). Each of them is right in his own way. But that is the subject of another article.

But, starting from Hegelian philosophy, since such recognition is not the one-sided recognition by a slave of his master, it can only be the mutual recognition of equal and free people. Mutual recognition is therefore a peculiar result of the development of the individual, of his ability to transcend instinctive biologicalism and primitive egoism. It is also altruism, for it recognizes the Other with all his rights, dignity, and interests derived from them. There is a *moral* obligation to act in the interest of the Other in accordance with his entitlement. But it is also egoism, because both one's own rights and interests have the same meaning for the human self. O. Höffe called this symbiosis of altruism and egoism, understood as an exchange of initial obligations, without which legal communication is impossible, a transcendental exchange, giving to such an exchange the significance of a universal precondition for the very existence of society, law, and state (Höffe, 1993, pp. 99–102). Such an exchange can be viewed from an economic perspective as a primary and mutually beneficial transaction, which is the basis for the subsequent maximization of the well-being of each member of society and society as a whole.[3] But from the perspective of religious philosophy, this exchange is already a reflection of the involvement of both participants in existential legal communication in the unifying supreme principle, which is expressed in the commandment of love for God and for one's neighbor.

Without mutual legal recognition, law is impossible, because legal relations presuppose beings with the capacity to understand certain rules of conduct, to relate them to the value of their own person and the personalities of other subjects, and to be free to accept or not accept their significance depending on whether these rules are reckoned with their legal personality. Legal recognition is based on the moral capacity to perceive the Other as the same, but also different from myself (the other); the capacity to respect this Other as oneself and to assume a moral obligation not to harm this Other. This line of thought,

[3] Such an exchange (obligations of recognition of the Other as a sovereign subject, a bearer of rights and obligations) guarantees participants in economic relations the most favorable starting positions, allowing participation in various, including market relations on an equal basis. On the maximization of welfare and rational choice from the position of the communicative approach *see* Polyakov, 2021, pp. 39–101.

formulated in the communicative philosophy of law, was tested in the Russian school of "revived natural law," and it is supported in the communicative philosophy of law projects abroad, in particular, in the works of J. Habermas and A. Honneth.

IV. Communication and Mutual Recognition in the Works of J. Habermas and A. Honneth

In his philosophical constructions, Habermas also assumed that the subjectivity that "transforms human flesh into a spiritual vessel" is formed through an intersubjective relationship with the Other. The individual self emerges "exclusively on the social way of outward manifestation and can only stabilize itself in a network of mutually effective relations of mutual recognition" (Habermas, 2003, pp. 45–46). The philosopher finds interdependence between the autonomy of the individual and the principle of equal respect for everyone as the basis of both law and morality. He writes that the modern doctrine of *"morality of reason"* and *"law of reason"* is based on the basic notion of the autonomy of the individual and on the principle of equal respect for everyone (Habermas, 2010, p. 470). He sees the transition from morality to law, as does Klaus Günther, in replacing the "symmetrically restrictive perspective" of respect for the autonomy of someone else with a claim for recognition and respect for one's own autonomy on the part of the Other. The morally sparing treatment of the *"vulnerable other"* is replaced by a conscious demand — a demand for legal recognition of him as a self-determining subject who "lives, feels and acts according to his (or her) own judgment" (Günther, 2009, pp. 275–276). Thus, Habermas recognizes the principle of mutual legal recognition as the moral basis of law. The thinker writes explicitly that the universal dignity due equally to all persons, the connotation of which is self-respect, rests on social recognition.

Therefore, the dignity of man also requires to be rooted in civic status, that is in belonging to a certain community organized in time and space. And such a status must be equal for all. The concept of human dignity, in Habermas's thought, transfers the content of the morality of "equal respect" for everyone to the status order of state citizenship, and

the self-respect of each citizen arises from being recognized by others as a subject of an *"inter-all agreed right"* (Habermas, 2010, p. 471).

Axel Honneth, a disciple of Habermas, develops these insights by revealing the complementarity and interdependence of individual and collective autonomy. Honneth's paradigm of the struggle for recognition shows how the egoistic and altruistic beginnings work in the development of individuals and social relations (institutions). Egoistic interests of individuals involved in the struggle, creating social conflicts, in A. Honneth act as an engine of moral progress of society, in which individuals reach a new understanding of the common good and realize it. As B. van den Brink testifies, "the struggle for recognition is not just one of the many forms of struggle in society, it is the engine of historical change, the transformation of social, political and moral attitudes throughout society" (Van den Brink, 2014, p. 7).[4]

Honneth understands the identity of the "I" as a product of sociality, i.e., identity emerges through the fact that everyone recognizes himself in the Other (and the Other does so in sync with me). It should be noted that the origins of this can be found as early as in Hegel, in whose philosophical views Honneth emphasizes points that were previously overshadowed. As I. Mikhailov puts it, Hegel himself finds recognition as early as in Fichte, who in the "Fundamentals of Natural Law" defines it as the interaction between individuals that underlies legal relations. Hegel further uses models of recognition to explain the reciprocal actions of individuals. "To the extent that a subject finds his special abilities and qualities "recognized" by another subject (and thus finds himself reconciled with it, in agreement), he learns to see his own unique identity, thereby finding himself opposed to the other as special" (Mikhailov, 2012, p. 71). Honneth also finds that this interpretation of Fichte helps Hegel to look afresh at Hobbes' notion of struggle as well, whose meaning in the new interpretation is not limited to the struggle for physical existence but is a quality of an *"original-moral event."* The social contract merely takes this struggle to a new level. Hegel calls such

[4] As an example, the author cites the participants of labor movements that demanded fairer wages and decent working conditions. Their struggle for fair wages was accompanied by an awareness by all members of society of the common good (Van den Brink, 2014, p. 7).

elementary forms of mutual human recognition *"natural morality"* (Mikhailov, 2012, pp. 71–72).

Consequently, personal and collective identity, according to Honneth, can only be sustained together if there is a developed relationship of mutual recognition of personalities at all three basic levels: love (at the level of the individual as a bodily being), right (at the level of the abstract individuality) and solidarity (at the level of the concrete individual capable of realizing his subjective capacities in activity) (Honneth, 1995, pp. 93–95). And again, these elementary levels of recognition are found in Hegel in the form of the stages of natural morality. In the first stage, subjects mutually recognize themselves as loving in the parent-child relationship. Then, on the second level, subjects act as participants in ordered forms of exchange (e.g., commodity exchange). Further, on the third level, the subjects act as participants in legal relations based on universal, contractually fixed legal norms (Mikhailov, 2012, p. 72). This is how the moral foundations of legal communication are revealed.

The principle of mutual legal recognition allows a person to perceive himself as a subject, which means to recognize himself as capable of taking part in public life and having a voice, including in the process of making laws for society. The conflicts over political and participatory rights that have arisen on this basis have led the individual to define himself or herself as a citizen. Ignoring this right objectifies the individual, making him "invisible" to the state, destroying his legal personality.[5] Interestingly, recognition entails a limitation of egoism and a predominance of altruism. Honneth notes that recognition requires a conscious self-limitation of one's egoistic impulses, requires overcoming the thirst to satisfy one's inclinations at all costs. Social relations arise since the participants in the interactions see that the Other, under the influence of my activity, performs this act of moral self-limitation and responds by performing the same exact act. As a result, an entirely different content is introduced into the biological world that was absent there: moral self-restraint is the germ of sociality.

[5] "Invisibility" is understood by A. Honneth as a way of humiliating the human person by ignoring him, "looking through," recognizing the non-existence of the person in the social sense, and in the legal sense in particular (Honneth, 2001, p. 111).

Honneth defines recognition as the mutual restriction of one's own passionate egoistic desires in favor of the Other (Honneth, 2010, p. 20). It is the capacity from which the rest of the social qualities in human self-awareness emerge. Through mutual recognition, society becomes intelligent — one in which freedom and solidarity are organically related to each other.

V. The Communicative Foundations of Law in L. Petrażycki's and P. Novgorodtsev' Theories

L. Petrażycki and P. Novgorodtsev come to similar conclusions. According to Petrażycki, there are such areas of law where there are "such general and strong intuitive legal convictions that the rules of social life, duties and rights that are subject to them cannot arouse doubts in anyone except for mentally insane people" (Petrażycki, 2000, p. 484). The scientist considers it possible to *"conditionally call"* such statements as "the axioms of intuitive law" (Petrażycki, 2000, p. 484).

Intuitive law, as Petrażycki puts it, is perceived by the experiencing subject as imposing a duty to abstain from all assaults on the personal, property and bodily integrity of "neighbors," giving "neighbors" themselves the right to demand the omission of such acts and, eventually, the right to protection (individual or collective) in case of such assaults. In fact, this means recognizing essential rights of the "neighbor" that are not established by the state but correspond to human nature as it has evolved in the evolutionary development of society. It is also clear that these rights extend to all "neighbors" among civilized peoples and are the boundaries of their legal freedom. Thus, freedom and equality are also necessarily present in such a construction, and the recognition of such inalienable rights for each "neighbor" also means the mutual recognition of their legal personality (mutual legal recognition). Petrażycki's reservations about "neighbors" and "civilized peoples" are not accidental. The scholar understood the development of human society *"along the path of progress"* would be accompanied by a dialectical struggle of egoistic and altruistic principles, and that only gradually would *"civilized law, based on mutual recognition,"* embrace both broader strata of society and new nations and states,

gradually displacing egoistic emotions and replacing them with altruism (Petrażycki, 1913, pp. 587–593).

It is interesting to note that both L. Petrażycki, the head of the St. Petersburg School Philosophy of Law, and P. Novgorodtsev, the head of the Moscow one, were supporters of Darwin's evolutionary theory, viewing it in close connection with philosophy and legal theory. P. Novgorodtsev's central construction of the social ideal is associated with it. Describing Darwin's discoveries as *"great"* (Novgorodtsev, 1991, p. 79), Novgorodtsev, in a communicative spirit, formulated a question that should still be at the center of attention of philosophers of law today: "under what conditions, derived from the laws of biological evolution, could the peaceful perfection of coordinated communication be preserved?" (Novgorodtsev, 1991, p. 82). In answering this question, the scholar relied on the main provisions of the Neo-Kantian school, trying to combine them with some of Hegel's ideas, but without departing from the traditions of liberalism. Consequently, the thinker asserted the impossibility of full-fledged human communication without recognizing all people as subjects of communication. Entering communication with his fellow human beings, Novgorodtsev noted, "an individual cannot deny their rights except by denying his own self and his own rights. Hence, the duty of mutual recognition is born" (Novgorodtsev, 1991, p. 111).

It should be noted that in the pre-revolutionary period (a few years before the events of 1917), the philosopher derived this duty not from the dictates of some *"morally superior"* being — society or the state — but from *"the individual's own law"* (his moral autonomy), from his inherent *"striving for the ideal norm"* (Novgorodtsev, 1991, p. 111).[6] It is this desire for the ideal norm, which is the norm of mutual recognition, that makes possible, according to Novgorodtsev, communication itself, and gives rise to the very possibility of both law and morality. "Law is inconceivable without elements of equality and freedom, albeit in their narrowest and most modest manifestation, just as it is inconceivable

[6] In the last years of his life, Novgorodtsev's position on this would undergo a radical change, which, however, is explained not so much by rational grounds as by his emotional reaction to the assertion of the Bolshevik power in Russia.

without mutual recognition of individuals, without the beginning of solidarity" (Novgorodtsev, 1991, p. 115).

"The ideal meaning of communication," Novgorodtsev explains, "is not exhausted by the principles of formal law, which provides each his own: it is even more expressed in the requirements of a higher moral law, which unites people in the spirit of solidarity and love and binds their disparate forces into a common cultural aspiration. Thus, in the concept of the individual, both his claims to equality and liberty and his obligation of solidarity and unity with others have their origin in the same way" (Novgorodtsev, 1991, p. 115).

It appears that both the ideas of Petrażycki and Novgorodzev, and the research of modern neuroscientists in general confirm the important thoughts of Darwin formulated by him in the second half of the 19th century. For example, in "The Origin of Man and Sexual Selection," Darwin argued that human mental and moral capacities arise, improve, and develop under the influence of natural selection, including through inheritance (Darwin, 2012, p. 67). Morality and law, in this approach, are necessary means for the survival and development of man, for development along the path of progress. Such "social" moral feelings, according to Darwin, are akin to instinct. They arose with necessity in the ancient man to be able to live together with other kinsmen and perform social functions.

The English scholar also believed that, in addition to heredity, ancient people derived the necessary moral qualities from their own experience. As the "faculties of thought" and "prudence" of tribesmen improved, each of them, Darwin believed, could easily see that in helping others he usually received help in turn. From this self-loving motive man could acquire the habit of helping his fellowmen, and the habit of doing good, no doubt, must have increased the sense of sympathy which serves as the first impetus to good deeds (Darwin, 2012, pp. 68–69). An additional impetus for its formation and maintenance was the psychological influence of society itself. "It is evident," stated the scholar, "that the members of one tribe approved of acts which, in their opinion, served the common good, and condemned those which seemed injurious to them. From this experience were formed not only emotional attitudes to each other's actions, but also fundamental principles of

morality." Darwin derives this *"cornerstone of morality"* in the form of the famous formula of the "golden rule:" one must "do good to others, to act towards others as we would have them do to us" (Darwin, 2012, p. 89).

In the post-classical theory of law, I. Chestnov reflects in this context. The scientist sees society as the basis of all social phenomena, which he calls *"transcendental."* Like everything social, "it follows from a natural (maybe, biological) need of a person for cooperation, communication, interaction, and joint existence. Law together with other social phenomena ensures this co-existence, i.e., provides self-preservation, stability (ideally — development) of society as a totality of connections between certain, appeared as a result of social evolution, statuses" (Chestnov, 2002, p. 263). In his later work, I. Chestnov emphasizes that it is only through a legal dialogue as an interaction that presupposes the acceptance of the point of view of a socially significant Other (a bearer of a social status) that the self-reservation of society is possible (Chestnov, 2012, p. 633).

VI. Mutual Recognition as an Universal (Spiritual, Moral and Legal) Value

If we look from the perspective of neuroscience at the views outlined above, we will see something in common, namely a value that unites them in some way different positions, clearly claiming a universal character and even an ontological status for law. This value is the value of the *mutual recognition of the human being as a human being*. Such recognition (in contrast to recognition among primates or other social animals) has a complex structure. It is formed initially (during the evolutionary development of man and society) at the subconscious (unconscious, intuitive), emotional level, but later also at the conscious, rational level. At the subconscious level, recognition manifests itself in the form of empathy. Empathy manifests itself through trust, friendship, and love. The highest degree of empathy is love (both social, agape love and erotic love). Acknowledgement at the highest level of social empathy can be seen as the practical realization of the Gospel commandment to love one's neighbor as oneself (Matthew 22:37-39). Recognition

on a rational level operates through the awareness of the boundaries between the possible and the permissible in human relationships and involves reciprocity (the connection between the values of egoism and altruism). This recognition is the natural basis for the emergence of the concept of the rights and responsibilities of each person in relation to himself and others and for real interaction on this basis. The dominant idea here is equality in freedom[7] and the responsibility to preserve each other's dignity (solidarity).

As Habermas points out, "Animals... do not belong to the universe of members who address intersubjectively accepted rules and orders to one another. "Human dignity," as I would like to show, is in a strict moral and legal sense connected with this relational symmetry. It is not a property like intelligence or blue eyes, that one might "possess" by nature; it rather indicates the kind of "inviolability" which comes to have a significance only in interpersonal relations of mutual respect, in the egalitarian dealings among persons" (Habermas, 2003, p. 33). A. Honneth also understands the identity of the "I" as a product of sociality, i.e., identity arises through the fact that everyone recognizes himself in the Other and only in this way is "We" formed (Honneth, 2010). Consequently, personal, and collective identities can only be sustained together if a developed relationship of mutual recognition of personalities is formed (Honneth, 1995, p. 46, 211).

The very existence of two levels of recognition (intuitive and rational) and their known epistemological and practical competition are not accidental. This is how the human brain works. Its dualism corresponds to the two decision-making systems available in the human brain. As is known, the presence of two systems, formed during evolutionary development of the human brain, has been shown and explained by D. Kahneman. According to his concept, System 1 is fast, intuitive, automatic, unconscious; System 2 is slow, purposeful, rational. System 2 tries to control and manage System 1, but its ability to do so is limited (Kahneman, 2011, pp. 19–105, 377–418).

[7] It is interesting that neurobiologists attribute freedom, which includes the absence of restrictions on movement and information, to the innate programs of the human brain (Dubynin, 2022, pp. 48–49).

Modern neuroscience researchers conclude that the ability to assess the fairness of social interaction is extremely important for ensuring long-term cooperation within a social group. Immediate involuntary reinforcement of fair suggestions and punishment of unfair behavior is an important evolutionary mechanism for the existence and cohesion of social groups. Therefore, the automatic involuntary response of System 1 often suppresses System 2. The "diffuse" nature of decision making… allows the weight contribution of the emotional and rational (cognitive) components to be adjusted depending on the context… which gives the decision-making system the necessary plasticity (Klyucharev, Schmids, and Shestakova, 2011, p. 22).[8] The systems thus complement each other, and this explains a kind of dualism of mutual recognition as the highest legal and moral value: after all, it can exist both as an initial legal intuition and as a conscious moral-legal principle that requires everyone to recognize equal freedom, dignity, responsibility, and solidarity in relations between people.[9] The possibility and necessity of combining both options as elements of legal communication is justified in the communicative theory of law (Polyakov, 2014, 2022).

VII. Conclusion

Theory and practice do not always correlate. A human being is a limitedly rational being. Therefore, situations are quite possible when theoretical ideas about what the law should be, go against the dominant intuitive values, which, as already noted, for various reasons may differ from each other with considerable variability. One perceives the theory of law not only in terms of its consistency, probative value, and applicability in practice, but also in terms of whether it corresponds to one's underlying, basic value intuitions. Mutual legal recognition is a balance of the value of the individual with the value of the super

[8] On the connection between the theory of law, cognitive research and neuroscience see, for example: Malman, 2016.

[9] In this context, it is also appropriate to recall C.G. Jung's warning: we should never forget that "the world exists only because of the balance of opposing forces: the rational is balanced by the irrational, and what is planned and set as a goal is what exists" (Jung, 1981, p. 216). *See also:* Hauser, 2007; Haidt, 2006.

personal — with the value of society and its possible modifications (nation, state, tradition, etc.). An imbalance in the direction of any of these principles creates an attitude of unilateral recognition (absolutization) of either the value of the individual (antisocial egoism) or the value of the super person (for example, anti-human tribalism, mixed with racial altruism). Such a skew in the value hierarchy may be caused both genetically (a predisposition to such a deformation may be inherited by individuals) and by specific socio-cultural circumstances (for example, total propaganda, civil war). In both cases, the connection between value orientation and genetic and sociocultural influences is not strictly deterministic, but only probabilistic. Consequently, rational reasoning and human free will remain the most important components of adopted behavioral attitudes (Markov, 2011, pp. 92–106, 125–136).

One example is the ideology of non-recognition of the equality of all people in rights, duties and dignity that dominated Nazi Germany in the 1930s. Only a small number of opponents of the regime could consciously resist the demand to be with their people and the Führer in these matters as well. Most Germans supported the new order in one form or another (halfheartedly or wholeheartedly). But even this support, linked to a situational reassessment of values under the hypnosis of authoritarian rule that stirred up tribal instincts, was only temporary. After the fall of the regime, its former supporters were left to wonder how quickly they could be recruited and values reoriented by Nazi ideologists.[10]

The denial or distortion of the principle of mutual legal recognition leads to the deformations of legal communication (Osvetimskaya, 2021), and even to outright arbitrariness. Therefore, the understanding that the recognition of the value of law and, accordingly, of human rights and obligations as a universal asset, as priority values that among other things have a moral sense, is essential. It is an indispensable condition for the survival of human society. But this understanding is sometimes gained at too great a price.

[10] The problem of irrational obedience to authority is addressed in a famous study by S. Milgram (Milgram, 1974).

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The Communicative Function of Law in a Digital State

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Abstract: The paper is dedicated to the analysis of the communicative law function, which is the basis of the modern interaction between social state and civil society in the era of the digital law formation. In the context of modern digital society and state, we need to take into account the specificity of understanding and classification of the law functions. Communication is one of the most important characteristics of modern digital state and law. In this regard, the paper considers the communicative law function both socially and legally. Socially, the communicative function is considered as an informational one. In this regard, it is essential for the legal culture, legal education and legal consciousness. Communicative function as a social one involves understanding of the interaction between society and law from a position of the linguistic paradigm. With this concept, the legal system is seen as a system of communication between subjects based on the autonomy of the individual. In the modern digital state communication as a social function of law is a basis of legitimization of legal acts. The legal consciousness is an important condition for law recognition.

Along with the social function, communication plays an important role as a legal one. In this aspect, communicative action is connected to the regulatory and the protective functions of law. Communication plays a key role in the modern legal regulation due to the extension of its subject. The functioning of law in modernity has its own specifics with regard to the process of society juridification under conditions of law modernization and fulfilment of the state social function. The

juridification consists in the fact that legal norms replace other social rules. Regulation of the majority of social relations through legal functions leads to the need to take into account communicative connections in society. Legal functions of law in the modern society should use the principle of deliberation in law to achieve their goals. Communication in its functional aspect is deemed a necessary foundation of an effective legal regulation and legal policy.

Keywords: functions of law, legal communication, legal regulation, digital state, legitimization of society, legitimacy of law, communicative function of law, subject of law, principle of deliberation in law

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Contents

I. Introduction

Functions of law is a "description of the main areas of legal influence on social relations, as well as the role (purpose) of law in society" (Radko, 2014, p. 207). The theory of functions of the law reveals questions of an impact of legal rules on society, specificity of such an impact in a state, as well as its main directions. Functional approach to law is important because it reveals the features of legal regulation in various states. In the modern period, the digital state is being formed, which affects the type and content of the functions of the law. The most important areas of legal influence in connection with the digitalization of legal relations are, first of all, the informational and communicative functions of law. In the second half of the 20th century, there was a transition to an information society in which the structure of the economy radically changed, which was reflected in the legal

policy of a state power. Information becomes the main object in public relations, including legal ones. As J.-F. Lyotard pointed out in 1979, "It is widely accepted that knowledge has become the principle force of production over the last few decades; this has already had a noticeable effect on the composition of the work force of the most highly developed countries" (Lyotard, 1998, pp. 18–20). Both in public and private law, the phenomenon of information reality is being developed, which forms a system of objects that may be absent outside the virtual space. The formation of a significant number of new legal relations inevitably results in the expansion of the subject of legal regulation. At the same time, their specificity leads to the formation of new functions associated with legal procedures that have no analogues in the past. Thus, modern society is characterized as a postmodern or late modern society, in which relations are determined by the so-called "hyperreality" and "simulacra" (Baudrillard, 1981, p. 45). The effectiveness of the functions of law in a modern state directly depends on the legal policy in the field of information relations. Therefore, it is important to understand the role of the communicative function and its relationship with other functions, such as regulatory and protective ones. The concept of the communicative function of law is thus conditioned by the development of social relations and presupposes a doctrinal analysis of the entire system of legal functions in a modern digital state.

II. Legal Communication in a Digital State

In the 1970s, the "communication" category becomes one of the key ideas in political and legal science. From that time to the present, various concepts of legal communication have been formed. Analyzing this question, we should note that there are several aspects of understanding the "communication" category. Mark van Hoecke wrote, "The concept of communication has the advantage and disadvantage of being polysemic" (Van Hoecke, 2012, pp. 20–21). In legal science, communication is considered from the following aspects: firstly, in constitutional law, the basic condition for obtaining a certain legal status, for example, citizenship or a work permit for a foreign citizen, is a certain level of proficiency in the state language, that is a "communicative competence"

(Parfenov, 2019). Secondly, in relation to the questions of the functions of law, the scientific approach to communication was revealed within the framework of the theory of N. Luhmann and J. Habermas (Luhmann, 1969, pp. 120–145). These concepts reveal the specifics of legal regulation in the modern information society. It is these theories that are of interest to us, since with the help of a communicative method, the understanding of the essence of law is being revised. An important communicative approach is the theory of "autopoesis in law" by the German sociologist N. Luhmann (1985, p. 436).

In the modern state law, according to N. Luhmann, should be understood not as a system of legal documents but as a system of communications. This approach to law is associated with the consequences of social development, which consists of the complication and differentiation of social systems. These two processes lead to the existence of autonomous social systems. Modern social systems differ from each other in two characteristics, firstly, it is a program, and secondly, it is a binary code. The legal system, in particular, is characterized by its binary code — legally/not legally, and its programs, by which various sources of law are understood. In the information state, the phenomenon of a decline in the effectiveness of legal regulation arises, since the legal system does not correctly recognize the communications of other systems. Unlike more ancient periods, in the modern era, law is an autonomous system within which information is exchanged, that is, the process of communication takes place.

Thus, the functioning of the legal system within the framework of the theory of N. Luhmann is considered through the idea of communication. The communicative approach to understanding legal regulation is most consistent with the legal policy of the digital state. The theory of autopoiesis in law considers the social grounds of legal acts. As a practical recommendation, N. Luhmann suggests indirect legal regulation that will achieve the goals of legal acts. As an example of such regulation, one can point to labor law, in which legal acts only establish the foundations of the legal status of citizens, and the subjects of legal relations themselves form specific rights and obligations. Thus, the communicative understanding reveals the phenomenon of the functions of law from methodological grounds other than the

normative type of legal thinking. Speaking about legal communication, A.V. Polyakov writes, "Law in such a communicative perspective is not an isolated entity — an abstract metaphysical idea (for example, the common good), an a priori value (for example, equality, freedom or justice), a textual prescription, behind which stands someone's "will" (for example, the law), but appears as a "living" (coherent, synthetic, integral, procedural, developing) social phenomenon that includes reason, values, normativity, and textuality" (Polyakov, 2011, p. 32).

The discursive-communicative concept of J. Habermas plays the greatest role for the theory of legal functions. In the work "The Theory of Communicative Action" J. Habermas notes that the nature and structure of conflicts is changing in modern society. Earlier they were formed in the sphere of economic production and were connected with the distribution of public goods. Now "new conflicts break out not in the field of distribution problems, but in connection with the grammar of life forms" (Habermas, 1997, p. 15). Therefore, social changes of the second half of the 20th century require a new understanding of the system of functions of law and a new scientific methodology. J. Habermas considers communication as a type of social action from the position of the linguistic paradigm. The word is not understood here "as a mean of expressing the results of thinking; thinking and the use of language are interpreted as coinciding processes (and the second process becomes more important for the researcher of society). Therefore, the philosophy of the "pure" (only) subject is being replaced by the philosophy of intersubjectivity" (Denisenko, 2020, p. 314).

In the second half of the 20th century, the so-called linguistic turn in philosophy took place, which influenced the development of various directions in jurisprudence. The expansion of positive law into the sphere of morality, the expansion of the subject of legal regulation in a modern social state inevitably posed the problem of language learning and interaction through language. Language act is a key term for understanding, research related to linguistics. Gadamer notes, "language has its true being only in dialogue, in coming to an understand." To understand the speaker's position is "to come to an understanding about the subject matter, not to get inside another person and relive his experiences" (Gadamer, 1988, p. 452). For example, a doctor listening to a pa-

tient's complaints acts as an observer studying the signs of the patient's internal state. A distinctive sign that the interlocutor understands the statement of the interlocutor is to come to a "substantive understanding" (Gadamer, 1988, p. 446). In this case, the text appears not just as a manifestation of the one who speaks or writes, but is considered as a claim to truth.

The understanding of interaction through language came through Karl Buhler's theory of language. Buhler identified three functions of language signs: 1. representative function — to represent the state of affairs; 2. appellative — to appeal to someone; 3. expressive function — to express the speaker's experiences. This classification of functions made it possible to move away from the understanding of a language, description or representation and served as the basis for the formation of a new philosophical paradigm of a language as an action. This paradigm was developed by J.L. Austin in the work "Word as action" and was named the theory of speech acts (Austin, 1986, pp. 26–27). J.L. Austin, unlike all previous researchers, reveals a different aspect of speech. Through words, we do not just convey information, but perform actions that change social facts. J. Austin for the first time points out that earlier in philosophy statements were considered as a description or claim of something. At the same time, the statements were evaluated as true or false. Meanwhile, there are statements that do not describe the situation, but carry out an action. For example, the saying "All rise, the court is in session" does not describe the situation, but commits an action performed by the subjects.

A declaration on entering into marriage is not a description of the commission of marriage, but it is the commission of an action with legal consequences. It was J.L. Austin who introduced the category "performative" to introduce the word-action into scientific circulation. A performative is a statement that is an action at the same time. As a result of the language analysis, Austin came to the conclusion that any statement that people use in life has a performative change. So, the phrase "there is a dog outside!" is not only a description, but also a warning.

According to Austin, the speech act consists of a number of elements: locution, illocution and perlocution. Locution is a kind of

message when information is transmitted. For instance, a message about what time it is now. An illocutionary act already means an act of action in the process of speaking, so by saying what time it is, a person reminds that it is time to get off. Perlocution is the effect on the feelings and thoughts of the listener. Austin focuses on the illocutionary element of speech, since it is the illocutionary act that has the power of influence. This power indicates exactly what action we are performing when we utter a particular statement. The power of a speech act is expressed in performative verbs that command or allow something. The special feature of the speech act lies in its conventionality. That is why Austin especially focuses on the conditions of their success.

The concept of speech acts by J.L. Austin was supplemented and developed by J.R. Searle, who distinguished the regulatory and constitutive rules. "Regulative rules regulate a pre-existing activity, an activity whose existence is logically independent of the rules. Constitutive rules constitute an activity the existence of which is logically dependent of the rules" (Searle, 1969, p. 34). The rules of etiquette are regulatory rules. Sports rules that create the possibility of the activity itself are constitutive ones. J.R. Searle investigated the constitutive rules of successful speech acts and their illocutionary force. He researched the constitutive rules of successful speech acts and their illocutionary power. Ideas of the concept of speech acts by J. Austin — J.R. Searle formed in the English analytical philosophy had a significant impact on the development of the theory of discourse in political and legal science. Primarily, we are talking about the discursive and communicative theory of philosophy of K.O. Apel and J. Habermas. "As a mean of achieving understanding, speech acts serve to: 1. establish and resume interpersonal relationships; the speaker establishes an attitude to something in the world of legitimate (social) orders; 2. imagine (or assume) the state of things and events; at the same time, the speaker establishes a relation to something in the world of the existing state of affairs; 3. express experiences — that is, to present oneself, while the speaker establishes an attitude to something in the subjective world to which they have privileged access" (Habermas, 1997, pp. 308).

According to J. Habermas there are three types of claims to significance in a speech act. Truth claim means that the speaker

assumes that the existing state of affairs corresponds to what they are talking about. Correctness claim in the normative sense characterizes the fact that the speech act does not contradict the existing institutional structures. Finally, honesty claim means that the speaker is really guided by the intentions that are expressed. J. Habermas explains his understanding of speech act by giving an example. A professor asks a student: "Could you bring me a glass of water, please?" Such a statement contains a correctness claim. The student may not recognize this claim by answering: "You can't treat me as your employee." Honesty claim means that the professor does not pursue any other goals except the one expressed in words. The student can challenge this claim by saying: "In fact, you want to put me in a bad light in front of other participants of the seminar." Truth claim means that the state of things voiced in the professor's statement really exists. The student may question this claim by saying: "The nearest water source or faucet is so far away that I will not have time to return by the end of the seminar." The speech act will have power if the student recognizes all three claims. Thus, the success of a speech act means the implementation of a linguistically mediated so-called "communicative action." J. Habermas introduces this term for the designation of speech acts-actions that would distinguish actions aimed at mutual understanding (communicative) from actions aimed at manipulating the interlocutor to achieve their own success (strategic). "In my opinion, communicative action are those linguistically mediated interactions where all participants pursue illocutionary and only illocutionary goals with their mediating acts. On the other hand, I consider as a linguistically mediated action those interactions where at least one of the participants wants to produce perlocutive effects on the partner with their speech acts" (Habermas, 1997, p. 295).

Thus, speech acts should be distinguished from communicative actions. From the standpoint of the discursive theory of J. Habermas speech acts are a broader phenomenon, since they can also include acts as means of strategic interactions. The fundamental position here is the understanding of the communicative act as the basic action for other speech acts. The use of language with an understanding orientation is a fundamental form of its use in relation to strategic interaction. Habermas points out, "Speech acts can serve the non-illocutionary purpose

of influencing listeners only if they are adapted to achieve illocutionary goals. If the listener did not understand what was the speaker said, the strategically acting speaker would not be able to provoke the listener through communicative acts to behave the way the listener wants him to" (Habermas, 1997, p. 291). The concept of speech acts formulated in this way explains the mechanism of coordination of citizens' interaction using language.

Within the framework of the linguistic understanding of law, there are two directions in the understanding of speech acts: narrative and discursive-communicative. The fundamental difference between them is that representatives of the narrative approach consider a speech act as a narrative or a story, which can be an instrument of deception or manipulation, for example, in the speech of a lawyer. Representatives of postmodernism considered the category of "narrative" in the same way. The expression "metanarrative" by the French philosopher Lyotard, contains criticism of the ideas of the Enlightenment, calling them "big stories." In contrast to this view, proponents of the critical theory of the philosophy of law, such as R. Alexy, B. Melkevik, A. Honnet, J. Habermas justify the need for legal policy in modern society precisely through such a type of speech act as a communicative one.

The key categories for understanding this type of speech act as a communicative action are the terms "communicative rationality," as well as an "ideal speech situation." J. Habermas understands rationality within the framework of the discursive philosophy of law in the cognitive sense, that is, rationality is related to knowledge: "When we use the term "rationality," we believe that there is a close relation between rationality and knowledge. Our knowledge has a structure of judgment; opinions can be presented in the form of statements" (Habermas, 1997, p. 292).

Rationality of knowledge is related to criticism, since actions or expressions are rational insofar as they are based on knowledge that can be criticized. In philosophy, rationality has two understandings. Initially, the idea of rationality was developed in a non-communicative, transcendental sense. Enlightenment thinkers formulated this approach to rationality. Communicative rationality is a new understanding of it in the 20th century, associated with the ability to change social facts (for example, in the legal system) in the process of discourse. Habermas

formulates the following definition of communicative rationality: "This concept of communicative rationality brings with it connotations based on the central experience of the unlimited, unifying, consensus-producing power of argumentative speech, through which various participants overcome their purely subjective opinions and, thanks to the generality of rationally motivated opinions, gain confidence both in the unity of the objective world and in the intersubjective connectedness of their lifeworld" (Habermas, 1997, p. 292). The peculiarity of communicative rationality implies the possibility of criticism and justification of statements.

As a rule, the claim to significance is not relevant in everyday communication. This is due to the fact that the consent associated with the coordination of actions is usually based on beliefs shared intersubjectively by the entire community. In the cases when a statement raises doubts about the normative correctness, it requires the use of another form of linguistic communication — discourse. "Discourse is a reflexive form of communicative action where communicative rationality becomes explicit. A discussion of the claim to the significance of statements takes place in a discourse" (Habermas, 1997, p. 294). Therefore, discourse can be considered as a non-everyday form of communication in which there is a discussion and critical verification of statements.

The condition for the recognition of the truth claim of a statement is the consent of all stakeholders of the discourse. Consent can be based on coercion or deception, therefore, only such consent that is exempt from other types of coercion or privileges can serve as a criterion of normative correctness. German jurist R. Alexy formulates the so-called rules of discourse to achieve consensus: "1. Every language-speaking and capable subject can take part in the discourse; 2. Anyone can question any statement. Anyone can introduce any statement into the discourse. Everyone can express their attitudes, desires and needs; 3. No compulsion dominating outside or inside the discourse should prevent any of the speakers from exercising their rights defined in the paragraphs" (Alexy, 2011, pp. 110–137). Such rules are an ideal model, but they are important for understanding the conditions of argumentation. Based on the intersubjective understanding of interaction in society,

the theory of speech acts is used for the discursive justification of legal norms.

At the same time, the significance of moral rules differs from the justification of the norms of law. The justification of legal norms is connected with the concept of justice, and the norms of law — with legitimacy. Habermas emphasizes that "meaningful legal norms are indeed consistent with moral norms, but they are "legitimate" in the sense that they additionally express an authentic self-understanding of the legal community, a fair consideration of values and interests, and a purposeful choice of strategies and means in the implementation of policy" (Habermas, 1996, p. 147). It should be noted that a discursively justified norm can be changed in the future if there are grounds to reject a rule that is recognized at the moment.

III. The Communicative Function of Law: the Concept and Features

The mechanism of discourse and the communicative justification of law is associated with the threat of delegitimization of law in the conditions of a modern information society, when law loses touch with reality and is considered as a "simulacrum." According to J. Baudrillard, a simulacrum is not just a deception or a fiction, but a situation when, as a result of simulation or imitation of reality, an object of the so-called "hyperreality," that is a simulacrum, is formed. Jean Baudrillard defines the following order of simulacra: "the first order is imitations, effigies, copies, forgeries; this order is a characteristic of the Renaissance; the second order is functional analogs, series that characterize the era of the Industrial Revolution; the third order is hyperreality (money, fashion, DNA, model, public opinion), a characteristic of the postmodernism era" (Baudrillard, 2015, p. 45).

The characteristic of modern society is also relevant to the legal system: "The new legal picture of the world of the postmodern era, with its apology for a blurred, segmental, pluralistic rule of law, essentially legitimizes the rejection of universal and general law in favor of situational and particular, and ultimately — the legal war of all against all. Postclassical jurisprudence is the jurisprudence of returning to

the legal social state existing outside the framework of the normative principles of formal equality and equivalence. Law of social relations is being replaced by law of social transactions, the legal content of which is continuously redefined depending on their location in an impersonal and anonymous network structure of communication" (Vedeneev, 2014, p. 648). In the conditions of the information society and digital law, legal science begins to be considered as a set of meta-narratives, that is stories that impose a picture of the world in the interests of the ruling elite. V.V. Lazarev indicates: "The general theory of state and law has promoted and promotes myth-making, fulfilling a political order. On this basis, it is possible to refuse it as a science.

However, we will leave aside both economics and politics. It is more important to expose the epistemological roots. Theorists recalled them when, for example, they pointed out the reasons for the multiplicity of theories, linking them, in particular, with the nature of cognition (exalting one side of the subject to the detriment of others)" (Lazarev, 2015, pp. 13–14). New branches of law are beginning to form in the information society, which leads to the expansion of the subject of legal regulation. The process of replacing other social rules with legal norms is a general trend of most modern states. J.-L. Bergel notes: "Technological progress has endlessly led to the renewal of human views and living conditions. The law had to adapt to them every time and manage new spheres and new forms of human activity in order sometimes to develop them and sometimes to limit their development" (Bergel, 2000, p. 286). The expansion of the sphere of legal regulation is a natural historical process associated with the formation of new functions of law (Belyaev, 2016). The formation of new branches of legal regulation itself performs a social function, since it ensures the protection of citizens' rights and freedoms by state coercion. At the same time, there are also negative consequences, since an increase in the number of regulations leads to collisions in the legal system. A more significant problem of increasing the scope of regulation of legal norms is the crisis of legitimacy of law. This is due to the complexity of understanding legal norms, as the system of legal rules becomes too complex due to a significant increase in the number of regulatory legal acts. The issue

of increasing the number of regulations is relevant for the legal system of the Russian Federation. A.S. Pigolkin wrote, "The fight against the 'overproduction' of laws, their consolidation and unification is becoming increasingly relevant" (Pigolkin, 2000, p. 251).

In the context of the expansion of the sphere of legal regulation and the transition of a significant number of legal relations into the virtual space, the phenomenon of a state, fully controlling all social relations of a subject in society, is being formed. To characterize a digital state exercising universal control over citizens, the term "biopolitics" is used, which means full control over a citizen's body. Detailed regulation of public relations by laws leads to the power of the state, which is embodied in M. Foucault's formula — "to make live or to let die" (Foucault, 1988, p. 68). Currently, biopolitics issues have become relevant due to legal regulation in a state of emergency (Malinovsky, Osina, and Trikoz, 2021, pp. 283–287). In the context of the Covid-19 pandemic, legal regulation began to be conducted in accordance with exceptional norms, which replaced the general rules.

In this situation, the most acceptable way to ensure the effectiveness of the functions of law is the implementation of a discursive understanding of speech acts. This approach allows us to maintain the necessary level of legitimacy of the functions of law in the conditions of the information state. The classical theory of the functions of law combined all directions of legal influence on the regulatory and protective functions. This approach considers legal regulation from an instrumental position. Understanding the impact on society as a kind of tool was common for the Russian jurisprudence of the mid-twentieth century. This approach gained wide popularity thanks to the works of S.S. Alekseev, who developed such categories as "mechanism of legal regulation" and "legal means."

Currently, it has become obvious that such an approach, which understands the functioning of law as a system of tools and mechanisms, is one-sided. The instrumental approach to the action of law does not take into account the problems of the legitimacy of legal norms, as it focuses on state coercion. As G.V. Maltsev pointed out, "Nowadays, the words "legal mechanism," "mechanism of legal regulation, law-making,

law enforcement" take pride of place in the lexicon of a lawyer who is not at all confused by the mechanical nature of legal and institutional devices. On the contrary, in these terms they see what is severely lacking in a complex, chaotic, fluid reality — clear relationships according to a given scheme, the movement of elements according to a calculated vector, geometrically correct arrangement of lines in the process of movement, etc. In practical terms, the image of a clockwork mechanism as an ideal for legal regulation is very attractive. However, there is one circumstance that, in a theoretical and methodological sense, makes this image inconvenient for law: it leaves aside the existence of the latter as a super-complex dynamic system, literally growing into its social environment, capable under certain conditions of self-adjustment and self-development" (Maltsev, 2007, p. 64).

In Russian jurisprudence, the mechanistic understanding of the functions of law is associated with the long dominance of Karl Marx's philosophy, which is associated with the scientific and technical paradigm of the 19th century. Marxism used the terms "apparatus," "machine" and "mechanism" as key categories. The mechanistic approach to the state and society was popular in the political and legal science of Europe at the beginning of the 19th century. The reason for this was the discoveries, made thanks to the successes of science, which changed the life of society, so these times were called the "era of Industrial Revolution." Science, in this historical period, actively influenced public opinion and culture, so the ideas of legal positivism, as well as criticism of natural law, were popular in jurisprudence.

Meanwhile, in the 20th century the European science overcame the understanding of society and the legal system as a mechanism. At the same time, in Russian jurisprudence, a mechanistic understanding of law and an instrumental understanding of legal regulation is still widespread. We should agree with N.V. Varlamova's opinion that the instrumental approach to the essence of law contradicts the values of the current Constitution of the Russian Federation: "The fundamental teleological value provided by legal regulation is recognized as personal freedom, the manifestation and concretization of which are human rights and freedoms. However, these constitutional arrangements,

which radically change the ideas about the social purpose of law, have not yet received proper theoretical understanding and legal-dogmatic interpretation in Russian science. In particular, they had no effect on the development of the problems of the effectiveness of legal regulation. Today the socio-instrumentalist approach to understanding the effectiveness of law prevails both in theoretical and empirical research" (Varlamova, 2009, p. 215).

Communicative approaches to the functions of law have an advantage over instrumental ones, since they consider law as a certain system. The ideas of substantiating legal norms through discourse are relevant precisely for the modern state and law. In a modern state, positive law is not established by traditions, but is created by a legislator. Compliance with formal procedures for the adoption of laws is a condition of legality, and not reliance on religion or customs, as it was in a traditional state. In the constitutional state of the Modern period, the law is legitimized "on the principle of national sovereignty and human rights." The law is legitimate only if it does not violate human rights and acts as an expression of the will of the people. The discursive philosophy of law through communicative action justifies the legitimacy of the law in modern society. This approach was implemented in the concept of discursive (deliberative) democracy.

The first scientist to introduce the category of "deliberative democracy" into wide scientific circulation was J. Dewey, who pointed out: "Majority rule, just as majority rule, is as foolish as its critics charge it with being. But it never is merely majority rule... The means by which a majority comes to be a majority is the more important thing: antecedent debates, modification of views to meet the opinions of minorities... The essential need, in other words, is the improvement of the methods and conditions of debate, discussion, and persuasion" (Dewey, 1954, p. 207). The modern philosopher W. Kymlicka points to a "deliberative turn" in 1990, which found consolidation in the European constitutional legislation, because the attention of democratic theorists "shifted from what happens in the voting booth to what happens during public discussion in civil society" (Kymlicka, 2010, p. 371).

The relevance of the principle of deliberation in relation to law "is currently due to the expansion of the subject of legal regulation, which is a general trend in the legal systems of developed countries" (Denisenko, 2008, p. 56). The principle of deliberation is implemented both in law-making and in law enforcement. In law-making, the principle of deliberation means the insufficiency of representative democracy and discussion procedures within the institutions of representative power. In law enforcement, the principle of deliberation is the ability of citizens to participate in the realization of law as a full-fledged subject of legal relations, for example, through mediation. Varieties of discursive procedures in law are aleatory decision-making mechanisms in public law. Thus, the functions of law are legitimized. In particular, the use of aleatory procedures in making publicly significant decisions is a condition for the effectiveness of the regulatory function of law.

Consensual procedures, such as mediation, serve as a tool for resolving conflicts not only in private, but also in public law. Thus, mediation procedures in criminal proceedings form a special institution, restorative justice, in which the communicative function of law is realized. Communication makes it possible to form a consensus in the relations between the subjects of legal relations and thus ensure the implementation of the functions of law in a digital state. This allows us to substantiate the understanding of the communicative function, namely as a legal one, and not only as a social one. For a long time, the approach has prevailed in Russian jurisprudence, according to which the informational function of law is a legal impact that should be distinguished from legal regulation. Therefore, the informational function of law was distinguished from the regulatory and protective (Chervyakovsky, 2007, p. 127).

The formation of information law and the digital state has significantly changed legal relations in the Russian legal system. Currently, the communicative function is inextricably linked to the legal regulation or the functions of law, since the role of information and communication in the legal system has become crucial. Communication is a highly important element of legal regulation. The implementation of the main directions of legal regulation should be considered in the context of the legitimacy of legal norms.

IV. Conclusion

In the modern state, the communicative function of law is a condition for the effectiveness of legal regulation of society. The communicative understanding of the legal impact of power on society considers the functioning of law based on two grounds, coercion and the legitimacy of legal norms. The communicative function is an important basis for both the regulatory and protective functions of law. The functioning of law should be considered as not only an authoritative process of ordering public relations, but at the same time as a process of legitimation of legal rules, where citizens can participate in law-making and law enforcement. The peculiarity of the development of the modern state is the expansion of the subject of legal regulation and the formation of an information society, therefore legal regulation cannot be based only on ideology and coercion. In the conditions of a digital state, in order to fulfill its aims, "it should include two aspects — facticity and significance. The factuality of law is its enforcement of the norms of law, while the significance is the legitimacy of the functions of law, their recognition in society as an authority" (Habermas, 1997, p. 18).

The communicative function of law includes legal procedures that allow legal acts to successfully perform the role of mediator between the state and society. The legal regulation of the absolute majority of public relations, "fulfilling its task of protecting the individual rights, at the same time inevitably leads to a number of negative consequences, both formal and substantive" (Denisenko, 2020, p. 302). Formal consequences consist in an increase of legal norms collisions, while substantive ones are associated with a crisis of legitimacy of law, which occurs due to an increase in the number and size of normative acts. In the context of the expansion of the subject of legal regulation, the legal means that can ensure the achievement of the necessary goals of legal regulation are deliberative procedures. It can be concluded that the legal policy of the digital state should be associated with the implementation of the communicative function of law, since this is a necessary condition for law to fulfill its main aim — the regulation of public relations.

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Article

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The Communicative Function of Legal Transplants in Mixed Legal Systems

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Abstract: The article analyzes the definition of the communicative function of law from the point of view of legal communication between the dependent legal systems of the former colonies. In this context, the "evergreen issue" arises about *legal transplantation*, the legal transfer of norms and institutions and reception of nomadic legal constructs. The modern comparative lexicon uses three *types of metaphors* related to the interaction of legal systems and their law hybridization: anthropomorphic, communicative and mechanical metaphors.

Among the best-known cases of legal transplantation, the authors pay attention to the spread of codes, the diffusion of common law, and the emergence of *mixed legal systems*. They explore the positivist concept of "*legal transplants*," which appeared in comparative discourse thanks to the *theory of Alan Watson*. The article discusses the comparative opposition to this theory — the so-called *cultural concept* of legal transplants (*transferists vs. culturalist debate*), as well as the musical metaphor "legal transposition" and the process of diffusion of law in dependent legal systems. The practice of legal transplants in mixed common law systems and their application in practice are analyzed in national jurisdictions.

The article shows criminal legal bijuridism and the process of the so-called "*diffuse codification*" in India, Canada, Australia and other British former colonies, which is an example of codistics communication

of dissimilar political and legal cultures and circulation of model codes between them. In conclusion, attention is drawn to the discourse of the effectiveness, applicability and effectiveness of transplants. It is concluded that the *success — failure discourse* of legal transplants depends on the *degree of communicativeness* of transplanted and receptive constructs, their ability to "speak" in an understandable language for the host cultural environment of law.

Keywords: comparative law; communication of law; legal transplants; diffusion of law; reception; legal pluralism; bijuridism; mixed legal systems; legal culture; law and development; common law; Indian Penal Code, legal codistics

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Contents

I. Introduction. Understanding the Communicative Function of Law in Mixed Systems

The heterogeneity of legal regulations and the legal heterogeneity of countries with mixed legal systems aggravate the problem of connectivity of legal transplants and the legal unification, convergence and development of countries.

The unifying principle becomes more important when a legal entity, which combines elements of two or more legal traditions/families, tries to survive under the conditions of unstable poly-legalism and increasing legal fragmentation (Denisenko and Trikoz, 2018, pp. 29–31). Against the backdrop of contrasting cultural-geographical, technical-legal and religious-ethical features of local law, the role of the legal system's communicative capacity increases. The latter lies in the high degree of transparency of the legal environment, in the perception, reception and circulation of analogue court decisions and statutory models (colonial model codes and integral model laws).

In mixed jurisdictions and poly-legal settings, communication and discourse are vital and constitute an ever-present context of legal development in these pluralistic legal orders.

Yet, the communicative function of law is particularly tangible in the post-colonial "*hybrid legal family*," where it can potentially bring together different borrowed and syncretic legal subsystems both within the boundaries of a single nation state (Hooker, 1975), or at the level of sub-regional international organizations, like the British Commonwealth of Nations in the ruins of the former world empire. The development of uniform or harmonized legal norms at the international level has been a major force driving legal transplants around the world in the last half century. The communicative function of law in the space of *bijuridism* is, at the same time, difficult to realize because different legal scholars, "speaking" in an eclectic legal dialect with a mixed glossary (Brierley, 1992), approach variously even the very essence definition of law as a phenomenon of human civilization (Antonov and Denisenko, 2015). We are mistaken when we assume that "two different legal cultures share common epistemological accounts of what is meant by law" (Carvalho, 2019). If the positivist conception of law makes legal transplants less

problematic and the instrumental conception of law favors or hinders transplantation and reception depending on whether the borrowed institutions achieve a certain effect in application practices, then in contrast the culturalist conception of law accepts legal transplants only if they are able to prove themselves compatible with the local culture and legal tradition (Cotterrell, 2001, p. 79).

Through legal transplantation, legal transmission, legal reception, nomadic constructions or legal migration, the diffusion of legal models in the world remains an evergreen issue (Roghină, 2020, p. 142). The search for a harmonious concept that can unite the communicating legal traditions and legal cultures will continue in this context through the palette of different types of legal understanding: "law and legal theory," "law and history," "law and economics," "law and development," "law as rules," "law as system," "law as culture," "law as tradition," "law as social fact," "law in context," etc.

No legal system exists in the contemporary world that develops exclusively through its internal legal resources without interacting mutually with other legal systems, which can never survive in isolation, not communicating and exchanging experiences through borrowing and reception, transmitting *legal transplants* to one another (Denisova, 2012, p. 329). Through successful communication and subsequent cross-breeding of initially incompatible, genetically different donor-mother and recipient-donor legal systems, a hybrid legal landscape is constructed based on the interaction of two or more cultural traditions, legal practices and normative techniques as well as styles of legal thinking.

II. The Positivist Concept of "Legal Transplants" in Comparativist Discourse: Alan Watson's Theory

Legal transplants are based on the concept of *diffusionism of law*, where the majority of changes in most legal systems occur as a result of borrowing. Classic cases of legal transplantation are the reception of Roman law; the diffusion of codes; the diffusion of common law; and the intermingling of legal systems (Graziadei, 2019, pp. 445–450).

Since the 1970s, the study of legal reception, legal borrowing and transplantation as a form of communication and dialogue of legal systems has been dealt with by a separate sub-field of comparative law — legal transplants as "*applied comparative law*." The topic of "global receptivity to foreign law" was first developed in a separate section of the Eighth Congress of the International Academy of Comparative Law (AIDC — IACL, Pescara, Italy, 1970). Subsequently, at the thirteenth IACL congress in Montreal (1990) an alternative terminology was discussed which has gained recognition particularly outside the common law world — the "circulation of legal models."

A new category of "legal transplants" and the anthropocentric metaphor of legal *transplantation* was also introduced in the early 1970s and was discussed in parallel by three renowned professors: O. Kahn-Freund, A. Watson and R. Sacco. The Scottish lawyer and novelist Frederick P. Walton was the first to use the metaphor of "legal transplantation" to explain legal development, which was due to his imperial academic career in Scotland, Quebec and Egypt. In his view, mixed (hybrid) Scottish law, "like the law of Lower Canada and Louisiana, has undergone profound changes as a result of contact with English common law" (Walton, 1902, p. 17*)*. In August 1927 Walton first gave a talk on "The Historical School of Jurisprudence and the Transplantation of Law" at a meeting of the International Academy of Comparative Law in the Hague, which was then published (Walton, 1927, pp. 183–190).

Around half a century later, Otto Kahn-Freund, Professor of Comparative Law at Oxford University, began using the essentially medical term "transplantation," borrowing it from the popular discussion of organ and tissue transplants in the late 1960s and 1970s. In his 1973 lecture "The use and misuse of comparative law" which he delivered at the London School of Economics, Kahn-Freund stated that in the 20th century British law had become a specifically open field for foreign influence and borrowing, especially in the area of commercial law and family law. He analyzed the practice of using various "*foreign legal patterns*" as instruments of social or cultural change "which raises most sharply the problem I am discussing — the problem of *transplantation*" (Kahn-Freund, 1974, pp. 2–5). He also applied the category

of "exchanging mechanisms," such as *carburetors*, in this lecture. The professor thereby attempted to develop ideas of transferability in law and used this metaphor to discuss a spectrum of transplantable rules: from mechanical (*easy*) to organic (*difficult*). Kahn-Freund emphasized that a comparative analysis of law "becomes an abuse… if it is based on a purely legalistic spirit which ignores the context of the law" (Kahn-Freund, 1974, p. 27).

The anthropocentric metaphor appeared at the same time in a book by the Scottish legal historian and novelist W. Alan J. Watson under the same title "Legal Transplants" (Watson, 1974; 1993), where he argued that this problem should become a major subject of comparative legal research in order to study contacts between legal cultures and the complex patterns of change that such contacts bring about (Cairns, 2013, p. 637). By "*legal transplants*" Watson means "the transfer of a rule or an entire system of law from one country to another" (Watson, 1974, pp. 22–24). He considers *transplants* to be the most fruitful source of legal development and therefore the role of legal transplants in a system of globalization of law should be thoroughly studied in the future. *Watson's* writings fill some twenty books and one hundred articles including "Legal Transplants and Law Reform," 1976; "Comparative Law and Legal Change," 1978; "Two-Tier Law — A New Approach to Law Making," 1978; "Legal Change; Sources of Law and Legal Culture," 1983; "The Future of the Common Law Tradition," 1984; "Chancellor Kent's Use of Foreign Law," 1993; and others.

Comparing the approaches of F.P. Walton and A. Watson to the concept of "*legal transplants,"* Walton's metaphor was more horticultural than surgical. Yet the similarities between the two remain striking: borrowing is central to the development of law; legal culture is central to the legal system and the adaptation of rules; law is not related to society in the necessary way. Rodolfo Sacco stated a similar position at the same time, stressing the importance of legal transplants and reception in the system of general methodological questions of comparative jurisprudence (Sacco, 1974, pp. 127–131).

But it was not until a quarter of a century later that Thomas Charbonneau, in his review of Patrick Glenn's book "Legal Traditions of the World, Sustainable Diversity in Law," tried to argue that since

Alan Watson, *"legal transplants"* have transformed into a vital and "constructive discourse" of comparative law (Carbonneau, 2000, p. 729). Watson's book itself, almost half a century after its first publication, despite its author's initial reservation about its untimeliness and still-birth, has become the obvious "*landmark book"* of legal comparativism.

If we proceed from the assumption that *legal comparativism* is not limited to the study of one or more legal systems or to a simple comparison of their elements and institutions, but must also involve lawyers in the study of relations and communications between different legal systems, a special attention to the problem of the methods and techniques of such inter-system *legal communication* becomes evident.

In this context, the practice of transferring legal rules or institutions from one legal system to another or importing definitions and terminological labels of individual legal phenomena or methodological techniques and methods of such legal convergence acquire an important status in the system of legal knowledge. The French comparativist-criminologist and distinguished judge Marc Ancel (1975, pp. 303–304) insisted on this as early as half a century ago in his review of A. Watson's book on legal transplants.

A. Watson in his study has proposed a *theory of legal change* and argued that the phenomenon of "legal transplantation" is deeply rooted in the foundations of the Western and extra-Western tradition in a diachronic section. He argued that *legal transplantation* is alive and well today, no worse than in the days of the ancient Eastern ruler Hammurabi. As well as discussing the underlying identity of national legal systems and the key concept of *Volksgeist* ("national spirit"), Watson nevertheless argues that legal transplants are a universal, common and ancient phenomenon. He traces their origins from the ancient Sumerian influence on the Babylonian code of Hammurabi, the ancient Greek reception in the Code of XII Tables and the spread of Roman law in Egypt (Watson, 1974, pp. 29–30), to the legal reception of the ancient Roman law of Aquilius and the Roman contract *emptio-venditio* in Western European medieval law and the Roman construction of property rights in the basis of all European systems, including France, Germany and Switzerland (Watson, 1974, pp. 82–87). As an illustration, he mentions a number of rules relating to matrimonial

property that were transmitted "from the Visigoths to become a legal provision in the Iberian Peninsula as a whole, and then migrated from Spain to California, from California to other states to the western United States" (Watson, 1993, p. 21). Watson gives more examples of "legal transplantation" such as the reception of ancient Roman legal methods and substantive law in Scotland,[1] Roman-Dutch law in South Africa, medieval compilations of the reopened Code of Justinian, the collection of the Massachusetts General Laws and Liberties (Grayson, 1981), the first code of the Western World in 1648, and the spread of English law to New Zealand in the 19th century (Watson, 1974, pp. 39, 44–46).

In discussing the reasons for borrowing and adopting transplants through which a particular legal model is to be disseminated, Watson spoke of the authority of the legal system communicating with the recipient. He had in mind a high degree of "respect for such a dominant system" as well as the "reputation and authority" of the model or its creators, and linked acceptance of transplants to "the ease with which the norm [can] be acquired" and the particular use of language and "accessibility" factors, regardless of the suitability of the law to meet the needs of the local society that would implement the transplant (Watson, 1977, pp. 104, 135).

In his studies of the problem of legal communication between cultures and the resulting legal changes, Watson insisted on a direct link between foreign cultural transplants and local legal reforms. In this context he refuted a number of *mirror theories* which see a direct and deterministic connection between law and society. Outstanding authors such as Montesquieu, Savigny, Pound, Marx and Engels, whom Watson criticizes for their moderate and particularistic, romantic and dogmatic, pragmatic and functionalist, materialist and socialist views, represented this position in political and legal thought. Metaphor of law as "mirrors of society" and on content of "mirror theories" see (Ewald, 1995, pp. 492–493).

In his view, however, comparative studies and legal history show a sharp decline in the weight of "mirror theories" in the modernization of legal systems. All the more so because their proponents do not

[1] See, for example Reid and Zimmermann, 2000.

adequately address important factors in legal culture such as developmental inertia and the obstacles to modification posed by power elites and law enforcement actors who tend to monopolize the interpretation of the law. So, Watson has developed nine factors that influence the transplantation process: Source of Law, Pressure Force, Inertia, Opposition Force, Transplant Bias, Law-shaping Lawyers, Discretion Factor, Generality Factor, Felt Needs (Watson, 1978, pp. 328, 331). The majority of these factors are indeed irrational and subjective (Kyselova, 2008).

Watson's concept of the *"nomadic character*" of legal rule1993 s (transplants) proves that changes in the law do not depend on the action of any social, historical or cultural substratum; rather it is a function of the rules themselves, borrowed from another legal system. Therefore, "the transplantation of legal rules is socially easy" (Watson, 1993, p. 95).

III. The Culturological Concept of "Legal Transplants" and the Comparativist Opposition: A Critique by Alan Watson

The phenomenon of *legal transplants* gained more interest, adherents and critics especially in the 1990's and 2000's. From that time theorists and comparativists began to appear and took on the burden of identifying mechanisms that could explain the motives and ways of legal transplants and their direct relationship to the processes of globalization and economic development (Mattei, 1994, p. 3). Alan Watson himself has kept pace with the comparativist mainstream, which he once unwittingly initiated by juxtaposing "legal transplants" with "legal formants" (Watson, 1995, pp. 469–471). In the later period, Watson confined himself to a theory of legal transplantation in the private law field, tendentiously Western, but with outlets beyond it as well (Watson, 1977, pp. 8, 132).

His Italian colleague R. Sacco more clearly formulated a comprehensive theory of the "circulation of models" or the circulation among legal systems of certain legal models — prototypes (*it. teoria della circolazione dei modelli*). He superimposed this concept of the model on the notion of a *legal formant* (Latin: *formans, formantis* — forming something from the maternal basis) (Sacco, 1991, pp. 1–34). He showed that models circulate between different systems primarily

through homologous formants, although these circulations of legal models can be mutually dissociated. Without compiling an exhaustive list of "legal formants," Sacco analyzed *statutory rules, formulations of scholars, judicial reasons and conclusions*, highlighting the multi-layered and complex nature of transplant objects. It is typified by the circulation of the French model of codification in relation to the legislative formant, or the reversal of the German dogmatic model in relation to the doctrinal formant. At the same time, the circulation of the judicial formant throughout history has been a relatively less frequent or, in any case, less studied type (Di Martino, 2021, pp. 750–751).

Sacco also introduced the category of *cryptotype* in the legal field, which refers to an implicit model (Italian *modello implicito*) that is strongly contextualized and cannot be influenced by circulating legal transplants, especially as far as the mentality of lawyers or legal thinking is concerned (Sacco and Rossi, 2019, pp. 136–137). The circulation of legal models and the coming changes in the law, however, do not always lead to the unification or standardization of the communicating legal systems. The uniformity of law has often been interpreted in light of colonial history as a *"deculturation"* in the field, in contrast to legal anthropology, which helps to conceptualize the specificities of the original indigenous cultures, suggesting a competition between legal models (Luther, 2009).

Watson's positivist conception of transplants became heavily criticized because the author reduced them to purely legal-technical rules, indifferent to practical implications (purely door-to-door) and socio-cultural context (Abel, 1982, pp. 785–786; Cotterrell, 2001, pp. 71–79). Critics rebuked Watson for a simplistic and even caricatured version of "mirror theories," subjectively lumping Montesquieu, Savigny, Pound and Marx into a single bundle of functionalists and obscuring the complexity of their thought. Watson himself adheres to an equally instrumental version of "anti-functionalism" reasoning about communicating legal systems based on goals that he himself set in advance. However, these systems could not achieve this in the process of interaction, thus reinforcing the image of "aimless legal systems" determined by the arbitrary choice and inertia of legal elites (Nelken, 2003, pp. 437–440).

Finally, for authors sensitive to the "hermeneutic turn" in legal thought, Watson's conception of legal transplants does not do justice to the interpretive differences associated with various cultures, since these contexts are envisioned as semantic networks involving both law and society type (Wise, 1990, pp. 12–13).

The possibility of legal transplants itself has also been contested. Pierre Legrand, a French comparativist and professor at the University of Tilburg (Netherlands), has initiated a lively debate on the usefulness and feasibility of legal transplants, drawing even more attention to the topic type (Legrand, 1997, pp. 111–112). His argued that legal transplants in their pure positivist form are impossible because the transfer of a text to another context consequently changes its meaning. Thus, we can only talk about the "dislocation" of the legal norm itself and not its meaning that is closely linked to the cultural environment into which it is immersed and where its text was first "articulated" type (Legrand, 2001, pp. 55–56).

Legrand, as an alternative to Watson's positivist understanding ("law-as-geometry"), proposed his cultural interpretation of law as a "multivalued signifier that connotes cultural, political, sociological, historical, anthropological, linguistic, psychological and economic referents." Every manifestation of law and its norms must therefore be apprehended as a 'fait social total', a complete social fact (Legrand, 2001, p. 116). The social and cultural boundaries of the legal system will always retain an intractable element of autochthony that limits the epistemological receptivity to the incorporation of legal norms from other jurisdictions. According to the Latin principle "*Extra culturam nihil datur*," as M. Reinstein has stressed, "even words of the same language can have different meanings in different legal systems" (Rheinstein, 1968, p. 419).

For his part, Günter Frankenberg, the famous German constitutional comparativist, challenged the simplification of P. Legrand's position on the impossibility of transposition and comparison, which only means an inevitable change of meanings in different legal environments. The transfer of a legal institution from one system to another requires awareness of all inherent risks as well as the decontextualization, objectification and formalization of such legal provisions while, on the other

hand, their recontextualization occurs in the new host environment, whereby the reproduced institution will necessarily be accompanied by "reinterpretation, redesign and bricolage" (Frankenberg, 2013, p. 1).

Bill Bowring, professor at Birkbeck College, University of London, is another critic of "legal transplants" which he believes "follows logically from the frequent condemnation of human rights discourse as hopelessly Western" (Bowring, 2021, p. 7).

Matthias Siems, professor at the University of Cambridge, criticizes the phenomenon of transplants, dedicating a chapter to it in a comparative law book entitled "*Malicious Legal Transplants*" (Siems, 2018, pp. 103–110). Transplants have been negatively assessed because they are rarely able to "adapt" to the country of transplantation due to differences in the socio-economic context, and they have also been opposed as "legal irritants" or even stated that legal transplants are "impossible" (Teubner, 1998, p. 11; Legrand, 1997, p. 111).

Sometimes the criticism has also been directed against the very essence of transplants and their nature. After all, legal transplants and receptions of law have often been the result of military conquest or expansion. Contemporary military operations in different parts of the world still trigger legal transplants affecting various dimensions of the law (Graziadei, 2019, p. 467).

IV. The Metaphors "Legal Transposition" and "Diffusion of Law" in Subsidiary Systems

A decade ago, the methodological device of "legal transplants" was included in an authoritative monograph on the methods of modern comparative law as a quite standard methodological approach accepted in the discipline and in comparativist practice. A separate chapter on "legal transplants and transnational codes" was devoted to this device in terms of cultural prejudices and doctrinal positions in relation to them (Geoffrey, 2012, pp. 165–170; Chen, 2012, p. 192).

Roger Cotterrell, Professor at Queen Mary College, University of London, has suggested a distinction between four types of communities according to the degree to which "legal transplants" are perceived:

instrumental, traditional, affective and faith communities (Cotterrell, 2001, pp. 71–92).

Instrumental communities, for example, are characterized by short and weak interpersonal relationships, being functionally oriented towards certain economic goals, and therefore have a closer relationship with law and more readily accept transplants, especially in the field of commercial and contract law. However, *traditional communities* are typified by a relationship of legal proximity and an exchange of practices and terminology, where the right to coexist and communicate in certain areas of criminal law, property rights and civil liability is firmly respected. A third category of *affective communities* is built on a more ethical regulation of family-patriarchal, mutually friendly and trusting relationships, seeking to escape from the rigid legal ones, therefore quite resistant to legal transplants, which affect private succession, family law and rules relating to sexual abuse.

Finally, the so-called *belief communities* are distinguished by the sharing of religious values and the existence of apparently stronger interpersonal ties and links between the value system and community identity, which prevents foreign cultural transplants, unless certain issues are "degraded" to instrumental problems or problems of traditional stability (e.g., the protection of human rights).

As Professor R. Cotterrell concludes, the instrumental logic of community development makes legal transplantation markedly easier if legal solutions have similar objectives, whereas it is less frequent and less effective (Cotterrell, 2001, p. 82) among affective communities, where the application of heteronomous norms is more complex.

Within jurisprudence, there is a *contradictory approach* to the understanding of the term "reception of law," and in addition to "legal transplantation" there are transterminous "legal acculturation" (Abramov, 2005; Sokolskaya, 2009, pp. 1289–1290) and "legal mutation" (Bowe, 1985). As Micheli Graziadei notes, the term *"reception of law"* is sometimes used as a *synonym* for any and all of the above, though it also has a specific denotation referring to global *legal transfers* (Graziadei, 2019, p. 724).

More recent contributions speak of the "*transfer of law*" instead of "*legal transplant*." The concept of legal transplants has rapidly

become a central "paradigm" in not only traditional but also critical legal comparativism over the years, with various biological and anthropomorphic metaphors (such as *"body of law"* or *"body politic"*). In addition to the term *"legal transplants,"* comparativists use related categories such as *"legal borrowing"* (in the works of *Grosheide*) and *"legal imitation"* (in the works of *Sacco*).

Turkish comparativist E. Örücü, professor at the Universities of Glasgow and Rotterdam, distinguishes between such legal terms as transposition, imposition, implantation, grafting, re-filling, cross-pollination, emulation, infusion, infiltration (Örücü, 1999). Generic expressions such as "*legal influence*" or "*inspiration of law*" are also in use, while other terms, for example, "*cross-fertilization*," are gaining currency (Graziadei, 2019, p. 725).

In order to study legal systems Esin Örücü suggested making use of the concept of *"cross-fertilization"* (i.e., the legal systems interaction). Örücü describes this process stating that "All legal systems contain ideas, concepts, structures and rules born in other legal soils, moving and cross-fertilizing. All systems are mixed in the sense that even when the nation state is regarded as the only source of law, systems have mixed sources, that is, the elements that combine to form a system are from different legal sources... These differing normative systems may also reflect differing socio-cultures..." (Örücü, 1996). An unusual notion of "legal transposition" is also applied, borrowing it from music and preferring in some contexts the terms *"law transposition"* and *"legal tuning"* (Örücü, 2002).

Her understanding of *"law as transposition"* means that each note, i.e., a legal institution or legal rule, is sung — introduced and used, in the same place in the scale of the new tone ("receiver-recipient") as in the original tone (the sample-donor). "Transposition occurring according to the specific vocal range (socio-legal culture and country needs) of the recipient singer" (Örücü, 2013).

Transplants are often referred to in the broader discourse of the so-called "transfer of law," which includes the concepts of *legal acculturation* and *diffusion of law*.

J.W. Powell is credited with creating the word "acculturation," having first used it in an 1880 report of the US Bureau of American

Ethnography. He explained that the term refers to psychological changes caused by cross-cultural imitation. In a wider context, many modern scholars apply the term of "acculturation" to legal ideology and legal policy.

Ludmila V. Sokolskaya considers reception of law to be a variant of legal acculturation, and proposes to define it as a unilateral process of transferring elements of the legal system of the donor society with obligatory assimilation by the recipient society (Sokolskaya, 2009, pp. 1289–1290). In addition, the initiator of the reception is the party that wishes to implement in part or in full the legal system of the donor, while the donor is usually indifferent to such a process of borrowing (Kuryshev, 2010). Vladimir N. Sinyukov, noting that the involvement of foreign state and legal institutions does not make the *recipient* civilized and does not solve the problems of its legal culture. However, the scientist did not deny that *legal reception* is an objective factor of legal progress (Sinyukov, 1995, pp. 162, 366).

Diffusion of law is a particularly new area of research that appeared at the beginning of the 21st century (Farran, Gallen, and Rautenbach, 2015). The diffusionists, for example, speak of the *sovietization* of the law in Central and Eastern Europe after World War II.

At the same time, William Twining identified the following possible objects of diffusion of law: any legal phenomena or ideas, including ideology, theories, personnel, mentality, methods, structures, practices (official, private practitioners, educational, etc.), literary genres, documentary forms, symbols, rituals, etc. (Twining, 2006, p. 514). The term "diffusion" has the merit of being a standard concept in the social sciences, suggesting a movement from "metropolitan power to colony, from center to periphery, from rich, modern, developed country to poor, traditional, underdeveloped one" (Twining, 2006, p. 510).

The American international lawyer Charles Maechling, studying the relations between legal systems in a historical context, suggested a new field of analysis in the form of "migrations of legal rules" (Maechling, 1975, pp. 1037–1038). Maximo Langer uses the linguistic metaphor of *"translation"* to distinguish between the original "text" (a legal idea or institution) and the translated text. Such a metaphor allows us "to distinguish the source language or legal system from which the legal

idea or institution originates, from the target language into which the legal idea or institution is translated" (Langer, 2004, p. 33). Overall, as Margit Cohn rightly observes, in fact "the study of legal transplants has reached a saturation point" (Cohn, 2010, p. 583).

The process of interaction and hybridization of legal systems has given rise to three kinds of metaphors in the comparativist lexicon: 1) anthropomorphic-organic type metaphors (in particular legal grafting, legal contamination, cross-legal pollination, etc.), 2) communicative type metaphors (for example, legal interaction, legal communication, conflict dialogues, etc.), 3) mechanical type metaphors (legal transplants, law transplantation, export/import, prestigious reception, etc.).

According to the Italian constitutionalist Alessandra Di Martino, some metaphors also include additional elements and mixed aspects: for instance, the metaphor of legal migration contains communicative and organic components, while the metaphor of the circulation of legal models contains mechanical and communicative elements (Di Martino, 2021, p. 866). However, such metaphors often significantly "help researchers to justify their approach to conceptualizing the phenomenon of legal borrowing" (Sorokina, 2008, p. 33).

V. "Legal Transplants" Practice in Mixed Common Law Systems

A large number of studies in the current discourse focuses on the practical application of "legal transplants" in individual national jurisdictions. Such studies are particularly relevant in the so-called mixed legal systems, since they have communicated with other legal traditions and practices, which have borrowed and "transplanted" new legal institutions, legal procedures or legal regimes to their own domestic environment. The American institute of trust, for example, is reflected in the Chinese legal reality, the estoppel has moved to the French legal space, the jury transplant has appeared in Japanese court practice, Brazilian jurisprudence has borrowed from corporate law and biolaw, etc. (Foster, 2010; Dean, 2011; Cuniberti, 2012; Pargendler, 2012; Travieso et al., 2021).

In this context, a distinction is proposed between legal transplants that are voluntary or compulsory in nature. The voluntary nature of the process leading to legal transplantation means that it is less intentional and more fluid when a common language and similar culture converge and influence the intellectual exchange. Here, the terms like "legal circulation," "cross-fertilization," "diffusion" or "migration" are appropriate to describe voluntary transplantation (Perju, 2012, pp. 1306–1308).

In a context of heightened territorial disputes and multi-polarity, with the revival of the rhetoric of neo-colonialism, the notion of *legal expansion* (Benton, 2001) is becoming increasingly topical today. The introduction of foreign law is often reinforced by the permanent political control or military presence of a dominant or more powerful power. The legal regime thus established often gives rise to ambiguous and contradictory perceptions of the legitimacy of "legal transplants" and the inequality of the parties in such a legal mix. Thus, instrumentalist jurisprudence (instrumentalist approaches), principally the Old and the "New" *law-and-development genre*, remain concerned with issues of efficient management of *transition* from "*non*"-modern to modern law (Baxi, 2003).

The subject of legal transplantation has increasingly become a topic of interest in a variety of legal reform programs adopted or supported by international institutions and regional frameworks that aim to bring about legal change on a global scale. It also features prominently in the literature on "law and economics," which explores the significance of legal transplants for the economy.

Next, consider the practical example of *"diffusion of the common law"* in the countries of the British Commonwealth of Nations, most of which have been transformed by this practice of imperial powers into countries with a mixed legal system in the post-colonial period.

Apropos, the metaphor of *"transplant"* in this particular context of the spread of metropolitan law was first used by the English utilitarian philosopher Jeremy Bentham. He proposed in his 1782 work "Of the Influence of Time and Place in Matters of Legislation" (Bentham, 1802) the general principles of "transplantation" of law in the context of the spread of English common law — "Rules Respecting the Method of

Transplanting Laws" (cited in Huxley, 2007, p. 177). Bentham wrote that "when attempts have been made to transplant laws without revision from one country to another and the consequences of such attempts have proved disastrous." Bentham insisted on the laboriousness of the transplantation process and called for consideration of both external factors and the internal state of legal thinking or legal consciousness of the host country. But this does not mean, according to the legal philosopher, that *"the laws of barbarous nations should therefore be eternal, while those of the most civilized demand a change."*

Jeremy Bentham, who pioneered European legalism (lawmaking techniques and legislative tactics) and was passionate about codification techniques (*legal codistics*), also developed legal technical rules for the transposition of law in the new colonies (Bentham, 1802).

The English common law became the applicable law in the Indian colonies in most cases where the local courts were directed to adjudicate cases according to *"principles of justice, good conscience and equity"* if found applicable to Indian society and circumstances. The High Courts in Calcutta, Bombay, and Madras had original jurisdiction to apply *the English common law directly* (Lau, 1994, p. 266). Werner Menski illustrates the influence of English rule and British law on Hindu law (Menski, 2003, p. 131). The French legal historian Jean-Louis Halpérin applied the ideas of transplantation to colonial India (Halpérin, 2010, p. 12).

From 1857 onwards, the British Crown began to rule directly over the British colonies in India, hence the decision to promote a program of codification and consolidation of law in the colonies in compliance with and on the model of English law (Graziadei, 2019, pp. 451–452). *Pattern of the common law transition* was applied here in areas such as contracts, the sale of goods, partnerships, succession, civil procedure and criminal law in creating sectoral consolidated statutes (Krasheninnikova and Trikoz, 2022, pp. 230–235).

This *"criminal Bijuridism,"* voluntarily for reasons of prestige, can be observed as a consequence of the so-called "diffuse codification" that began in India in the 1840s and spread rapidly to Canada, Australia, South Africa and other colonial possessions of the British Empire and later to the Commonwealth countries (Bois and Visser, 2003,

pp. 593–595). This codificatory communication of different political-legal cultures and the circulation of model codes between them led to innovative outbursts and great creations. The treatise of the great historian-statesman and codifier of law, Lord Thomas Babington Macaulay, who served in colonial India in the 1940s, can be credited with this.

The legal genius, enlightened attitude and liberal views of T.B. Macaulay enabled him to create at the crossroads of three great cultures (Hindu, British and Muslim) an unsurpassed example of criminal law technique and doctrinal codification — the 1860 Indian Penal Code. For the North American colonies, the "legal transplantation" of English common law was active after independence, when many of the new states adopted "*reception statutes"* receiving the English common law and Acts of Parliament as they existed as of a certain date (usually 1507, 1620, or 1776), provided that they were not contrary to U.S. federal or state constitutions or statutes.

In the Australian colonies the spread of *common law* in the 18th century was justified by the concept of "right of first possession" because these English settler colonies were considered de jure unoccupied by anyone (Lat. *terra nullius*), although the factual background to this claim was sometimes questionable.[2]

Outlining the history of the institution of criminal prosecution in England and its spread to the Canadian colonies, Douglas Hay stresses that Canadian historians "are more inclined to speak of legal transplants, of the imposition of law and martial law, and of the slow and controversial way in which English law became part of our culture" (Hay, 1984, p. 24).

The term *"criminal law transplant"* was used by Eulalio A. Torres when investigating the origin of the Penal Code in Puerto Rico in 1902 (Torres, 1976, pp. 42, 71). The California Penal Code of 1873 was essentially introduced under the guise of this code, and the occasion for transplantation and copying was the punitive nature of this American code, and its bilingual text, which included both English and Spanish translation. In turn, the source of the California Criminal Code was the

[2] *See* Mabo and others vs Queensland (No. 2) (1992) 175 CLR 1.

draft New York Code prepared by David Dudley Field in 1864 and the reproduction of selected Anglo-Saxon criminal statutes (Muñiz, 2008).

It is often difficult to identify who created the original innovation that later became the legal model for the diffusion of transplants and their circulation in the legal circle of contiguous legal systems. A prime example is the diffusion of a system of registration of rights in immovable property called the "Torrens' title system" after Sir Robert Richard Torrens, an Irish immigrant to South Australia in the 19th century, who allegedly invented this particular legal regime for recording land transactions (Taylor, 2008, pp. 230–235).

These "legal transplants" were not always possible merely by the fact of the dominance of the common law system, but also due to the social fact of prestige (Ajani, 1995). "Prestige" motivates imitation, as it is rooted in the desire to have the best of another legal system, which can provoke transplantation or reception.

VI. In lieu of a Conclusion. Transferists vs Culturalist Debate and "Success — Failure Discourse" of Legal Transplants

Two poles can be distinguished in the current multi-polar continuum of attitudes towards transplants with their communicative function: *transferists* and *culturalists* (*transferists versus culturalist debate*) (Foster, 2000, p. 611; Small, 2005, p. 1431). The first group of comparativists, led by Alan Watson, argue that the development of the civil law family is the result of "purely legal history" and can be explained "without reference to social, political, or economic factors."

Alan Watson in his book "Society and Legal Change," developing the concept of legal transplants and the divergence of legal systems, introduces the term *"legal scaffolding,"* i.e., scaffolding that exists to support the established legal system and ensure its workability and modification. Here he focuses on renewable codification and the code as a transplant, asking whether codification can destroy the "legal scaffolding" and remove legal divergence between donor and recipient law (Watson, 1977, pp. 136–137).

The second group of comparativists, starting with the work of P. Legrand, argues that the transplantation of law is not possible at all,

because each law is defined by its own culture and social context. In this extreme, they proceed from the understanding of communicating legal systems as "operationally closed social discourses," which do not allow the historical factor to play a major mediating role.

But it is always easy to challenge this radical negativism of the "culturalists" by referring to the historical examples of the reception of foreign law and legal transplantation in Japan and Turkey. As a "classic example of foreign transplantation," the Japanese Constitution of 1946 has been very successful and has never been changed (Inoue, 1991), also because of the successful combination of the American principle of gender equality and protection of personal dignity with the traditional Japanese social hierarchy and the concept of aristocratic honor (Alston, 1999, p. 627).

Obviously, most legal transplants, if not stillborn, acquire over time a social dynamic in the new legal environment that differs from that of the autochthonous norms. The limitation of the *"transnferist"* approach, as opposed to the "*culturalist"* approach here, is that they considered the life of legal transplants on a door-to-door basis, up to the point of entry into the new legal system and consolidation in a law or judicial decision, but did not follow their legal implementation and practice.

An important aspect of the analysis of legal transplants today is the discourse of effectiveness, applicability and efficiency of transplants and their success — failure discourse of legal transplants (Galinou, 2005).

An Italian comparativist Elisabeth Grande writes about this in her study "Imitation and law: hypotheses on the circulation of legal models" (Grande, 2002, pp. 43–45). She distinguishes between three types of such models: scientific-cultural, technical-legal and political-philosophical.

Thus, the first of these, the *scientific-cultural legal model*, is meta-positivist, due to the focus on the quality of theoretical elaboration and legal dogma; its examples are German dogmatic jurisprudence and American legal realism. According to E. Grande, a "dogmatic formant" is thus transmitted.

The *technical juridical model* broadcasts an underlying humanitarian ideal, understood as the defense of individual freedom

and the advancement of civilization and can be influenced by the criminal law and procedure. According to E. Grande, a "legislative formant" is thus transmitted. Hence the European idea of the criminal code spread in the American states, where the principle of legality in criminal cases, linked to popular legitimacy, was seen as an element of progress, compared to the concept of criminality in case law because of its chaotic and subjective nature of decisions. Another example is the spread of a more liberal accusatory procedural model in Italy, replacing the former inquisitorial procedure, in which the judge is directly involved in establishing the truth of the case (Grande, 2002, pp. 84, 110, 113).

Describing the third, *political-philosophical legal model*, E. Grande sees the main reason for this imitation in the greater efficiency of the proposed legal solutions, such as the extension of the institution of criminal responsibility of legal persons, the concept of insanity and criminal conspiracy, probatory sentences from Anglo-American jurisprudence to the European criminal legal system in the reverse direction or to the British colonies.

Further elaborations of the conceptual framework for studies of legal transplants are underway. In this context much depends on the degree of communicability of the transplanted institutions and recipient constructions, their ability to "speak" in life in a comprehensible language to the host legal culture. If a dialogue with the legal culture of the recipient system and a "permanent residence" therein cannot be achieved, the legal transplant can at least find a doctrinal grounding and an instrumental practice in the specific internal culture of national lawyers and jurists (lawyers' legal culture). There should be a feedback loop in which those who perform legal transplantation, even if there is no reverse implantation, have to reflect on their own law and legal traditions (Bowring, 2021, p. 297).

Let us conclude by quoting Jonathan Wiener's curious metaphor about "legal transplants:" we take some regulatory DNA from national law, insert it into the embryo of international law and hope that this new legal hybrid will grow into a healthy offspring (Wiener, 2001, p. 1296).

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Discussions on the Status of the Ethics Committee and Biobanking Practices in the Nordic Countries

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Abstract: The article analyzes the institutional status of the ethics committee as a social regulator. The object of the study is the practice of legal and administrative regulation in the field of application of genetic technologies in the Nordic countries. To this end, a comparative analysis of national legislation and practices regulating the activities of biobanks in these countries is carried out. Particular attention is given to the legal status of the ethics committee, the possibility of the ethics committee performing a regulatory function, as well as its relation to the legal system, is being investigated. Various positions concerning the legitimization of the decisions of the ethics committee in modern literature are considered. The heterogeneity of this institution is determined, which makes it possible to consider it both as legal, administrative and metaethical social regulators.

Keywords: ethics committee; biobank; genetic technologies; Nordic countries; genomic research; social regulator; law; bioethics

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Contents

I. Introduction

Modern society has been considered informational for more than half a century. Although collection of information, its storage and processing have been among the vital spheres of human activity since ancient times, it is in recent decades that their importance has grown significantly. Genomic research, the use of genetic technologies and the development of precision medicine resulted in the birth of a special information sphere — biobanking. This area includes collection, storage and use of different types of biomaterials, including human biomaterials. In connection with the above, issues of legal and ethical regulation of the collection and storage of biomaterial and other genetic data are of particular importance. The legal regulation of genetic research is steadily improving, but still does not keep up with the development of genetic research itself, especially in the field of the development and application of technologies based on their achievements.

A distinctive feature of this area of law at present is its higher dependence on ethics, which led to the creation of a special institution — the ethics committee, combining the possibilities of ethical and legal expertise, but at the same time giving rise to numerous problems of

both organizational and substantive nature. Some of these problems are reflected in discussions about the relationship between ethics and law, the epistemological status of bioethics, etc. For example, the domestic literature expresses the thesis that the organization and conduct of ethical examinations, unlike legal ones, is much better regulated and can be carried out within the framework of the current regulatory framework. Meanwhile, the need for legal expertise in the field of genomic research and genetic technologies is no less, if not greater, which is confirmed by the lack of legal support for many important decisions of the authorities and actions of research teams. The opinions of scientists, lawmakers and the general public often differ in the assessment of the powers of ethical committees, and in the possibility of their attribution to the sphere of law or morality. In this regard, it seems appropriate to study the experience of the work of ethical committees in the Nordic countries, as well as the practice of legal regulation in these States. But first it is necessary to analyze the theoretical concepts of the legal status of the ethics committee that exist in modern science.

II. Decision of the Ethics Committee: Together with the Law, instead of the Law or a Special Kind of Law

The history of bioethics teaches us that its emergence was associated with a qualitative change in the situation in medicine appeared due to the emergence of new technical capabilities and devices, technologies for the diagnosis and treatment of patients. Bioethics received a new powerful impetus due to the development of genetic technologies that have found application not only in medical institutions, but also in research laboratories, where they searched for answers that not only doctors, but also biologists, breeders, anthropologists, historians, criminologists posed. In a completely different way, the problem of what can and cannot be done in the clinic and laboratory, what steps can and cannot be taken in the process of treatment, study, production, collection and processing of information was posed. Consumer genomics has become a separate high-tech, investment attractive and highly profitable business sector. With the development of the field of genomic research and the use of genetic technologies, it became

increasingly obvious that conventional legislation and traditional ethics systems were not suitable for its regulation. Moreover, their inability to effectively regulate this area was connected not only with the content of regulatory legal acts or moral theory — the very mechanism of their creation and implementation made the performance of the assigned function impossible.

The rule makers were unable to foresee all the contradictions between research interest and ethical principles that arise in the process of development of this rapidly growing and becoming more complex branch of knowledge. Moral theory with religious or humanistic roots was even less suitable for this. Divine revelation and creative experience turned out to be not so universal, first, in matters of their interpretation, the mechanisms of which could not but be conditioned by numerous cultural-historical, ethno-confessional and even political contexts. Researchers, doctors and technologists faced the question of a fundamentally different method of obtaining an answer to the question whether it is possible or impossible to do such actions, having a certain degree of knowledge about their possible results. It was even necessary to redefine the role of philosophy in bioethics, arguments in favor of a new functional were in demand alongside the increasing status of philosophical knowledge. Jennifer Blumenthal-Barby, Sean Aas et al. write "We do not mean to imply that philosophy is the only discipline that has an important role to play in the field of bioethics. Our point is simply that philosophy still has a very meaningful and important role to play in bioethics — not just the branch of philosophy that is ethics, but many other branches of philosophy as well. If anything, philosophy has a central and expanding role to play in bioethics. The field of bioethics could benefit from acknowledgement of this in light of recent skepticism" (Blumenthal-Barby et al., 2022, p. 10).

One of the topics hotly discussed today in connection with the correlation of philosophy and bioethics is the complexity of organizing bioethical, biomedical and legal expertise in the field of genomic research and the use of genetic technologies. Undoubtedly, the participants of the discussion regularly return to the problem of the legal, bioethical and epistemic status of ethical committees. Still, other difficulties may arise in addition to the philosophical interpretations of the essence and

specifics of the ethics committee itself: its competence remains rather unclear. Andrew Moore and Andrew Donnelly draw attention to the fact that ethics committees are forced to solve two different tasks. The first task of an ethics committee is to ensure that the research project is evaluated in terms of the current legislation (code-consistency review of proposals for consistency with the applicable code), while the second is to verify the feasibility of ethical standards and requirements (ethics-consistency review of proposals for ethical acceptability). "'Code-consistency review' and 'Ethics-consistency review' describe each potential job in turn. 'Relations between the two sorts of review' argues that the two are distinct in principle and practice. 'Combining code-consistency and ethics-consistency review' identifies different ways in which authorities could establish combinations of code-consistency and ethics-consistency review and argues that each is problematical" (Moore and Donnelly, 2018, p. 481).

It is possible to agree with Moore and Donnelly that the performance of two such different tasks by the same authority challenges the results of its expertise. The point here is not only a conflict of interests; the tasks themselves are heterogeneous, because they are designed to solve problems caused by different reasons. The need for a special assessment of the project for compliance with the laws is caused by the quality of the laws themselves as they can create legal uncertainty. No matter how perfect the law is as Moore and Donnelly rightly state, it is impossible to provide for all cases requiring legal expertise, because at the design stage of scientific research there is a limited idea of what awaits the researcher ahead. If we are talking about the compliance of the project with bioethical norms and principles, then the situation here is qualitatively different. It is not the opacity of the wording of the law that matters here, but the predictability of the consequences of the implementation of the plan developed by the researchers.

Thus, if situations of legal uncertainty are solved with the help of the law itself, then situations of divergence of law and ethics can be solved either by destroying the law, or by rejecting certain principles or, in extreme cases, mitigating them. Moore and Donnelly state that "Ethics-consistency thinking will tend to run together the matter of which factors are apt to be considered at review with the matter of which

issues are 'ethical issues.' Focus will tend to accrue to such questions as: Is the lawfulness of a proposed activity an ethical issue? Is the scientific quality of a proposal an ethical issue? Principled answers to such questions are difficult to give, unless one appeals to some controversial and reasonably rejectable conception of ethics while also rejecting other such conceptions" (Moore and Donnelly, 2018, p. 486). At the same time, the authors note that the difference in the understanding of ethics itself by Aristotle and Mill, on the one hand, and Kant, on the other, retains its significance to this day, which creates additional difficulties in determining the regulatory status of ethics-consistency review of proposals for ethical acceptability. It is important to to recall that the tradition coming from Aristotle does not separate ethics from law, and Kant's concept of moral philosophy is based on the differentiation of these areas (and these regulators). Considering the above, Moore and Donnelly propose to rename the "ethics committees" into "supervisory boards," depriving them of some of their powers today.

Moore and Donnelly propose that the definition of the functions of the ethics committee, its status and powers depends on some or other ethical theory and that legislators have to choose between different ways of philosophical reasoning and justification. Søren Holm strongly disagrees with this argument. "Research ethics committees are not philosophy seminars, and their job is not to try to shape research projects in a way so that they are ethically optimal. Their job is to make sure that the research is ethically acceptable. This means that they should only deviate from the code if the code leads to a result that is ethically unacceptable. Because there is space between what is ethically acceptable and what is ethically optimal or ideal, it is not the case that a research ethics committee '…must be empowered at review to revise those standards when this would make for an ethical improvement'" (Holm, 2018, p. 488).

Søren Holm, criticizing the article by Moore and Donnelly, notes that ethical committees cannot and should not reproduce the activities of philosophers whose thought was aimed at finding the right solution, chosen from a certain number of alternatives. The members of the ethics committee only determine what in the research project under consideration falls under the scope of legislative prohibitions, without

touching upon the topic of moral prescriptions or ethical preferences. Matti Häyry defends the same point of view. "Their primary professional task is to clarify distinctions, explicate arguments, and analyze judgments by examining their background assumptions — their presuppositions. It is important, I believe, to realize that the concrete normative judgments ethicists make will eventually rest on a prior subjective or intersubjective choice of presuppositions, not on any bedrock of perennial philosophical wisdom" (Häyry, 2015).

The position expressed by European researchers Helga Nowotny and Giuseppe Testa consists in the fact that bioethics cannot, in the strict sense, be attributed either to the sphere of morality or to the field of law. According to these authors, bioethics from the very beginning acted as a new type of social regulator, located together with the law, but not dissolving into it. Nowotny and Testa call bioethics a humanitarian regulatory technology, which occupies a place in a complex regulatory system that includes, in addition to bioethics, legislation and administrative management, or rather the type of it that they call governance. They qualify this new humanitarian technology as a kind of social technology or technology of humanitarian standardization. "The spectrum of norms that are involved in the greatest possible participation of the actors is accordingly diverse — state and international law, conventions and habits, soft law and good governance. Governments, nongovernmental organizations (NGOs), and industries have differing norms but have joined together in network governance. It is tacitly presumed that the exercise of governance already guarantees the democratic political quality of the outcome, since the securing of democratic legitimacy lies in the diversity of the participating actors. Measured against the standards of democratic representation, however, the democratic quality of governance proves to be problematical — all the more so because its arenas are often decoupled from the institutions of representative democracy" (Nowotny and Testa, 2010, p. 78).

Nowotny and Testa discuss the birth of a new type of sociality that mainly differs from the former one not only that there is the emergence of new social regulators and the renewal of old ones. Modernization concerns all elements of society, not just the legal system: management technologies and social institutions must be radically transformed,

socially significant goals and values must acquire a new meaning. According to Nowotny and Testa "the aim is to create standards that permit a change — a reshaping — of forms of life. A deeper convergence of the molecular age is thereby revealed. Human technologies that have reached a certain degree of societal maturity are converging with a biology that is open to societal goalsetting, to taking legal and ethical limitations into account from the beginning, and to including them in its design. Common to both is that they are complex systems that should be disassembled" (Nowotny and Testa, 2010, p. 83).

A common idea was the mention of the fact that traditional forms of regulation of genetic research are increasingly failing. Traditional algorithms for resolving ethical contradictions that arise in research laboratories and medical clinics are extremely inefficient. This applies equally to both the level of international law and national regulatory systems.

As already mentioned, the classical understanding of morality and law was under attack due to the rapidly developing branch of knowledge and activity — the field of genomic research and the use of genetic technologies. Reducing all possible actions to a relatively small number of principles and a bureaucratic understanding of their application does not achieve its goals where questions arise about informed consent and cloning, genome editing and precision medicine. As noted by Silvia Camporesi and Giulia Cavaliere "knowledge of and training in moral philosophy are not sufficient for successful work in bioethics. As part of their public role, bioethicists are often asked to comment on recent developments or controversies and make judgments about the most appropriate course of action. As such, it is critical that they understand the relevant features of a particular issue or controversy and the historical, social and political context in which it is situated. In order to do so, bioethicists need to develop a relational or interactional type of expertise" (Camporesi and Cavaliere, 2021). The specificity of bioethics as a social regulator is that people with a different set of competencies participate in the development and decision-making, and the mechanism of forming a bioethical committee itself turns out to be a challenge to established foundations. The mechanism of formation of the ethics committee acts as an alternative to the mechanisms of

formation of the legislative assembly, which forms the law as a social regulator. On the other hand, the appearance of ethical norms within the framework of religious or philosophical doctrines about good and evil, existing and due, etc. is less formalized, but also sanctified by tradition. Tradition and authority confirm the confirmation of legitimacy in both the first and second cases, while the ethical committee uniting politicians and journalists, public activists and scientists is still formed quite arbitrarily. That is why the question arises whether the members of the ethics committee are able to act as alternative experts in ethics and law, medicine and biology, pushing aside specialists whose involvement was previously confirmed by relevant academic degrees and scientific publications.

III. Key Features of Biobanking in the Nordic Countries

The Nordic countries, after joining the European Union, consistently bring their legislation into line with the norms and principles developed and adopted by the supranational structures of the EU and European bureaucrats. The sphere of functioning of biobanks has not become an exception, discrepancies in the rules of functioning of which are often considered as one of the most serious obstacles to genomic research and the use of genetic technologies. In the rapid development of this field of science and practice related to the field of high technology, effective cooperation between different countries in the field of research is especially important. One of the main difficulties for legislators and law enforcement officers is the practice of using personal data that primarily includes medical and genetic information related to individuals, including patients receiving treatment and other voluntary participants in scientific research.

Of great importance for the unification of the national legal systems of the Nordic countries was the adoption of the EU General Data Protection Regulation (GDPR)[1] in 2016 and its application since May 2018. "Although the GDPR is not a research regulatory tool, in an attempt to regulate the processing of personal data, it creates a rather

[1] General Data Protection Regulation (GDPR). Available at: https://gdpr-info.eu/ [Accessed 07.09.2023].

complex 'research regime,' also known as the 'scientific research regime' or 'research exemption,' through which it determines how scientific research is regulated in relation to personal data" (Slokenberga, Tzortzatou, and Reichel, 2021, p. 1). The advantages of GDPR include the fact that the law contains strict requirements for the processing of medical and genetic data. The rights of the data subject and the obligations required of biobanks and research teams in relation to them are clearly legislated. The possibilities of deviation from these rules are indicated when it is necessary to achieve the goals of scientific research. The GDPR text sets guidelines for the development of national special laws and biobanks or for the adaptation of other regulations that perform their functions.

IV. The First Biobank Law: The Interaction of Genomics and Law in Sweden

In its development of biobanking, Sweden, like other Nordic countries, does not lag behind such world leaders as the USA, Great Britain, as well as other EU countries. In total, Swedish biobanks have accumulated more than 150 million preserved samples taken from humans or fetuses. Research institutes and centers, as well as medical institutions study them. The number of biobanks is also growing, which has already exceeded three hundred, which is quite a lot for a country with a population of ten million. Back in 2002, Sweden adopted a special law on biobanks.[2] Its disadvantages include the fact that the text of the law, like the texts of many other similar acts of the beginning of the 2000s, establishes only general requirements for the creation and operation of biobanks. The practice of developing genetic technologies and conducting scientific research inextricably linked with their application has shown the limited nature of the norms proposed by legislators, calling into question the effectiveness of such regulation. The recommendations of the Council of Ministers of the Council of Europe on

[2] The Swedish Biobanks in Medical Care Act (SFS 2002:297). Available at: https://www.global-regulation.com/translation/sweden/2989107/law-%25282002%253a297%2529-om-biobanks-in-health-care%252c-etc.html [Accessed 07.09.2023].

the research of biological materials of human origin in the 2016 edition mark an important step towards the unification of national legislation, and also marks a movement towards detailing what until recently was considered unimportant and not subject to legal regulation.[3]

Magnus Stenbeck, Sonja Eaker Fält and Jane Reichel commenting on the content of the Swedish biobank law in relation to personal data note the minimalist approach demonstrated in Art. 89 to limit the possibility of using biobank materials in future research. They explain this by the fact that Swedish legislation pays considerable attention to the right to public access to official information. The problem is that the confidentiality rules for different categories of information differ, which prevents the effective use of different state registries in research: linking personal information obtained from biobanks with personal information from other databases (national statistical population registers, national clinical registers, etc.) turns out to be difficult and sometimes impossible (Stenbeck, Eaker Fält, and Reichel, 2021, p. 379). Thus, Stenbeck, Eaker Fält and Reichel conclude that "the Swedish regulatory framework allowing for the use of health data for scientific purposes, on the one hand, is quite liberal, giving researchers wide access to registers, but, on the other hand, it can be a source of legal uncertainty (ambiguous). No specific legal basis for the processing of personal data in research has been introduced by law, but the Government has indicated that this is not necessary, given the already existing legal context in which public interests are a priority" (Stenbeck, Eaker Fält and Reichel, 2021, p. 394).

Thinking of the development of legal regulation of genomic research and the use of genetic technologies, the legislators of Northern Europe strive to take into account the best world practices. This has resulted in the adoption of a number of regulatory legal acts on biobanking as a type of bioresource collections. These include the Swedish Biobank Act effective as of 1 July 2023. The authors of the bill claim that the new legislation will be much better than the previous one (Law on Biobanks of 2003) in terms of regulation of the conduct of scientific

[3] CM/Rec(2016)6). Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168064e8f [Accessed 14.01.2023].

research and the work of medical institutions. The rulemakers managed to take into account their own and foreign experience of the functioning of the science and healthcare system to eliminate excessive administration, while maintaining the necessary level of protection of donors' rights. Lena Hallengren, Minister of Social Affairs, states that "Biobanks are important for research and healthcare, including diseases such as cancer. The current Law[4] on biobanks is almost twenty years old, and it needs to be modified."[5]

According to the information in the media, the new law will also regulate how identifiable biological samples will be collected, stored and used without the threat of violating the rights of donors and privacy. It is assumed that the new Biobank Act will take precedence over most other national laws and legislative acts of the European Union. "Consent to the collection and preservation of samples for the care or treatment of a donor is not required if the patient has consented to care or treatment in accordance with the Law on Patients or the Law on Dental Care and has received certain information in accordance with the Law on Biobanks. The Ethical Review Body or the Ethical Review Appeals Board have to basically request information and consent for the processing of samples for research. The rules for providing samples outside the biobank are being clarified and a new possibility of sending samples for a certain measure is being introduced. The general ban on storing samples abroad has been lifted.

V. Development of Biobanking in Finland

The Finnish Biobank Act was adopted in 2012 and its text is much more specific in terms of content than the Swedish one. A decade later, many problems were seen differently, and the ways to solve them were suggested by practice. In the preamble, the main purpose of the law is "to support research in which human biological samples are used, to promote openness in the use of these samples and to ensure the

[4] Here Lena Hallengren speaks about the Law on Biobanks of 2003.

[5] New Biobank Law in Sweden will Facilitate Research and Healthcare. Available at: https://www.biobanking.com/new-biobank-law-in-sweden-will-facilitate-research-and-healthcare/ [Accessed 14.01.2023].

protection of privacy and self-determination in the processing of these samples."[6]

The difference between the Finnish Biobank Act and the Swedish one is the definition of the place and role of the National Committee on Medical Research Ethics, which allows us to talk about legislative support for institutional and infrastructural aspects of regulating genetic research in this area. The Swedish law mentions only the National Board of Health and Welfare, while the Finnish legislation prescribes sufficiently the mechanisms of interaction between ethical and legal aspects of regulation, including the functionality of ethical committees. The Finnish Biobanks Act stipulates that the National "ethics committee must determine whether the activities of a biobank comply with the conditions regarding the protection of privacy and the right to self-determination set out in this law and in other laws and provide an informed opinion on the ethics of the activity."[7] And they must do this no later than in two months' period.

A significant advantage of the law under consideration is the regulation of the duties of the biobank's custodian. According to the Act, the custodian of a biobank must attend to: "performing quality control for the samples being stored; maintaining, linking and protecting registers and databases; ensuring the protection of privacy when processing samples and information related to them; safeguarding the code key and supervising its use; realising the the right of access to information; other duties of custodians, provided in this act."[8]

Finnish legislators have significantly modernized the national system of legal regulation of genomic research and the use of genetic technologies, especially in the field of biomedicine. They are drafting amendments to the current Biobank Act, taking into account the requirements of the GDPR. In January 2019, a new Data Protection

[6] Biobank Act. Ministry of Social Affairs and Health, Finland. Available at: https://finlex.fi/en/laki/kaannokset/2012/en20120688.pdf [Accessed 07.08.2022].

[7] Biobank Act. Ministry of Social Affairs and Health, Finland. Available at: https://finlex.fi/en/laki/kaannokset/2012/en20120688.pdf [Accessed 07.08.2022].

[8] Section 8. Duties of the custodian of a biobank. Biobank Act. Ministry of Social Affairs and Health, Finland. Available at: https://finlex.fi/en/laki/kaannokset/2012/en20120688.pdf [Accessed 07.08.2022].

Act came into force; its main difference from the previous one is its compliance with the spirit and wording of the GDPR. The emerging system is completed by the Act on the Secondary Use of Health and Social Data, which gradually comes into force from May 2019 (Southerington, 2021, p. 244). Art. 89 of the GDPR made it possible for Finnish legislators to allow derogation from certain rights of the owner of personal data for the purpose of conducting scientific research, compensating for this with strict guarantees that apply, among other things, to the entire data set, and not only to personal data.

VI. Unique Character of the Danish Model of Legal Support for Genetic Research

Denmark's experience in this area is completely different. The specifics of the Danish approach to the legal support of the creation and use of bioresource collections, primarily genomic databases and biobanks, is that regulation itself is not carried out through the development of a special law on biobanks. The Danes seek to explore the regulatory potential of the already existing general laws that ensure confidentiality, information protection and privacy. Here it is appropriate to refer to the opinion of a Danish expert Mette Hartlev who notes the sufficiency of the Danish Health Act[9] and the Danish Criminal Code[10] as to the legal maintenance of the functioning of bioresource collections, including biobanks (Hartlev, 2015). Other laws and administrative rules fully compensate the absence of a special law. According to Mette Hartlev an important role here plays the understanding of the general meaning of law and the guiding principles in general. Art. 72 of the Danish Constitution[11] that protects the inviolability of the home, the secrecy of letters and communications regulates privacy protection.

[9] Consolidating Act No. 2014 of 14 November 2014, Act on Health. The Health Act (No. 546 of 2005). The Health Care Act. Consolidating Act No. 1202 of 14 November 2014.

[10] Consolidating Act No. 871 of 4 July 2014, Criminal Code, Sections 152b-c and Section 264d. Consolidated Act 1068 of 6 November 2008, The Consolidate Penal Code (Consolidate Act No. 976 of 17 September 2019).

[11] Denmark's Constitution of 1953. Available at: https://adsdatabase.ohchr.org/IssueLibrary/DENMARK_Constitution.pdf [Accessed 07.09.2023].

Protection is provided through "three main legal regulatory procedures, including the general rights of patients (especially the right to self-determination and confidentiality), the regulation of research and data protection laws" (Hartlev, 2015, p. 745).

Experts of the Organization for Economic Cooperation and Development in Europe consider this "general information" approach of Denmark not only acceptable, but also advanced. The Danish Data Protection Act adopted in Denmark in 2000 is based on the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)[12] and Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[13] The general rules for the processing of personal data and the protection of access to them by third parties are recognized as very effective. It was the Organization for Economic Cooperation and Development that adopted the Recommendation on Health Data Governance[14] in 2016 (Russia participated in its development). Currently, they are developing some indicators to assess the implementation of the 12 principles set out in Recommendation by countries that adhere to them. At the same time, the Danish regulation experience is considered among good practices that law makers relied on, along with Icelandic models of agreements between ministries in Iceland on coordination and cooperation between bodies that process health data.

The Danish model of processing personal health data is regulated by special rules that aim at excluding the very possibility of revealing such information as sexual life, race or nationality, political views,

[12] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108). Council of Europe. Strasbourg, 28.01.1981. Available at: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=108 [Accessed 07.09.2023].

[13] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on The protection of individuals with regard to the processing of personal data and on the free movement of such data. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31995L0046 [Accessed 07.09.2023].

[14] Recommendation of the Council on Health Data Governance. Available at: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0433 [Accessed 07.09.2023].

religious or philosophical beliefs, and participation in trade unions. The text of the Danish Law also contains possible exceptions to the general rule: these are the needs of preventive medicine, medical diagnosis, provision of care or treatment, or management of the health care system. A special case is the permission for the processing of data by medical professionals, because they are bound by obligations clearly established in the legislation on professional secrecy.

As M. Hartlev notes "the Danish regulatory framework for research in the field of biobanks can be described as 'research-friendly.' Explicit consent of the research participant is required only in projects in which individuals are recruited directly as volunteers. In other situations, patients and persons who have previously participated in research are assumed ready to provide samples for the needs of the study. If this is not the case, the person must actively refuse to participate, but it is not possible in some situations. In this regard, the question arises whether the current disposition corresponds to Section 1 of the Law on the Review of Ethics of Research in the Field of Health. (5Act No. 1436 or 17 December 2019 on amendment of the Act on Research Ethics Review of Health Research Projects)" (Hartlev, 2021, pp. 225–226). M. Hartlev emphasizes that despite the need to respect human rights and protect privacy, it is necessary to turn to the concept of a solidarity approach, when "we as individuals are obliged to society, especially in the context of a welfare society like the Danish one." Thus, the Danish law on research ethics in the field of healthcare, declaring loyalty to the values of humanism and anthropocentrism, also contains a reference to the interests of society and science. According to M. Hartlev these very interests of society and science allow a deviation from strict compliance with the requirement of informed consent that in practice becomes the rule rather than an exception.

The Danish legislation regulating the creation and use of such bioresource collections as the medical biobank is in close relationship with the corresponding infrastructure. The Statens Serum Institute (SSI) was created under the auspices of the Danish Ministry of Health and specializing in the fight against infectious diseases and biological threats or the organizational and institutional support of this system. "SSI houses the Danish National Biobank, which stores more than

22 million biological samples, such as serum, plasma, leukocyte film, whole blood and DNA. The main goal of the Danish National Biobank is to provide scientists from Denmark and other countries with an overview and access to biological samples in both existing and future collections. Scientists have the opportunity to link information about biological samples in Danish biobanks with a large volume of data contained in Denmark's unique health registers."[15]

The Institute is creating new registers of the data registered and approved by the Danish Data Protection Agency. With the mandatory approval of the Ethics Committee, external researchers and SSI employees can process data from the SSI biobank that stores the samples of two-thirds of Danes in its repository. Thus, no prohibitions will stay in the way of a research project implementation and it will be possible to link the data from the SSI bioresource collections to the data from other collections. It is not difficult to see the special role of SSI in the overall system of governance and regulation of genomic research and the use of genetic technologies both in medicine and in other areas of social life.

In order to gain access to health data from the SSI bioresource collection, which create an opportunity for the identification of the subject, researchers must prove it necessary in his project. An application form is available on the SSI website and it requires specifying the goals and methods of the project, which make it possible to estimate the volume of necessary data sets requested by researchers. The institute receives about two thousand of applications annually. The procedure for the regions and municipalities submitting applications to obtain data on the health of individuals is separately specified. According to the license agreement signed by the parties, the Institute exchanges data with regions and municipalities through a special web portal, the data protection of which is considered sufficiently reliable. The Danish Data Protection Agency thoroughly investigates all cases of unauthorized access attempts to the web portal resources.

The most difficult issue for legal regulation is the reuse of data voluntarily provided by donors supported by the informed consent. As noted in the report of the Organization for Economic Cooperation and

[15] *See*, Statens Serum Institute (SSI). Available at: https://en.ssi.dk/ [Accessed 07.09.2023].

Development, "in Denmark, the volume of data related to biological materials (genetic data) is growing; the use of this data in projects involving linking with other health data is expanding. In this regard, the risk of re-identification of biological data is currently being discussed in Denmark. In particular, the issue of consent to the use of biological data is being discussed and whether such consent should be broad (i.e., allow the use of data for subsequent research without the requirement of re-obtaining consent)."[16]

Thus, the general structure of the Danish health data governance system emerges, that is, the system of legal and administrative regulation of bioresource collections. It includes the Statens Serum Institute (SSI) research institute, the Danish Data Protection Agency, and the Danish National Committee on Biomedical Research Ethics. The third element, the ethics committee, plays approximately the same role in this triad as in systems that consider biobanks as subjects of special regulation.

VII. Icelandic and Norwegian Systems of Legal Regulation on the Legal Map of Northern Europe: The Search for the Golden Mean

Another Nordic country, Iceland, finds itself between Sweden and Finland in a comparative analysis of biobank legislation. On the one hand, the Icelandic national law was adopted two years earlier than the Swedish one — in 2000. However, the amendments and supplements made thereto have significantly changed the effect of all its main articles. Such changes were made three times: in 2008, 2009 and 2014.

As in other similar laws, the purpose is to authorize the collection, storage, processing and use of human biological samples. The experience of conducting genetic research, as well as the development and application of genomic technologies, forced the rule makers, in addition to the samples themselves, to refer medical data collected for scientific research to the objects of regulation.

[16] Big data for sound health. Denmark Experience. Available at: https://oecd-russia.org/analytics/bolshie-dannye-dlya-krepkogo-zdorovya-opyt-danii.html [Accessed 08.08.2022]. (In Russ.).

The law prohibits the use of stored data, which could result in "discrimination of a person on the basis of information obtained from his/her biological sample [or health data]."[17] Storage of gametes and embryos (artificial insemination and use of human gametes and embryos for stem cell research), removal of organs or remains are separately regulated; compliance is established with another legislative act — the Cultural Heritage Act.[18]

Norway occupies a special place on the legal map of genetic research regulation in Northern Europe. The development of this sphere of regulation in fact began alongside the drafting the Act on medical and health research (The Health Research Act) that was adopted on 20 June 2008. This law came into force on 1 July 2009, the same day when they issued the Regulations on the organisation of medical and health research, which answers the most provocative questions on the matter.[19] The bill, which was presented in Odelsting as Proposition No. 74 (2006–2007), was based on the Norwegian Official Report NOU 2005:1.[20]

The main task set by the Norwegian rulemakers is the revision and simplification of the regulatory framework, which increasingly hindered the conduct of medical and biological research in the field of genetics. "The regulations pertaining to this area have now been largely compiled into a single Act, and researchers now have to relate mainly to one authority when applying for approval of research projects. This authority consists of the Regional Committees for Medical and Health Research Ethics (REK)."[21]

[17] The Biobanks and Health Databanks Act No. 110/2000 as amended by Act No. 27/2008, No. 48/2009 and No. 45/2014. Available at: https://www.government.is/media/velferdarraduneyti-media/media/acrobat-enskar_sidur/Biobanks-Act-as-amended-2015.pdf [Accessed 07.09.2023].

[18] The Cultural Heritage Act No. 80/2012. Available at: https://www.althingi.is/altext/stjt/2012.080.html [Accessed 07.09.2023]. (In Icelandic).

[19] The Health Research Act. 8 October 2020. Available at: https://www.forskningsetikk.no/en/resources/the-research-ethics-library/legal-statutes-and-guidelines/the-health-research-act/ [Accessed 07.08.2022].

[20] Summary of the Official Norwegian Report NOU 2005:1 — Good Research, Better Health. Available at: https://www.helsetilsynet.no/globalassets/opplastinger/english/nou_2005_1_english-summary.pdf [Accessed 07.08.2022].

[21] The Health Research Act. 8 October 2020.

Regulation of scientific research due to the peculiarities of this type of activity is a most difficult task for legislators. The Norwegian Health Research Act establishes minimum general requirements for the organization and content of research. Content analysis inevitably leads to ethical issues that prompted legislators to introduce the concept of ethically based research. The functions of the REC include the study of possible ethical violations and a "standard assessment of the research ethics of the project" in the form of preliminary approval of the latter. "Ethical standards can be established in writing (for example, the ethical rules of professional associations and the Helsinki Declaration), stem from individual decisions taken by the ethical bodies of professional associations, supervisory authorities, the REC, the National Committee on Ethics of Medical Research and Health Research. (NEM) or the courts, or follow from principles generally recognized by society as a whole or by professionals. "Ethical standards may be established in writing (for example the ethical rules of professional associations and the Declaration of Helsinki), ensue from individual decisions taken by the ethical bodies of professional associations, supervisory bodies, REK, the National Committee for Medical and Health Research Ethics (NEM) or courts of law, or ensue from principles that are generally recognised by society in general or the professions."[22]

VIII. The Importance of Bioresource Collections for the Preservation of the Achieved Level of Biodiversity: The Contribution of Northern Europe

Biobanks specializing in human genetic data are not the only type of bioresource collections. Although the legal and administrative regulation of their activities plays a much smaller role in the legal development of the Nordic countries, the importance of this branch of genomic research and the use of genetic technologies cannot be underestimated. For example, Marte Qvenild (2008) compares the global seed storage created by the Norwegians on the island of Svalbard with the "Noah's Ark." The meaning of this allegory is clear: in the event

[22] The Health Research Act. 8 October 2020.

of an anthropogenic or natural global catastrophe, this repository will provide the humanity with hope for at least a partial restoration of the biodiversity available today. It similar to the acquisition by medieval Europeans of ancient manuscripts in Arabic translation, and then in the original, made possible a cultural Renaissance and the birth of modern Europe.

It all began in 1984, when, on the initiative of the Scandinavian Genome Bank (NGB), an abandoned coalmine in the Arctic Archipelago was converted into a repository for duplicate seed collections from Northern European countries. For this purpose, a large roomy metal container was used, inside which seeds packed in sealed glass ampoules and placed in wooden boxes were stored. The increasing technological capabilities resulted in the storage conditions improvement: aluminum bags have replaced glass ampoules; their "germination" is regularly checked. The importance of this enterprise is increasingly becoming more recognized: the growing fears of another great extinction under the influence of global warming and other catastrophic phenomena of both man-made and natural nature add up to the fear born of the threat of nuclear war.

The creation of the repository has given rise to many legal and political problems discussed in the Food and Agriculture Organization of the United Nations (FAO). The debates in the Commission on Genetic Resources for Food and Agriculture, held at the Tenth Regular Session of the Commission on Genetic Resources for Food, Agriculture in Rome on November 8–12, 2004 was completed with the "CGRFA-10/04/REP" Report that highlighted the difference in the approaches applied in developed and developing countries. While developing countries wanted free access to plant genetic resources, most developed countries and the seed industry wanted to strengthen the exclusive rights of breeders to improved plant genetic material.

By locating an "international" storage bank in a developed country without legal clarity regarding the ownership of the material, the initiators created ideal conditions for a conflict of interest. As M. Qvenild notes, FAO and the International Board for Plant Genetic Resources (IBPGR) hastened to guarantee "unlimited access of depositors to their materials stored in Svalbard." They stressed that "every germ

plasm deposit should remain the property of the Depositor... and will not be opened or used by any other party without the consent of the Depositor. Developing countries have already had experience of how plant genetic material collected in their countries was improved and protected by intellectual property rights by the seed industry, which led to blocking the country of origin from obtaining financial benefits or even preserving the freedom of use of the material in some cases" (Qvenild, 2008, p. 113). This episode once again highlights the complexity of the value basis of the legal regulation of the turnover of genetic materials related to food and agriculture. The experience of the Nordic countries shows how harmful the influence of economic interests on the sphere of science and scientific knowledge can be. Issues of ethics and politics are inextricably linked with the development of law, but in this case, this connection is especially relevant.

Apparently, then the scientific community seemed to cope well with such problems within the framework of the existing scientific traditions and research practices. Indeed, the organization of scientific expertise has always been regulated; there were reviewers, opponents, academic councils, and scientific supervisors, departments in universities and departments in research institutes. If there was an ethical aspect in assessing the relevance of the topic or the scientific novelty of the results obtained, it was more likely to appear when discussing the means chosen by the researcher to achieve the goals set than in discussions about the goals themselves.

IX. Conclusion

The experience of the evolution of the Institute of the Ethics committee is most valuable for the development of the system of legal regulation of genomic research and the use of genetic technologies. The movement towards mutual harmonization of national systems of legal regulation of biobanks in the Nordic countries led to the creation in 2014 of a single body — the Nordic Committee on Bioethics. The reasons here were the motives of the similarity of the legal systems of the five countries of the region and the resulting awareness of the similarity of the problems facing the legislators of these countries on the

way to their integration into the common legal space of the European Union. The annual bulletins published by the Committee allow for a comparative analysis of national legislation on the following items: assisted reproduction, preimplantation genetic diagnostics (PGD) and genetic screening (PGS), abortions, prenatal diagnostics and/or screening, organ and tissue transplantation, embryo research, cloning, human clinical trials, biobanks, etc. The discussion of the legal status of the Council of Europe Convention on Biomedicine and its additional Protocols is highlighted separately.[23]

A French journalist, during an interview, asked M. Heidegger if he was ready to write about "Ethics" that, in accordance with tradition, would be interpreted as a doctrine of action? "Ethics?" the German philosopher asked. "Who can afford it today and on behalf of what authority to offer it to the world?" (Palmier and Towarnicki, 1969). From the point of view of classical philosophy and theory of law, ethics and law are separate social regulators, although they are closely related to each other and ideally should not conflict with each other. Meanwhile, in everyday life and in diverse social practices, they often diverge, resulting in incessant philosophical discussions about the relationship between law and morality. However, with the advent of ethical committees, the question of their ontological status arose, which gave rise to three different concepts explaining the nature and essence of this phenomenon. The first concept, which could be called the "right regulator," interprets the ethics committee as a special legal institution, where the source of law is the decision of a qualified assembly, whose activities are regulated by law. The second concept, conventionally referred to as the formula "together with the law," interprets the ethics committee as a social institution whose decisions are complemented by the actions of laws and ensure their qualified application. And finally, the third concept, built according to the "instead of law" formula, means abandoning the idea of legal regulation of a certain type of decisions taken during scientific research, clinical trials and even medical practices due to the lack of such regulation. In this case, we are talking

[23] Legislation on biotechnology in the Nordic countries. An overview 2022. Available at: https://www.nordforsk.org/2022/legislation-biotechnology-nordic-countries [Accessed 07.09.2023].

about replacing the legal regulator with some other social regulator, in particular, bioethics. Among the advantages of the latter is the fact that bioethics differs qualitatively from traditional ethics in that it does not appeal to any authority or any tradition, but, consistent with law and morality, represents a social technology for making the best decisions from both an ethical and a legal point of view.

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Article

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The Dialogic Nature of Legal Communication and the Problem of Measuring the Legitimacy of Law

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Abstract: Communication can be monologic or dialogical. Only the latter forms are an essential characteristic of legal reality. At the same time, dialogue is conceived as an immanent feature of sociality as such. In the process of identity formation and personality socialization, dialogue is necessary and inevitable. The process of dialogic socialization ensures the reproduction of any society. Society exists only in case if there is recognition of mutual legal claims, i.e., legitimacy of law. The principle of universal trust as a constitutive foundation of sociality is at the same time the fundamental principle of a legal system. These initial philosophical and legal provisions require explication in the actual legal refraction. Designation of social situations as legal, attributing legal features to them, involves correlation of personal intention with the legal status of the Self and the counterparty in a legal relationship or in a simple form of realization of law. Thus, the relation I-You is mediated by the legal instance of It. However, it is quite difficult to measure the reciprocity of recognition of the Other as a bearer of legal status in empirical reality, especially in the field of public law. The criteria of "extreme injustice" (G. Radbruch's formula) and "aggressive violence" (in the terminology of V.A. Chetvernin) can be used to explicate the legitimacy of law and can be specified in sociological and legal studies. This paper states the paradox of measuring of the legitimacy of law, which

consists in the difference between trust in an empirically given counter-subject in a legal relationship, and impersonal status of a legal institution. Trust in the institution, according to the authors, extends, among other things, to a critical attitude towards it, however, with the condition if there is a recognition of the need for its existence. Another paradox of the legitimacy of law, considered in the article, is associated with the antinomy "the ideal — the real." Violations (non-observance) of legal norms, if they are not widespread, do not put into question the legitimacy of the legal system as a whole. In general, the recognition of law is determined not by the average result of a sociological survey, but by the understanding of the necessity and the inevitability of the Other as a carrier of a typified legal status (for example, in criminal proceedings: in recognizing the interdependence of the Self from Others as carriers of the status of subjects of law).

Keywords: legal communication; dialogical nature of law; law and communication; legitimacy

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Contents

I. Dialogue as a Condition of Social Life

The philosophy of dialogue is one of the most important areas of philosophical thought in the 20th — early 21th century. Although its premises are found in the philosophy of Socrates and Plato, dialogism becomes an influential and original philosophical movement in the works of G. Cohen, M. Buber, F. Rosenzweig, O. Rosenstock-Hüssy, M.M. Bakhtin in the beginning of 20th century; and later, in the middle of 20th century, in the works of M. Heidegger and G.-G. Gadamer.

The translation of the works of M.M. Bakhtin into French, English and German in the second half of the 20th century led to the rebirth of the philosophy of dialogue in postmodern (or poststructuralist) studies. The rapid development of theory of communicative action as a paradigm of humanitarian knowledge also facilitated this transformation.

In this regard, the question arises about the relationship between two concepts: dialogue and communication. This also remains important in relation to postmodern legal science. A.V. Polyakov, criticizing I.L. Chestnov, argues that "*dialogue*... is still the same that *communication,* and renaming communication into dialogue does not give anything new for understanding this phenomenon [known as law — I.Ch., E.S.]" (Polyakov, 2013, p. 9). We suppose that this kind of criticism can be recognized as correct not in a substantive aspect, but only from the point of view of the possibly insufficient clarity of the formulations of the dialogical theory of law, which will be discussed below. Let us now note that both, from the point of view of historical perspective and in terms of its content, dialogical philosophy (and dialogical philosophy of law) is in no way stands in a subordinate position, but on the contrary, has a priority in relation to the communicative theory. Moreover, communication can be monologic and dialogical. Only the latter is an essential characteristic of legal reality. We believe that the concepts of dialogue and communication do not oppose, but complement each other.

One of the most important provisions of the dialogic philosophy, which substantiates the existence of law, is that *social existence is immanently dialogical*. One may not accept completely the postmodern (or post-structuralist) thesis, stated back in the 1920s by M.M. Bakhtin (Bakhtin, 1997), F. Rosenzweig (Rosenzweig, 1988), and later by O. Rosenstock-Hüssy (Rosenstock-Hüssy, 1981), that social being reveals itself as a language (Rosenzweig, 1988), or that it reveals itself in "being-event" (Bakhtin, 1997). However, it is impossible to deny the role of *language-speech* and its influence on human existence. Language intention, which implies pronunciation, is internally dialogical. Focusing on the statement as the most important unit of language-speech, Bakhtin not only affirms its objectivity, expressiveness and relation to someone else's speech (Bakhtin, 1997, p. 229), but also insists on the

"internal dialogicity of any word" (Bakhtin, 1997, p. 224). "Dialogization sharpens the feeling and consideration of someone else's word (an 'actively-responsive' listener of a contemporary), but at the same time brings the word closer to reality…" (Bakhtin, 1997, p. 223). Therefore, Being is a dialogical communication, as M.M. Bakhtin puts it in his study of Dostoevsky's work (Bakhtin, 2000).

The exchange of statements includes not only the author and the addressee, both their empirical reality, and the images arising from the imposition of social statuses on themselves, the counterparty of the dialogue and the situation, but also the position of the third person. This position is held by the socially significant Other, in terms of social interactionism. Such situation is nothing but an appeal to the supposed normality and normativity of the dialogical relation. Both the author and the addressee of a statement (who change their roles with each other as the dialogue continues) perceive the Other person and the situation of speaking (more broadly — of any activity that demonstrates the expression of the participants in the dialogue) as normal. More precisely, they evaluate it from the point of view of the assumed norm: whether the realization of social statuses by the participants corresponds to the norm in the context of the concrete situation. Here arises the problem of the uniformity of understanding by participants in dialogical communication of the situation, of the Self and the status of the Self, and the problem of general stock of their knowledge. At the same time, there can be no complete coincidence between these positions, due to individual needs, interests and expectations. It is important that the participants in the interaction were focused on mutual understanding, taking into account the position of the Other. Only in this case their communication becomes a dialogue. It is interesting, however, that Bakhtin included in the dialogue also the "opposition between Self and Other" and even their conflict (Bakhtin, 1997, p. 209). "Dialogical relations — the position of agreement — disagreement, evaluation" (Bakhtin, 1997, p. 230). It is important that the position of the Other was taken into account by the actor and, vice versa, i.e., it is important that there must be an interconnection of expectations of the participants in the interaction.

Dialogue is a complex, multifaceted phenomenon. It consists of the outer side and the inner side that can be represented by the dialogic nature of understanding or mutual understanding (Bakhtin, 1997, pp. 210, 215), self-consciousness as a "dialogue between a person and his/her conscience" (Bakhtin, 1997, p. 459). The internal dialogue ("ideal") understood in this way is realized outside: in behavior, which produces changes in the world and which can be called the "material" aspect.

Recognizing the normativity immanent in a dialogue, it is appropriate to conclude that the latter always presupposes the correlation of what Is (an action, an act) with a norm that expresses what is Ought. The concept of "being-event" just captures such a dialogic correlation of the Is and the Ought. The process of individual socialization presupposes the internalization of norms (the Ought) into the emerging self-consciousness of the individual. Due to the process of socialization, reproduction of society is ensured. On the other hand, the performance of an action (the Is) is always evaluated from the point of view of the norm (the Ought). Legal qualification represents a dialogue between the Is and the Ought — the choice of a norm corresponding to the act. This aspect should also include the antinomy of the ideal and the real (or material), in which the dialogue in law is also manifested. The Ought, as ideal, expressed in the principles of law, never has a full implementation in the legal order, and should not have such. The ideal in law acts as a guideline for its improvement.[1] At the same time, the given legal order, in order to be precisely the legal order, and not potestary violence, cannot differ very much from the legal ideal.[2] These aspects form the sides of the dialogue, mutually conditioning each other and expressing its content. Why did these ideas lead to A.V. Polyakov's critique one can only guess, although Professor Polyakov himself writes that the communicative approach to law "allows us to understand the latter both as the Ought, and as the Is, as a semantic structure, and as something

[1] In this regard, a fundamental question arises: what is an "ideal law" and who determines it? It needs special consideration and is not included in the subject of this study.

[2] The boundary between the ideal and the real in law is always relative in terms of content.

experienced, as a value that can be disposed of and served" (Polyakov, 2019, pp. 60–61).

The most important manifestation of the existing dialogue is the mutual recognition of interests and needs, of expectations of its participants, as well as trust in abstract structures. The last point was discussed in detail by A. Giddens in 1990 in connection with the definition of the features of "high modernity." Abstract systems conquer or subjugate the life world of everyday life — this was also written by J. Habermas (Habermas, 1973) — and bind personal and systemic trust (Giddens, 1990, p. 111). The latter, being a belief in impersonal principles, which are expressed in the legitimacy of expert knowledge, helps to overcome fears of more and more new risks, of permanent uncertainty. F. Fukuyama pointed out the constitutive role of trust in social progress was pointed out in 1995 (Fukuyama, 1995).

Dialogue is the principle of reciprocity (or, equivalently, mutual trust). For all peoples, at all times, this principle of organizing living together is found, whether in the biblical "golden rule," in the Kantian categorical imperative, or in the deliberative theory of J. Habermas. Reciprocity, on the other hand, implies the recognition of the Other as formally equal to the Self, at least as a necessary and worthy partner of an interaction, and implies fair interaction.

II. Dialogue as a Constitutive Principle of Law and its Reproduction in Legal Reality

All mentioned above gives reason to conclude that *the principle of universal trust is the constitutive basis of sociality. It is also the foundation of a legal system. Law is the mutual trust, or the principle of justice, which, in the ontological sense, is immanent to sociality, and which ensures its reproduction through implementation in practices forming legal order of society*. These initial provisions of legal philosophy require explication in the actual legal refraction. P. Ricoeur points this out in his famous analysis of justice: "justice that is rooted in the pursuit of the good life and takes the most ascetic rational formulation in procedural formalism, reaches the particular fullness only at the stage of the application of the rule to a specific situation" (Ricoeur,

2000, pp. 133–145). The problem is that the original principle never obtains a single and only correct specification in legislation and implementation in practices. As P. Ricoeur rightly mentions (with reference to R. Dworkin) legal principles are not unambiguous (Ricoeur, 2005, p. 133). Therefore, there is an urgent need for "operationalization" of the principle of mutual trust in legal practice and its measurement for future evaluating practices.

Designating social situations as legal and attributing legal features to them involves correlating personal intention with the legal status of the Self and the counterparty of the legal relationship, or requires a simple form of implementation of law. Thus, the relation I-You is mediated by the legal instance of It. At the same time, it is people — the participants in the dialogue — who construct this instance, i.e., legal norm in the relevant context of place, time, and culture. This represents the dialogic nature of law-making, considered at the level of philosophical abstraction. In practical terms, the dialogic nature of law-making implies the participation of the population in the discussion of innovative projects. J. Habermas writes about this a lot and in detail, concretizing the thesis of I. Kant that only those norms that people set for themselves and apply to themselves, can be legal. For him, the validity claim of a legal norm is acquired in the process of deliberation, which is formed by the rules of universal pragmatics: the right to participate in the discussion of social problems; everyone should have an equal chance to make their own views; the right to argue, to agree or disagree with the arguments expressed by other participants in the discussion (Habermas, 2001, p. 115). R. Alexy, a well-known legal theorist, develops and formulates in detail the following "specific rules of discourse" that make it possible through procedural deliberation of the rule of law to acquire the status of general validity. Here are these rules put forward by the German philosopher: "1. Everyone who can speak can take part in a discourse. 2. (a) Everyone can question any statement. (b) Everyone can introduce any statement into the discourse. (c) Everyone can express their views, desires and needs (2.2). 3. No speaker may be prevented from exercising his rights enshrined in paragraphs (1) and (2) by any pressure, within or outside the discourse. These rules guarantee the rights of each of those who take part in the discourse, as well as freedom

and equality within the discourse. They serve as an expression of the universal character of the theory of discourse" (Alexy, 2008, pp. 452–453).

Such an interpretation of law-making can be criticized by skeptics or realists as a utopian. Indeed, the real procedures of even a liberal democracy, which are closest to the presented concept, are far from the ideal. However, as it is usually said, humanity has yet to come up with anything better. At the same time, it should be noted that rational acceptance conceived as a criterion for the legitimacy of law, as insisted by J. Habemas and R. Alexy, does not cover all aspects of legitimacy as such. The latter includes a suggestive aspect that prevails over the rational one. Most people trust the Other (both a specific counter-subject in a legal relationship, and "abstract structures" according to A. Giddens (1990), most often due to cultural predisposition. Rational calculation is a fairly rare phenomenon in social (and legal) life.

Therefore, the principle of mutual trust intersects with the authoritative construction of the system of law, and is always only to a certain extent embodied in this kind of activity. In confrontation with other forces (powerful actors), power constructs public opinion through its symbolic capital — the right to nominate (define) officially some social phenomena as legal. In other words, power defines, classifies, categorizes and qualifies the social world (constructs a picture of the world), endows with legal significance that aspect of the social world that it — power — considers the most significant. Such categorization is the basic cognitive process of segmenting and organizing the social world into social categories. Due to this process, the constructed picture of the world acquires in the eyes of the population (including a significant part of the authorities) a natural, self-evident character ("natural attitude," in terms of the supporters of social phenomenology). Thus, the social world is endowed with signs of rationality (reasonable arrangement), and its predictability, stability, and "ontological security" is being affirmed in the minds of population. Ontological security, according to the English sociologist A. Giddens, is the confidence experienced by a significant part of people — both in relation to the preservation and constancy of the surrounding social and natural environment, and to their self-identity (Giddens, 1990, p. 123). This is the process of social

and legal legitimation in the broadest sense of the word. The principle of mutual trust, as well as values, in the ontological (or ontic — in the terminology of M. Heidegger) sense represents a postulated structure of sociality, which cannot be ignored by the power, if the latter is not intended to self-destruction. If the principle of mutual trust is not implemented, at least to a minimum extent, in social practices formed by the authorities, chaos and anarchy will begin in such a society.

Postmodern era problematizes the outlined picture. Today there is no single power. Different social groups form their own vision of reality, including the legal one. A multitude of legal systems and legal orders is a "visiting card" of the postmodern world. Therefore, powerful actors strive to dominate in their vision of the world — to impose on a society their own vision of legitimacy of legal order. For doing this, the power of discourse is used (Foucault, 1988, pp. 5–6) as well as formation of myths, stereotypes, content of which is formed by social representations, structured (framed) into scripts — schemes of obligatory behavior in a typified situation. Due to the reified social representation, the above mentioned cease to be questioned and thus provide confidence in the typical expectation of the contractor's adequate behavior in the corresponding (typified) situation. *Legitimation itself is the stereotyping of situations and the ways of behavior in them, which form confidence as the predictability of the actions of any "normal Other."*

It is fundamentally important to show *how exactly the legal system is being institutionalized in a complexly structured, multicultural postmodern society, to demonstrate the process of legal legitimation*. The process of legitimation begins with a theoretical and normative legal (official) formulation of what should be considered law, with giving legal significance to certain social phenomena and processes. Today it is obvious that humanity does not have objective, reasonable, apodictic criteria for determining the content of justice, or the functional significance of legal norms — i.e., criteria for attributing justice or functional significance to social phenomena. Therefore, it is necessary to analyze how exactly the power constructs law — legal significance. At the same time, the power acts, obviously, in its own interests — strengthening its own influence. However, the power cannot

but take into account external factors that turn out to be limiters of its arbitrariness. These embrace socio-cultural and historical context, including alignment of political forces. These external factors should be perceived as a *social (legal, juridical) problem*. This issue is analyzed in detail by the "school of P. Bourdieu." According to R. Lenoir, who was basing on the analysis of the social significance of cancer, the condition of a social problem is that it affects high social status groups of the population (Lenoir et al., 2001, p. 194). Therefore, the problem is not just a dysfunction, but its recognition and legitimation (Lenoir et al., 2001, p. 112). The problem acquires social significance in modern conditions, due to the activities of the media (Lenoir et al., 2001, p. 114). R. Lenoir emphasizes that "It is through the mechanism of state consecration that private, hardly thematized problems are elevated to the rank of social problems that require collective solutions, most often in the form of general regulation, legal provision, material equipment, economic subsidies, etc. These solutions are almost always developed by voluntary or professional "specialists." One of the main phases of establishing a problem as a social one consists precisely in its recognition as such by state authorities" (Lenoir et al., 2001, p. 119).

A social problem, therefore, is determined by the degree of its social significance, which is determined, in turn, both by the objective functional significance of this problem for a society, and by the idea of its significance formed in public opinion by the means of mass communication. This suggests that there are no "objective" problems reflecting the "natural origin of things." Any problem that is socially significant today may turn out to be a pseudo-problem tomorrow.

Thus, the bearers of legal and symbolic power (these aspects of power are interdependent) produce social meanings with the help of discursive practices — among other means, by selecting certain social phenomena as socially significant. It is the power, using its monopoly right to nominate, and, thereby, to declare certain social phenomena existing and significant, that determine such seemingly "natural" phenomena as age (for example, the border of old age), illness, unemployment, suicide, family and others. It is the power that forms public opinion, which, as P. Bourdieu stated in 1972, does not exist as some kind of objective reality (outside public opinion polls)

"as an imperative obtained solely by adding up individual opinions" or "something like an average arithmetic or mean opinion" (Bourdieu, 1993, p. 163). Moreover, it is the power that operates in modern society mainly as a symbolic power producing the construction of social classes.

Who shapes the legitimacy of the legal system? This is done by the elite with the help of a reference group, using the mechanisms of ideological construction of public consciousness. It is the elite who translate social phenomena and processes into political ones and endow them with legal significance. Thus, these phenomena and processes are declared vital. At the same time, the criterion of social domination (symbolic capital), according to P. Bourdieu, is embodied in the monopolized right to nomination — naming of people and things, their official classification.[3] "The political field," P. Bourdieu writes, "is the site of a competitive struggle for power, which is carried out through competition for the uninitiated, or, better, for a monopoly on the right to speak and act on behalf of any part or all of the uninitiated" (Bourdieu, 2005a, p. 198). Therefore, "in order to change the world, it is necessary to change the ways in which it is formed, i.e., the vision of the world and the practical operations by which groups are constructed and reproduced" (Bourdieu, 2005a, p. 85) "Law, of course, is the highest form of the symbolic power of nomination, creating named things and, in particular, groups. The realities resulting from these operations of classification are endowed with the full degree of constancy — the constancy of things — that one historical institution can endow other historical institutions" (Bourdieu, 2005b, p. 104).

At the same time, it should be borne in mind that the idea formed by the dominant group in terms of nomination cannot be completely arbitrary. An innovation can be successful, i.e., legitimized by the population, if the society is willing to accept it. Therefore, "the real legislator is not the author of the draft law, but all those agents who, expressing specific interests and obligations, associated with their position in various fields (in the legal field, but also in the religious,

[3] P. Bourdieu writes "The symbolic struggle over the perception of the social world can take many forms. On the objective side, it can manifest itself through actions, representations, individual or collective, aimed at seeing and making certain realities be appreciated" (Bourdieu, 2005a, p. 78).

political, etc.), first develop private and unofficial aspirations and demands, and then give them the status of 'social problems,' organizing for the purpose of their 'promotion' forms of public expression of will (articles, books, platforms of associations or parties) and pressure (manifestations, petitions, demands)" (Bourdieu, 2005b, p. 114).

The transformation of an innovation into a tradition (or an individual image into a social representation), which constructs legitimacy, in turn, occurs through the mechanism of legitimation. It is based on the struggle of various social groups for the imposition of their vision of the world (including the state). In this struggle, the symbolic power is used "as the power to establish the given through a statement, the power to make see and believe, to affirm or change the vision of the world and, thereby, influence on the world, and hence the world itself, it is a quasi-magical power, which, thanks to the effect of mobilization, allows to get the equivalent of what is achieved by force (physical or economic), but only on condition that this power *is recognized*, i.e., not perceived as arbitrariness" (Bourdieu, 2005a, p. 95).

Dialogic communication for Bakhtin is a necessary and sufficient condition for human existence; outside the dialogue, a person simply does not exist (Bonetskaya, 2016, p. 264). "I build my image (I realize myself) both from myself and from the point of view of the Other," M.M. Bakhtin wrote (Bakhtin, 1997, p. 68). *The dialogic nature of the subject of law* flows from this. A person "of flesh and blood," as a socialized being, is always a bearer of the status of a subject of law. Awareness of this status involves an internal dialogue of the personal (individual) Self and its assumptions about how the carrier of the corresponding status should look like. P. Ricoeur analyzing the "dialogic and institutional structure of the subject of law" (Ricoeur, 2005, p. 34 et seq.), makes a distinction between two aspects of identity: selfhood (*ipse* — distinguishing the Self from the Others, personal uniqueness), and identifying the Self with the reference group (*idem*). Thus, the internal dialogicity of the subject of law is expressed in the correlation of their representations about their individual abilities and needs (interests) with the requirements imposed by the status on its bearer (as an individual understands them); this is the basis for the "external" dialogue — legal relations, and the implementation of law.

III. Measuring the Legitimacy of Law

How can one *measure mutual trust, which forms the basis of dialogue in law?* Unfortunately, neither A. Giddens, nor F. Fukuyama, nor J. Habermas, or P. Ricoeur give any hints on this matter. This problem remained very briefly developed by V.V. Denisenko in his numerous publications on this topic. The difficulty is aggravated by the fact that, as M. Weber pointed out, legality can be considered legitimate both on the basis of rational agreement with a legal norm, and as forced obedience to it (Weber, 1968, p. 316). Does the legitimacy of law take place in the second case?

In private law, trust can be more or less easily measured through the use of private law institutions. So, if a marriage contract is concluded in less than 3 % of the total number of marriages, then this clearly indicates its illegitimacy (or relative legitimacy, since the majority of the population — even if they do not approve this institution — they at least do not demonstrate its rejection). Consent to preserve the institutions of public and tort (protective) law can be qualified as their legitimacy. Only an analysis of the existing practices of reproduction of a legal system can answer the question of how mutual trust is measured in law.

The criterion of "extreme injustice" (G. Radbruch's formula) and "aggressive violence" (in the terminology of V.A. Chetvernin) can be used to explicate the legitimacy of law; and these concepts are well specified in sociological and legal studies. However, the researcher in this regard is faced with *the paradoxes of measuring the legitimacy of law*. The first paradox consists of the difference between trust in an empirically given counter-subject in a legal relationship, and trust in an impersonal status of a legal institution. Trust in an institution, from our point of view, extends, among other things, to a critical attitude towards it, which goes together, however, with the recognition of the need for its existence. Another paradox of measuring the legitimacy of law is connected with the antinomy of the ideal versus the real. Violations (non-observance) of legal norms, if they are not total, do not put into question the legitimacy of the legal system as a whole and a separate norm in particular. In general, the recognition of law is determined not by the average result of a sociological survey, but by the understanding of

the necessity and inevitability of the Other as a bearer of a typified legal status. For example, in criminal proceedings — it happens in recognizing the interdependence of the Self from the Others as carriers of the status of subjects of law. The recognition of "equal legal personality (mutual legal personality, sovereign rights and obligations, where there is interaction on the basis of these rights and obligations)" by the subjects of law, was correctly considered the content of legal legitimacy by A.V. Polyakov (Polyakov, 2019, p. 61). Fully supporting the fact that mutual trust is a principle of law, we note that the nature of principles (as well as values or ideologemes), in a substantial sense, remains "bare abstraction" (in the words of G. Hegel). The principle exists, first, in the ideal world (for example, in the "third world" of K. Popper) and is implemented, and concretized in legislation and practice, always to a limited extent. At the same time, it is important to emphasize that there is no logical derivation (or necessity) for precise and definite formulations in legislation and "recipes for practical behavior." "The paradox of following the rule" put forward by L. Wittgenstein (no rule ever contains a complete and exact recipe for following it) is a clear confirmation of this. Therefore, the most important problem is the analysis of the correlation of the principle of mutual trust with the institutional and behavioral levels of its implementation.

Legitimacy as a process that manifests itself in discursive legal practices exists at three levels: micro — meso — macro, i.e., at the level of interactions (legal relations), customs, norms and institutions of law, and a legal system. It is the "level" analysis that should be used to measure the legitimacy of law. The micro-level of legitimacy of law is fixed in legal relations and simple forms of implementation of law. At the same time, these practices reproduce legal institutions at the meso-level. Legal values enshrined in the principles of law, and functioning of the institutions of law — all this testify to the legitimacy (or a certain degree of it) of the concrete legal system. A close point of view is expressed by A.V. Polyakov, suggesting three levels for the analysis of the process of legitimation of law: mutual recognition of the autonomous status of a person, the use of rights and obligations, and the external manifestation of legitimacy (Polyakov, 2019, pp. 62–65).

The legitimacy of legal relations at the micro-level is achieved by everyday practices, mostly justified by the functionality or habit formed by socialization. Habitualization (accustomization) of legal interactions forms legal customs/practices that fill the content of legal norms and institutions. The institutionalization of legal relations into norms and institutions of law always includes legitimacy and manifests itself in the process of internalization, described in detail by P. Berger and T. Luckmann (1966); this constitutes the meso-level of legitimacy.

The macro-level of legitimacy of law is the level of legal values, ideologies that ensure the legitimacy of the legal system of the concrete society. Measurement of legal values is one of the most difficult tasks for the legal science. The problem, as discussed above, is that values (including legal ones) are always violated by everyone (to a certain extent), but this does not deny their existence. The values of law, like the legitimacy of the legal system as a whole, cannot be explicated by an empirical calculation of their observance. In everyday legal consciousness, the values and principles of law exist as a matter of course (the same is true for the theoretical and professional levels of legal consciousness regarding "common places" — topoi of legal science or practice accepted without any reflection; for example, such idiomatic expressions as "law regulates social relations," "the constitution protects our rights" or "the purpose of punishment is the reeducation of the convict"). We believe that legal values exist until they are completely "depreciated," or completely denied by legal consciousness, or there is no practice of their implementation at all: in this case, they turn into "pseudo- or anti-values."

The legitimacy of a legal relationship can always be "argued" by an alternative version of legal interaction, as well as legal practice, carried out involuntarily, without consent, and sometimes under pressure. Only the analysis of behavioral legal practice, together with the study of legal consciousness (primarily, everyday typifications, on the basis of which legal significance is attributed to situations and their classification, categorization and qualification) of the actors of such practice, can give a more or less accurate assessment of the legitimacy of the concrete legal norm. Knowing exactly how people perceive specific legal situations and

why they act in such a way could be a key to clarifying the legitimacy of law at the micro-level.

There are no less problems in measuring legitimacy at the meso-level, in relation to a legal institution. We believe that the legitimacy of a legal institution extends from complete trust in it to its critical assessment. Such a measurement — like any public opinion poll — is always relative, first of all, in connection to the position of the interviewer and the way the question is formulated. Therefore, *the assessment of the legitimacy of a legal institution by the method of "by contradiction"* — i.e., *its illegitimacy — is more operational,* when the population (the question arises — who it is, in what quantity, etc.) believes it is undesirable. At the same time, in this case, too, it is necessary to take into account the inaccuracies and uncertainties of "public opinion," and even of the opinions of experts: both are formed by the power. The researchers of the Institute of Sociology of the Russian Academy of Sciences in 2010s, when studying the level of trust in institutions, establishments and groups, came to the conclusion that "...in addition to history, culture, language and territory, as the phenomena that unite people in modern Russia, people single out such negative grounds as "common troubles"' and "dissatisfaction with the authorities," which are significantly ahead of such important foundations for societal integration as the state, the constitution, morality, and solidarity. The consistently low level of trust in all political and legal institutions invariably reproduces answers to the question about institutional trust in all surveys. The lowest indicators of trust in that survey were given in relation to the State Duma, local authorities, the government, regional authorities, the president, and political parties.

This data was confirmed by answers to other questions. 36 % of respondents believe that the activities of political parties are "rather harmful," and only 24 % think that they are "beneficial." 41 % of respondents believe that there are no political parties in Russia that act in the interests of common people, while only 31 % believe that there are such parties. 51 % of respondents are sure that the activities of the State Duma are "rather harmful," and only 24 % think that they are "beneficial." Finally, according to 52 % of the respondents, the activity of the police "rather hinders the maintenance of law and

order in Russia," while only 31 % believe that it helps. In other words, the existing system of state and political institutions does not fulfill its function of legitimizing the social order and societal integration; and citizens, accordingly, do not recognize the current social and political order as legitimate.

We believe that the wording used in the mentioned study ("the activities of this state body brings more good or harm") is much better than the simple question "do you trust the relevant body (institution)." However, the wording "does our legal system need such a state body (institution)?" would be even more accurate. Surely, that with a negative attitude of the population towards the State Duma, courts and police, the vast majority of the population of our country (and even experts) will agree that these institutions must be reformed, but without them the legal system will not be able to function normally. In this case, their institutional legitimacy will be confirmed, although its quantitative indicators will vary for different institutions.

At the same time, the paradox of measuring the institutional legitimacy of law is the relative autonomy of mental and behavioral sides of this legitimacy. The institution of traffic rules is constantly violated (both by motorists, exceeding the speed limit, and by pedestrians, crossing the street in the wrong place), but this does not cancel the legitimacy of this institution. However, if any institution of law for several generations is not reproduced by behavioral practices at all and, at the same time, its assessment by the population is indifferent, only in this case it turns into a social fiction and can be recognized as completely illegitimate.

The contradiction between legally significant practices and explicit trust is one of the paradoxes of the legitimacy of law, thus, according to A.V. Polyakov "...the absence of any significant rights among the population can be taken for granted by the population itself and not cause any protests" (Polyakov, 2019, p. 62). If a legal norm or a system of law is followed solely under coercion or on the basis of manipulation of public opinion, is it possible to talk about the legitimacy of law? If the population approves the existence of death penalty in the legislation, would it be legitimate to put the moratorium on its implementation? As D.I. Lukovskaya puts it, the question could be formulated more broadly:

Is any order in a given society legal, i.e., legitimate? "The value of order, as opposed to chaos and arbitrariness," Professor Lukovskaya writes, "is not subject to critical discussion. And yet, order 'at all costs' is a defective principle in relation to law. It is precisely the argument of order for the sake of order that the ruling elites have used and are using, willing to achieve social legitimation of their power and the power of the law, even blatantly unjust, and not of any specific law, but of the entire existing normative order <...> Will it not turn out that, having gone 'to the street' from the 'veil of ignorance' (J. Rawls), the subjects will find such a mismatch of their claims with reality that they will be happy to approve the order (legal order) as such, even if it does not meet their expectations? Such legitimation, which reproduces 'order for the sake of order,' I repeat, is defective. But the main thing is not even that. Such a legitimizing sense of law is powerless in the face of impending arbitrariness and, ultimately, the destruction of the legal order" (Lukovskaya, 2019, pp. 22, 26).

The main indicator of the legitimacy of the legal system, from our point of view, is the state of legal order as a set of legal relations and simple forms of law enforcement, i.e., legally significant practices. It is fundamentally important to note that this kind of stability cannot exist for a relatively long time solely on the base of violence. Stability as normativity is always expressed not only in practices, but also in a positive assessment of the existing legal order. Psychic, mental processes are inseparable from behavioral, and they also need to be taken into account when conceiving the legal system.

At the same time, it should be noted that the complex social organization of modern society, its multiculturalism (in the broad sense of the word), and fragmentation, in a certain sense, forces us to speak of multiple legitimacy or, sometimes, a conflict of legitimacy at the level of the legal system. The same institution of law in different social groups gets a different degree of legitimacy. General legal (or general national) legitimacy is manifested in the consensus (an abstract social contract, which is in most cases implicit or latent) of the main social groups about the desirability of the legal order in the concrete society. Such a general social idea of the desirability of the legal order (social peace) exists in situations of stability and is always under the

threat of challenge, even in the form of riots or revolutions.[4] Therefore, we repeat, the only indicator of the legitimacy of a legal system is its stability. At the same time, the legitimacy of a legal system can only be measured retrospectively, after a certain period of time, sufficient for its evaluation without political engagement. These are far from all the problems associated with measuring the legitimacy of law. Their complexity, inconsistency and "essential disputability," however, are not a reason to refuse to study the most urgent problem of modern legal science.

It is impossible to specify one or a group of "reasons"" that give rise to trust in law. Following P. Bourdieu, it is permissible to say that legitimacy arises as a result of "a competitive struggle for power, which is carried out through competition for the uninitiated, or, better, for a monopoly on the right to speak and act on behalf of any part or all of the uninitiated" (Bourdieu, 2005a, p. 198). Therefore, "the real legislator is not the author of the draft law, but all those agents who, expressing specific interests and obligations, associated with their position in various fields (in the legal field, but also in the religious, political, etc.), first develop private and unofficial aspirations and demands, and then give them the status of "social problems," organizing for the purpose of their "promotion" forms of public expression of will (articles, books, platforms of associations or parties) and pressure (manifestations, petitions, demands)" (Bourdieu, 2005a, p. 95).

The foregoing does not mean a complete denial of the importance and necessity of the procedural aspect of the legitimacy of law. By and large, a rational procedure, on the priority of which V.V. Denisenko insists, when analyzing the legitimacy of law (Denisenko, 2014), is supplemented by suggestive aspects of legitimation — the ideological hegemony of a social group that has a monopoly on the official nomination, classification, categorization and qualification of social phenomena as legal. How exactly is this complementarity actually carried out? This requires special research.

At the same time, mutual trust as the legitimacy of law represents not only the rational acceptance by the population of the institutions

[4] Tilly writes interestingly and in detail about the "forms of challenging" political regimes (Tilly, 2005, pp. 424–440).

that form the legal system of society, and the imposition of its "general significance" on the population, or the mytho-ideological conviction of the population of the justice and the necessity of the existing legal order, but mutual trust is also a condition for the self-preservation of sociality. Therefore, the legitimacy of law should be discussed at least at two levels: transcendental (general social level) and immanent (microsocial). At the same time, self-preservation, or reproduction of the foundations of sociality, presupposes mutual recognition of the rules of behavior. The self-preservation of sociality can only be postulated as a "naked abstraction," but it must be concretized by a microanalysis of the mechanisms of legitimation.[5] The future of research on the legitimacy of law seems to lie in the analysis of the ways by which the population accepts (including how it is persuaded to do so) those rules of behavior that the elite and reference groups consider to be socially significant.

The foregoing gives grounds to state once again that trust in law (its legitimacy) is quite difficult to measure. The boundaries of legitimacy are conditional and changeable; they range from complete trust to a critical attitude towards the relevant institution of law. The mechanism of reproduction (both innovative and traditional) of trust in law is formed by the discursive practices of social groups in the struggle for the right to officially nominate social phenomena, including legal qualifications. It is the winner who, with the help of the symbolic power of the nomination, "convinces" the population of the legitimacy of the corresponding picture of the world, and of the legal reality. As long as the broad masses of the population do not openly oppose such a picture of the world, legitimacy takes place in this society as the content of dialogicity.

[5] As Habermas writes, there is no guarantee that deliberation procedures necessarily correspond to the best result. Therefore, it is impossible to substantiate the truth (corresponding) by procedures, as well as in the conditions of ontological uncertainty, it is impossible to guarantee the optimum when making political decisions (Habermas, 2001, p. 187). However, it is impossible to completely abandon the substantive criterion of legitimacy even by referring to the possibility of reviewing decisions. If those are "harmful" and turn into hardships and negatively perceived consequences, then nothing will remain of procedural legitimacy due to inevitable social chaos (Habermas, 2001, pp. 110–112). Therefore, the imperative of self-preservation is the transcendent basis of the dialogic nature of law.

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Research Article

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Embedded Relationship Nature of Human Rights, Industrialization, Environment, Sustainable Development Goals, Constitution, Legislation, and Judiciary

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Abstract: Issues of addressing challenges of pursuing Inclusive Sustainable Industrial Development (ISID) complying with Internationally Recognized Human Rights (IHR) without degradation of an environmental ecosystem have attracted researchers and policymakers. Despite sustainable development being promulgated in international and national legal contexts, there is still a gap witnessed in integrating IHR, ISID and environment, Sustainable Development Goals (SDGs), Constitutional and Legislation provisions, and Jurisprudence. Qualitative and quantitative embedded relationship and reinforcing nature of SDGs and Constitution, Judiciary, and Legislations related to IHR, environmental, ISID Jurisprudence, and influence of the principle of sustainable development on the domestic legal regime is analyzed. The paper reveals the pivotal role of the Constitution, Legislation, and Judiciary in establishing a doctrine of sustainable development. Based on the analysis, the paper concludes that the reinforcing and embedded nature between IHR, ISID, environmental protection, SDGs, Constitution, Legislation & Judiciary is undeniable, and this reinforcing

and embedded relationship can be utilized holistically in advancing SDGs. The study reveals significant and varied levels of Embedded Relationship Index between the Constitutional provisions and SDGs, thereby signifying the need to include global legal indicators in SDG progress analysis as an explicit reference, and this extra-legal compliance mechanism can produce positive synergies in realizing SDG objectives. As a case study, the Constitution of India, Legislation, and Judgements pronounced in various Courts in India are considered in this paper. Principles established, analysis model developed, and recommendations made in this paper can be deployed across geographies.

Keywords: human rights; ISID, environment; sustainable development; SDG; Constitution; Legislation; Jurisprudence; Judiciary; reinforcing nature; embedded relationship; ERI

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Contents

I. Study Background

I.1. Introduction

Internationally Recognized Human Rights (IHR) are predominantly relevant to the concept of inclusive growth and Inclusive Sustainable Industrial Development (ISID) while ensuring that no one is eliminated or discriminated against in resource sharing or allocation, development process, economic growth strategy and industrialization. United Nations' (UN) seventeen Sustainable Development Goals (SDGs), together with their 169 targets, constitute the 2030 Agenda for Sustainable Development (SD). As adopted by the UN General Assembly Summit in 2015, SDGs and their associated targets provide a way forward for a triple-bottom-line model of development, drawing together ingredients of equitable, inclusive, sustained economic growth, peace, the rule of law, IHR, and ISID.

The 2030 Agenda is strongly grounded in IHR, ISID, and environmental conservation principles and are clearly reflected in several SDGs; IHR, ISID, and environment are indistinguishably linked, inextricably tied together and endeavor to leave no one behind, and anchor equality and non-discrimination (Feiring and König-Reis, 2020; Spijkers, 2020).

Environmental degradation, non-compliance to IHR, and industrial growth without due adherence to ISID development principles are some of the major problems in the contemporary world, but a common international law promoting ISID while protecting IHR and the environment is unfounded (Olawuyi, 2014; Akyuz, 2021; Suresh and Sundaram, 2022). Changing contours of environment-related crimes coupled with IHR violations create a disastrous impact on all dimensions of SD, be it on the environment and natural resources, economic development and ISID, or social and cultural fabric (Suresh and Sundaram, 2021). Thus, concerted efforts are required from all quarters to reduce all forms of environmental crime and ensure social inclusion and transparency in governance, constituting core requirements of people's well-being and essential conditions for achieving SD. It is also essential to enhance safe and sustainable eco-friendly urban, rural, and industrial ecosystems and communities, to deliver access to a fair and transparent, responsive, and accountable Judiciary system that conforms to IHR standards, to promote a vibrant economic investment and ISID ecosystem that is compatible with ecological preservation and social imperatives, crimeless inclusive model of poverty less gender-balanced society (Suresh and Sundaram, 2021, 2022). Thus to achieve SDG, a key democratic institution essentially needs to encompass elements of good governance, accountability, transparency, and a fair and effective Judiciary system (Du Plessis, 1999; Suresh and Sundaram, 2021).

Various research studies, international reports, and institutions have focused their attention on the global arena of IHR, environmental, and industrialization Jurisprudence (Peel and Osofsky, 2018; Mayer, 2019; Preston, 2021). Despite SD being promulgated in international and national legal contexts in a structured manner, there is still a gap witnessed in literature in integrating IHR, ISID and environmental principles, SDG and their targets, Constitutional provisions, and Jurisprudence. It is imperative that SDGs, Constitutional and Legislation

provisions, and judicial intervention must be analyzed, considering their interdependencies and mutually reinforcing nature. Only a little attempt has been made in the past in this direction. Further, the embedded relationship and reinforcing nature of IHR, ISID, environment, and SDG are rarely analyzed comprehensively. Analyzes are confined to SDG dealing with health or water (Scanlon, Cassar, and Nemes, 2004), the right to food and nutrition (Vivero Pol and Schuftan, 2016; Aller, Romero, and Carvajal, 2018), clean energy or related areas (Spijkers, 2020). Earlier studies reveal that the cross-embedded relationship nature of IHR-related treaties and instruments with environment-related SDGs can be utilized holistically in advancing SDGs (Suresh and Sundaram, 2022). Hence analyzing the embedded relationship and reinforcing the nature of IHR, ISID, environment SDGs, Constitutional and Legislation provisions, and Judiciary assumes great importance in this context.

I.2. Purpose

The main objective of the paper is to examine the embedded relationship and reinforcing nature of IHR, ISID, environment SDGs, Constitution, Legislation, and Judiciary in driving a structured transformation process toward inclusive economic growth and industrialization adhering to IHR and ISID values that are environmentally centric and sustainable in a true sense. The perceived gap is addressed through:

i. understanding of theoretical framework principles of embedded relationship and reinforcing nature between IHR, ISID, environment SDGs, Constitution, Legislation, and Judiciary;

ii. a systematic review and textual analysis of legally enforceable (by courts) and non-enforceable Constitutional provisions, their relevance and applicability in SDG analysis from the perspective of IHR, ISID, and environment;

iii. analyzing embedded relationship and reinforcing nature of the Constitution, Legislation, and Judiciary in (a) IHR-related SDGs (IHR-SDGs) and targets of SDG dealing with IHR dimensions (IHRT-SDGs); (b) environment-related SDGs (E-SDGs) and targets of SDG dealing

with environment dimensions (ET-SDGs); (c) ISID related SDGs (ISID-SDGs) and targets of SDG dealing with ISID dimensions (ISIDT-SDGs);[1]

iv. critical analysis of selected landmark Judgements from the perspective of IHRT-SDG, ET-SDG, ISIDT-SDG; and

v. development of a quantitative measure of embedded relationship and relative quantitative analysis of embedded relationship both from Constitutional provision and IHRT-SDG, ET-SDG, and ISIDT-SDG perspectives.

The 2030 Agenda warrants close monitoring of thematic areas of IHR-SDGs, E-SDGs, and ISID-SDGs in relation to IHRT-SDGs, ET-SDGs, and ISIDT-SDGs, respectively. The study presents key components of an embedded relationship and reinforcing nature, as enumerated earlier. As a case study, the Constitution of India, various Legislation, and Judgements pronounced in various Courts in India are considered in this paper. However, principles established, qualitative and quantitative analysis methodology, and recommendations made in this paper can be deployed across geographies.

II. Theoretical Framework Principles of Embedded Relationship and Reinforcing Nature between IHR, ISID, Environment SDGs, Constitution, Legislation, and Judiciary

Principles of SD can be tracked to Stockholm Declaration (UN, 1972). Though a nonbinding treaty in nature, it is recognized that there is "general recognition of interdependence and interrelatedness

[1] "(i) SDG 8: Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all, i.e., ISIDT-SDG 8.1–8.3, 8.5–8.10, 8.a–8.b, and ET-SDG 8.4; (ii) SDG 9: Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation, i.e., ISIDT-SDG 9.1–9.3, 9.5, 9.a–9.c, and ET-SDG 9.4; (iii) SDG 12: Ensure sustainable consumption and production patterns, i.e., ET-SDG 12.1–12.2, 12.4–12.7, 12.a–12.c, and ISIDT-SDG 12.3, 12.8; (iv) SDG 13: Take urgent action to combat climate change and its impacts, i.e., IHRT SDG 13.3, 13.b, and ET-SDG 13.1–13.2, 13.a; (v) E-SDG 14: Conserve and sustainably use the oceans, seas and marine resources for SD, i.e., ET-SDG 14.1–14.7, 14.a–14.c; (vi) E-SDG 15: Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss, i.e., ET-SDG 15.1–15.9, 15.a–15.c; (vii) IHR-SDG 16: Promote peaceful and inclusive societies for SD, provide access to justice for all, and build effective, accountable, and inclusive institutions at all levels, i.e., IHRT-SDG 16.1–16.10, 16.a–16.b" (UN General Assembly, 2015).

of IHR and environment" seemingly acknowledging a right to an adequate environment. Promotion, protection, and fulfillment of IHR, economic growth, ISID, and environmental sustainability are viewed as complementary objectives at the core of SD. It is imperative to understand environmental protection as an IHR- and ISID-connected issue, and a high-quality environment is a key element of IHR (Boer and Boyle, 2014; Lewis, 2018) and sustained economic growth and eco-friendly industrialization on the principles of ISID.

Philosophical, theoretical, and legal perspectives of IHR, ISID, and the environment are discussed in literature (Leib, 2011; Boer and Boyle, 2014; Suresh, Erinjery, and Jegathambal, 2016; Suresh, 2018; Knox, 2018; Kaltenborn, Krajewski, and Kuhn, 2020; Akyuz, 2021; Knox and Morgera, 2022; Suresh and Sundaram, 2022). The Human Rights Council (HRC) resolution acknowledged many important elements of strengthening nature between IHR and the environment.[2] ISID model is considered as a growth engine for income generation, an enabler, and a facilitator for rapid and sustained improvement and enhancement in living standards coined to offer robust technical solutions to environmentally compatible and sound industrialization, thereby enhancing and reinforcing economic growth and diversification in a socially inclusive and environmentally sound acceptable manner.[3] Even though analysis related to reinforcing nature of IHR and environment and linkage studies between SDG, IHR, and environment, literature still emphasizes studies on long-overdue recognition of IHR, ISID, and environment nexus and their litigation-related matters[4] (Wernham,

[2] UN General Assembly. Human rights and the environment. Available at: undocs.org/en/A/HRC/RES/16/11 [Accessed 20.09.2022]; UN General Assembly. Analytical study on the relationship between human rights and the environment. Available at: undocs.org/en/A/HRC/19/34 [Accessed 20.09.2022].

[3] UNIDO. Lima Declaration: Towards inclusive and sustainable industrial development. Available at: https://www.unido.org/sites/default/files/files/2018-12/UNIDO_GC15_Lima_Declaration.pdf [Accessed 11.09.2023]; UNIDO. Inclusive and Sustainable Industrial Development. Africa Region. Vienna: UNIDO.

[4] The Danish Institute for Human Rights, (2008). The Rights of Persons with Disabilities and the Sustainable Development Goals. Copenhagen, K.; The Danish Institute of Human Rights, (2017); The Office of the Legal Counsel in collaboration with the Communicable Diseases and Department Environmental Determinants of Health, 2022.

2016; Fraser and Henderson, 2022; Suresh and Sundaram, 2022). Environmental dimensions of IHR, industrial, and business law are rarely addressed in the literature, despite the increase in environmental cases in IHR and industrialization Jurisprudence.

In the past, India adopted an economic development strategy driven by a model of large-scale industrialization without adequate environmental safeguards; development of industrial clusters without much consideration for environmental and pollution abatement infrastructure and without adhering to ISID development models; promotion of small-scale industries, which cannot afford the creation of standalone pollution control measures; energy-intensive hard to abate emission industries; and biochemical-based agricultural technology, which has led to environmental degradation and IHR and ISID violations especially in managing waste and equitable distribution of resources (Suresh, Erinjery, and Jegathambal, 2016; Suresh, 2018; Gill and Ramachandran, 2021; Suresh and Sundaram, 2022). However, it is not possible to conclude that concern for the protection of the environment was not present; after independence, several laws were passed in India to protect the environment.

The Legislature, Executive, and Indian Judiciary have taken several initiatives and proactive measures not only to conserve, protect and improve the environment and uphold IHR and ISID principles in alignment with SDGs. In the Indian scenario, especially in environment conservation and protection-related measures and IHR and ISID values, the Judiciary has played a proactive role. Analyzing the role of the Indian judiciary in the IHR, ISID, and environmental sector is a challenging and interesting task, since the Judiciary has consistently adjudicated measures to conserve, protect and improve the environment and uphold IHR and ISID principles over past decades.

Even before being a signatory to the Stockholm Declaration (UN, 1972), the Government of India (GoI) became cognizant of the hazards of environmental degradation and pollution as early as 1969. Even in First Five-Year Plan (1951–1956) (Planning Commission, First Five-Year Plan (1951–1956), 1950), GoI emphasized rehabilitation of forest areas, and means of communication with forests were also improved during

this plan. Simultaneously, as part of the subsequent five-year planning process, environmental aspects were considered by establishing a link and balance between planning and environmental management.

A significant change that paved the way for environmental law as it exists in India was the Constitution of India (The Constitution of India, 1950) that embodies a framework of protection and preservation of nature without which life cannot be enjoyed. The Indian Constitution is not inert but a living document that evolves and grows over time. Specific provisions of the Constitution on environmental protection can be regarded as the result of dynamic and evolutionary attributes and growth potential of the country's fundamental law.

Fundamental rights, Directive Principles of State Policy (DPSP), and fundamental duties prescribe fundamental obligations of the State to its citizens and duties of citizens to the State. DPSPs are active obligations of the State; they are policy prescriptions for the guidance of the Government. The preamble of the Constitution assures a socialist model of society and the dignity of the individual. A decent standard of living, clean environment, decent work, and sustained economic inclusive growth are built into it. Be its fundamental rights, fundamental duties, or DPSP, they all contain provisions for IHR, ISID, and environmental protection.

III. A Systematic Review and Textual Analysis of Legally Enforceable (by Courts) and Non-Enforceable Constitutional Provisions, their Relevance, and Applicability in SDG Analysis from the Perspective of IHR, ISID, and Environment

III.1. Approach

As enumerated earlier, IHR, ISID, and environment compliance provide direction for the deployment of the 2030 Agenda for SD, and similarly, the 2030 Agenda and SDGs can contribute significantly to achieving IHR and ISID while not only preventing environmental degradation but also to conserving ecology and environment. Biodiversity and ecosystem services are essential to achieving the 2030 Agenda

for SD. The role and relevance of IHR, ISID, and the environmental rule of law in achieving SDG have been recognized. A textual analysis of Constitutional provisions is also provided, focusing on possibilities for embedded relationships with IHRT-SDGs, ISIDT-SDGs, and ET-SDGs. Substantive rights, negative and restrictive obligations for States,[5] and States' positive and proactive obligations[6] are analyzed. The section gives various provisions of legally enforceable and non-enforceable Constitutional provisions in the context of SDGs, with a qualifying statement that Constitutional provisions discussed in this paper are not comprehensive or chronological.

III.2. Textual Analysis

Textual analysis of themes of IHRT-SDGs, ISIDT-SDGs, and ET-SDGs demands several IHRs[7] to achieve their targets. A textual analysis of the Constitution of India, Part III provisions reveals that ingredient requirements of IHRT-SDGs, ISIDT-SDGs, and ET-SDGs are guaranteed under the umbrella of fundamental rights (The Constitution of India, 1950). They are defined as basic human rights of all citizens and are enforceable by Courts subject to specific restrictions. It guarantees fundamental rights that are indispensable for the development of each individual and to which a person has an inherent right by virtue of being a human. Important fundamental rights, i.e., Art. 12–35 of the

[5] To avoid initiating activities that may hinder equality before the law, IHR, ISID, and environmental objectives.

[6] (i) To protect and comply with IHR and ISID; (ii) to protect the welfare of people; (iii) to secure social order; (iv) for adequate livelihood; (v) to control of material resources distribution to subserve the common good; (vi) for just and humane conditions of work; (vii) to protect wages and labor rights; (viii) procedural obligations for ensuring access to information and performing environmental and social impact assessments; (ix) public participation in environmental decision-making; and (x) remedy mechanisms for IHR and ISID violations.

[7] IHR rights include (i) the right to equality; (ii) principle of equality before the law; (iii) equal protection of the law; (iv) prohibition of discrimination on various grounds; (v) equality of opportunity in employment; (vi) the right for decent work; (vii) the rights against exploitation; (viii) protection of certain rights regarding industrial activities; (ix) multi-faceted fundamental rights relating to the right to livelihood and the right to a wholesome environment; and (x) remedies for enforcement of rights, etc.

Constitution of India in the context of IHRT-SDGs, ET-SDGs, and ISIDT-SDGs imply:

i. No denial to any person equality before the law or equal protection of laws,[8] thereby triggering other rights like gender equality and empowering women and girls, reducing inequalities, equality of resources sharing, right to wholesome environment, access to justice for all for ensuring and promotion of inclusive societies, IHR, ISID, and environment conservation;

ii. Prohibition of discrimination against any citizen on any grounds, thereby not only ensuring gender equality and empowerment of women and girls and oppressed communities but also granting authority to the State to ensure their protective and positive intervention, promoting peaceful and inclusive societies, promotion of IHR values;[9]

iii. Decent work and productive employment-related rights[10] leading to reducing inequalities, promotion of inclusive societies, IHR and ISID principles;[11]

iv. Industrial activities-related rights and compliance[12] leading to the promotion of IHR, environmental conservation, and ISID governance;[13]

v. Legal protection-related rights,[14] thereby promoting peaceful and inclusive societies, providing access to justice for all, building ef-

[8] Art. 14, the Constitution of India.

[9] Art. 15, 17, 18, the Constitution of India.

[10] Related rights include (i) equality of opportunity for all citizens in matters of public employment; (ii) gender equality; (iii) protective and positive intervention for oppressed communities; (iv) rights against exploitation; (v) prohibition of traffic in human beings and forced labor; and (vi) prohibition of employment of children in factories, work in any factory or mine or engaged in any other hazardous employment.

[11] Art. 16, 23, 24, the Constitution of India.

[12] The aspects would include (i) right to develop with limitations and restrictions; (ii) empowerment of the State to make laws imposing restrictions as deemed fit and comply with a host of rules and relations on labor, environment, and financial both during the development and operation stage; (iii) development of everyone economically and socially, and ecologically responsible; (iv) right to wholesome environment; and (v) access to the rapid response to violations.

[13] Art. 19, the Constitution of India.

[14] (i) The rights in respect of conviction for offenses except for violation of a law in force; (ii) preventing prosecution and punishment for the same offense more than

fective, accountable, and inclusive institutions at all levels, and promoting IHR values;[15]

vi. Multi-faceted fundamental rights[16] leading to the promotion of IHR, ISID, and environment conservation principles;[17]

vii. Remedies for enforcement of fundamental rights and right to Constitutional remedies,[18] thereby promoting peaceful and inclusive societies, providing access to justice for all, promoting IHR, ISID, and environmental conservation principles.[19]

Textual analysis of IHRT-SDGs, ISIDT-SDGs, and ET-SDGs also endeavors States to formulate and adopt Laws[20] for achieving their targets. A qualitative analysis of the Constitution of India, Part IV provisions reveals that guidelines and enablers for attaining IHRT-SDGs, ISIDT-SDGs, and ET-SDGs are discussed under the ambit of DPSP (The Constitution of India, 1950), thereby implying ideals of

once; (iii) prohibition of self-incrimination; (iv) protection against arrest and detention in custody without being informed; (v) the right to consult, and to be defended by a legal practitioner; and (vi) safeguards against arbitrary arrest and detention.

[15] Art. 20, 22, the Constitution of India.

[16] Relating to (i) the right to livelihood; (ii) the right to live in an environment free of pollution; (iii) the right to a clean and healthy environment free from the danger of disease and infection; (iv) the right to a wholesome environment; (v) embracing clean and environment-friendly solutions, practices, technologies, and industrial processes also fall under the purview of the right to life; (vi) the right to access clean drinking water; (vii) the right to sanitation; (viii) the right to electricity; (ix) the right to housing; (x) the right to food; (xi) the right to health; and (xii) the right to live free from the danger of disease and infection.

[17] Art. 21, the Constitution of India.

[18] (i) The right to appeal to the Honorable Supreme Court through appropriate procedures for the enforcement of the fundamental rights; and (ii) for the implementation and enforcement of any of the fundamental rights, the Honorable Supreme Court is empowered to issue directions or orders or writs, be it in the form of habeas corpus, mandamus, prohibition, quo warranto, and certiorari as appropriate.

[19] Art. 32, the Constitution of India.

[20] Laws related to (i) promotion of welfare of the people; (ii) minimizing the inequalities; (iii) an adequate means of livelihood; (iv) fair distribution of material resources of the community; (v) productive and decent work; (vi) equal justice and free legal aid; (vii) separation of the Judiciary from the executive; (viii) promotion and improvement of environment and improving public health; and (ix) promotion of international peace and security.

constructing a welfare State. DPSP of the Constitution are guidelines for the drafting of Legislation by the Government and are not enforceable by Courts. On the other hand, the principles on which they are based are fundamental guidelines for governance that the State is supposed to apply in the formulation and adoption of Laws. Important DPSP, i.e., Art. 36–51 of the Constitution of India in the context of IHRT-SDGs, ET-SDGs, and ISIDT-SDGs, imply that the State shall:

i. Strive to secure a social order for the promotion of the welfare of people, minimize inequalities in income, and endeavor to eliminate inequalities;[21]

ii. Direct its policy[22] towards achieving ISID and sustainable economic growth;[23]

iii. Secure credible operation of the legal system,[24] promote peaceful and inclusive societies, and build effective, accountable, and inclusive institutions at all levels;[25]

iv. By suitable Legislation,[26] endeavor, conducive work conditions, decent and productive work, gender equality, and promoting sustained inclusive and sustainable economic growth;[27]

[21] Art. 38, the Constitution of India.

[22] Policy initiatives would include (i) the right to an adequate means of livelihood; (ii) ownership, and control of the material resources of the community for fair distribution; (iii) decentralization of wealth for the operation of the economic system; (iv) equal pay for equal work for both men and women; (v) health and strength of workers; and (vi) preventing child labor.

[23] Art. 39, the Constitution of India.

[24] Initiatives would include (i) access to justice for all; (ii) promoting justice on basis of equal opportunity; (iii) providing free legal aid; (iv) ensuring justice are not denied to any citizen by reason of economic or other disabilities; and (v) taking steps to separate the judiciary from the executive in the public services of the State.

[25] Art. 39A, 50, the Constitution of India.

[26] Legislation includes (i) the right to work; (ii) effective provisions to public assistance in cases of unemployment, old age, sickness, and disablement; (iii) provision for securing just and humane conditions of work and for maternity relief; (iv) living wage; (v) ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities; and (vi) participation of workers in the management of organizations engaged in any industry.

[27] Art. 41–43A, the Constitution of India.

v. Endeavor to protect and improve the environment[28] in a structured manner for SD;[29] and

vi. Promote international peace and security, endeavor to foster respect for international law and treaty obligations, settle international disputes by arbitration, strengthen means of implementation, and revitalize global partnership.[30]

Further, textual analysis of IHRT-SDGs, ISIDT-SDGs, and ET-SDGs also demands that people be responsible and perform actions and duties for achieving its targets, thereby fostering a spirit of commitment to SD. A qualitative analysis of the Constitution of India, Part IVA Art. 51A under the umbrella of fundamental duties (The Constitution of India, 1950), implies the moral commitment and responsibilities of citizens to attain SDGs. They are not legally binding and enforceable by Court and prescribe eleven fundamental duties, and in the perspective of IHRT-SDGs, ISIDT-SDGs, and ET-SDGs,[31] implies that abiding by the Constitution and Law of State, it would result in building effective, accountable, and inclusive institutions, sustained inclusive economic growth and promotion of inclusive societies.

Textual analysis of IHRT-SDGs, ISIDT-SDGs, and ET-SDGs also demands certain administrative relations between Union and States. A qualitative analysis of the Constitution of India, Part XI Chapter II Art. 262 provides for adjudication of any dispute or complaint with

[28] Initiatives include (i) raising the standard of living by improvement of public health; (ii) securing clean water, and sanitation; (iii) protecting, restoring, and promoting sustainable use of terrestrial ecosystems; (iv) halting and reversing land degradation; (v) halting biodiversity loss; (vi) safeguarding the forests and wildlife; (vii) increased resource-use efficiency; and (viii) greater adoption of clean and environmentally sound technologies and industrial processes.

[29] Art. 47, the Constitution of India.

[30] Art. 51, the Constitution of India.

[31] The fundamental duties in this context would include (i) renouncing practices derogatory to the dignity of women, empowerment of women and girls; (ii) protecting and improving the natural environment including forests, lakes, rivers and wild life, compassion for all living creatures; (iii) developing the scientific temper, humanism and the spirit of inquiry and reform; (iv) safeguarding public property and abjuring violence; and (v) striving towards excellence in all spheres of individual and collective activity.

respect to the use, distribution, or control of waters of, or in, any inter-State River or river valley, water rights as riparian rights were created to resolve State River water disputes.

IV. Qualitative analysis of the Embedded Relationship and Reinforcing Nature of IHR, ISID, Environment, and SDGs with Constitutional, Legislation, and Judiciary

IV.1. Prelude

Constitutional provisions are backed by several laws, acts, rules, and notifications. Apart from applicable Constitutional Provisions, there are (i) Major Criminal Acts (The Indian Penal Code, 1860; The Indian Evidence Act, 1872; The Code of Criminal Procedure, 1973), Procedural Laws (The Code of Civil Procedure, 1908); (ii) Minor Criminal Acts, Rules, Regulations, and Local Laws under Indian context.

The Department of Environment was formed in 1980 to approach issues of the environment holistically. This later became the Ministry of Environment and Forests in 1985, and subsequently, in 2014, it was named as Ministry of Environment, Forest and Climate Change (MoEFCC). Environmental Protection Act (EPA), 1986 (The Environment (Protection) Act, 1986) came into force shortly after the Bhopal gas tragedy and is considered as a framework law because it fills many gaps in existing laws. Thereafter many acts and rules pertaining to the environment came into existence as problems began arising. Apart from the air pollution act (The Air (Prevention and Control of Pollution) Act, 1981), the water pollution act (The Water (Prevention and Control of Pollution) Act, 1974), and the environment protection act (The Environment (Protection) Act, 1986), there exist common law doctrines and Constitution provisions touching environmental perspectives. Further, there are statutory remedies such as the law of crimes (The Indian Penal Code, 1860), civil procedure code (The Code of Civil Procedure, 1908), and criminal procedure code (The Code of Criminal Procedure, 1973), which play a very important role in preventing and controlling different kinds of pollution.

Several landmark judgments across countries can be cited on the subject of IHR, ISID, and environmental conservation, especially the

right to a healthy environment and the right to livelihood (Scanlon, Cassar, and Nemes, 2004). A body of Jurisprudence on SDGs and their domestic implementation has evolved in India. With a gamut of judicial leverage,[32] the principle of SD, over a period of time, has occupied a center stage of IHR, ISID and environmental Jurisprudence in India (Suresh, Erinjery, and Jegathambal, 2016; Suresh, 2018; Suresh and Sundaram, 2022).[33]

The Honorable Supreme Court has reiterated SD's importance in the country's environmental legal regime and has contributed immensely to SD, IHR, ISID, and environmental Jurisprudence and has been instrumental in preserving the doctrine of SD. The Honorable Supreme Court emphasized that expression is indeed a principle of development and provided a larger encompassing meaning within its fold and underlined important elements.[34] The Judiciary has, in fact, extended the scope of Art. 32 and 21 of the Constitution as broadly as possible. The tool of a continuing mandamus has been extensively utilized to moni-

[32] (i) Right to livelihood and food; (ii) right to health; (iii) right to education; (iv) rights of women and children; (v) right to a healthy environment; (vi) clean water and sanitation; (vii) affordable, clean energy and promoting renewable energy; (viii) rights against discrimination; (ix) responsible industrial operations, corporate liability and responsibility especially fossil fuel producers and hard to abate emission industries, Resource Efficient and Cleaner Production (RECP) practices, public trust doctrine; (x) sustainable cities and communities; (xi) protecting life on land and life below water, intra-and inter-generational equity; (xii) an integrated approach of focusing on climate change and other contingent situation on planet and people; (xiii) implementing emission reductions and low-carbon economy measures adhering to Paris Agreement commitments (UN, 2015); (xiv) holistic approach in promoting principles of SD; (xv) ensuring environmental and green taxes, subsidies and carbon credits; (xvi) enforcing statutory and executive obligations; (xvii) energy-related regulations, renewable energy targets and infrastructure for e-mobility; (xviii) right of equality before law; and (xix) augmenting progress on SDGs.

[33] UNEP (2019) Environmental Rule of Law, First Global Report, Job number: DEL/2227/NA.

[34] Development initiatives need to be truly sustainable with a long term view of preservation of natural environment for present and future generations while upholding IHR and ISID values and underlined important elements of (i) intergenerational equity; (ii) use and conservation of natural resources, (iii) environmental protection; (iv) precautionary principle; (v) polluter pays principle; (vi) obligation to assist and cooperate; (vii) eradication of poverty; and (viii) financial assistance to developing countries.

tor the enforcement and implementation of orders by demanding regular updates and reports from concerned Governmental agencies on compliance and progress achieved. The Courts have reminded both the State and the citizens about their duties towards the environment while deciding environmental issues by referring to Art. 48A and 51A(g) of the Constitution. The Indian Judiciary has developed IHR, ISID, and environmental Jurisprudence both through public interest litigations and by its powers to issue appropriate instructions and directions to various statutory authorities to function as per assigned mandate under applicable environmental laws. Further, as a proactive measure, National Green Tribunal (NGT), a specialized tribunal for addressing environmental matters, was established through NGT Act, 2010, thereby leading to an effective, speedy, robust Jurisprudence in effectuating the principle of SD.

The embedded relationship and reinforcing nature of Constitutional provisions with SDGs are analyzed in a qualitative manner. The actual text of IHRT-SDGs, ISIDT-SDGs, and ET-SDGs are analyzed in more detail and is subjected to textual analysis, in which the language of IHRT-SDG, ISIDT-SDG, and ET-SDG is compared with authoritative codifications of various Constitutional provisions. Further, a selective list of landmark judgments of Indian Courts in the context of SDGs, evidencing the reinforcing nature of IHR, ISID, environment Constitution, Legislation, and Indian Judiciary, is discussed with a qualifying statement that the list is not comprehensive or in a chronological manner.

IV.2. Qualitative analysis of the Embedded Relationship and Reinforcing Nature — IHR-SDG 5

The theme of IHR-SDG 5 is "Gender equality," and six substantive targets of IHR-SDG 5,[35] three targets on means of implementation and

[35] Focus on (i) ending all forms of discrimination against all women and girls; (ii) eliminating all forms of violence against all women and girls, including trafficking and sexual and other types of exploitation; (iii) eliminating all harmful practices, such as childhood, early and forced marriage and female genital mutilation; (iv) recognizing and valuing unpaid care and domestic work, and promotion of shared responsibility within household and family; (v) ensuring women's full and effective participation and equal opportunities for leadership; and (vi) access to sexual and reproductive health and reproductive rights (UN General Assembly, 2015, 2017).

other initiatives provide gender equality and empower all women and girls (Suresh, Erinjery, and Jegathambal, 2016; Suresh, 2017, 2018; Asian Development Bank, 2019). The Honorable Supreme Court of India held that gender-based bias was totally impermissible and wholly unacceptable.[36]

The summary of the embedded relationship of Constitutional provisions with IHR-SDG 5 in a qualitative manner is presented below.

i. IHRT-SDG 5.1: "*End all forms of discrimination against all women and girls* everywhere."; IHRT-SDG 5.2: "*Eliminate all forms of violence against all women and girls in the public and private spheres*, including *trafficking and sexual and other types of exploitation*."; IHRT-SDG 5.3: "*Eliminate all harmful practices, such as child, early and forced marriage, and female genital mutilation*."

— Fundamental rights: 14, 15(1)–15(5), 15(6)(a)–15(6)(b), 21, 21A, 23(1)–23(2), 24;

— DPSP: 38(1)–38(2), 39(f), 45, 51(c); and

— Fundamental duties: 51A(e), 51A(k).

ii. IHRT-SDG 5.4: "*Recognize and value unpaid care and domestic work* through the provision of public services, infrastructure and social protection policies, and the *promotion of shared responsibility within the household and the family* as nationally appropriate."

— Fundamental rights: 14, 15(1)–15(5), 15(6)(a)–15(6)(b), 21;

— DPSP: 38(1)–38(2), 39(a), 39(d)–39(e), 42, 46, 51(c); and

— Fundamental duties: 51A(e).

iii. IHRT-SDG 5.5: "*Ensure women's full and effective participation and equal opportunities for leadership* at all levels of decision-making in political, economic, and public life."; IHRT-SDG 5.a: "Undertake *reforms to give women equal rights to economic resources*, as well as access to ownership and control over land and other forms of property, financial services, inheritance, and natural resources, in accordance with national laws.

— Fundamental rights: 14, 15(1)–15(5), 15(6)(a)–15(6)(b), 16(1)–16(4), 16(4A)–16(4B), 16(5)–16(6), 21;

— DPSP: 38(1)–38(2), 39(a), 39(d)–39(e), 42, 46, 51(c); and

— Fundamental duties: 51A(e).

[36] Charu Khurana and Ors v. Union of India (UoI) and Ors LNIND 2014 SC 942.

iv. IHRT-SDG 5.6: *Ensure universal access to sexual and reproductive health and reproductive rights* as agreed in accordance with the Programme of Action of the International Conference on Population and Development and the Beijing Platform for Action and the outcome documents of their review conferences."

— Fundamental rights: 14, 15(1)–15(5), 15(6)(a)–15(6)(b), 16(1)–16(4), 16(4A)–16(4B), 16(5)–16(6), 21;

— DPSP: 38(1)–38(2), 39(a), 39(d)–39(e), 42, 46, 51(c); and

— Fundamental duties: 51A(e).

v. IHRT-SDG 5.b: "*Enhance the use of enabling technology*, in particular information and communications technology, to *promote the empowerment of women*."

— Fundamental duties: 51A(h).

vi. IHRT-SDG 5.c: "Adopt and strengthen sound policies and enforceable Legislation for the *promotion of gender equality and the empowerment of all women and girls* at all levels."

— Fundamental rights: 15(1)–15(5), 15(6)(a)–15(6)(b), 16(1)–16(4), 16(4A)–16(4B), 16(5)–16(6), 21;

— DPSP: 39(a), 39(d)–39(e), 42; and

— Fundamental duties: 51A(e).

IV.3. Qualitative Analysis of the Embedded Relationship and Reinforcing Nature: SDG 8

The theme of SDG 8 is "Decent work and economic growth," and seven substantive targets of SDG 8,[37] five targets on means of implementation, policy initiatives, other measures, and trade support, on SDG 8 are proactive measures towards promoting sustained inclusive,

[37] Focus on (i) sustaining per capita economic growth; (ii) achieving higher levels of economic productivity; (iii) improving global resource efficiency in consumption and production and endeavoring to decouple economic growth from environmental degradation; (iv) achieving full and productive employment and decent work; (v) reducing proportion of youth not in employment, education, or training; (vi) eradicating forced labor, ending modern slavery and human trafficking, elimination of child labor, eliminate use of child soldiers, and (vii) protecting labor rights safe and secure working environment, protecting migrant workers (UN General Assembly, 2015, 2017).

sustainable economic growth, full and productive employment, and decent work and achieving ISID model of development (UNIDO, 2013, 2015; UN General Assembly, 2015, 2017).

Displacement of people due to development initiatives need not necessarily be viewed as a violation of fundamental rights under the Constitution, provided resettlement and rehabilitation measures are adequate, responsive, and implemented immediately and effectively; the right to a healthy environment, including SD, are fundamental human right implicit in the right to life.[38] It is imperative to appreciate that fundamental rights provided in Constitution are not unfettered and unregulated. Article 19(6) of the Constitution does provide for reasonable restrictions on fundamental rights; the right to carry on business while causing a nuisance to society is invalid.[39] Industries cannot reap profit at the cost of public health as it violates the principle of ISID. It is essential to evaluate cost-benefit analysis and detrimental effect on workers, the public, and society at large by operating a cluster of polluting industries and discharging untreated industrial trade effluent to rivers as opposed to inconvenience caused, economic loss, loss of employment and labor due to closure of cluster of industries not in compliance with regulations and not taking minimum steps required for combating pollution.[40]

The following summarizes the embedded relationship of Constitutional provisions with SDG 8 qualitatively.

i. ISIDT-SDG 8.1: "*Sustain per capita economic growth* in accordance with national circumstances and, in particular, at least 7 percent gross domestic product growth per annum in the least developed countries."; ISIDT-SDG 8.2: "*Achieve higher levels of economic productivity through diversification, technological upgrading, and innovation*, including through a focus on high-value added and labor-intensive sectors."

— Fundamental rights: 21;

[38] Narmada Bachao Andolan v. UOI and Ors LNIND 2000 SC 1361, AIR 2000 SC 3751, (2000) 10 SCC 664, MANU/SC/0640/2000.

[39] Abhilash Textile and Ors v. The Rajkot Municipal Corporation AIR 1988 Guj 57, 1987 GLH (2) 447, (1987) 2 GLR 1325, MANU/GJ/0095/1988.

[40] MC Mehta v. UoI and Ors LNIND 1987 SC 663, AIR 1988 SC 1037, (1987) 4 SCC 463, MANU/SC/0396/1987.

— DPSP: 38(1)–38(2), 39(a)–39(c); and

— Fundamental duties: 51A(h), 51A(j).

ii. ISIDT-SDG 8.3: "Promote development-oriented policies that support *productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro-, small- and medium-sized enterprises,* including through access to financial services."; ISIDT-SDG 8.5: "By 2030, achieve *full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value*."; ISIDT-SDG 8.6: "By 2020, substantially *reduce the proportion of youth not in employment, education or training*."; ISIDT-SDG 8.7: "Take immediate and effective measures to *eradicate forced labor, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labor, including recruitment and use of child soldiers, and by 2025 end child labor in all its forms*."; ISIDT-SDG 8.8: "Protect labor rights and *promote safe and secure working environments for all workers, including migrant workers, in particular women migrants*, and those in precarious employment."

— Fundamental rights: 15(1)–15(5), 15(6)(a)–15(6)(b), 16(1)–16(4), 16(4A)–16(4B), 16(5)–16(6), 19(1)(g), 19(6), 21, 23(1)–23(2), 24;

— DPSP: 38(1)–38(2), 39(a)–39(f), 41–43, 43A, 46; and

— Fundamental duties: 51A(e), 51A(h), 51A(j).

iii. ET-SDG 8.4: "Improve progressively, through 2030, *global resource efficiency in consumption and production and endeavor to decouple economic growth from environmental degradation,* in accordance with the 10-Year Framework of Programmes on Sustainable Consumption and Production, with developed countries taking the lead."

— Fundamental rights: 19(1)(g), 19(6), 21;

— DPSP: 38(1)–38(2), 39(a)–39(c), 42, 47, 48, 48A, 51(c);

— Fundamental duties: 51(g)–51A(j); and

— Relations between the Union and the States: 262.

iv. ISIDT-SDG 8.9: "By 2030, devise and implement policies to *promote sustainable tourism that creates jobs and promotes local culture and products*."

— Fundamental rights: 15(1)–15(5), 15(6)(a)–15(6)(b), 16(1)–16(4), 16(4A)–16(4B), 16(5)–16(6), 19(1)(g), 19(6), 21, 23(1)–23(2), 24, 29(1);
— DPSP: 38(1)–38(2), 39(a)–39(f), 41–43, 43A, 46, 48A, 49; and
— Fundamental duties: 51A(e)–51A(j).

v. ISIDT-SDG 8.10: "Strengthen *the capacity of domestic financial institutions to encourage and expand access to banking, insurance, and financial services for all*."

— Fundamental rights: 16(1)–16(4), 16(4A)–16(4B), 16(5)–16(6), 19(1)(g), 19(6), 21;
— DPSP: 38(1)–38(2), 39(a)–39(c); and
— Fundamental duties: 51A(e), 51A(h), 51A(j).

vi. ISIDT-SDG 8.a: "*Increase Aid for Trade support* for developing countries, in particular least developed countries, including through the *Enhanced Integrated Framework for Trade-related Technical Assistance* to Least Developed Countries."; ISIDT-SDG 8.b: "By 2020, *develop and operationalize a global strategy for youth employment* and implement the Global Jobs Pact of the International Labor Organization."

— Fundamental rights: 19(1)(g), 19(6), 21;
— DPSP: 38(1)–38(2), 39(a)–39(c), 51(c); and
— Fundamental duties: 51A(e), 51A(h), 51A(j).

IV.4. Qualitative Analysis of the Embedded Relationship and Reinforcing Nature: SDG 9

The theme of SDG 9 is "Industry, innovation and infrastructure," and five substantive targets of SDG 9,[41] three targets on means of implementation, policy initiatives, and other initiatives are proactive

[41] Focus on (i) developing quality, reliable, sustainable, and resilient infrastructure; (ii) promoting inclusive and sustainable industrialization; (iii) increasing access of small-scale industrial and other enterprises to financial services; (iv) upgrading infrastructure and retrofitting industries to make them sustainable, with increased resource-use efficiency and greater adoption of clean and environmentally sound technologies and industrial processes; and (v) enhancing scientific research, upgrading technological capabilities of industrial sectors, encouraging innovation and substantially increasing number of research and development workers (UN General Assembly, 2015, 2017).

measures toward building resilient infrastructure, promoting inclusive and sustainable industrialization, and fostering innovation.

The right to pursue any lawful trade or business is obviously subject to such reasonable restrictions and conditions as may be considered fit by the governing authority, indispensable to the safety, health, peace, order, and morals of the community. Noise made, odors generated, and hazards as an outcome of some occupations need to adhere to regulations of their business location. Further, the dangerous and hazardous nature of raw materials used, manufactured, stored, or sold requires special expertise and qualifications in parties permitted to use, manufacture, store, or sell them.[42] The Honorable Supreme Court of India[43] observed that mere directions are inconsequential unless a rigid implementation mechanism is laid down. Continuation of industrial activity is permitted when there is in place a functional primary effluent treatment plant. The establishment of functional common effluent treatment plants within the stipulated period shall be the responsibility of the pollution control board.[44] Industries need to constantly upgrade technologies and facilities in the larger interest of workers and the public in general. In one instance, Sub-Divisional Magistrate[45] directed the stoppage of the mixing of carbon in two rubber industries due to the absence of dissemination prevention equipment, and the Honorable High Court sentenced that the dissemination of carbon black in the environment is causing a public nuisance and also affecting respiratory organs of people.

The health of citizens and access to a clean environment should be given utmost priority, and manufacturers of the automobile industry have an obligation to adopt new technologies to reduce the adverse impact of vehicles produced on the environment and public

[42] Cooverjee B. Bharucha v. The Excise Commissioner and the Chief Commissioner, Ajmer, and Ors LNIND 1954 SC 2, AIR 1954 SC 220, 1954 SCR 873, MANU/SC/0010/1954.

[43] Paryavaran Suraksha Samiti and Ors v. UoI and Ors MANU/SC/0222/2017, 2017 (3) SCALE 651, (2017) 5 SCC 326, 2017 (6) SCJ 14.

[44] Paryavaran Suraksha Samiti and Ors v. UoI and Ors MANU/SC/0222/2017, 2017 (3) SCALE 651, (2017) 5 SCC 326, 2017 (6) SCJ 14.

[45] P.C. Cherian v. State of Kerala MANU/KE/0090/1981.

health.[46] However, the Courts or Tribunals alone will not be able to ensure environmental protection unless and otherwise, their orders are properly implemented and statutory authorities act diligently in congruence with the law. While Judiciary has performed a creditable function in environmental protection, it is imperative that citizens and State also need to deliver their responsibilities.[47]

The summary of the embedded relationship of Constitutional provisions with SDG 9 in a qualitative manner is presented below.

i. ISIDT-SDG 9.1: "Develop *quality, reliable, sustainable and resilient infrastructure, including regional and transborder infrastructure*, to support economic development and human well-being, with a *focus on affordable and equitable access for all*."; ISIDT-SDG 9.2: "*Promote inclusive and sustainable industrialization* and, by 2030, significantly raise *industry's share of employment and gross domestic product*, in line with national circumstances, and double its share in the least developed countries"; ISIDT-SDG 9.3: "*Increase the access of small-scale industrial and other enterprises*, in particular in developing countries, to *financial services, including affordable credit, and their integration into value chains and markets*."; ET-SDG 9.4: "By 2030, *upgrade infrastructure and retrofit industries to make them sustainable, with increased resource-use efficiency and greater adoption of clean and environmentally sound technologies and industrial processes*, with all countries taking action in accordance with their respective capabilities."; ISIDT-SDG 9.5: "*Enhance scientific research, upgrade the technological capabilities of industrial sectors* in all countries, in particular developing countries, including, by 2030, *encouraging innovation and substantially increasing the number of research and development workers* per 1 million people and public and private research and development spending."; ISIDT-SDG 9.a: "Facilitate *sustainable and resilient infrastructure development* in developing countries through *enhanced financial, technological and technical support* to African countries, least developed countries,

[46] MC Mehta v. UoI and Ors LNIND 2018 SC 551, AIR 2018 SC 5194, 2018 (14) SCALE 263, MANU/SC/1205/2018.

[47] Noyyal River Ayacutdars Protection Association and Ors v. The Government of Tamil Nadu and Ors LNIND 2006 Mad 3127, 2007 1 LW 275, MANU/TN/7824/2006.

landlocked developing countries and small island developing States."; ISIDT-SDG 9.b: "Support *domestic technology development, research, and innovation in developing countries*, including by ensuring a *conducive policy environment* for, inter alia, *industrial diversification and value addition to commodities*."; ISIDT-SDG 9.c: "Significantly *increase access to information and communications technology* and strive to provide *universal and affordable access to the Internet* in the least developed countries by 2020."

— Fundamental rights: 15(1)–15(5), 15(6)(a)–15(6)(b), 16(1)–16(4), 16(4A)–16(4B), 16(5)–16(6), 19(1)(g), 19(6), 21;

— DPSP: 38(1)–38(2), 39(a)–39(c), 42, 43, 43A-43B, 46, 48, 48A, 51(c); and

— Fundamental duties: 51A(e)–51A(j).

IV.5. Qualitative Analysis of the Embedded Relationship and Reinforcing Nature: SDG 12

The theme of SDG 12 is "Responsible Consumption and Production," and seven substantive targets of SDG 12,[48] four targets on means of implementation, with a wide range of themes, enable the decoupling of inclusive economic growth from natural resource use and material consumption and chemicals and deploy waste valorization. Decoupling is considered imperative due to the rapid depletion of natural resources and Environment, Economic, and Social (EES) considerations (UN General Assembly, 2015, 2017). Decoupling and other initiatives on SDG 12 is a proactive initiative towards migrating to a sustainable business model and circular economy, triple bottom line, and Environment, Social, and Governance (ESG) reporting (Suresh, Erinjery, and Jegathambal, 2016; Suresh, 2017, 2018; Asian Development Bank, 2019).

[48] Focus on (i) sustainable management and efficient use of natural resources; (ii) halving per capita global food waste at the retail and consumer levels and reduce food loss along production and supply chains; (iii) environmentally sound management of chemicals and all wastes throughout their lifecycle; (iv) substantially reduce waste generation through prevention, reduction, recycling and reuse; (v) encourage companies to adopt sustainable practices and integrate sustainability information into their reporting cycle; (vi) promoting public procedure practices that are sustainable; and (vii) sustainable tourism (UN General Assembly, 2015, 2017).

A clean environment has become a fundamental right that too right to a wholesome environment and can be viewed as a combined effect of Art. 21, 48A, 51A(g) of the Constitution. The Constitution assures the protection of life and personal liberty, which includes the right to fresh air. While science and technology are extensively deployed in manufacturing and services as a measure to enhance the quality of life, there is definitely a reasonable element of peril or hazard intrinsic in the very adoption of such tools and methods. Though it may not be difficult to eliminate such hazards or risks, however, it is possible to take necessary precautionary steps for locating such industries in a designated zone with adequate safeguards, thereby resorting to the least-risk situation and maximizing safety requirements.[49] Despite the scenario wherein industries charged for causing pollution may be of vital importance to the nation's economy, they cannot be permitted to operate at the cost of ecology. So, every industry needs to demonstrate before State authorities and the Court that they are conducting their operations and business in an area of demarcated guidelines and in an eco-friendly manner. The Honorable Supreme Court of India[50] observed that while provisions of the Constitution and statutory guard a person's right to fresh air, clean water, and a pollution-free environment, the source of the right is an incontrovertible common law right to a clean environment.

Through a landmark judgment triggering a deep-seated transformation in scope and usefulness of the absolute liability principle, the Honorable Supreme Court[51] found the strict liability principle is inadequate to protect citizens' rights and replaced it with the absolute liability principle. The Court held that liability for dangerous things must be absolute and not only strict, and thus, as against the principle of strict liability, the concept of absolute liability has also evolved. The Court observed that strict liability, evolved in Rylands versus Fletcher, 1868,[52]

[49] MC Mehta v. UoIAIR 1987 SC 965.

[50] Vellore Citizens Welfare Forum v. UoI and Ors LNIND 1996 SC 1344, AIR 1996 SC 2715, AIR 1996 SC 2826, MANU/SC/0686/1996.

[51] MC Mehta v. UoI LNIND 1986 SC 539 1987, AIR 1987 SC 1086, (1987) 1 SCC 395, MANU/SC/0092/1986.

[52] [1868] UKHL 1.

has several exemptions; thereby, companies are not fully held to assume liability. Act of God has been regarded as one of the potential limitations of the principle of strict liability. Absolute liability, on the other hand, provides companies with no defense or exemptions and can be viewed as a part of Art. 21 of the Constitution. The Court wanted corporations to be made fully accountable and liable for the future undeserved suffering of innocent citizens and held that a hazardous enterprise has an absolute non-delegable duty to the community. Thus, an enterprise engaging in a hazardous or inherently dangerous activity or operation, and if harm has resulted to anyone due to an accident in the operation of such activity, then defaulting enterprise shall be strictly and absolutely liable to compensate all those affected by the accident. Given lacunae in regimes may be exploited by those who may not be sensitive to environmental challenges, and thus, the creation of the absolute liability principle by the Honorable Supreme Court[53] is a well-recognized testament to adopting international principles and recasting them factoring Indian context. The Honorable Courts and Tribunal have upheld polluter pay and precautionary principle on various occasions and have become a part of the law of the land as enumerated below:

i. Principles of environmental law should always be considered, and anyone in violation of those principles should be made to pay compensation;[54]

ii. On one occasion, pollution was caused by the sinking of ships and oil spills in territorial water; a blanket of oil layer was formed on the surface of the sea, polluting the marine ecosystem. No proper adherence to pre-voyage due diligence and negligence was attributable. The sinking of the ship was not by accident; elements of men's rea could be identified. The ship was directed to continue with its voyage, despite one of the pumps and generator having been identified to be non-functional. Respondents were liable for degradation, damage, and

[53] Municipal Corporation of Greater Mumbai v. Ankita Sinha and Ors LNIND 2021 SC 393, MANU/SC/0815/2021.

[54] Sterlite Industries (India) Ltd. v. Tamil Nadu Pollution Control Board and Ors Appeal Nos. 57 and 58 of 2013 [Appeal Nos. 22 and 23 of 2013 (SZ)] Decided On: 08.08.2013, MANU/GT/0070/2013.

pollution of the marine ecosystem and hence liable to pay environmental compensation;[55]

iii. The Honorable Supreme Court of India[56] upheld the settlement of claims pertaining to victims of the Bhopal gas leak disaster. In an earlier judgment, the Court passed an order to provide immediate and substantial relief to victims. Union Carbide Corporation was directed to pay $ 470 million to UoI towards the settlement of claims on or before 31 March 1989. The Court directed that all civil proceedings related to disaster would stand concluded, and all criminal proceedings would be quashed in terms of settlement;

iv. Exercising authority for the benefit of a particular industry having polluting activities is considered arbitrary in nature. Acts (The Water (Prevention and Control of Pollution) Act, 1974; The Environment (Protection) Act, 1986) did not permit the State to grant an exemption to a particular class of prohibited polluting industries near to lake area. Granting permission is contrary to the perspective of public interest and in contradiction to the right to clean water under Art. 21 of the Constitution. With a view to ensuring complete justice and compliance with the principles of SD, the Honorable Supreme Court of India[57] issued directions to refer technical issues to expert bodies such as Appellate Authority under the appropriate Act.[58] The Court referred to the formulation of the precautionary principle and new burden of proof. The Court observed that the concept of precaution warrants anticipation of likely environmental harm and hazards and proactive policies, systems, and measures to mitigate it or adopt the least environmentally harmful activity with adequate safeguards. Thus, the approach towards precautionary duties should not only be triggered by anticipation of probable hazard but also based on scientific assessment of risk profiling and risk potential;

[55] Samir Mehta v. UoI and Ors MANU/GT/0104/2016.

[56] Union Carbide Corporation and Ors v. Union of India (UoI) and Ors AIR 1992 SC 248, 1991 (2) SCALE 675, (1991) 4 SCC 584, MANU/SC/0058/1992.

[57] AP Pollution Control Board v. MV Nayadu and Ors LNIND 1996 SC 1344, (1999) 2 SCC 718, AIR 1999 SC 812, MANU/SC/0686/1996.

[58] The National Environment Appellate Authority Act, 1997.

v. The polluter pays principle necessitates that absolute liability of harm to the environment extends to both compensating victims of pollution and the cost of restoring environmental degradation. The process of SD also involves the remediation of damaged environments. Private companies responsible for contaminating soil and underground water need to compensate community that is affected by pollution and should take necessary steps to clean the polluted environment and restore it back to its original position;[59] and

vi. Due to interference with the natural course of the river, the Court held that the concerned organization pays compensation by way of costs for restitution of the environment and ecology of the area. Polluter pays concept warrants that liability for harm to compensate not only victims but also the cost of restoring environmental degradation and reversing the damaged ecology of the polluter.[60]

The responsibility of industries for adhering to RECP is vital. It is imperative to recognize that a mere issue of a consent order by State authorities for production did not entitle industries to discharge industrial trade effluents without adhering to discharge standards. Industries need to adhere to stipulations and conditions mentioned in the consent order, and any failure to comply with the requirement of the establishment of an effluent treatment plant shall result in a lapse of consent.[61] Industries need to curtail emission-intensive processes like the closure of coal gasifier units and need to switch over to Piped Natural Gas (PNG) or clean technology as a part of responsible production practices.[62] It is essential that industries should switch over to the adoption of natural gas instead of coke/coal in order to conserve a great historical monument from deteriorating effects of air pollution, and a regular review of compliance is essential, including the

[59] Indian Council for Enviro-Legal Action and Ors v. UoI and Ors AIR 1996 SC 1446, 1996 (2) SCALE 44, (1996) 3 SCC 212, MANU/SC/1112/1996.

[60] MC Mehta v. Kamal Nath and Ors MANU/SC/1007/1997, [1996] Supp1 SCR 12, 1996 (9) SCALE 141, (1997) 1 SCC 388; MC Mehta v. Kamal Nath (2002) 3 SCC 653, AIR 2002 SC 1515, [2002] 2 SCR 477, LNIND 2002 SC 209.

[61] Narula Dyeing & Printing Works v. UoI and Ors LNIND 1995 GUJ 9, AIR 1995 Guj 185, 1995 GLH (1) 679, MANU/GJ/0177/1995.

[62] Babubhai Saini v. Gujarat PCBMANU/GT/0078/2022.

shutdown of industries that are not able to comply with switching over to natural gas.[63] Industrial establishments in proximity to residential colonies pose environmental concerns, and the problem is compounded, especially when industrial clusters are formed in contradiction to zoning or development plans. It is a prudent approach that once a development plan had earmarked area for residential usage only, then end use of demarcated land needed to be maintained, thereby implying right to life in Art. 21 of the Constitution includes the right to environment.[64]

The summary of the embedded relationship of Constitutional provisions with SDG 12 in a qualitative manner is presented below.

i. ET-SDG 12.1: "Implement the 10-year framework of programs on *sustainable consumption and production*, all countries taking action, with developed countries taking the lead, taking into account the development and capabilities of developing countries."; ET-SDG 12.2: "By 2030, achieve the *sustainable management and efficient use of natural resources."*; ET-SDG 12.4: "By 2020, achieve the *environmentally sound management of chemicals and all wastes throughout their life cycle*, in accordance with agreed international frameworks, and significantly *reduce their release to air, water, and soil in order to minimize their adverse impacts on human health and the environment*.": ET-SDG 12.5: "By 2030, substantially *reduce waste generation through prevention, reduction, recycling, and reuse*."; ET-SDG 12.a: "Support developing countries to strengthen their *scientific and technological capacity to move towards more sustainable patterns of consumption and production*."

— Fundamental rights: 19(1)(g), 19(6), 21;
— DPSP: 38(1)–38(2), 39(a)–39(c), 42, 47–48, 48A, 51(c);
— Fundamental duties: 51(g)–51A(j); and
— Relations between the Union and the States: 262.

[63] MC Mehta v. UoI and Ors LNIND 1996 SC 2207, 1997 (1) SCALE 61, AIR 1997 SC 734, MANU/SC/0175/1997.

[64] Lakshmipathy and Ors v. State of Karnataka and Ors AIR 1992 Kant 57, MANU/KA/0006/1992; V. Lakshmipathy v. the State of Karnataka ILR 1991 KARNATAKA 1334, 1991 (2) KarLJ 453, MANU/KA/0408/1991.

ii. ISIDT-SDG 12.3: "By 2030, *halve per capita global food waste at the retail and consumer levels and reduce food losses along production and supply chains, including post-harvest losses*."

— Fundamental rights: 19(1)(g), 19(6), 21;

— DPSP: 38(1)–38(2), 39(a)–39(c), 47–48, 48A, 51(c); and

— Fundamental duties: 51A(g)–51A(j).

iii. ET-SDG 12.6: "Encourage companies, especially large and transnational companies, *to adopt sustainable practices and to integrate sustainability information into their reporting cycle*."

— Fundamental rights: 19(1)(g), 19(6), 21;

— DPSP: 38(1)–38(2), 39(a)–39(c), 42, 47–48, 48A, 51(a)–51(d);

— Fundamental duties: 51(g)–51A(j); and

— Relations between the Union and the States: 262.

iv. ET-SDG 12.7: "Promote *public procurement practices that are sustainable, in accordance with national policies and priorities*."

— Fundamental rights: 19(1)(g), 19(6), 21;

— DPSP: 38(1)–38(2), 39(a)–39(c), 42, 47–48, 48A, 51(c); and

— Fundamental duties: 51(g)–51A(j).

v. ISIDT-SDG 12.8: "By 2030, ensure that people everywhere have the *relevant information and awareness for SD and lifestyles in harmony with nature*."

— Fundamental rights: 15(1)–15(5), 15(6)(a)–15(6)(b), 16(1)–16(4), 16(4A)–16(4B), 16(5)–16(6), 19(1)(a)–19(1)(g), 19(6), 21, 21A, 23(1)–23(2), 24, 25(1)–25(2), 28(1)–28(3), 29(1)–29(2), 30(1), 30(1A), 30(2), 32; and

— DPSP: 38(1)–38(2), 39(a)–39(f), 39A, 41–43, 43A, 45–46, 48A, 49, 51(a)–51(d); and

— Fundamental duties: 51A(a)–51A(k)

vi. ET-SDG 12.b: "Develop and implement tools to *monitor SD impacts for sustainable tourism that creates jobs and promotes local culture and products*."

— Fundamental rights: 15(1)–15(5), 15(6)(a)–15(6)(b), 16(1)–16(4), 16(4A)–16(4B), 16(5)–16(6), 19(1)(g), 19(6), 21, 23(1)–23(2), 24, 29(1);

— DPSP: 38(1)–38(2), 39(a)–39(f), 41–43, 43A, 46, 48A, 49; and

— Fundamental duties: 51A(e)–51A(j).

vii. ET-SDG 12.c: "*Rationalize inefficient fossil-fuel subsidies that encourage wasteful consumption by removing market distortions*, in accordance with national circumstances, including by *restructuring taxation and phasing out those harmful subsidies*, where they exist, to *reflect their environmental impacts*, taking fully into account their specific needs and conditions of developing countries and minimizing the possible adverse impacts on their development in a manner that protects the poor and the affected communities."

— Fundamental rights: 19(1)(g), 19(6), 21;
— DPSP: 38(1)–38(2), 39(a)–39(c), 42, 47–48, 48A, 51(c); and
— Fundamental duties: 51(g)–51A(j).

IV.6. Qualitative Analysis of the Embedded Relationship and Reinforcing Nature: SDG 13

SDG 13 on climate action is a significant issue and undoubtedly a critical factor in environmentally sustainable growth in countries that are at risk from climate change impacts (UN General Assembly, 2015, 2017). Climate change has many interlinkages with other IHRT-SDGs, ISIDT-SDGs. and ET-SDGs. Various initiatives subsequent to UNFCCC Paris Agreement have led to sufficient financial and other resources flowing to climate change. Judicial intervention for the deployment of cleaner fuels, including PNG, compressed natural gas, biogas, propane, butane, and others that facilitate the reduction of carbon dioxide emissions, is considered a proactive measure in addressing climate change challenges.[65]

The embedded relationship of Constitutional provisions with SDG 13 in a qualitative manner is presented below.

i. ET-SDG 13.1: "*Strengthen resilience and adaptive capacity to climate-related hazards and natural disasters* in all countries."; ET-SDG 13.2: "*Integrate climate change measures into national policies, strategies, and planning.*"

— Fundamental rights: 19(1)(g), 19(6), 21;
— DPSP: 38(1)–38(2), 39(a)–39(c), 48A, 51(c); and

[65] Utkarsh Panwar and Ors v. Central Pollution Control Board and Ors MANU/GT/0106/2021.

— Fundamental duties: 51(g)–51A(j).

ii. HRT-SDG 13.3: "Improve *education, awareness-raising, and human and institutional capacity on climate change mitigation, adaptation, impact reduction, and early warning*."; ET-SDG 13.a: "Implement the commitment undertaken by developed-country parties to the *UN Framework Convention on Climate Change* to a goal of *mobilizing jointly $ 100 billion* annually by 2020 from all sources to address the needs of developing countries in the context of *meaningful mitigation actions* and transparency on implementation and fully *operationalize the Green Climate Fund* through its capitalization as soon as possible."; IHRT-SDG 13.b: "Promote mechanisms for *raising capacity for effective climate change-related planning and management* in the least developed countries, including *focusing on women, youth, and local and marginalized communities*."

— Fundamental rights: 15(1)–15(5), 15(6)(a)–15(6)(b), 16(1)–16(4), 16(4A)–16(4B), 16(5)–16(6), 19(1)(a)–19(1)(g), 19(6), 21, 21A, 23–24, 25(1)–25(2), 28(1)–28(3), 29(1)–29(2), 30(1), 30(1A), 30(2), 32;

— DPSP: 38(1)–38(2), 39(a)–39(f), 39A, 41–43, 43A, 45–46, 48A, 49, 51(a)–51(d); and

— Fundamental duties: 51A(a)–51A(k).

IV.7. Qualitative Analysis of the Embedded Relationship and Reinforcing Nature: E-SDG 14

E-SDG 14 on life below water addresses a set of problems becoming increasingly serious for reasons related to their direct impacts and indirect stresses they place on the environment (UN General Assembly, 2015, 2017). For example, ocean acidification, overfishing, marine pollution, and eutrophication are resulting in the deterioration of coastal and marine ecosystems. E-SDG 14 has seven substantive targets[66]

[66] Focus on (i) preventing and significantly reducing marine pollution; (ii) sustainably managing and protecting marine and coastal ecosystem; (iii) minimizing impacts of ocean acidification; (iv) regulating harvesting and ending illegal fishing, unreported and unregulated fishing, and destructive fishing practices; (v) conserving coastal and marine areas; (vi) increasing scientific knowledge and developing research capacity and transferring marine technology; and (vii) providing access for small-scale artisanal fishers to marine resources and markets (UN General Assembly, 2015, 2017).

that collectively aim to preserve the health and well-being of marine ecosystems and three targets focusing on means of implementation.

State and Government authorities are under a legal obligation to control marine pollution and protect the coastal environment. The establishment of integrated aquaculture farms on modern lines requires careful evaluation of likely hazards, degradation of marine ecology, coastal environment, and aesthetic uses of sea coast" and in-depth analysis of such development initiatives is required factoring livelihood rights of fishermen and farmers living in coastal areas.[67] It is prudent to declare ecologically sensitive areas undergoing severe environmental degradation due to increased human intervention, recognizing the socio-economic importance of waterbody as vulnerable wetlands to be protected and critically vulnerable coastal areas.[68] Coastal Regulation Zone notifications are issued in the interest of protecting the environment and ecology in coastal areas, and hence construction raised in violation of such regulations cannot be lightly condoned.[69]

The summary of the embedded relationship of Constitutional provisions with E-SDG 14 in a qualitative manner is provided below.

i. ET-SDG 14.1: "By 2025, *prevent and significantly reduce marine pollution* of all kinds, in particular from land-based activities, including marine debris and nutrient pollution."

— Fundamental rights: 19(1)(g), 19(6), 21;

— DPSP: 38(1)–38(2), 39(a)–39(c), 48A, 51(c);

— Fundamental duties: 51(g)–51A(j); and

— Relations between the Union and the States: 262.

ii. ET-SDG 14.2: "By 2020, sustainably *manage and protect marine and coastal ecosystems* to avoid significant adverse impacts, including by *strengthening their resilience,* and take action for their restoration in order to achieve *healthy and productive oceans*."; ET-SDG 14.3: "Minimize and address the *impacts of ocean acidification*, including

[67] S. Jagannath v. UoI and Ors AIR1997SC811, MANU/SC/0188/1997, [1996] Supp9SCR848, (1997)2SCC87.

[68] Vaamika Island (Green Lagoon Resort) v. UOI and Ors. MANU/SC/0836/2013, (2013)8SCC760.

[69] Piedade Filomena Gonslves v. State of Goa and Ors. MANU/SC/0239/2004, (2004)3SCC445, [2004]2SCR1135.

through enhanced scientific co-operation at all levels."; ET-SDG 14.c: "Enhance the *conservation and sustainable use of oceans and their resources* by implementing international law as reflected in the UN Convention on the Law of the Sea, which provides the *legal framework for the conservation and sustainable use of oceans and their resources*, as recalled in Para. 158 of "The future we want."

— Fundamental rights: 19(1)(g), 19(6), 21;
— DPSP: 38(1)–38(2), 39(a)–39(c), 48A, 51(c); and
— Fundamental duties: 51(g)–51A(j).

iii. ET-SDG 14.4: "By 2020, effectively *regulate harvesting and end overfishing, illegal, unreported and unregulated fishing and destructive fishing practices* and implement science-based management plans in order to *restore fish stocks* in the shortest time feasible, at least to levels that can produce maximum sustainable yield as determined by their biological characteristics."; ET-SDG 14.5: "By 2020, *conserve at least 10 percent of coastal and marine areas, consistent with national and international law* and based on the best available scientific information."; ET-SDG 14.6: "By 2020, *prohibit certain forms of fisheries subsidies* which *contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing* and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation."; ET-SDG 14.7: "By 2030, increase *the economic benefits to small island developing States* and least developed countries from the *sustainable use of marine resources, including through sustainable management of fisheries, aquaculture, and tourism.";* ET-SDG 14.a: "Increase *scientific knowledge, develop research capacity, and transfer marine technology*, taking into account the Intergovernmental Oceanographic Commission Criteria and Guidelines on the Transfer of Marine Technology, in order to *improve ocean health and to enhance the contribution of marine biodiversity* to the development of developing countries, in particular, small island developing States and least developed countries."

— Fundamental rights: 19(1)(g), 19(6), 21;
— DPSP: 38(1)–38(2), 39(a)–39(c), 48, 48A, 51(c); and

— Fundamental duties: 51(g)–51A(j).

— ET-SDG 14.b: "Provide *access for small-scale artisanal fishers to marine resources and markets*."

— Fundamental rights: 19(1)(g), 19(6), 21;

— DPSP: 38(1)–38(2), 39(a)–39(c), 43B, 48, 48A, 51(c); and

— Fundamental duties: 51(g)–51A(j).

IV.8. Qualitative Analysis of the Embedded Relationship and Reinforcing Nature: E-SDG 15

Serious concerns relating to E-SDG 15 include continued loss of land productivity, declining biodiversity, and poaching and trafficking of wildlife. E-SDG 15 has seven substantive targets[70] that ensure the conservation and restoration of terrestrial and freshwater ecosystems and five targets focusing on means of implementation.[71]

The State has a larger role in managing a natural resource meant for free usage by the public. Public trust is an order for the State to use public property for public purposes and is derived and evolved under Art. 21, thereby protecting the fundamental rights of people. Thus, the Government has an obligation to maintain public resources like beaches, parks, public places with historical importance, etc., under public trust doctrine principles, and any unregulated development in public resources would deprive the public of the quality of life as

[70] Focus on (i) ensuring conservation, restoration and sustainable use of terrestrial and inland freshwater ecosystems; (ii) implementation of sustainable management of all types of forests, halting deforestation, restoring degraded forests and increasing afforestation; (iii) combating desertification, restoring degraded land and soil; (iv) reducing the degradation of natural habitats, halting the loss of biodiversity; (v) promoting fair and equitable sharing of the benefits arising from the utilization of genetic resources; (vi) ending poaching and trafficking of protected species of flora and fauna; and (vii) preventing the introduction and significantly reducing the impact of invasive alien species (UN General Assembly, 2015, 2017).

[71] UN General Assembly (2015) General Assembly resolution 70/1, Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1 (25 September 2015). Available at: undocs.org/en/A/RES/70/1 [Accessed 14.09.2022]; UN General Assembly (2017) Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable development. Available at: undocs.org/en/A/RES/71/313 [Accessed 19.09.2023].

stated under Art. 21 of the Constitution.[72] Beneficiaries of the seashore, running waters, air, forests, and ecologically fragile land are the public rather than a few individuals or private entities. The State, as a trustee, has the legal duty to protect and improve natural resources. Such publicly available resources cannot be converted into private property or ownership. The Government is expected to adopt a larger degree of judicial scrutiny, especially on taking any action having long-term bearing like the change of land use, etc. Under these circumstances, Government, as a trustee of certain public resources, has to perform in a diligent manner and has a larger obligation to protect such resources.[73]

If the issue of ecology is of litigation, Art. 48A and 51A(g) of the Constitution are to be taken into consideration, and the Courts have the power to interfere and prohibit executive decision if it leads to environmental degradation.[74] Urban local bodies also have a crucial role in protecting the environment and, specifically, preventing pollution in rivers.[75] Further, natural resources are held by State in the capacity of a trustee, and hence State has an obligation to maintain and protect them for public use and prevent the depletion of resources and environmental degradation; thus, the role of the State is to be viewed as a positive intervention.[76] A Municipal Council with a mandate to preserve public health and provide sanitation facilities cannot cite financial inability or crisis in delivering its expected duties.[77] Moreover, taking into consideration Art. 48A and 51A(g) of the Constitution, it can be said that it is the duty of the State and citizens to protect, preserve, safeguard, and improve the environment and vital natural resources. Hence the

[72] MI Builders Pvt. Ltd. v. Radhey Shyam Sahu and Ors AIR 1999 SC 2468, MANU/SC/0999/1999, (1999) 6 SCC 464.

[73] Intellectuals Forum, Tirupathi v. State of AP. and Ors LNIND 2006 SC 119, AIR 2006 SC 1350, 2006 (2) SCALE 494, MANU/SC/8047/2006.

[74] Sachidanand Pandey and Ors v. The State of West Bengal and Ors LNIND 1987 SC 159, AIR 1987 SC 1109, 1987 1 SCALE 311, MANU/SC/0136/1987.

[75] MC Mehta v. UoI and Ors LNIND 1988 SC 14, AIR 1988 SC 1115, (1988) 1 SCC 471, MANU/SC/0586/1988.

[76] Shailesh R. Shah v. the State of Gujarat 2002 GLH (3) 642 MANU/GJ/0206/2002.

[77] Municipal Council, Ratlam v. Vardichan and Ors LNIND 1980 SC 287, AIR 1980 SC 1622, (1980) 4 SCC 162, MANU/SC/0171/1980.

preservation of the environment and sustaining ecological balance cannot be viewed as an exclusive responsibility of the Government, and it is the fundamental duty of every citizen to protect the environment as enshrined in Art. 51A(g) of the Constitution.[78] Neglection or failure to abide by or to perform a duty is tantamount to betrayal of fundamental law, which the State and citizens are bound to uphold and maintain.[79] Compliance with laws in the context of the protection of flora and fauna can be viewed as an integral part of the preservation of ecological balance and the prevention of environmental damage.[80]

The following summarizes the embedded relationship of Constitutional provisions with E-SDG 15 qualitatively:

i. ET-SDG 15.1: "By 2020, ensure the *conservation, restoration, and sustainable use of terrestrial and inland freshwater ecosystems* and their services, in particular *forests, wetlands, mountains, and drylands*, in line with obligations under international agreements."; ET-SDG 15.8: "By 2020, introduce measures to *prevent the introduction and significantly reduce the impact of invasive alien species on land and water ecosystems and control or eradicate the priority species*."; ET-SDG 15.9: "By 2020, integrate ecosystem and biodiversity values into *national and local planning, development processes, poverty reduction strategies, and accounts*."

— Fundamental rights: 19(1)(g), 19(6), 21;

— DPSP: 38(1)–38(2), 39(a)–39(c), 48A, 51(c);

— Fundamental duties: 51(g)–51A(j); and

— Relations between the Union and the States: 262.

ii. ET-SDG 15.2: "By 2020, promote the implementation of s*ustainable management of all types of forests, halt deforestation, restore degraded forests, and substantially increase afforestation and reforestation* globally."; ET-SDG 15.3: "By 2020, *combat*

[78] Rural Litigation and Entitlement Kendra and Ors v. State of Uttar Pradesh and Ors AIR 1987 SC 359, 1986 (2) SCALE 1083, 1986 Supp(1) SCC 517, MANU/SC/0111/1986.

[79] Kinkri Devi and Ors v. State of Himachal Pradesh and Ors AIR 1988 HP 4, 1988 (1) ShimLC 32, MANU/HP/0002/1988.

[80] Tarun Bharat Sangh, Alwar v. UoI and Ors AIR 1992 SC 514, 1992 Supp(2) SCC 448, MANU/SC/0094/1992.

desertification, restore degraded land and soil, including land affected by *desertification, drought, and floods, and strive to achieve a land-degradation-neutral* world."; ET-SDG 15.4: "By 2030, ensure the *conservation of mountain ecosystems, including their biodiversity,* in order to enhance their capacity to provide benefits that are essential for SD."; ET-SDG 15.5: "Take urgent and significant action to *reduce the degradation of natural habitats, halt the loss of biodiversity*, and, by 2020, *protect and prevent the extinction of threatened species*."; ET-SDG 15.a: "Mobilize and significantly *increase financial resources from all sources to conserve and sustainable use biodiversity and ecosystems*."; ET-SDG 15.b: "Mobilize significant resources from all sources and at all levels to *finance sustainable forest management* and provide adequate incentives to developing countries to advance such *management, including for conservation and reforestation*."; ET-SDG 15.c: "Enhance global support for efforts to *combat poaching and trafficking of protected species,* including by increasing *the capacity of local communities to pursue sustainable livelihood opportunities*

— Fundamental rights: 19(1)(g), 19(6), 21;

— DPSP: 38(1)–38(2), 39(a)–39(c), 48A, 51(c); and

— Fundamental duties: 51(g)–51A(j).

iii. ET-SDG 15.6: "Promote *fair and equitable sharing of the benefits* arising from the *utilization of genetic resources and promote appropriate access to such resources*, as internationally agreed."

— Fundamental rights: 15(1)–15(5), 15(6)(a)–15(6)(b), 19(1)(g), 19(6), 21;

— DPSP: 38(1)–38(2), 39(a)–39(c), 48A, 51(c); and

— Fundamental duties: 51(g)–51A(j).

iv. ET-SDG 15.7: "Take urgent action to *end poaching and trafficking of protected species of flora and fauna and address both demand and supply of illegal wildlife products*."

— Fundamental rights: 19(1)(g), 19(6), 21;

— DPSP: 38(1)–38(2), 39(a)–39(f), 39A, 48A, 49, 51(c); and

— Fundamental duties: 51(g)–51A(j).

IV.9. Qualitative Analysis of the Embedded relationship and Reinforcing nature: IHR-SDG 16

The theme of IHR-SDG 16 is "Peace, justice and strong institutions," and five substantive targets of IHR-SDG 16,[81] seven targets on means of implementation, and other initiatives promote peaceful and inclusive societies for SD, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels.

The enactment of new pollution control laws or sustainability laws need not repeal existing penal laws. In fact, the Honorable Supreme Court of India[82] declared that the enactment of new pollution control laws doesn't repeal Section 133 of the Code (The Code of Criminal Procedure, 1973). Section 133 of the Code has not been impliedly repealed by coming into existence of the Act (The Water (Prevention and Control of Pollution) Act, 1974). Section 133 still has a reasonable level of relevance in the context of environmental pollution. Further, it was made clear that the arena of this section and pollution laws are not identical in nature. The right to live includes the right to enjoy pollution-free water and air. In the event of impairment of quality of life by derogation of laws, a citizen has the right to recourse Art. 32 of the Constitution to eliminate water or air pollution that is detrimental to the quality of life. Public interest litigation must not be misused to satisfy personal grudges and enmity.[83]

The summary of the embedded relationship of Constitutional provisions with IHR-SDG 16 in a qualitative manner is presented below.

i. IHRT-SDG 16.1: "*Significantly reduce all forms of violence and related death rates* everywhere."

[81] Focus on (i) significantly reducing violence and related death rates; (ii) ending abuse, exploitation, trafficking, and violence against and torture of children; (iii) significantly reducing illicit financial and arms flows, strengthening recovery and return of stolen assets and combating organized crime; (iv) substantially reducing corruption and bribery; (v) providing legal identity including birth registration (UN General Assembly, 2015, 2017).

[82] State of MP v. Kedia Leather & Liquor Ltd. and Ors LNIND 2003 SC 686, AIR 2003 SC 3236, 2003 (6) SCALE 736, MANU/SC/0625/2003.

[83] Subhash Kumar v. State of Bihar and Ors LNIND 1991 SC 13, AIR 1991 SC 420, 1991(1)SCALE 8, MANU/SC/0106/1991.

— Fundamental rights: 14, 21, 32;

— DPSP: 38(1)–38(2), 39(a), 39A, 50, 51(a)–51(d); and

— Fundamental duties: 51A(a)–51A(k).

ii. IHRT-SDG 16.2: "*End abuse, exploitations, trafficking and all forms of violence against and torture of children*."

— Fundamental rights: 14, 21, 21A, 24, 28(1)–28(3), 32;

— DPSP: 38(1)–38(2), 39(a), 39(f), 39A, 50, 51(c); and

— Fundamental duties: 51A(k).

iii. IHRT-SDG 16.3: "*Promote the rule of law* at the national and international levels and *ensure equal access to justice for all*."

— Fundamental rights: 13–14, 17, 18(1)–18(4), 20(1)–20(3), 21, 22(1)–22(7), 32;

— DPSP: 38(1)–38(2), 39(a), 39A, 50, 51(c); and

— Fundamental duties: 51A(a)–51A(k).

iv. IHRT-SDG 16.4: "By 2030, significantly *reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets, and combat all forms of organized crime*."

— Fundamental rights: 13–14, 19(b), 19(3), 20(1)–20(3), 21, 22(1)–22(7), 32;

— DPSP: 38(1)–38(2), 39(a), 39A, 50, 51(a)–51(d); and

— Fundamental duties: 51A(c), 51A(i).

v. IHRT-SDG 16.5: "Substantially *reduce corruption and bribery* in all their forms."; IHRT-SDG 16.6: "Develop *effective, accountable, and transparent institutions* at all levels."; IHRT-SDG 16.7: "Ensure *responsive, inclusive, participatory, and representative decision-making at* all *levels*." IHRT-SDG 16.8: "Broaden and strengthen the participation of developing countries *in the institutions of global governance*."

— Fundamental rights: 14, 15(1)–15(5), 15(6)(a)–15(6)(b), 16(1)–16(4), 16(4A)–16(4B), 16(5)–16(6), 17, 18(1)–18(4), 19(1)(a)–19(1)(g), 19(6), 20(1)–20(3), 21, 21A, 22(1)–22(7), 23(1)–23(2), 24, 25(1)–25(2), 26(a)–26(c), 27, 28(1)–28(3), 29(1)–29(2), 30(1), 30(1A), 30(2), 32;

— DPSP: 38(1)–38(2), 39(a)–39(f), 39A, 40–43, 43A-43B, 44–48, 48A, 49–50, 51(a)–51(d);

— Fundamental duties: 51A(a)–51A(k); and

— Relations between the Union and the States: 262.

— IHRT-SDG 16.9: "By 2030, provide *legal identity for all, including birth registration*."

— Fundamental rights: 21;

— DPSP: 38(1)–38(2), 39(a)–39(c), 39A;

— Fundamental duties: 51(g)–51A(j); and

— Relations between the Union and the States: 262.

vi. IHRT-SDG 16.10: "*Ensure public access to information and protect fundamental freedoms* in accordance with national Legislation and international agreements."

— Fundamental rights: 19(1)(g), 19(6), 21;

— DPSP: 38(1)–38(2), 39(a)–39(c), 42, 47, 48, 48A, 51(c);

— Fundamental duties: 51(g)–51A(j); and

— Relations between the Union and the States: 262.

vii. IHRT-SDG 16.a: "Strengthen relevant national institutions, including through international co-operation, for *building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime*."

— Fundamental rights: 19(1)(g), 19(6), 21;

— DPSP: 38(1)–38(2), 39(a)–39(c), 42, 47, 48, 48A, 51(c);

— Fundamental duties: 51(g)–51A(j); and

— Relations between the Union and the States: 262.

— IHRT-SDG 16.b: "Promote and *enforce non-discriminatory laws and policies for sustainable development*."

— Fundamental rights: 14, 15(1)–15(5), 15(6)(a)–15(6)(b), 16(1)–16(4), 16(4A)–16(4B), 16(5)–16(6), 17, 18(1)–18(4), 19(1)(a)–19(1)(g), 19(6), 20(1)–20(3), 21, 21A, 22(1)–22(7), 23(1)–23(2), 24, 25(1)–25(2), 26(a)–26(c), 27, 28(1)–28(3), 29(1)–29(2), 30(1), 30(1A), 30(2), 32;

— DPSP: 38(1)–38(2), 39(a)–39(f), 39A, 40–43, 43A-43B, 44–48, 48A, 49–50, 51(a)–51(d);

— Fundamental duties: 51A(a)–51A(k); and

— Relations between the Union and the States: 262.

IV.10. Summary of Key Components of the Embedded Relationship and Reinforcing Nature between Constitutional Provisions and SDGs

The study also examined key components of the embedded relationship and reinforcing nature between Constitutional provisions and SDGs with due emphasis on (i) the conceptual relationship between Constitutional provisions and IHRT-SDGs, ISIDT-SDGs, and ET-SDGs; (ii) non-compliance of IHRT-SDGs, ISIDT-SDGs, and ET-SDGs resulting in threats to Constitutional principles; (iii) mutual reinforcement of IHRT-SDGs, ISIDT-SDGs and ET-SDGs and Constitution protection; and (iv) extraterritorial dimensions of Constitutional provisions and IHRT-SDGs, ISIDT-SDGs, and ET-SDGs (Suresh and Sundaram, 2022).

With the low and extremely embedded relationship of Constitutional provisions with IHR-SDG 5[84] and IHR-SDG 16[85] respectively, IHR-SDG 5 and IHR-SDG 16 adopt the language that expresses IHR principles in an implicit and explicit manner. With the moderately embedded relationship of Constitutional provisions with SDG 8,[86] SDG 9,[87] and

[84] Reflects (i) the conceptual relationship between Constitutional provisions principles and IHR-SDG 5 (IHRT-SDG 5.5, 5.a); (ii) non-compliance of IHR-SDG 5 resulting threats to Constitutional principles (IHRT-SDG 5.1–5.3, 5.c); (iii) mutual reinforcement of IHR-SDG 5 and Constitution protection (IHRT-SDG 5.4, 5.b); and (iv) extraterritorial dimensions of Constitutional provisions and IHR-SDG 5 (IHRT-SDG 5.6).

[85] Reflects (i) the conceptual relationship between Constitutional provisions principles and IHR-SDG 16 (IHRT-SDG 16.1–16.2); (ii) non-compliance of IHR-SDG 16 resulting threats to Constitutional principles (IHRT-SDG 16.6–16.7, 16.9, 16.10); (iii) mutual reinforcement of IHR-SDG 16 and Constitution protection (IHRT-SDG 16.4–16.5, 16.a–16.b); and (iv) extraterritorial dimensions of Constitutional provisions and IHR-SDG 16 (IHRT-SDG 16.3, 16.8).

[86] Reflects (i) the conceptual relationship between Constitutional provisions principles and SDG 8 (ISIDT-SDG 8.2, 8.5–8.6, ET-SDG 8.4); (ii) non-compliance of SDG 8 resulting threats to Constitutional principles (ISIDT-SDG 8.1, 8.7); (iii) mutual reinforcement of SDG 8 and Constitution protection (ISIDT-SDG 8.3, 8.9–8.10); and (iv) extraterritorial dimensions of Constitutional provisions and SDG 8 (ISIDT-SDG 8.a–8.b).

[87] Reflects (i) the conceptual relationship between Constitutional provisions principles and SDG 9 (IHRT-SDG 9.2); (ii) non-compliance of SDG 9 resulting threats to Constitutional principles (ET-SDG 9.4); (iii) mutual reinforcement of SDG 9 and Constitution protection (ISIDT-SDG 9.1, 9.3, 9.b); and (iv) extraterritorial dimensions of Constitutional provisions and SDG 9 (ISIDT-SDG 9.5, 9.a–9.c).

SDG 12;[88] SDG 8, SDG 9, and SDG 12 adopt the language that implicitly and explicitly expresses ISID and environmental principles. Despite an underdeveloped situation in addressing climate change challenges, with the minimum number of targets pertaining to SDG 13, a moderate level of embedded relationship is witnessed between Constitutional provisions with SDG 13.[89] SDG 13 adopts a language that explicitly and implicitly expresses IHR and environmental principles. With the low embedded relationship of Constitutional provisions with E-SDG 14[90] and E-SDG 15;[91] E-SDG 14 and E-SDG 15 adopt the language that expresses environmental principles in an explicit and implicit manner.

V. Quantitative Characterization of Embedded Relationship and Determination of ERI

The previous section provided insight into the embedded relationship and reinforcing nature of Constitution provisions with

[88] Reflects (i) the conceptual relationship between Constitutional provisions principles and SDG 12 (ISIDT-SDG 12.3, ET-SDG 12.5, 12.7, ISIDT-SDG 12.8, ET-SDG 12.b); (ii) non-compliance of SDG 12 resulting threats to Constitutional principles (ET-SDG 12.4); (iii) mutual reinforcement of SDG 12 and Constitution protection (ET-SDG 12.2, 12.6, 12.c); and (iv) extraterritorial dimensions of Constitutional provisions and SDG 12 (ET-SDG 12.1, 12.a).

[89] The embedded relationship between Constitutional provisions and SDG 13 reflects (i) the conceptual relationship between Constitutional provisions principles and SDG 13 (ET-SDG 13.2, IHRT-SDG 13.3); (ii) non-compliance of SDG 13 resulting threats to Constitutional principles (ET-SDG 13.1); (iii) mutual reinforcement of SDG 13 and Constitution protection (ET-SDG 13.a); and (iv) extraterritorial dimensions of Constitutional provisions and SDG 13 (IHRT-SDG 13.b).

[90] The embedded relationship between Constitutional provisions and E-SDG 14 reflects (i) the conceptual relationship between Constitutional provisions principles and E-SDG 14 (ET-SDG 14.6); (ii) non-compliance of E-SDG 14 resulting threats to Constitutional principles (ET-SDG 14.3, 14.5); (iii) mutual reinforcement of E-SDG 14 and Constitution protection (ET-SDG 14.1–14.2, 14.4, 14.7, 14.b); and (iv) extraterritorial dimensions of Constitutional provisions and E-SDG 14 (ET-SDG 14.a, 14.c).

[91] The embedded relationship between Constitutional provisions and E-SDG 15 reflects (i) the conceptual relationship between Constitutional provisions principles and E-SDG 15 (ET-SDG 15.6, 15.9, 15.c); (ii) non-compliance of E-SDG 15 resulting threats to Constitutional principles (ET-SDG 15.4–15.5, 15.7); (iii) mutual reinforcement of E-SDG 15 and Constitution protection (ET-SDG 15.2, 15.8); and (iv) extraterritorial dimensions of Constitutional provisions and E-SDG 15 (ET-SDG 15.1, 15.3, 15.a-15.b).

SDGs in a qualitative manner. However, it is imperative to develop a quantitative assessment of the embedded relationship between Constitutional provisions and SDG. Hence study evolved the ERI, a deterministic number on a scale of 0–5, as a quantitative measure of embedded relationships and their reinforcing nature. The number of Constitutional articles that deal either explicitly or implicitly with concerned IHRT-SDG, ISIDT-SDG, and ET-SDG is computed and compared with a maximum number of Constitutional articles that deal either explicitly or implicitly across all IHRT-SDGs, ISIDT-SDGs, and ET-SDGs. A similar exercise is also conducted for each SDG.

The mathematical expression of ERI is given below:

$$\mathrm{ERI_i} = \frac{\mathrm{x_i}}{\mathrm{Maximum}\,\mathrm{x_1^n}} \mathrm{X5} \qquad \textit{Equation 1}$$

Where ERI_i = ERI of given IHRT-SDG, ISIDT-SDG, ET-SDG, or given SDG as applicable, on a scale of 0 to 5

x_i = Number of Constitutional articles covered in given IHRT-SDG, ISIDT-SDG, ET-SDG, ISIDT-SDG, or given SDG as applicable

n = Total number of targets for SDGs

$$\mathrm{ERI_j} = \frac{\mathrm{y_j}}{\mathrm{Maximum}\,\mathrm{y_1^n}} \mathrm{X5} \qquad \textit{Equation 2}$$

Where ERI_j = ERI of given Constitutional provision like fundamental rights, DPSP, fundamental duties, etc., on a scale of 0–5

y_j = Number of fundamental rights, DPSP, and fundamental duties articles covered in the given SDG

n = Number of SDGs

Table presents IHRT-SDG wise, ISIDT-SDG wise, ET-SDG wise, SDG wise, and Constitutional provisions like fundamental rights, DPSP, fundamental duties ERI in a quantitative manner computed based on textual analysis and mathematical modeling of embedded relationship.

Table:
IHRT-SDG wise, ISIDT-SDG wise, ET-SDG wise, SDG wise, and Constitutional provisions wise ERI in a quantitative manner

SDG targets		ERI	SDG targets		ERI	SDG targets		ERI
IHRT	5.1	1.042	ISIDT	9.b	1.927	ET	14.c	0.729
IHRT	5.2	1.042	ISIDT	9.c	1.927	ET	15.1	0.781
IHRT	5.3	1.042	ET	12.1	0.938	ET	15.2	0.729
IHRT	5.4	0.938	ET	12.2	0.938	ET	15.3	0.729
IHRT	5.5	1.354	ISIDT	12.3	0.833	ET	15.4	0.729
IHRT	5.6	0.938	ET	12.4	0.938	ET	15.5	0.729
IHRT	5.a	1.354	ET	12.5	0.938	ET	15.6	1.094
IHRT	5.b	0.052	ET	12.6	1.094	ET	15.7	0.938
IHRT	5.c	1.094	ET	12.7	0.885	ET	15.8	0.781
ISIDT	8.1	0.365	ISIDT	12.8	3.698	ET	15.9	0.781
ISIDT	8.2	0.365	ET	12.a	0.938	ET	15.a	0.729
ISIDT	8.3	1.927	ISIDT	12.b	2.240	ET	15.b	0.729
ET	8.4	0.833	ET	12.c	0.885	ET	15.c	0.729
ISIDT	8.5	1.927	ET	13.1	0.729	IHRT	16.1	1.198
ISIDT	8.6	1.927	ET	13.2	0.729	IHRT	16.2	0.833
ISIDT	8.7	1.927	IHRT	13.3	3.646	IHRT	16.3	1.875
ISIDT	8.8	1.927	ET	13.a	3.646	IHRT	16.4	1.406
ISIDT	8.9	2.240	IHRT	13.b	3.646	IHRT	16.5	5.000
ISIDT	8.10	0.990	ET	14.1	0.781	IHRT	16.6	5.000
ISIDT	8.a	0.625	ET	14.2	0.729	IHRT	16.7	5.000
ISIDT	8.b	0.625	ET	14.3	0.729	IHRT	16.8	3.073
ISIDT	9.1	1.927	ET	14.4	0.781	IHRT	16.9	0.625
ISIDT	9.2	1.927	ET	14.5	0.781	IHRT	16.10	0.938
ISIDT	9.3	1.927	ET	14.6	0.781	IHRT	16.a	0.885
ET	9.4	1.927	ET	14.7	0.781	IHRT	16.b	5.000
ISIDT	9.5	1.927	ET	14.a	0.781			
ISIDT	9.a	1.927	ET	14.b	0.833			

SDG	Number of articles covered				ERI
	Fundamental rights	DPSP	Fundamental duties	Others	
IHR-SDG 5	107	51	12	0	1.436
SDG 8	149	114	38	0	2.542
SDG 9	144	104	48	0	2.500
SDG 12	88	128	53	6	2.323
SDG 13	117	70	37	0	1.892
E-SDG 14	30	77	40	1	1.250
E-SDG 15	43	88	48	3	1.537
IHR-SDG 16	348	156	81	7	5.000

SDG	Fundamental rights	DPSP	Fundamental duties	Others
IHR-SDG 5	1.537	1.635	0.741	0.000
SDG 8	2.141	3.654	2.346	0.000
SDG 9	2.069	3.333	2.963	0.000
SDG 12	1.264	4.103	3.272	4.286
SDG 13	1.681	2.244	2.284	0.000
E-SDG 14	0.431	2.468	2.469	0.714
E-SDG 15	0.618	2.821	2.963	2.143
IHR-SDG 16	5.000	5.000	5.000	5.000

VI. Conclusion and Recommendation

Several man-made and natural factors cause irreversible damage to the environment apart from having significant negative impacts on human well-being and eventually deterring the achievement of IHR and ISID (Suresh and Sundaram, 2022).[92] Obligations of the Government under IHR and labor law are crucial as they are interlinked to the attainment and enjoyment of safe, clean, healthy, and sustainable environment and provide a sturdy basis for understanding

[92] UN HRC, (2012) Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: preliminary report. Available at: undocs.org/en/A/HRC/22/43 [Accessed 20.09.2022].

and implementing IHR obligations relating to environment and industrialization (Knox, 2018; Knox and Morgera, 2022). IHR and environmental law frameworks have yet to be integrated despite the interrelated relationships between the two domains, as recognized by the 1972 Stockholm Declaration (UN, 1972). IHR law includes obligations relating to the environment that encompass both procedural and substantive obligations.[93] Environmental law as a discipline revolves around some of the basic principles which encompass its essence. These principles include SD, precautionary principle, polluter pays principle, public trust doctrine, and intergenerational equity. A negative impact on one SDG target has appalling multiplier effects on other targets of SDGs linked to IHR, environment, social, industrial, and economic growth. "Leaving no one behind" commitment encourages a more IHR and ISID-friendly interpretation and its application to all SDGs. These reflective characteristics, coupled with the reflection of IHR, ISID, and environment provisions in the 2030 Agenda and inextricably linked attributes of IHR, ISID & environment, and SDGs, lend to the analysis of reinforcing nature of Constitutional and Legislation provisions and Jurisprudence with SDGs.

Qualitative and quantitative embedded relationship and reinforcing nature of SDGs and Constitution, Judiciary, and various Legislations related to IHR, environmental, ISID Jurisprudence, and influence of the principle of SD on the domestic legal regime is analyzed. Reflection of IHR, ISID, and environmental aspects in the Constitution and Legislation is evident from textual analysis. Two arguments can be cited to characterize reinforcing nature (i) legally enforceable and non-enforceable Constitutional and Legislation provisions incorporate IHR and ISID principles to include an environmental dimension when environmental degradation averts complete fulfillment of guaranteed rights, and (ii) legally enforceable and non-enforceable Constitutional and

[93] UN HRC (2009) Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, A/HRC/10/61 (15 January 2009). Available at: undocs.org/en/A/HRC/10/61 [Accessed 14.09.2022]; UN HRC (2013) Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox — Mapping report, A/HRC/25/53 (29 December 2013). Available at: undocs.org/A/HRC/25/53 [Accessed 14.09.2022].

Legislation provisions demonstrate a new substantive IHR and ISID to a safe and healthy environment and sustained economic growth. Similar views are also found in the literature (Shelton, 2006). A substantial number of Constitutional and Legislation provisions demonstrate how environmental protection contributes to the enjoyment of IHR and ISID. Most importantly, fundamental rights, especially the right to life under Art. 21, as provided under Constitution and interpreted by Judiciary, have immensely helped develop Indian Jurisprudence on IHR, ISID, and the environment.

From Constitutional and Legislation provisions and judgements discussed above, it is evident that:

i. There are substantive rights for an adequate and decent standard of living; decent work enabled through the ISID development structure;

ii. There exist a group of negative and restrictive obligations for the Government so as to avoid initiating activities that are likely to hinder IHR, ISID, and environmental objectives or other such activities annulling their obligation to comply with IHR, ISID, and environmental governance;

iii. There are Government positive and proactive obligations to promote social order, protect and comply with IHR and ISID, livelihood, control and equitable distribution of material resources, humane conditions of work, wages and labor rights, sustained economic growth, respect for international law and treaty obligations;

iv. There are also procedural obligations, thereby ensuring access to information and conducting environmental and social impact assessments and industrial developments;

v. That fundamental right and duties of every individual to take part in Government initiatives and in the conduct of public affairs is acknowledged;

vi. That Government should proscribe discrimination and ensure equal and effective protection against discrimination, which shall also apply to equal enjoyment of IHR and ISID relating to a safe, clean, healthy, and sustainable environment and decent work and labor rights, and sustained economic growth;

vii. That Governments have an obligation to facilitate public participation in environmental decision-making in order to protect

IHR and ISID against environmental harm and exploitation of the labor force;

viii. That Government should provide an "effective remedy" for IHR and ISID violations which shall also encompass remedies for violations of IHR and ISID pertinent to environmental and labor issues, including delivering access to judicial and other procedures for effective remedies; and

ix. The concerned Government needs to establish a robust mechanism for the enjoyment of a safe, clean, healthy, and sustainable environment, including enforcing effective legal and institutional frameworks for safeguarding against environmental harm and full accomplishment of IHR and ISID due to their interlinkages.

All the above findings are also in alignment with earlier studies[94] (Knox and Morgera, 2022; Suresh and Sundaram, 2022). It is evident that the reinforcing and embedded nature between IHR, ISID, environmental protection, SDGs, Constitution, Legislation & Judiciary is undeniable, and the embedded relationship nature established in this paper can be correlated with direct embedded and cross-embedded relationships of IHR-related treaties and instruments, and environment-related treaties and instruments with SDGs (Suresh and Sundaram, 2022).

Multi-faceted growth and awareness of IHR, ISID, and environmental governance throw substantial challenges, and RECP practices, sustainable technologies, and dissemination assume importance.

[94] UN General Assembly (1948) Universal Declaration of Human Rights. Available at: undocs.org/en/A/RES/217(III) [Accessed 14.09.2022]; UN General Assembly (1966) International Covenant on Civil and Political Rights. Available at: treaties.un.org/doc/Treaties/1976/03/19760323 06-17 AM/Ch_IV_04.pdf [Accessed 18.09.2022]; UN CESCR (2002) General Comment No. 15: The Right to Water (Art. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11 (20 January 2003). Available at: undocs.org/en/E/C.12/2002/11 [Accessed 14.09.2022]; UN CRC (2013) General comment No. 16 on State obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16 (17 April 2013), Available at: undocs.org/en/ CRC/C/GC/16 [Accessed 20.09.2022]; UN HRC (2019) General Comment No. 36: on Art. 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36 (3 September 2019). Available at: undocs.org/en/ CCPR/C/GC/36 [Accessed 20.09.2022].

Strong driving factors[95] necessitate seamless integration of IHR, ISID, environment, SDGs, and legal aspects (Suresh and Sundaram, 2022). The SD approach is essential to secure long-term economic development and industrialization and make the economy resilient to future contingencies. Despite the fact SD is promulgated in international and national legal contexts in a structured manner, there is still a gap witnessed in enforcement and implementation, and hence the role of the Judiciary assumes great importance in this context. Provisions of the Constitution of India, Legislation, and the Indian Judiciary have elucidated several dimensions of IHR, ISID, and environment linkage and thus paving the way for developing IHR, ISID, and environmental Jurisprudence in India in alignment with the philosophy of SDGs. Indian Judiciary acts as a proactive facilitator in fostering SD and IHR, ISID, and environmental law to further SDGs progress. The Honorable Supreme Court of India has contributed immensely to SD Jurisprudence and has been instrumental in preserving the doctrine of SD.

It is evident from the above discussion that linking IHR, environment, and Constitutional and Legislation provisions with the SDG theme and extra-legal compliance mechanism of SDG can produce positive synergies in realizing SDG objectives (Suresh and Sundaram, 2022). Growing awareness of this reinforcing nature contributes to enjoying IHR, a healthy environment, sustained economic growth, and industrialization. Analyzing the reinforcing nature of Constitutional and Legislation provisions and Jurisprudence on IHR, ISID, and environmental provisions can facilitate accelerating SDGs progress. A significant level of reinforcing nature raises awareness and builds

[95] (i) Changing institutional framework from IHR, ISID and environmental perspective; (ii) signatory of various international and regional treaties and instruments; (iii) resource uncertainty and security; (iv) technological advances like use less and produce more; (v) need and growing business opportunities for sustainable green infrastructure, RECP, circular economy and eco-industrial park and industrial clusters development including retrofitting of existing assets; (vi) Government initiatives on infrastructure and industrialization and Public-Private Partnership legal framework and environmental risk allocation models; (vii) complexity of nature of environmental crimes coupled with IHR and ISID violations involved in rapid urbanization and industrialization in pursuit of economic gains; (viii) complex nature of law of torts and criminal law embedded in IHR, ISID and environmental law; (ix) corporate ESG compliance and reporting; and (x) competitive pressure, cost and profit issues.

a postulate by making environmental degradation and IHR and ISID violations as a potential threat to the attainment of SDGs.

The Constitutional and Legislation framework provides a clear moral and legal justification for immediate and urgent action to uphold IHR values and drive inclusive economic growth along the lines of the ISID development model while protecting the environment. Despite a number of Legislations, Constitutional directives, and duties related to IHR, ISID, and environmental provisions and the setting up of HRC and pollution control boards, and industrial development corporations all over the country, there are still several challenges in curbing environmental degradation coupled with violations of IHR and ISID principles. Hence a multi-pronged approach is required on the industrial and urbanization,[96] legal,[97] and capacity-building fronts[98] to tackle the problem of large-scale environmental hazards effectively and to evolve robust foundations in the environment and industrialization-related litigations while complying with IHR and ISID principles and achieve progress in SDG (Suresh and Sundaram, 2022).

IHR, ISID, and environmental laws, rules, and regulations must be widely understood, respected, and enforced to advance SDGs. Adoption and monitoring of legal indicators for SDGs are considered to provide a balance between sustained economic growth, IHR values, ISID principles, and environmental compliance through economic benefits by way of increased resource efficiency, innovation, and reduced cost for environmental management while complying with IHR and ISID principles.

[96] Initiatives would include (i) establishing state-of-the-art industrial infrastructure and eco-industrial parks; (ii) retrofitting traditional industrial parks; (iii) creating environmental infrastructure; (iv) practicing circular economy principles; (v) promoting sustainable and smart urbanization; and (vi) ESG reporting.

[97] Initiatives would include (i) implementing and enforcing clear, unambiguous laws; (ii) strengthening IHR, ISID, and environmental Legislation; (iii) ensuring accountability and transparency of public authorities in their decision-making process; (iv) a multi-stakeholder consultative process in development initiatives; (v) placing sustainability and SDGs at center of Judicial decision-making; and (vi) incorporating legal indicators for SDG progress analysis.

[98] Capacity-building exercise initiatives essential for advancing SDG include (i) IHR, ISID, and environmental awareness; (ii) education, and sensitizing on SDGs; and (iii) wider dissemination of Constitutional and Legislation provisions on IHR, ISID, and environmental Jurisprudence.

Embedded relationships and reinforcing nature also signify the need to include global legal indicators in SDG as an explicit reference. Compliance with Constitutional and Legislation provisions and Jurisprudence could promote more effective implementation and monitoring, wherein the approach is to view the global environment and climate change as common apprehension of humankind. Provisions of the Constitution, Legislation, IHR, ISID, and environmental Jurisprudence can be dovetailed in the form of global legal indicators in assessing SDG progress, and this extra-legal compliance mechanism can produce positive synergies in realizing SDG objectives.

This paper provides insight into how IHR, ISID, and environmental stipulations and recommendations, established through Constitutional and Legislation provisions and Jurisprudence, can be utilized holistically for achieving progress in SDGs. Principles established, analysis model developed, and recommendations made in this paper can be deployed across geographies.

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LAW ENFORCEMENT AND NATIONAL PRACTICES

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Article

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Ensuring the Health of the Nation as a Determinant of Innovations in Law Enforcement and Judicial Activities

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© T.I. Otcheskaya, T.I. Afanasyeva, P.D. Zhukova, N.V. Mishakova, K.A. Orkina, D.I. Shtefan, 2023

Abstract: The Constitutional Court of the Russian Federation has repeatedly stated the extreme importance of human life and health as values without which all other benefits lose their relevance. Despite this approach, practicing law upholders and law-makers are constantly faced with a dilemma between ensuring the human health and following public interests in a different dimension of the state activity. The purpose of this paper is 1) to substantiate the system-forming role of such vital values as preservation of human life and health in law-making and law enforcement, and 2) to determine the vector of legal regulation in the field of public health protection. The authors have analyzed the transformation of the legal regulation of relations aimed at ensuring the health of the nation in a number of key areas: the health of minors, high-tech medicine, the balance of interests of a doctor and a patient in law enforcement, digitalization of medicine and its impact on relations in the field of personal data protection, artificial intelligence in medicine, advanced legal regulation of the constituent entities of the Russian

Federation in the field of healthcare. Based on the Russian and foreign legislation, the practice of the courts of the highest instance and the lower courts, the authors have proved a determinative influence of the constitutional obligation of the state to ensure the rights to life and health on the legal regulation and law enforcement. Proposals have been made concerning the need to finalize legal acts aimed at detailing the regulation of issues in these key areas.

Keywords: health protection; high-tech medicine; breakthrough medical technologies; personal data protection; digitalization of medicine; artificial intelligence in medicine; iatrogenic crimes; medical error; balance of interests of the doctor and patient; advanced legal regulation

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Contents

I. Introduction

The study under examination covers regularities of lawmaking and law enforcement in several key blocks of the healthcare sector in the context of modern challenges and threats and the value orientation of the state. The examined areas include adolescent health, high-tech medicine, balance of interests of a doctor and a patient in law enforcement, digitalization of medicine and its impact on relations in the field of patients' personal data protection, artificial intelligence (AI) in medicine, advanced legal regulation of constituent entities of the Russian Federation in the healthcare sector.

The problem of choosing between ensuring the human health and securing public interests creates an asymmetry of the legal environment and leads to law enforcement errors that entail violations of basic human rights to life and health. The search for the balance between the interests results in an integrated approach to the study of this problem that has not received proper coverage in academic papers so far. The value of the authors' approach to this issue lies in the fact that the presented study is one of the first in Russia, where an attempt has been made to use the integrated approach to this problem by considering various aspects of state activities aimed at ensuring the health of the nation.

For the first time, the world community paid attention to the issues of protection of human rights, motherhood and childhood in 1948, when the UN General Assembly adopted the Universal Declaration of Human Rights, according to which "Motherhood and childhood are entitled to special case and assistance."[1] The Declaration of the Rights of the Child adopted by the General Assembly in 1959 became the first UN legal instrument in the field of children's rights protection. The Declaration proclaimed the principle that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth," and that "mankind owes to the child the best it has to give."[2]

[1] Universal Declaration of Human Rights (Adopted on 10 December 1948 by the UN General Assembly). Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights [Accessed 20.06.2023].

[2] Declaration of the Rights of the Child (Adopted on 20 November 1959 by Resolution 1386 (XIV) at the 841st plenary session of the UN General Assembly. Human Rights Library. Available at: http://hrlibrary.umn.edu/instree/k1drc.htm [Accessed 20.06.2023].

Turning to the history of this issue, the authors highlight that the Convention on the Rights of the Child was ratified by the USSR in June 1990. Having accepted obligations as the successor of the USSR, the Russian Federation started to form a new concept in the area of child protection. The Family Code of the Russian Federation (the RF FC) has consolidated the rights of families and children and provided guarantees for their implementation.[3] At that time, the law-maker paid special attention to the safeguards of the rights of the child, which became a priority for the State authorities.[4]

The Federal Law of 2006[5] became a landmark law in the field of providing the family with social support In Russia. Its adoption resulted in implementation of a new program of long-term support in the form of "maternal (family) capital" for families because of the birth or adoption of a second (or subsequent) child.

The new bodies of preventive medicine within the healthcare system — health centers — have been launched in the Russian Federation since 2009. Their main functions include health assessment, health prognosis, identification of health risks, counseling on prevention and promotion of health and a healthy lifestyle.

The adoption of the Federal Law "On fundamental healthcare principles in the Russian Federation" constituted the next stage of the State's recognition of children's health protection as the most important and necessary condition for their physical and mental development.[6]

In subsequent years, the State addressed the problems of protecting the health of children with disabilities. Legal and social guarantees of their rights are provided under the Federal Law "On Social Protection of Disabled Persons in the Russian Federation."[7] The Law recognized

[3] The Family Code of the Russian Federation No. 223-FZ dated 29 December 1995 (as amended on 19 December 2022) (In Russ.).

[4] Federal Law No. 124-FZ dated 24 July1998 (as amended on 29 December 2022) "On Fundamental Safeguards of the Rights of the Child". (In Russ.).

[5] Federal Law No. 256-FZ dated 29 December 2006 (as amended 28 December 2022) "On additional measures of state support for families with children". (In Russ.).

[6] Federal Law No. 323-FZ dated 21 November 2011 (as amended on 28 December 2022) "On fundamental healthcare principles in the Russian Federation." (In Russ.).

[7] Federal Law No. 181-FZ dated 24 November 1995 (as amended on 28 December 2022) "The Social Protection of Disabled Persons in the Russian Federation." (In Russ.).

the equal rights of disabled children, the need for their integration into society and rehabilitation. It outlined the right to family education, to education in institutions of general education or at home.

Dysfunctional families constituted one more concern for the State. Dysfunctional families include families with poor living conditions, parents addicted to alcoholism and drugs, domestic violence and single-parent families. Children in such families are exposed to high risk of mortality from external causes, including accidents and suicides. The necessity to regulate dysfunctional families led to the adoption of the Federal Law "Fundamental Principles of the System of Prevention of Child Neglect and Juvenile Delinquency"[8] in 1999.

Existing problems in the State caused a critical demographic situation at the turn of the new century. That required the Russian state to pay attention to children, women, and families. As a result, the Decree of the President of the Russian Federation approved the Concept of Demographic Policy of the Russian Federation for the period up to 2025.[9] The Concept determines reducing infant and maternal mortality, strengthening reproductive health and the family as the priorities for the State.

To date, the State has developed the Strategy for the Healthcare Development in the Russian Federation for the long-term period until 2025.[10] One of the main principles of the Strategy include the priority of children's health.

Information and digital tools and technologies have become an integral component of medicine and healthcare. However, it took time for this situation to develop. In the medical field, the use of digital tools,

[8] Federal Law No. 120-FZ dated 24 June1999 (as amended on 21 November 2022) "Fundamental Principles of the System of Prevention of Child Neglect and Juvenile Delinquency." (In Russ.).

[9] Decree of the President of the Russian Federation No. 1351 dated 9 October 2007 (as amended on 1 July 2014) "On the approval of the concept of the demographic policy of the Russian Federation for the period up to 2025." Art. 5009. Available at: https://www.prlib.ru/en/node/433241 [Accessed 07.05.2023]. (In Russ.).

[10] Decree of the President of the Russian Federation No. 254 dated 6 June 2019 "About the Strategy of development of health care in the Russian Federation for the period till 2025." Art. 2927. Available at: https://cis-legislation.com/document.fwx?rgn=116205 [Accessed 07.05.2023]. (In Russ.).

including using the digital tool for patient records, appeared much later than in other sectors of professional activities. And large cities form the vanguard in this matter. In remote settlements, digitalization of medical services and the healthcare system is still very complicated. Every person using digital devices in their life leave their digital footprints and digital shadows. New opportunities for the development of various technologies, at the same time, increase the vulnerability of private life jeopardizing the privacy of individuals.

Artificial intelligence is gaining weight in medicine as a tool used to reduce the risk of liability for an error (Tretyakova, 2021, p. 53). The medical field development is currently rapidly accelerating through the introduction of decision support systems based on the work of AI algorithms. The majority of the research devoted to this issue, to some extent, concerns the subject of responsibility for the decisions made.

One of the objectives the authors pursue is to establish the key elements of the doctor's responsibility, which can be influenced by the introduction of an artificial intelligence system and try to formulate a conceptual vector for the proper development of the relations under consideration in the medical industry.

In modern realities, the interaction and equality of interests of the doctor and the patient concerning treatment issues are of great importance. Over the past 5 years, the profession of a doctor has become one of the most discussed in the media. Every action of doctors and the healthcare system as a whole is subject to thorough examination from both the State and the patients, their relatives, and the Prosecutor's Office or the Investigative Committee of Russia.

In 2022, there was an increase in appeals to Roszdravnadzor for failure to provide guaranteed medical care. Patients complained about the poor quality of medical care and its insufficiency and unavailability. For ten months of 2022, the department received 21,164 complaints about such issues (in 2021, patients complained 18,400 thousand times). In this regard, the search for a balance between the interests of the doctor and the patient in the law enforcement dimension deserves attention (Tikhomirov and Nanba, 2019).

In federal states, the problem of permissibility of interference of the constituent entities in the sphere of federal legal regulation

arises inevitably. Also, the problem arises concerning the advanced legal regulation of issues referred to the joint jurisdiction of both the federation and constituent entities. In the context of protecting the life and health of the nation, these issues have not been studied so far. At the same time, the dynamics of social relations, value reorientation and the upheavals taking place in the world have long demonstrated inferiority of the linear approach to this issue.

II. The Priority of Protection of the Health of Minors as the basis for the Preservation of the Nation

In order to study implementation of the principle of health protection "Priority of children's health," it was found that in public health care system, mothers of children face a formal attitude, an underdeveloped health protection infrastructure, and they need legal assistance (Chicherin, 2013).

12.5 % of mothers claim that violations of the principle of justice, signs of family and social well — being discrimination in relation to children (in terms of their health protection) take place in state medical organizations, 23.5 % of mothers experience the same mistreatment in private medical organizations, 37.8 % in educational institutions, 35.4 % — in other institutions (organizations). Citizens are dissatisfied with the level of implementation of the right of children to being provided with medicines, special medical nutrition products, medical products in the conditions of public health institutions (17.8 % of mothers claim mistreatment), in private healthcare institutions (0.3 % of mothers claim mistreatment), educational institutions (1.2 % of mothers claim mistreatment), other organizations (0.8 % of mothers claim mistreatment) (Taranov et al., 2004).

In this regard, it is proposed to ensure that the population is widely informed about directions and measures taken by the State to ensure implementation of the principle of "priority of children's health," to provide public monitoring of the quality of practical implementation of this principle by state bodies and officials, and to create conditions for the practical implementation of this principle (Sadovnikova et al., 2015).

In the Russian Federation, the number of studying hours for schoolchildren has increased. Thus, the issue of preserving children's health (health-saving activities) in educational institutions is relevant.

In this regard, the experience of China is interesting for Russian educational institutions, where much attention is paid to the prevention of diseases and promotion of a healthy lifestyle. Effective ways of health protection for schoolchildren include participation of the State in the formation of a health culture, allocation of bank subsidies for the construction of schools complying with new sanitary and hygienic requirements, regulated computer training under the supervision of a teacher; a "restorative" mode of education. prevention and counteraction to educational stress, intensive development of physical education and sports, their popularization by the mass media, taking care of children with disabilities.

In Russia, much is also being done to preserve the health of schoolchildren, but the measures taken in most cases are of a "restorative" nature. According to Prof. Tsallagova, "human health preservation is possible only systematically, with the earliest acquisition of hygienic knowledge and skills by children" (Tsallagova, 2001).

At the moment, the situation is complicated by a new economic crisis and, if in China the costs of health care and education are increasing annually, in Russia, unfortunately, they are decreasing, which cannot but affect the implementation of projects in the field of health care for schoolchildren. However, some Chinese health-saving methods and technologies do not require large expenditures and can be used in the work of teachers and they can bring positive results: 1) an axiological approach that considers health as the highest value, 2) variability and diversity of means, methods and organizational forms in achieving the goal (Tsallagova, 2001).

We cannot avoid dwelling on the experience of India that in recent years has taken a leading position in many economic and political indicators. The Constitution of India prohibits any form of discrimination and it separately focuses on the rights and freedoms of the child (Maklakov, 2003).

However, in India, the problems still exist in protection of children's rights. To sum up, in India: child mortality rate remains high

(130 girls per 100 boys who died under the age of 5) (Chauhan, 2013); the principle of protecting the child from "forms of neglect and cruelty" is not observed in many Indian public schools (Tsallagova, 2001); by the number of girls married before the age of 15, India is second only to the states of the South Asian region and sub-Saharan Africa (Chauhan, 2013); children are engaged in factory production and services and in enterprises related to heavy machinery and mining ores.[11]

In this regard, the principle of priority of children's health, enshrined in Art. 4 of the Federal Law "On the Basics of Public Health protection in the Russian Federation," is also confirmed in the Strategy for the Development of Healthcare in the Russian Federation for the long-term period of 2015–2030. In the State, children should have the highest attainable level of health and development that will meet their needs. The level of protection and the regime for the exercise of their rights should provide an opportunity to fully realize their potential.

We consider positive the emerging trend to prioritize the preservation of human health by courts of general jurisdiction in cases related to medical intervention necessary to save lives (Chapter 31.1 of the Code of Administrative Procedure of the Russian Federation[12]) (hereinafter referred to as the CAP of the Russian Federation).

In Russia, as in the law of other countries (Linnard-Palmer and Kools, 2004), parents are given the prerogative of making decisions for their children, including issues of preserving children's health. However, sometimes parents are unable to make a decision adequate to their child's health and refuse medical intervention in a situation where it is necessary to save lives. To overcome the "veto" of the legal representative, there is a judicial control procedure established by Chapter 31.1 of the CAP of the Russian Federation that can be initiated by a medical institution.

[11] Bureau of International labor affairs. India. 2013 Findings on the Worst Forms of Child Labor. Available at: http://www.dol.gov/ilab/reports/child-labor/india.htm [Accessed 07.05.2023].

[12] The Code of Administrative Procedure of the Russian Federation No. 21-FZ dated 8 March 2015 (as amended on 29 December 2022). Available at: http://pravo.gov.ru [Accessed 09.03.2015]. (In Russ.).

By virtue of Part 3 Art. 285.1 of the CAP of the Russian Federation, the administrative statement of claim must be accompanied, among other things, by the medical documentation of the citizen in whose interests the administrative statement of claim is filed, and the opinion of the medical commission of the medical organization indicating the diagnosis, severity of the disease, description of the condition requiring saving the patient's life, as well as other materials confirming the need for medical intervention in order to save the patient's life. However, sometimes a medical institution is objectively unable to submit the specified documentation, since legal representatives refuse to undergo a medical examination of their wards. If the courts unquestioningly followed this requirement, the minors and the incapacitated would remain completely defenseless in the "power" of their legal representatives, and their right to life and health would be not enforced by the State.

Law enforcement practice includes cases when courts have taken into account the objective impossibility of submitting the required annexes to an administrative statement of claim and made a decision in such circumstances confirming the legality of medical intervention without the voluntary consent of legal representatives.[13] The cases were related to the need for medical examination of children whose parents have been diagnosed with HIV infection, but they evade from testing their children for HIV. Meanwhile, there is a real possibility of infection for minors, which creates a danger to their life and health. Prolonged absence of examination and preventive treatment can lead to death in the foreseeable future. In addition, without proper medical examination in a specialized organization, children are deprived of the right to social

[13] *See* The Decision of the Railway District Court of the city of Khabarovsk dated 18 September 2019 in case No. 2a-2971/2019. Available at: https://sudact.ru/regular/doc/KxBd8IlTrTo1/?regular-txt=&regular-case_doc=2%D0%B0+-+2971%2F2019&regular-lawchunkinfo=&regular-date_from=&regular-date_to=&regular-workflow_stage=&regular-area=&regular-court=&regular-judge=&_=1676286816611 [Accessed 13.02.2023]. (In Russ.); Decision of the Railway District Court of Khabarovsk dated 18.09.2019 in case No. 2a-2972/2019. Available at: https://sudact.ru/regular/doc/GoUzkVJmYO02/?page=2&regular-court=&regular-date_from=&regular-case_doc=2%D0%B0+-+2972%2F2019&regular-lawchunkinfo=&regular-workflow_stage=&regular-date_to=&regular-area=&regular-txt=&_=1676287039028&regular-judge= [Accessed 13.02.2023]. (In Russ.).

security in case of illness. The right to health protection and medical care in case of HIV infection cannot be fully ensured. It is noteworthy that in all cases the administrative claims of the medical institution were supported by the Prosecutor's Office.

This practice exposes the problem of insufficient protection of the rights of minors and the incapacitated to health protection and necessitates a law-making initiative. We consider it expedient to supplement Part 3 Art. 185.1 of the CAP of the Russian Federation with provisions by virtue of which it is allowed to accept an administrative statement of claim for consideration without patient's medical documents and the conclusion of the medical commission, if their submission by the administrative plaintiff is impossible due to the representative's refusal to subject a minor (or a person recognized as legally incompetent) to a medical examination.

III. High-Tech Medicine and Digitalization of Healthcare: Advantages and Threats

In modern society, the demand for a completely new quality of life and state of health is increasingly being formed. As the result, the market for high-tech medicine services is growing. High-tech medicine services include remote diagnostic methods, personalized medicine, "smart" medicines, electronic analogues of sensory organs, etc. New terms "digital medicine" and "digital healthcare" have appeared.

Over the past five years, new computer systems and information technologies have integrated into various spheres of social life incredibly fast. This process cannot be treated as accidental: it demonstrates a distinct independent vector that is supported and stimulated by the State. It is in the field of healthcare that the State Program "Healthcare Development" functions.[14] The State Program is implemented in a number of areas (subprograms). Their final formation should be completed

[14] Resolution of the Government of the Russian Federation No. 1640 dated 25 December 2017 (as amended on 16 December 2022) "On approval of the Governement Program of the Russian Federation "Healthcare Development." Art. 373. Available at: https://minzdrav.gov.ru/ministry/programms/health/info [Accessed 07.05.2034]. (In Russ.).

by 2025. These areas include: 1. the subprogram for the development and implementation of innovative methods of diagnosis, prevention and treatment; and 2. the subprogram that focuses on the development of information technologies. In particular, the Program envisages measures aimed at improving specialized, high-tech medical care, implementing control and supervisory functions in the field of health protection exercised within the framework of the Order of the Prosecutor General of Russia "On organization of prosecutorial supervision over the implementation of laws, observance of the rights and freedoms of the man and citizen,"[15] developing information technologies in healthcare. The solution of these tasks will contribute to the achievement of the state development goals of the Russian Federation by 2030 in accordance with the Strategy for the Development of Healthcare of the Russian Federation for the long-term period 2015–2030.

Digital medicine today is represented by several leading areas: personalization in healthcare (selection of medicines not for an abstract patient, but for a specific person); introduction of blockchain technology in medicine (distributed storage of information on various computers); preventive medicine (timely identification of determinants of the disease); introduction of artificial intelligence (diagnostic accuracy, responsible attitude to well-being, effectiveness of treatment). The implementation of these measures and development and introduction of high technologies and the process of informatization in the activities of the healthcare system allow the healthcare system to radically improve the standard of living for the population. The program of government-funded free healthcare for citizens in 2023 and for the planned period of 2024 and 2025 approved a detailed list of types of high-tech healthcare including treatment methods and sources of financial support for high-tech medical care.

[15] Order of the Prosecutor General's Office of Russia No. 195 dated 7 December 2007 (as amended 21 December 2022) "On organization of prosecutorial supervision over the implementation of laws, observance of the rights and freedoms of the man and citizen." Available at: https://epp.genproc.gov.ru/documents/3624886/3666564/prikaz-n-195.doc/2b885621-7acd-ff42-37cd-b5780340f2fd?t=1588909562795&download=true [Accessed 07.05.2023]. (In Russ.).

Speaking of high-tech healthcare, it should be noted that due to public-private cooperation, Russian residents have gained access to such types of high-tech methods of radiation treatment as proton therapy, the *GammaKnife* and *CyberKnife* systems. These types of medical care until 2020 were funded from regional budgets. Since 2020, the financing of this type of healthcare has become probable at the expense of the Obligatory Medical Insurance (OMI), while the funds of the regional budget have been redirected to the treatment of benign formations using these methods.

For comparison, in China, cardiovascular surgery including coronary artery bypass grafting, traumatology and orthopedics including joint replacement, oncology, ophthalmology, neurosurgery, obstetrics and gynecology, pediatrics remains the most popular types of high-tech medical care among residents of the country. A number of unique surgeries were performed in the regional high-tech centers of the Celestial Empire: kidney and liver transplants. 1.5 times more percutaneous coronary interventions per 1 million people are performed for coronary heart disease.

Since 2017, innovative solutions and products of Russian companies have been used in Serbia, including in the field of healthcare, which contributes to the development of mutual trade and investment. The healthcare system is governed by the Ministry of Health of the Republic of Serbia. At the end of 2021, Russia and Serbia agreed to build the Center for Nuclear Science and Technology (CNST). The CNST project in Serbia will be implemented consistently. First, a complex for the production of radiopharmaceuticals for the treatment of oncological diseases will be built.

In November 2022, an official representative office of the Skolkovo Foundation was opened in New Delhi (India). This event strengthens cooperation between the Russian and Indian technological community and simplifies the introduction of high-tech products to local markets. The main areas of work of the representative office include the support of transactions between Indian companies and startups and partners of Skolkovo in the field of research of innovative processes.

Resolution of the Government of the Russian Federation No. 56[16] dated 29 January 2019 approved the rules for the financial support of high-tech healthcare not included in the program of compulsory medical insurance provided to citizens of the Russian Federation by medical organizations of the private healthcare system.

In order to improve the quality and accessibility of healthcare for citizens in the Russian Federation (Beskaravainaya, 2022), the same conditions have been established for the participation of public and private healthcare organizations in the implementation of the program of government-funded free healthcare.

According to the Ministry of Health of the Russian Federation, in 2020 the number of non-governmental medical organizations providing services in the OMI system amounted to 3,392. Over the period from 2010 to 2020, their number has increased more than fivefold. Non-governmental medical organizations provide medical care within the framework of OMI territorial programs in all constituent entities of the Russian Federation, with the exception of the Chukotka Autonomous Okrug and the city of Baikonur.

In 2021 the Government of the Russian Federation approved a strategic direction in the field of digital transformation of healthcare. The grounds for the development of the strategic direction were the decrees of the President of the Russian Federation on national goals until 2024 and 2030[17] and the previously mentioned Strategy for the

[16] Decree of the Government of the Russian Federation No. 56 dated 29 January 2019 (as amended on 20 June 2022) "On approval of the Rules for financial support of high-tech healthcare not included in the basic program of compulsory medical insurance provided to citizens of the Russian Federation by medical organizations of the private healthcare system." Art. 524. Available at: https://base.garant.ru/72164770/ [Accessed 07.05.2023]. (In Russ.).

[17] Decree of the President of the Russian Federation No. 204 dated 7 May 2018 (as amended on 21 July 2020) "On national goals and strategic objectives of the development of the Russian Federation for the period up to 2024." Art. 2817. Available at: https://www.consultant.ru/document/cons_doc_LAW_297432/ [Accessed 07.05.2023]. (In Russ.); Decree of the President of the Russian Federation No. 474 dated 21 July 2020 "On national development goals of the Russian Federation for the period up to 2030." Art. 4884. Available at: https://base.garant.ru/74404210/ [Accessed 07.05.2023]. (In Russ.).

Development of Healthcare in the Russian Federation for the period up to 2025 (Kamensky, 2020).

The adoption of such strategic products was encouraged by a number of reasons. In particular, isolation during the spread of coronavirus infection prompted the need to solve administrative issues without leaving home, e.g., to make an appointment with a doctor, to obtain a medical referral or a prescription for medicines. Digital communications have opened up new opportunities for access to medical information and education.

An interesting approach was suggested by Prof. Kartskhiya claiming that "[t]oday, such a legal framework is being actively developed where digital medicine and telemedicine stand out as important strategic directions for the development of healthcare and medical technologies, along with biomechanics, preventive medicine, and medical genetics. This trend is gaining popularity in many developed countries, as the introduction of innovative technologies not only contributes to the development of preventive personalized medicine, but also facilitates managerial decision-making" (Kartskhiya, 2021).

It is necessary to agree with these conclusions, taking into account the fact that international instruments that have influenced national legislation are of great importance for the development of digital healthcare.

Thus, the Global Strategy on Digital Health 2020–2025 adopted by the World Health Organization (WHO) was based on resolutions of the United Nations General Assembly and the World Health Assembly.

The Global Strategy defines digital health as "the field of knowledge and practice associated with the development and use of digital technologies to improve health."

This definition of digital health extends the concept of e-health. Its content involves digital consumers with their intelligent connected devices, including artificial intelligence for new diagnostic and treatment solutions (artificial intelligence); cloud storage and data serving as the basis for predictive analytics (Big data); telemedicine and healthcare software, especially important during the pandemics ("My Health" on mos.ru, etc.); blocking technology used in order to ensure the security

and reliability of information during data processing (blockchain tech), etc.

The coronavirus pandemic has become a serious impetus for the accelerated transfer of domestic healthcare to digital rails. However, due to weak government regulation, the personal data of patients who applied for medical services through electronic systems in many cases ended up in the hands of unscrupulous individuals. "In the context of rapidly developing information and communication technologies and artificial intelligence, we see a lag in the development of technologies that ensure the protection of patients' personal data" (Zapisnaya, 2020).

In countries where the electronic document exchange between a state and an individual have been perfected, the problem of unauthorized data acquisition has practically been solved.

In the USA, the safety of personal data of citizens is in the jurisdiction of the government. Thus, in the event of a cyber-attack and theft of digital identity, the perpetrators will be promptly investigated and brought to justice.

In China, a medical cloud (a single repository of medical data) is constantly being formed, which allows the users to combine data, analyze and make managerial decisions. The law-maker has authorized collection, exchange and use of data and the cloud management. The corresponding responsibilities are outsourced to both public and private companies. Due to this practice, large amounts of data become available to researchers and developers of artificial intelligence, which contributes to the development of technologies.

Under Russian laws, the patient is not obliged to give consent to personal data processing, and an organization providing medical services is not entitled to requiring such consent from the patient.

The patient can write a statement prohibiting any transfer of personal data and data constituting healthcare data privacy in electronic form to third-parties. However, not all patients and not always do this, avoiding the persistence and sometimes threats on the part of healthcare institutions in refusing service, especially private healthcare institutions.

Today, in large private medical companies, on the patient's consent form for the processing and transfer of personal data, almost half

of the page is occupied by a list of affiliated medical, pharmacy and other commercial institutions that will be given access to the patient's personal data.

In recent years, decisions of the Constitutional Court of the Russian Federation have played an important role in judicial practice in the field of personal data.

A number of cases related to the obligation of a medical institution to provide medical documentation[18] were considered following Resolution of the Constitutional Court of the Russian Federation No. 1-P dated 13 January 2020."[19]

The Resolution of the Constitutional Court of the Russian Federation dated 13 July 2022 No. 31-P "On the case of checking the constitutionality of Para 11 and 12 of Part 1 Art. 79 of the Federal Law 'On Fundamentals of Public Health Protection in the Russian Federation' after the complaint of F."[20] is one more significant instrument used in resolving disputes related to the accounting of personal data and digitalization of the work of medical institutions. In the judicial act under consideration the Supreme Court pointed out the need to add information into the medical information system concerning recognition of forced hospitalization in a psychiatric hospital as illegal if the court finds it illegal.

Today, the question whether an electronic medical record is an official medical document remains open. In a number of constituent entities under their regional legislation, extracts or copies from an

[18] Decision of the Nagatinsky District Court of Moscow dated 21 April 2021 in case No. 2-2731/2021. Available at: mos-gorsud.ru/rs/nagatinskij/services/cases/civil/details/259476a0-7739-11eb-acd8-4f299f771e4d [Accessed 05.05.2023]. (In Russ.).

[19] Resolution of the Constitutional Court of the Russian Federation No. 1-P dated 13 January 2020 "On the case of checking the constitutionality of Parts 2 and 3 Art. 13, Para. 5 of Part 5 Art. 19 and Part 1 Art. 20 of the Federal Law 'On the Fundamentals of Public Health Protection in the Russian Federation' for the complaint brought by Mrs. R.D. Svechnikova." *Bulletin of the Constitutional Court of the Russian Federation,* 2020:1. (In Russ.).

[20] Resolution of the Constitutional Court of the Russian Federation No. 31-P dated 13 July 2022 "On the case of checking the constitutionality of Para 11 and 12 of Part 1 Art. 79 of the Federal Law 'On Fundamentals of Public Health Protection in the Russian Federation' for the complaint of F." *Rossiyskaya Gazeta,* 2022:160. (In Russ.).

electronic record are informative and unofficial. Other regions, on the contrary, recognize the information from the electronic record as official.

Time will tell how relations in this area will develop and whether different regions of the country will come to uniformity in this matter.

In the context of the development of digital healthcare, the interaction between a doctor and a patient is undergoing changes. The concept of "a connected patient" is being introduced and implemented — the provision of medical services using smart devices, as well as the concept of "remote doctor." In such cases, during the court proceedings, the court is obliged to make an opinion in respect of all medical workers involved in the treatment of the patient (Lopatina, 2019). At the same time, there is no legislative definition of the concept of "medical error." Lawyers use the definitions of "innocent infliction of harm" or "circumstance excluding criminal liability" to characterize the actions of a doctor that do not entail criminal liability.

In 2018, in order to achieve the most effective control over existing problems a unit was formed in the Investigative Committee to investigate crimes committed by medical professionals. Moreover, the Chairman of the Investigative Committee prohibited investigators to apply for forensic medical examinations to the institutions under the Ministry of Health. According to the new rules, forensic examinations are to be handled by the forensic expert center of the Investigative Committee of the Russian Federation. Thus, the conclusion of the forensic examination forms an exceptional element in the investigation of health care crimes (when other factors are absent) (Sazhneva, 2022).

What is the balance of interests of the doctor and the patient? What criteria must be met for their effective interaction? Where is the line between reasonable risk and unintentional harm?

By the balance of interests, we mean such a system of interaction between a doctor and a patient when the desired result coincides with the actual one for each of the parties.

First, in order to maintain the balance of the rights of the doctor and the patient, it is important to understand the doctor's place in society. In this regard, on the basis of government healthcare programs and the media, it is necessary to raise the social status of the doctor.

According to the Federal Law "On the Fundamentals of Public Health Protection in the Russian Federation," one of the principles of health protection is the priority of the patient's interests in the provision of healthcare. This principle is enshrined in few legal orders Thus, the Law of the Republic of Belarus "On Healthcare" does not contain the principle of balance of interests or priority of some interests over others.[21]

Despite the different approach to the consolidation of this principle in law, the balance of interests of the doctor and the patient is not considered as the most important direction of the healthcare system.

A significant imbalance of interests is proved by the fact that the patient ignores the doctor's appointment, refuses to purchase medicines, accordingly, treatment is not carried out, complete restoration of health does not take place and the actual result does not coincide with the desired one. In this regard, responsibility for actions or omissions should be established not only in relation to the doctor, but also in relation to the patient. However, the legislation of Russia and the Republic of Belarus focus on the duties of the doctor and forget about the duties of the patient.

The Law of the Republic of Belarus "On Healthcare" provides that the patient is obliged to take care of his own health, take timely measures to keep it. Any obligation implies responsibility for its non-fulfillment. The Russian law contains a similar rule. Is it possible to punish a patient who does not care about health? Of course not!

In this case, in order to maintain a balance of interests, it is necessary to motivate the patient, explain the negative consequences in case of non-fulfillment or improper fulfillment of the doctor's instructions. If a patient does not use his constitutional right (both in the legislation of Russia and the Republic of Belarus) to provide free medical care, then he has no motivation, and, therefore, medical services must be paid for.

However, it should also be noted that the patient and the doctor cannot be endowed with identical rights and responsibilities, since

[21] Law of the Republic of Belarus No. 2435-XII dated 18 June 1993 (as amended on 22 January 2021). National Legal Internet Portal of the Republic of Belarus. Available at: https://pravo.by/document/?guid=3871&p0=v19302435 [Accessed 14.02.2023]. (In Russ.).

they have directly opposite functions. Despite this, the principle of balance of interests must be observed on both sides, but not in rights and obligations, but in their implementation (for example, a doctor, according to accepted ethics, has no right to disclose confidential healthcare information, unlike a patient).

There is a communicative interest in understanding the rights of patients (Akca, Akpinar, and Habbani, 2015). To maintain a balance of interests, the doctor must have communication skills, because through proper communication it will be much easier to reach contact with the patient.

It is noteworthy that in the USA, due to the complications of the patient's health, doctors are not assigned prison terms. Compensation for physical damage is compensated from insurance funds. It is known that in America, the salary of doctors is much higher than the average salary. Thus, the income of an anesthesiologist for 2023 is $ 270,000, but the biggest part is aimed at paying for professional insurance.[22]

Like any field of activity, medicine is also imperfect and, unfortunately, is not always safe. Disputes often arise between patients and healthcare organizations concerning the quality of medical care provided. It is noteworthy that complaints about the quality of medical care are received only in case of deterioration of health or death. Russian legislation does not provide for the concept of "health complications" that are possible due to certain actions of the doctor and the characteristics of the body, and certain actions of the patient.

The Civil Codes of Russia[23] and the Republic of Belarus[24] do not contain any special rule regulating the contract for the provision of

[22] Wages in the United States in 2023. Available at: https://visasam.ru/emigration/canadausa/zarplata-v-ssha.html [Accessed 12.02.2023).

[23] The Civil Code of the Russian Federation (Part II) No. 14-FZ dated 26 January 1996 (as amended on 1 July 2021). Art. 410. Available at: https://www.consultant.ru/document/cons_doc_LAW_9027/ [Accessed 07.05.2023]. (In Russ.).

[24] Civil Code of the Republic of Belarus No. 218-Z dated 7 December 1998 (as amended on 6 January 2023). National Legal Internet Portal of the Republic of Belarus. Available at: https://pravo.by/document/?guid=3871&p0=hk9800218 [Accessed 12.02.2023]. (In Russ.).

healthcare. In turn, in the USA, a doctor and a patient enter into a contract. Consequently, the doctor can fully control the treatment.[25]

Insufficient legal regulation of the contract for the provision of medical services is compensated by law enforcement practice. The above example shows the consistent position of the Supreme Court of the Russian Federation in ensuring full protection of the rights of individuals in their relations with medical organizations. Of course, this approach will strengthen the order and respect for the patient in the area of medical care.

Thus, the Supreme Court of the Russian Federation ordered doctors to explain the course of treatment to patients and warn the patients about the possible consequences of the planned medical procedures.[26] The Supreme Court pointed out that the consumer rights law applies to the clients of medical institutions. Therefore, doctors must promptly provide clients with all reliable information about services so that the patient has the opportunity to make the right choice. At the same time, as the Supreme Court opined that this provision applies both to patients who pay for medical procedures and to patients who receive free treatment under a compulsory medical insurance.

This decision was made in the dispute between a resident of the city of Moscow, who planned to have dental implants placed in "Pirogov National Medical and Surgical Center" and the Pirogov Center. The parties made a contract for treatment with the subsequent dental implantation. The plaintiff paid money for implantation preparation and a dental surgeon consultation. In addition, after the surgery, the patient was advised to remove several teeth due to an infection that could prevent prosthetics. However, later doctors refused to restore the dentition referring to the chronic periodontitis that is a contraindication for the installation of dental implants.

[25] Patient Protection and Affordable Care Act dated 23 March 2010 (as amended on 8 September 2020) Available at: https://www.congress.gov/bill/111th-congress/house-bill/3590 [Accessed 07.05.2023].

[26] The Supreme Court obliged doctors to explain the course of treatment to patients. Available at: https://www.vsrf.ru/press_center/mass_media/27082/ [Accessed 01.06.2023]. (In Russ.).

The plaintiff considered that he was provided with inadequate medical care, since he was not warned that implantation was impossible without prior treatment of periodontitis. However, for some reason the medical center was preparing the plaintiff for the surgery and took money for their services. The hospital considered the client's claims ungrounded, indicating that all procedures were carried out properly and did not cause any harm to the plaintiff's health.

The Chertanovsky court of Moscow refused to satisfy the claim, arguing that the defendant's fault in causing harm to the plaintiff's health and in providing substandard medical services was not determined, and the Moscow City Court upheld the decision referring to the fact that the plaintiff was provided qualified medical services following his express consent.

However, the Supreme Court of the Russian Federation found that both instances significantly violated substantive and procedural law. Having examined all the files of the case and the results of examinations (the initial examination did not reveal violations, and the re-examination was rejected), the plaintiff saw in the refusal of re-examination the reason for the personal and official relationships of the experts who conducted the study and gave an opinion with the head of the department of maxillofacial surgery of "Pirogov National Medical and Surgical Center," which he substantiated providing documents proving the fact, but the courts that previously considered the case did not pay attention to the plaintiff's submission.

The Supreme Court of the Russian Federation opined that the violations of substantive and procedural law committed by the courts were significant, since they led to an incorrect resolution of the dispute, and they could be corrected only by overruling of all the decisions taken in the case. Thus, the Supreme Court referred the case for a new hearing to the court of first instance.

At the same time, ensuring a balance between the interests of the doctor and the patient incurs the need to counter the abuse of the rights of both parties. Doctors must also be protected.

The *opinions market* is quite common now, when any individual can go to the site, post their opinion and look through the opinions and evaluation of the work of a doctor. Such opinions can also be anonymous.

For this reason, the Supreme Court of the Russian Federation protected the doctors from negative opinions in the Internet. This was a consequence of the consideration of the case brought by T.V. Gladysheva against *MedReyting,* OOO, when she became aware that a profile with her data (first name, last name, place of work, occupation) was posted on the public website of the Internet resource where anonymous users left negative opinions about her work, which violated her right to privacy. T.V. Gladysheva requested the domain administrator of *MedReyting* to remove her account and profile from the Internet, including the doctor's personal data, as well as users' opinions, but *MedReyting* refused to settle the claim.

The Central District Court of Voronezh dismissed the claim brought by Gladysheva. The court's decision was left unchanged by the appeal ruling of the Judicial Board for Civil Cases of the Voronezh Regional Court.

However, the Supreme Court of the Russian Federation in its ruling overturned the appeal ruling of the Judicial Board for Civil Cases of the Voronezh Regional Court, referring the case for a new hearing to the court of appeal.

Moreover, when resolving the dispute concerning the balance of interests between privacy protection and freedom of speech, the court should have established whether the plaintiff had effective means to delete comments about her activities as a doctor in the profile created by the defendant, taking into account that the comments were partially anonymous, and it is difficult to determine the objectivity of the opinion expressed. T.V. Gladysheva was not able to respond to critical comments that were signed by real persons due to medical confidentiality.[27]

The introduction of artificial intelligence technologies in healthcare, on the one hand, contributes to the improvement of healthcare, and on the other hand, it is burdened with its shortcomings, including matters of balancing the interests of the patient and the doctor (a healthcare institution).

[27] Ruling of the Supreme Court of the Russian Federation No. 14-KG19-15 No. 2-2794/18 dated 12 November 2019. Available at: http://vsrf.ru/stor_pdf.php?id=1850664 [Accessed 01.06.2023] (In Russ.).

Researchers express different points of view for the near foreseeable future, while the majority adheres to the position that the doctor, as the specialist making the final decision, remains the sole ultimate beneficiary of responsibility for the outcome of decisions taken while providing medical services. A number of authors claim that 86 % of doctors use various forms of AI in their practice every day (Kaminsky, 2020).

Within the framework of this part of the study, the key attention is devoted not to the substantive element of the responsibility of doctors that can certainly be compensated both by the healthcare organization where the doctor works and by the manufacturer of equipment (including AI), if its shortcomings are identified.

As a general rule, doctors are held liable for negligence and the court, assessing the available evidence, resorts to an expert assessment of the situation (Ivanova, 2021).

In order to establish the points of influence of AI on the scope of the doctor's responsibility, we believe it is necessary to determine the answer to the question of what are the elements of this responsibility.

Thus, the primary element for the emergence of responsibility is the moment of the emergence of legal relations between the doctor and the patient, which is expressed in the provision of healthcare services with direct intervention in the body or without such intervention.

At this stage, it is already possible to predict that in the case of the introduction of medical consultation services carried out without a doctor-patient formula, that is, in the patient — AI format, the responsibility of the medical officer will be completely excluded and shifted to the right holders and developers of the AI system.

At the moment, there are a number of obstacles to the widespread practice of excluding a doctor from the process of providing medical care in the field of legal regulation and in the field of "obtaining additional data" (Forcier et al., 2019).

The second element of doctor's responsibility is a deviation from the standard of healthcare or from accepted clinical recommendations. In this element, variable situations may arise that can serve as a criterion for changing the legal characteristics of the act.

For example, a doctor who deviates from the generally accepted standard based on his experience and knowledge may not achieve a positive outcome of the treatment of the disease and at the same time doctor's actions may be evaluated by experts as the only correct and possible in a particular situation.

At the same time, a doctor who, due to his low qualifications, does not comply with generally accepted standards and requirements or is conscientiously mistaken in the initial symptoms of the patient, will be in a completely opposite position when his actions are being evaluated by an expert.

For the above situations, the AI algorithm can have both a positive and a negative impact on both the final decision made and the assessment of the nature of the doctor's responsibility.

In this case, much will depend on the integration of standards of medical care and clinical recommendations into the mechanism of AI. So, if such mechanisms are taken into account, the doctor from the latter situation will receive a more highly qualified mentor to make a final decision, which in the end can both improve his professional skills and completely exclude their further development. However, in the context of responsibility, its burden will remain entirely on the attending physician, as the subject of legal relations with the patient.

For the first situation under consideration, an AI algorithm configured to prioritize the application of the provisions of standards and clinical recommendations may interfere with making strong-willed decisions about non-standard methods of treatment, which will reduce the risks of liability for the doctor, but may negatively affect the result of treatment.

At the same time, an alternative AI that allows for the possibility of deviation from the standards established by law can add confidence to the doctor in the decision to apply a non-standard method of treatment and, as a result, can significantly reduce the number of medical errors committed and improve the overall quality of medicine in the world.

The third and probably the main element of the doctor's responsibility means causing harm to the life or health of the patient.

It is possible that AI algorithms can also lead to harm to life and health. At the same time, it should be noted that confirmation of a decision made by a doctor through an AI algorithm is more likely to meet positive confirmation from experts about the correctness of the decisions made, which to a certain extent can give psychological support to a medical officer in the exercise of his professional activity.

Currently, there is a discussion about giving AI legal personality (Stepanov, 2021, p. 15). In our opinion, the complete exclusion of the doctor's responsibility in healthcare and its transition to AI will introduce significant problems into the mechanism of training and improvement of the medical community as a whole, since decision-making algorithms on the part of AI will in many cases not be explicable, which will significantly complicate the science advancement and, as a consequence, the training of new medical personnel capable of creating together with new decision support systems by technical specialists.

IV. The Health of the Nation as a Validity Criterion for Deviation from the Common System of Delimitation of Law-Making Competence between the Russian Federation and Constituent Entities

Finally, we should focus on the problem of advanced legal regulation of the constituent entities of the Russian Federation in the field of healthcare.

The priority of human life and health determines the vectors of transformation of legislative work on the subjects of joint jurisdiction of the Russian Federation and its constituent entities, including the order of adoption of laws in the field of healthcare and other closely related areas of ensuring human well-being. Vivid evidence of this was the period of the Covid-19 pandemic, which acquired catastrophic development and consequences on a planetary scale, forcing the states of the world and Russia, including unprecedented measures, not only to support the population in every way, but also to restrict the right of free movement within the country and in its individual territories. In Russia, such restrictions were imposed not so much by federal laws

under Part 3 Art. 55 of the Constitution of the Russian Federation[28] as by-laws of the regional level, since the federal legislator could not keep up with the speed of the spread of a life-threatening disease with the adoption of decisions relevant to an extraordinary situation.

Naturally, the initiative of the constituent entities of the Russian Federation to establish restrictions on constitutional human rights caused a wave of indignation on the part of individual citizens and human rights organizations, which eventually became the subject of a legal assessment by the Constitutional Court of the Russian Federation that, taking into account the extraordinary situation, recognized the implementation of more general federal legal guidelines contained in the operational temporary regulation of the constituent entities of the Russian Federation in accordance with the Constitution in a number of federal laws.[29] In its resolution, the constitutional control body has formed a number of significant positions, among them we would like to note the following:

1) each of the levels of state power has a constitutional duty to protect the life and health of citizens;

2) the interests of protecting the life and health of citizens under certain circumstances may prevail over the value of preserving the usual legal regime for the exercise of other rights and freedoms;

[28] The Constitution of the Russian Federation (adopted by popular vote on 12 December 1993 with amendments approved during the all-Russian vote on 1 July 2020). Available at: http://www.constitution.ru/en/10003000-01.htm [Accessed 06.10.2022]. (In Russ.).

[29] Federal Law No. 68-FZ dated 21 December 1994 (as amended on 8 December 2020) "On Protection of the Population and Territories from Natural and Man-made Emergencies." Available at: https://www.consultant.ru/document/cons_doc_LAW_5295/ [Accessed 07.05.2023]. (In Russ.); Federal Law No. 2-FZ dated 30 March 1999 (as amended on 13 July 2020) "On Sanitary and Epidemiological Welfare of the Population." Available at: https://www.consultant.ru/document/cons_doc_LAW_22481/ [Accessed 07.05.2023]. (In Russ.); Federal Law No. 184-FZ dated 6 October 1999 in force at that time (as amended on 19.06.2004) "On the general principles of the organization of legislative (representative) and executive bodies of State power of constituent entities of the Russian Federation." Art. 5005. Available at: https://www.consultant.ru/document/cons_doc_LAW_14058/ [Accessed 07.05.2023]. (In Russ.).

3) when choosing legal means aimed at protecting the life and health of citizens in order to prevent and eliminate emergency situations related to epidemic diseases, the legislator is obliged to provide effective guarantees for the observance of other rights and freedoms of citizens, adequate to the goals of preserving the life of citizens and their health;

4) it is permissible to adopt legal acts that do not exclude the possibility of restricting human rights and freedoms, including within the framework of advanced legal regulation at the regional level, but only to the extent that this corresponds to the goals, while complying with the requirements of reliability and proportionality;

5) the lack of legal regulation adequate in its content and the measures envisaged for an emergency situation that really and unconditionally threatens the life and health of citizens cannot be an excuse for the inaction of public authorities to prevent and reduce the occurrence of deaths and serious illnesses. If interpreted differently, inaction would mean the removal of the State from fulfilling its most important constitutional duty to recognize, observe and protect human and civil rights and freedoms, and, in fact, would lead to its ignoring due to a purely formal interpretation of the constitutional principle of the rule of law.[30]

In our opinion, the above positions of the Constitutional Court of the Russian Federation have the significance of principles for law-making activities on issues of joint jurisdiction of the Russian Federation and its constituent entities in terms of the advanced legal regulation of the latter, not only in the conditions of an extraordinary situation.

As you know, the Constitutional Court of the Russian Federation has previously given explanations about the operational (advanced) legal regulation of the constituent entities of the Russian Federation on issues of joint jurisdiction and pointed out that such regulation cannot be regarded as a contradiction to the provisions of the Constitution of the Russian Federation. At the same time, the Court pointed out that the legislator of the constituent entity carrying out concretizing legal regulation, should avoid intrusion into the sphere of federal jurisdic-

[30] Resolution of the Constitutional Court of the Russian Federation No. 49-P dated 25 December 2020. Available at: https://www.consultant.ru/document/cons_doc_LAW_372430/ [Accessed 07.05.2023]. (In Russ.).

tion, but has the right to independently solve law-making tasks on issues that have not received meaningful expression in the federal law, without departing from the constitutional requirements for non-contradiction of laws and other regulatory legal acts of the constituent entity of the Russian Federation to federal laws and compliance with human and civil rights and freedoms.[31] The above position of the Constitutional Court of the Russian Federation, formed in conditions not complicated by an unprecedented situation, prescribes "to avoid intrusion into the sphere of federal jurisdiction." Now, the position of the Constitutional Court has been qualitatively transformed taking into account possible challenges and threats to the health of the nation and fully reflects the status of a state governed by the rule of law, where a person, his rights and freedoms have the highest value.

V. Conclusion

As a result of the work done, the study of various sources of information, the analysis of scientific literature devoted to the issues of ensuring the health of the nation as a determinant of innovations in law enforcement and judicial activities, the following results can be summed up.

High-tech medicine, in one way or another, contributes to the risk of medical errors when using breakthrough technologies. In this regard, the prosecutor has to solve the following tasks to ensure the rule of law in the field of healthcare as: elimination of violations of human rights and citizens' right to receive high-quality medical care; taking the full range of measures available to the prosecutor to prevent such violations; proactive nature of prosecutorial supervision in this area; alternate control over the execution of the introduction of response acts; holistic work to counteract offenses in the field of healthcare; tightening of prosecutor's supervision over the activities of state authorities of the

[31] Resolutions of the Constitutional Court of the Russian Federation No. 5-P dated 21 March 1997, No. 12-P dated 9 July 2002; No. 7-P dated 14 April 2008, No. 2-P dated 18 January 1996, No. 1-P dated 9 January 1998, No. 13-P dated 21 December 2005, No. 30-P dated 24 December 2013, No. 30-P dated 1 December 2015, No. 10-P dated 28 March 2017. Available at: LRS "ConsultantPlus." (In Russ.).

constituent entities of the Russian Federation, local self-government bodies, state control bodies in the field of protecting citizens' rights to health care. Solution of these tasks will encourage achieving a significant preventive effect.

Prosecutors should be guided by the Order of the Prosecutor General of Russia No. 195 dated 7 December 2007 that focuses on the protection of the rights to health protection and medical care and social security enshrined in the Constitution of the Russian Federation. Based on this, prosecutors are to apply measures implemented in order to eliminate the identified violations (these measures should be aimed at observing human and civil rights when providing them with medical care, increasing its availability and quality, strengthening the material and technical foundation of medical institutions, implementing the guarantees provided for medical staff).

The study of the issue of ensuring the health of the nation in the field of the development of artificial intelligence in medicine as a tool to reduce the risk of liability for error suggests that if the existing system of holding doctors accountable is used as a basis, then artificial intelligence, while preserving the doctor as an element of legal relations, is not a panacea for possible risks in the provision of medical care. At the same time, if there is a proper level of training of medical personnel and the development of a significant amount of practice in providing medical care using artificial intelligence, we can talk about a decrease in the frequency of cases of doctors being held accountable as a percentage of the indicators of different years.

Particular attention should be paid to the issue of responsibility of users of artificial intelligence at the stage of its development for the result of the performed medical service. It is also interesting to think about putting before artificial intelligence, in the process of its training, the question of the possible risks of the doctor's responsibility, taking into account the elaboration of information about deviation from the standards of healthcare and clinical recommendations.

Modernization of the structure of digital medicine development poses a fundamental ethical dilemma for the state: to preserve the right of healthcare institutions to unlimited data ownership or to change legislation point-by-point, for example, allowing the processing of

depersonalized data without requesting the consent of the patient. Such a statement has both its pros and cons. We invite all interested parties to further discussion on the issue under consideration.

Particular attention is paid to the issue of maintaining the balance of interests of the doctor and the patient in the law enforcement context**.** The main thing that the legislator needs to do is to designate the place of the doctor in society. In this regard, on the basis of state healthcare programs and the media, it is necessary to raise the social status of the doctor. Secondly, responsibility for actions or omissions should be established not only in relation to the doctor, but also in relation to the patient.

Given that the activities of doctors are constantly accompanied by risks, in this regard, it is necessary to amend the legislation to include the concept of "health complication," the occurrence of which is possible both through the fault of the doctor and the fault of the patient, as a result of improper fulfillment of doctor's prescriptions or in connection with the characteristics of the body. The task of the legislator is to regulate the issues of maintaining a balance between protecting the interests of the patient and additional guarantees against unjustified accusations of medical workers.

The assessment of the state of legal regulation, expressed in the positions of the courts, also serves as a guideline for legislative work in the field of ensuring real protection and safeguards for the right to life and health.

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Research Article

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Disciplinary Measures Consequent on the Judges' Misuse of Social Media in Jordanian and French Legislation: A Difficult Balance between Freedom of Expression and Restrictions on Judicial Ethics

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Abstract: This article deals with the disciplinary measure's consequent on judges' misuse of social media in Jordan and France. In fact, the research aims at approaching the disciplinary measures consequent on the judges' misusing the social media and stating at the cases that constitute a breach against the judicial job duties for which the issue of the study is in the extent of allowance of granting the judges the freedom to use social media and the extent to which judges publish their professional achievements, disclose their job information, comment on public opinion cases published on social media and participate in analysis and discussion. Yet, this study adopted the applied methodology for the variety of the legislations that have been different in dealing with sections and topics falling under this subject. In fact, the study concluded with several findings and recommendations, the most important of which is the necessity of subjecting judges in Jordan to adequate training on ethical principles to exercise basic freedoms, both in relation to their profession and in activities outside the scope of the profession while that this training shall include, in particular, practical guidance on the use of social media and the need to involve judges in Jordan when setting legislation and ethical standards related to the exercise of fundamental freedoms and political rights within the framework of an open and

transparent process, taking into consideration the existing international standards related to the exercise of fundamental freedoms and the jurisprudence of courts as well as the regional human rights mechanisms.

Keywords: judges; social media; disciplinary measures; fundamental freedoms; judicial conduct

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Contents

I. Introduction

Freedom of expression is a sensitive issue for the judicial authority. Actually, inappropriate statements can easily tarnish the image of the independence of the judicial authority in the eyes of the public. Therefore, it is important for judges to be extremely careful and exercise restraint in their relationship with the media and when they use social media. Hence, the question arises concerning the extent to which judges are entitled to enjoy freedom of expression, belief, affiliation and assembly, just like other citizens.

In fact, and as a general rule, members of the judicial authority have the right to freedom of expression like other civilians, but only on condition that they always act competently, in a manner that preserves the prestige of their office, a commitment to impartiality and integrity as well as the independence of the judicial authority in the exercise of these rights.[1]

Hence, dealing with social media requires setting controls for judges' use of these means by providing practical guidance to achieve a fair balance between the basic rights of judges and the legitimate

[1] United Nations Human Rights. (2018). Social media: A challenging new platform for judges around the world: The main factors aimed at ensuring the independence of the judiciary: the first topic: Judicial independence: United Nations Office on Drugs and Crime, UNODC. Available at: https://www.unodc.org/dohadeclaration/en/news/2018/11/social-media--a-challenging-new-platform-for-judges-around-the-world.html [Accessed 03.08.2022].

interest of the state by ensuring the impartiality and independence of the judicial authority in addition to providing a practical means for judges to help them make their own decisions on how to exercise basic freedoms, whether online or offline, in a manner consistent with the prestige of the profession they practice and the independence as well as impartiality of the judicial position (Nushi and Al-Rubei, 2017, p. 41; Ben Azza, 2015, p. 12).

The importance of the study lies in the fact that it deals with the legal implications of judges' misuse of social media and the media. In fact, this study is one of the modern and important topics that have a significant impact on practical reality for which the researcher will pay attention to all aspects of the subject, whether theoretical or practical, and address the deficiency in the Jordanian Constitution, the texts of the Jordanian Judicial Independence Law and its amendments, the Code of Judicial Conduct in Jordan and the Jordanian Judicial Inspection Regulation.

This study aims to identify the legal consequences of judges' misuse of social media and the media in addition to showing cases that constitute a breach of the duties of the judicial function and a prejudice to the impartiality and independence of the judiciary as well as to indicate the extent of the judicial inspection body's control over the social networking sites of actual and fictitious judges and to highlight the responsibility disciplinary consequences of judges' misuse of social media and the media.

Hence, through this study we will try to answer the questions that are represented by two main issues. What are the cases that constitute a breach of the duties of the judicial function and prejudice the impartiality and independence of the judiciary? What is the disciplinary responsibility for judges' misuse of social media and media sites?

Yet, several sub-questions emerge from these main issues, the most important of which are: is it permissible for a judge to disclose his/her job information on social media? Does the judge have to obtain the approval of the Judicial Council before establishing an account on social media? Is it permissible for judges to use social networking sites when exercising their judicial functions? Is it permissible for a judge

to comment on public opinion cases published on social media and to participate in analysis and discussion?

Accordingly, the comparative and the analytical approach will be adopted in this research to analyze all provisions of legislation related to the subject of this research in order to identify its contents, implications, and objectives, then criticize and comment on it, and highlight the differences between those provisions, and knowing the strengths and weaknesses of these different trends, and the extent of which they are considered, and highlighting the critical aspect of the researcher, where this research necessitated the use of several research methods due to its complex nature among the texts of the law, the viewpoints, the jurisprudential trends (Malkawi, 2018, p. 13; Al-Billeh, 2022a, p. 489).

II. Cases that Constitute Misuse of Social Media in Jordanian Legislation

The behavior of judges on social media platforms is visible to the public and any comment or statement published by the judge should renew people's confidence in the judicial authority and not conflict with the prestige of his position or with the independence and impartiality of this authority for which judges should ensure that their expression does not affect their opinions or their personal beliefs negatively on their official duties and not to raise doubts about their impartiality and duties that require them to show fidelity and responsibility towards their office (Gibson, 2016, p. 3). Further, judges must always respect and honor the judicial office when expressing their views and opinions on the Internet as well as to strive to maintain and enhance confidence in the judicial system (Mahmoud and Chiha, 2020, pp. 110–111). Yet, that they shall avoid engaging in any electronic activity that might undermine the public's confidence in the judiciary or raise doubts about its independence and impartiality (Fisher, 2019, p. 9).

Codes of professional conduct developed by professional associations have also contributed to the development of detailed standards for self-regulation that help judges make their own decisions about ethical choices in their professional and personal lives. However, there are few codes of ethical conduct that address issues related to the use of social

media. In fact, the lack of appropriate guidance has led to an increase in the number of "unintended" violations of the standards of professional conduct for judges, and at the national level, there is an increasing number of professional associations working to develop guidelines and provide training opportunities for their advocates on issues related to the use of social media (Mahmoud and Chiha, 2020, pp. 110–111).

Actually, only a few countries have established specific legislation or ethical standards to regulate the conduct of judges on social media platforms and media, and in some countries, professional associations of judges have implemented a number of activities to raise awareness of the risks associated with exercising their right to freedom of expression on the Internet, particularly on social media while other countries are updating their legal codes and establishing ethics bodies to clarify the issue of members of the judiciary's participation in social media (Al-Banna, 2013, pp. 16–17; Al-Billeh, 2022b, p. 120).

II.1. The Judge's Non-Observance with All the Provisions of the Code when Dealing with Social Media

When dealing with social media, the judge must take into account all the provisions stipulated in the Code of Judicial Conduct, 2021, so that the judge must observe all provisions of the Code when dealing with social media. Among these provisions, the judge must take into account when expressing his/her actions or behavior by any means, including social media, without affecting the sanctity of his/her message (Ben Azza, 2015, pp. 12–13).

In fact, we note here that Art. 10/1 of the Code of Judicial Conduct described above has obligated judges to observe all provisions of the Code of Judicial Conduct when expressing their behavior and acts in one of the social media to the effect that any publications published through those means do not contradict with the prestige and independence of the judiciary, so the criterion is an objective and not a personal criterion which assessment is attributed to the Judicial Council as to whether those publications that were published on social media are incompatible or inconsistent with the prestige and independence of the judiciary.

II.2. The Judge's Announcement of His/Her Capacity on Social Media Platforms

The judge must not announce his/her capacity on social media platforms, as Art. 10/2 of the Code of Judicial Conduct for the year 2021 states, "The judge must not announce his/her capacity on social media platforms."

In fact, one of the manifestations of the judges' commitment to preserve and maintain the prestige of the judiciary when using social media is that they do not disclose their judicial function through these means, except in appropriate places while not exploiting that function (Al-Hilali, 2018, p. 113).

Therefore, it is noted that when the judge creates an account on social media, and when reaches the job selection box, he/she must leave it blank and not indicate that he/she is working as a judge while the importance of that ban appears so that judges are not exploited when revealing their job through social media.

II.3 The Judge Publishes His/Her Rulings on Social Media

Judges must not publish or comment on rulings issued by them or others in any medium, including social media (Cooper, 2017, p. 523), and that the legal wisdom of this obligation is not to disclose the confidentiality of deliberations and to respect the rules for publishing and commenting on rulings for which Art. 10/3 of the Code of Judicial Conduct of 2021 states, "The judge shall refrain from publishing the rulings issued by him/her or others or commenting on them on social media."

In fact, part of the jurisprudence sees that publishing trials is a branch of publicity as long as the law does not prohibit publication and allows newspapers to publish the details of the pleadings that take place in cases as well as the pronunciation of the judgments issued in them as the purpose of publicity is to monitor the work of the courts, enhance confidence in the judiciary and urge judges to take great care in their judgments (Abdel Qader, 2012, p. 22), except that if the session is

confidential, then the trial procedures may not be published except for the judgment, so the judge may disclose and comment on confidential information in the case entertained before him/her or other fellow judges through social media which, in that case, constitutes a breach of the duties of the judicial office and a violation of the impartiality and independence of the judiciary (Somers, 2019, p. 16).

Actually, and in this case, it becomes clear that the judges must not publish any rulings issued by them through social media that are visible to the public, so that this case includes not only the provisions but also the preparatory decisions and the draft rulings because this reveals confidential information in addition to that this constitutes a violation of the privacy of the parties to the case which constitutes a violation of the impartiality and independence of the judiciary.

II.4. The Judge Expressing an Opinion or Exchanging Any Information through Social Media Sites

The judge shall not express an opinion or exchange any information through social media sites that would prejudice his/her impartiality, integrity, courteousness, decency and independence of the judiciary, whether he/she uses his/her real name or his/her capacity as a judge or otherwise under a nickname (Kurita, 2017, p. 189), as Art. 10/4 of the Code of Judicial Conduct provides, "A judge must refrain from expressing an opinion or exchanging any information on social media that would prejudice his/her impartiality, integrity, courteousness, decency and the independence of the judiciary, whether he/she uses his/her real name, his/her capacity as a judge, or under a nickname."

Yet, it should be noted that the technical and technological development of social media has led to the emergence of fake accounts that some judges intend to create on social media pages for which accounts belonging to a number of judges, but with other names, can be noted, either revealing a strictness in dealing with them and placing them under supervision and judicial inspection, or their desire to stay out of the spotlight and follow-up, with the exception of a few who use their real name and publish their pictures which phenomenon places

the judicial inspection body in front of the responsibility of studying fictitious cases, bearing in mind that the judge has the right to use social media, whether to interact with friends, follow the news of the time and keep up with people's concerns, or even to investigate information with limited controls that can be placed on him/her, but the Judicial Council should be aware at the same time, of the dangers of creating accounts for judges with fake names, which opens the way for piracy or fraud in a way that harms the judiciary and its standing as well as the judge himself/herself (Abdel Qader, 2012, p. 21).

However, the administration of Facebook, Instagram and Twitter worked to launch a blue authentication badge that appears next to the names of the real account holders of important and influential people, and this service aims to enable users to know the fake accounts from the real ones, and whether the account is authenticated by them for which the badge appears next to the name on the account profile and next to the account name in the search results which are always of the same color and are placed in the same place regardless of the theme or profile color customizations for which accounts that do not have the logo next to the name and that are displayed elsewhere, e.g., the profile picture, the back picture or the profile itself are considered as the unverified accounts (Al-Hilali, 2018, p. 106; Al-Billeh, 2022c, p. 11).

Therefore, we note that the issue of fake social media accounts is an important issue, as some judges may create an account under a nickname and publish through matters this account that affect the reputation and independence of the judiciary. Therefore, the judicial inspection body at the judicial authority must be aware of these accounts and monitor them, which is difficult and complicated but not impossible as some social media accounts, when created, ask for personal information about the person, such as a phone number and a personal email for which it is easy for the judicial inspection body to reveal them as information belonging to a judge, but the difficulty appears when using personal information belonging to other people with their consent.

II.5. Lack of Caution by the Judge in His/Her Words and Style when Using Social Media

Judges should be careful in their words and style when using social media and the impact of their participation through these means on the prestige of the judiciary as well as the observance of professionalism and dignity in publishing, commenting, posting the status, pictures or other matters (Browning, 2014, p. 490), as Art. 10/5 of the Code of Judiciary Conduct in Jordan for the year 2021 states, "The judge must be careful in his/her words and style when using social media and should evaluate the impact of his/her participation through these means on the prestige of the judiciary before doing them in addition to being professional and solemn in publishing, commenting or posting the status, photos or other things."

Therefore, the judge must be careful when using social media not to harm his/her reputation or the prestige and reputation of the judiciary while his/her behavior when using social media should be above suspicion that he/she is respected in the eyes of citizens (Katrina, 2019, p. 796).

Hence, the judge's lack of caution in his/her expressions and style when using social media can be considered a violation by the judge when using his/her words and his/her way of expressing his/her opinion (Al-Tamimi, 2020, pp. 10–11), so if the judge wants to express his/her opinion through social media, then his/her posts through these means should not affect the prestige of the judiciary, professionalism and dignity by publishing, commenting or posting the status, photos and videos.

II.6. The Judge Discusses the Merits of a Case Entertained before Him/Her through Social Media

Judges must not discuss the merits of a case entertained before them and to investigate its parties and witnesses through social media which affects their judgment (Singh, 2016, p. 154), as Art. 10/6 of the Code of Judicial Conduct in Jordan for the year 2021 provides, "The judge must refrain from discussing the merits of a case entertained before him/

her in addition to the investigation of its parties and witnesses through social media to avoid affecting his/her judgment."

In fact, this prohibition is due to the fact that the judge must demonstrate high standards of judicial behavior in order to enhance citizens' confidence in the judicial system, which is a basis for maintaining the independence of the judiciary for which and the judge's behavior through social media platforms must be above suspicion in the eyes of citizens (El Moumni, 2019, p. 27).

Therefore, it must be noted that the judge's research on the merits of a case entertained before him/her and the investigation of its parties and witnesses through social media, which affects his/her judgment constitutes a violation of the independence of the judiciary and a prejudice to the prestige of the judicial system as the judge's research into the merits of a case entertained before him/her encroaches his/her impartiality other than losing the confidence of the people (Al-Bayati, 2015, pp. 42–43). Further, this is also considered a violation of the legal methods that the judge must follow in serving witnesses and the parties to the case by virtue of written service process issued by a competent authority in the judicial system.

II.7. The Judge does not Write Off Any Contents in His/Her Personal Account

Judges must delete any contents available in their personal account prior to their appointment to the judiciary that would affect their independence and impartiality or cause the confidence of citizens to be lost, as Art. 10/7 of the Code of Judicial Conduct in Jordan for the year 2021 provides, "The judge must write off any contents available in his/her personal account being precedent to his/her appointment to the judiciary that could affect his/her independence and impartiality or his/her loss of citizens' trust in a way that that it will not be restored for sure."

Therefore, the judge must review the policies of the social media platforms he/she uses, their systems and the security as well as privacy settings approved by that platform, periodically review them and exercise caution in order to ensure and maintain personal, professional

and institutional integrity (Zaghdoudi, 2019, p. 31). In addition, it is recommended that the judge not make any comment or engage in any conduct on social media that may be embarrassing or inappropriate, that the judge be aware of the risks arising from sharing personal information on social media and be aware of the privacy as well as security risks arising from disclosing their location or any similar information directly or indirectly through posts on social media.[2]

Therefore, the judge appointed in the judiciary should review the settings of the judge's account by deleting any contents in his/her personal account prior to his/her appointment in the judiciary that would affect his/her independence and impartiality or cause the confidence of citizens to be lost or otherwise make those contents private so that no one can view the same.

II.8. The Judge Responds to the Abuse He/She is Exposed to on Social Media

Judges must not respond to the abuse he/she is exposed to through social media for which they must refrain from responding to the same while they must report to their president to take the necessary measures, as Art. 10/8 of the Code of Judicial Conduct in Jordan for the year 2021 provides, "If the judge is offended through social media, then he/she must refrain from responding to the same while he/she must resort to his/her superior to take the necessary measures."

Therefore, if the judge is insulted or abused through social media, then he/she must seek advice from his/her superior to take the necessary measures while he/she should not respond directly to those insults and abuses (Al-Dala'in, 2019, p. 39).

Accordingly, it is not permissible for a judge who has been subjected to abuse through social media to respond, but rather he/she must resort to his/her superior. Hence, and in the event that he/she is a magistrate's judge or a first instance judge, then he/she must report to the president of the court while if he/she is an appeal judge, then he/she must report

[2] United Nations Human Rights, (2020). Non-binding Guidelines for Judges Use of Social Media: Global Judicial Integrity Network, Doha. Available at: https://www.unodc.org/ji/ar/knowledge-products/social-media-use.html [Accessed 03.08.2022].

to the president of the court of appeal and if he/she is a cassation judge, then he/she must report to the president of the Judicial Council and present the subject of the offense to him/her, so that the president takes the necessary measures and addresses the official authorities to bring a case against the person and to transfer him/her to the competent courts.

II.9. The Judge Publishes Topics that Demonstrate His/Her Religious and Social Tendencies through Social Media

Judges are committed not to publish topics that demonstrate their religious and social tendencies or their support for certain parties on social media whereby this does not affect the appearance of his/her impartiality and harm the integrity of the judiciary as well as the confidence in the judicial authority (McPeak, 2019, pp. 211–212), as Art. 10/9 of the Code of Judicial Conduct in Jordan for the year 2021 provides, "The judge must refrain from publishing topics that demonstrate his/her religious and social tendencies or his support for certain parties on social media whereby this does not affect the appearance of his/her impartiality and harm the integrity of the judiciary as well as the confidence in the judicial authority."

In explanation of this, if the judge publishes topics that demonstrate his/her religious and social tendencies or his/her support of certain parties through social media, then he/she loses the confidence of citizens placed in him/her in addition to that this may violate the principle of impartiality, which may expose him/her in the future to a response by the parties to the litigation or the obligatory stepping aside or even the optional stepping aside if he/she feels embarrassed which will disturb the functioning of the judicial system.

II.10. The Judge's Use of Social Media to Promote Financial Interests

Judges should not use social networking sites to promote the financial interests of himself/herself or others, either directly or indirectly, as Art. 10/10 of the Code of Judicial Conduct in Jordan for

the year 2021 states, "A judge is prohibited from using websites of social media to promote the financial interests of him/her or others, whether directly or indirectly."

Therefore, judges should ensure not to use their social media accounts, either directly or indirectly, to advance their own or others' financial and business interests (Ezzat, 2012, p. 23).

Hence, it is noted that the judge's exploitation of social media in order to benefit himself/herself or others financially, whether directly or indirectly, constitutes an explicit violation of the principle of impartiality and that of independence of the judiciary. In addition, that these actions are inconsistent with the obligations and duties placed on the judge not to participate in any business that generates other income for him/her.

II.11. Making Statements through Various Visual, Audio or Written Media or Websites

As a general principle, judges should not immerse themselves in public contentious issues, but there are limited instances in which they can express their views and opinions on politically sensitive matters (Schmidt, 2019, p. 36), for example when they participate in public debates on legislation and policies that could affect the judges or when there is a threat to democracy and the rule of law when it is the duty of judges to speak out to defend the constitutional order and restore democracy (Al-Daqqaq, 1976, pp. 17–18). Also, judges must exercise caution in their relationship with the press and to always avoid commenting on the cases they are entertaining and making any unjustified comments would raise doubts about their impartiality, decency and fitness in sharing any personal information or photos on social media for which judges should always avoid making partisan political comments and never publish anything that might conflict with the prestige of their office or otherwise effect on the judiciary (Boothe-Perry, 2014, p. 73).

Yet, Art. 11 of the Code of Judicial Conduct in Jordan for the year 2021 states, "The principle is that "a judge must observe the sanctity of his/her message when expressing his/her opinions through the media"

for which a judge is prohibited from making statements, information and opinions through various visual or audio media, written documents or websites, except with the prior approval of the President of the Judicial Council."

Therefore, it turns out that if the judge wants to appear through the media, then he/she must obtain the written approval from the President of the Judicial Council, given that the media are visible means for everyone at the national and global level, and that the judge must be careful not to comment on cases being considered or making any unjustified comments that would raise doubts about his/her impartiality in addition to exercising caution in sharing any personal information or photos on social media.

III. The Freedom of Judges to Use Social Media with the Duty of Reservation in French Legislation

International treaties signed and ratified by France and French legislation set special procedures for dealing with social media and the media. Hence, Art. 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 provides under "Freedom of expression" that: 1 — Everyone has the right to freedom of expression and that this right includes freedom of opinion and freedom to receive or impart information or ideas without interference from public authorities without regard to limitations but this article does not prevent states from subjecting broadcasting, cinema or television companies to the licensing system. 2 — The exercise of these freedoms and the duties and responsibilities they include may be subject to certain transactions, conditions, restrictions or penalties prescribed by law and which are necessary measures in a democratic society for the purposes of the national security, territorial integrity, public safety or the protection of order and the prevention of crime or for the protection of health or morals, to protect the reputation or rights of others, to prevent disclosure of confidential information or to ensure the authority and impartiality of the judiciary."

Further, Art. 11 of the Charter of Fundamental Rights of the European Union, 2016, and under "Freedom of Expression and Informa-

tion" states that: "1 — Everyone has the right to freedom of expression, which right includes freedom to hold opinions and to receive and impart information and ideas without interference from public authority and regardless of limitations. 2 — The freedom and the pluralism of the media should be respected."

Hence, based on the foregoing, the French legislator has developed a judicial code of conduct for the ordinary judiciary and a code of judicial conduct for the administrative judiciary. As for the code of judicial conduct of the ordinary judiciary, Art. 15-F of the Compendium of the ethical obligations of magistrates for the year 2010 and its amendments provides, "The judge's expression of his/her views in his/her official capacity, regardless of the media that is open to the public, requires the utmost precaution in order not to prejudice the reputation and credibility of the judicial institution. Yet, the same applies to judges publishing their personal professional memoirs."

In fact, and by referring to the rulings of the French civil judiciary, and in a recent ruling of the French Court of Cassation-Civil Chamber II No. 1 dated 5 January 2017, regarding the acceptance of friendships on social networks (Facebook), then it ruled that "At a time when its sovereign authorities are evaluating the extent of the validity of the alleged grounds for the appeal, the Court of Appeal held that the term "friend" is used to refer to persons who agree to be in contact with social networks and does not refer to friendships in the traditional sense of the word and that the existence of connections between these different people through such networks is not sufficient to describe a particular bias, then the social media is just a means of specific communication between people who share the same interests, and in this case, the same profession" for which that the petition to dismiss is unfounded."[3]

Also, the French Supreme Council of the Judiciary, in its capacity as a disciplinary council for judges, ruled, in its judgment No. S212 issued on 30 April 2014, "Where Mr. X admitted that he was the author of the four letters mentioned above; and that he specified that the first three had been taken up during the suspension of the session, and that

[3] Judgment No. 1 dated 5 January 2017 (16-12.394) — Court of Cassation — Second Civil Chamber — ECLI: FR: CCASS:2017:C200001, "Claimant(s): Mr. Yann, X... Defendant(s): Attorney General at the Paris Court of Appeal On the single plea.

they constituted a kind of derivation to express something... and where Mr. X solemnly objected that during the session, he had sent the last message: I have not enjoyed since the last two hours; and that he was probably at home when he read and replied to Mr. C; and he described his letter to the rapporteur as being a joke, indicating in the council session that he was always received the necessary attention during the criminal court procedures; while Mr. X explained his behavior by trying to relieve the pressure, explaining that when he encountered problems, he always tried to get out of it with humor; he confirmed that he had, on this social network, 4,000 subscribers or 'followers' who were likely to read these messages, while justifying that these tweets were necessarily anonymous; nevertheless, the judge recognized the act of humor in sharing his mood on Twitter; as Mr. X admitted to the Inspectorate General of Judicial Services by publishing other messages for the next two days, but did not remember that they were related to the hearing; and that the investigation did not prove otherwise, while under the first paragraph of Art. 43 of the above-mentioned order of 22 December 1958, denoting that 'Any breach by a judge of the duties of his/her office, or of honor or dignity, constitutes a disciplinary default;' and that, if the principle of freedom of expression benefits judges as well as any citizen, its exercise, whatever the mode, must be applied to a judge respecting his/her job duties; while the use of social media, including under nicknames, cannot absolve the judge from the duties of his/her jurisdiction, in particular from his/her obligation to uphold the right, and the pledge of impartiality, especially during the course of the trial; and that such use is inappropriate because the messages exchanged can be read in real time by people outside the judicial institution and they make it possible to identify their authors and the circumstances of their motives."[4]

With regard to the Code of Judicial Conduct of the Administrative Judiciary in France, Art. 47 of the Code of Ethics for the French Administrative Judiciary / Principles and Best Practices issued on 14 March 2017 and amended on 16 March 2018 states, "The greatest degree of self-control must be taken into account when using social

[4] Superior Council of the Judiciary ruling as a disciplinary council for magistrates of the seat, S212, 30 April 2014.

networks on the Internet when access to these networks is not restricted exclusively to a private circle with protected access. The risks associated with unlimited data archiving and filtering search capabilities that may make it possible to publish personal relationships or private opinions that may raise doubts about impartiality between the public and the media will be considered in the judge's personal consideration. Further, the account of the social network must be monitored by its user, who acts as the publisher of the content… Therefore, the obligation of professional confidentiality and strict respect apply fully to the expression of members of the administrative jurisdiction on social networks and this is regardless of whatever are settings of the network used or the number of contacts of the account holder. Yet, the information transmitted on a social network account is likely to constitute private communications only when the user has previously and correctly created this account to control access and ensure the limited number of reliable communications. In any case, the user is recommended to adjust his/her account settings so that his profile does not appear in the results of search engines. Further, members of the judiciary who are on digital social networks should not mention the type of work of a judge or member of the State Council when they reach their profile. Yet, if such clarification is self-evident on social networks, then the user must be alert about the content he/she posts and the direct or indirect exchanges he/she maintains with his/her contacts. In any case, it is advisable to refrain from participating in any controversy in view of its subject or nature, which is likely to reflect on the institution. In addition, members of the administrative authority who are on social networks under a nickname are subject to re-identification by keeping only notes that they can bear publicly under their real identity. In fact, and in view of the presumed public character and privacy of digital social networks, it is recommended that members of the Administrative Court not use these media for the purpose of commenting on political and social news… Members of the Administrative Court, when they share a message on social networks or when expressing their adhesion in different forms of a message, should exercise caution in addition to paying the attention by the members of the Administrative Court when giving lectures, attending conferences or hearings, whether they are

filmed or not, which leads to the spread of rumors and their distribution by third parties leading to positing excerpts of their words via video or audio, especially on social networks or the Internet."

In fact, and by referring to the judicial rulings related to members of the administrative judiciary in France, the French Council of State ruled, in a recent ruling issued on 25 March 2020, that "With regard to legal and administrative news, members of the administrative judiciary must take into account, in the comments that they post on social networks with 'reservation and vigilance equal to that which involves publication in a scientific journal.' In fact, these recommendations, formulated as best practices, with regard to expression on social networks and taking into account the technical characteristics of expression patterns, aim to ensure compliance and adherence to the conservation required of members of the administrative authority judiciary, which aims to prevent the publication of their observations to avoid harming the nature and dignity of the jobs they practice and to ensure the independence, impartiality and proper functioning of the work... Yet, the critical paragraphs also indicate that information published on a social network account cannot constitute private correspondence unless the user has configured this account correctly in advance in order to control access and ensure the limited number and reliability of contacts, and in doing so, the Charter recommends that members of the administrative authority judiciary who use social networks modify their account settings so that their profile does not appear in search engine results and recommends not to mention the words judge or member of the State Council when completing their profile on a non-professional social network. In fact, these recommendations of wisdom do not have the effect of prohibiting the expression of members of the administrative authority on social networks... and are only intended to protect members of the administrative judiciary from the risk of receiving comments posted on social networks... The best practice recommendations thus set forth aim to ensure compliance with the conservation obligation on social networks, and do not directly affect the freedom of expression of members of the Administrative Court. In fact, the criticizing clauses of the charter recommend members of the Administrative Court, 'taking into account the supposed public nature and the privacy of digital social

networks,' 'not to use these media for the purpose of commenting on political and social news.' This cautionary statement takes into account the technical characteristics of public online communication networks in general and social networks in particular as well as the difficulty sustained by a user posting comments to ensure their privacy or limited dissemination as well as to ensure their integrity or to control their scope, taking into account in particular the reactions that may provoke."[5]

Therefore, it is noted from the foregoing that the French legislator developed detailed legislation showing the mechanism for dealing of judges with social media for ordinary judges and administrative judges for which it developed special provisions for the mechanism of how ordinary judges deal with social media and others showing the mechanism of how administrative judges deal with social media to the contrary of which the Jordanian legislature did not set special provisions for administrative judges, but considered the administrative judiciary as an integral part of the regular (ordinary) judiciary whereby the same provisions contained in the Code of Judicial Conduct apply to administrative judges in addition to the fact that the constitutional judiciary in Jordan also did not regulate the mechanism of using of the members of the Jordanian Constitutional Court for social media in the Code of Conduct for Constitutional Court judges.

IV. Extent of the Judicial Inspection Authority's Control on the Judges' Social Media Sites (Real and Fictitious)

Control on social networking sites is based on a set of legal considerations while this control may be prior (preventive control) before publishing on social networking sites or post-publication on those sites (Alnoaimy, 2019, p. 266).

In fact, judges have special duties and responsibilities that justify imposing specific restrictions on their fundamental freedoms, but these restrictions are only legitimate if provided for by law and necessary in

[5] Council of State, No. 421149 ECLI: FR: CECHR: 2020: 421149.20200325. Published in the Lebon collection, 4th — 1st chambers combined, Mrs. Céline Roux, rapporteur, Mr. Raphaël Chambon, public rapporteur, Reading of Wednesday 25 March 2020.

a democratic society to achieve a legitimate goal, such as protecting the independence, impartiality and prestige of its institutions.[6]

Yet, the Judicial Inspection Body undertakes the following tasks: A. Inspecting the work of judges who are not in the highest rank provided that the inspection is at least twice a year for judges on probation, and at least once a year for other judges; B. Evaluate the work of judges in terms of good application of the law, completion of litigation and proof procedures, reasons for postponement, the time taken to resolve the case, fulfillment of decisions and judgments for its reasons and causes, the integrity of the results reached and determining the annual dismissal rate of the judge; C. Inspecting the work of the regular courts at least once a year, including attending court sessions and preparing reports thereon; D. Inspection on the works of the Public Prosecution; E. Investigate complaints referred to it by the President" (Art. 4, The Judicial Inspection System of the Regular Courts, 2015).

In fact, the Jordanian Supreme Administrative Court ruled, in its judgment No. 141/2018 issued on 11 July 2018 to the effect that "by applying what was mentioned to the facts of this case, it appears that the Chief Inspector of the Judicial Inspection Body addressed the President of the Judicial Council, proposing to refer some of the judges, including the petitioner, to the committee formed under Art. 15 of the Law on the Independence of Judges, to look into their matter, as it was found by examining the papers and files available at the Judicial Inspection Department that some of them had some faults in their behavior and that their performance had stopped at this point while it is not hoped to improve. Yet, and in light of what was stated in the letter of the chief inspector and because there is justification for presenting the matter to the committee formed under Art. 15 of the Law on the Independence of the Judiciary, especially since the appellant had previously, during his service in the judicial system, been issued three disciplinary penalties, the first being a warning penalty dated 20 October 2010 and the second

[6] United Nations Human Rights, (2019). General Assembly, A/HRC/41/48, Independence of judges and lawyers — Report of the Special Rapporteur on the independence of judges and lawyers: Human Rights Council. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/118/68/PDF/G1911868.pdf?OpenElement [Accessed 06.08.2022].

being downgrading dated 20 May 2013 while the third was a forewarning on 11 April 2017, then the head of the Judicial Council convened this committee in its legal formation to meet, and after deliberation, the committee recommended referring the petitioner to the early retirement based upon which the head of the Judicial Council recommended the same to the Council which issued its challenged decision after it decided to adopt the recommendation of the committee and that of the president with its authority concerned with running the affairs of the judiciary in a way that achieves the public interest."[7]

As for France, the French Consultation State Council, as a judicial authority (Disputes Department) ruled, in its ruling issued on 23 March 2018 that: "The first article of the challenged ruling establishes a General Inspectorate for the Judiciary at the Custodian of the Seals, the Minister of Justice while the General Inspectorate exercises a permanent mission represented by the inspection, control, study, advice and evaluation of all bodies, administrations, institutions and departments affiliated with the Ministry of Justice and judicial courts as well as the legal persons from the public sector subject to the tutelage of the Ministry of Justice and legal persons under the tutelage of the private sector whose activities fall within the functions of the Ministry of Justice or do receive public funding to which the programs of the Ministry of Justice contribute in addition to evaluating the activity, work and performance of courts, institutions, departments and bodies under its control as well as the manner of service of employees, as part of an investigative mission. Further, it makes all useful recommendations and observations." On the one hand, if Art. 8 of the challenged decree states that inspectors general, inspectors from among judges, members of the staff of directors of the Ministry of Justice and members of staff employed by the National School of Administration or the of same level of employment may be employed, nevertheless Art. 14 and 15 of it provide that the operations of inspection and control of the courts of the judiciary is carried out by inspectors general and inspectors who have the capacity of a judge while the investigations into the professional and,

[7] Supreme Administrative, Khaled Alyan v. Jordanian Judicial Council, 11 July 2018, D 2018, 141 (The Jordanian Supreme Administrative).

where appropriate, personal conduct of judges may be carried out only by inspectors general or inspectors having the capacity of a judge and should be interpreted as requiring one of them to have a rank at least equal to the rank of the judge concerned."[8]

Therefore, it turns out that the judicial inspection body in both Jordan and France are considered one of the important organs in the judiciary while its importance is shown in revealing and proving facts in addition to preserving the independence of the judiciary, monitoring the social media of judges and detecting fake accounts created by judges.

V. Initiating a Disciplinary Case when Judges Misuse Social Networking Sites

Social media occupy an important place in the daily lives of citizens around the world including the judge, and represent a great tool for public awareness and education for which it can contribute to enhancing public confidence in the judiciary (Jahn, 2019, p. 41), but its use can generate new challenges and ethical concerns regarding the validity of the content of the published material, the unintentional manifestation of bias or inclination and the unintended consequences arising from the judge's interaction with other parties (Hajjar, 2017, p. 14).

Filing a disciplinary case if judges misuse social networking sites is one of the most important measures that raise the level of quality of the judicial system and ensure the proper functioning of the judicial process (Lackey and Minta, 2012, p. 150). Otherwise, the efforts made by the judicial inspection body to follow up and monitor violations and abuses would not have any benefit. Yet, monitoring and follow-up aims to hold judges accountable for negligence and transgression in judges' use of social media and media (Al-Safadi, 2019, pp. 33–34).

Also, it should also be noted that an independent authority, such as a judicial council, prosecutorial council or court, should be invoked in the event of any accusation or complaint made against a judge regarding the exercise of fundamental freedoms and disciplinary measures should be determined in accordance with the law, the code

[8] The French Consultation State Council, as a judicial authority (Disputes Department), Syndicat Force Ouvrière Magistrats, 23 March 2018.

of professional conduct and other well-established standards as well as ethical codes. Further, professional associations of judges shall establish advisory and consultant boards to advise judges when in doubt as to the compatibility of the exercise of a particular activity in the private sphere with their responsibilities and duties while such advisory bodies shall be independent of those responsible for imposing disciplinary sanctions.

V.1. Procedures Used to Initiate a Disciplinary Case Related to Judges' Misuse of Social Media

Judges are sometimes subject to disciplinary sanctions, including suspension and removal from office for exercising their right to freedom of expression, either alone or with others in a courtroom or otherwise on a social media platform and in the vast majority of cases, disciplinary measures are applied based on an alleged breach by judges of the duties binding on them, especially the exercise of restraint in the exercise of their fundamental freedoms in order to preserve the prestige of their position and the impartiality as well as independence of the judiciary (Eltohamy, 2016, p. 254). However, there are cases in which interference with the exercise of their fundamental freedoms cannot be considered necessary in a democratic society to achieve a legitimate objective such as maintaining public confidence in the judiciary (Saadoun, 2017, pp. 22–23).

With regard to disciplinary case procedures related to judges' misuse of social networking sites in Jordanian legislation, the disciplinary case is filed against the judge with a statement containing the accusation or charges made against him/her and the evidence supporting them submitted to the Disciplinary Council to initiate the procedures within a period not exceeding fifteen days from the date of submitting the statement to it. Then, the Disciplinary Council conducts whatever investigations it deems necessary and it may delegate one of its members to do so while the Disciplinary Council or the member it delegates has the authority entrusted to the courts with regard to summoning witnesses it deems necessary to hear their testimonies or request any other evidence. Yet, and after completing the investigations, if the disciplinary board does not find a reason to proceed with the case,

it shall decide to close it. Further, and if the Disciplinary Council finds a reason to proceed with the case for all or some of the violations, it shall instruct the judge to appear for the trial provided that the period between the summons to appear and the date of the trial shall not be less than seven days while the summons shall include a sufficient statement of the subject matter of the case and the evidence of the accusation (Art. 32, The Judicial Independence Law, 2014).

Actually, the disciplinary case related to judges' misuse of social media ends with the judge's resignation and acceptance by the council or by referring him/her to retirement or early retirement, as Art. 33 of the Jordanian Judicial Independence Law and its amendments provides that: "The disciplinary case ends with the judge's resignation and the council's acceptance of it or his/her retirement or early retirement."

Actually, the Jordanian Supreme Administrative Court ruled, in its judgment No. 158/2016 dated 24 May 2016 to the effect that "we find that the Disciplinary Council provided the opportunity for the appellant to plead, and thus the allegation of the claiming depriving the appellant of pleading and further abuse of power and violation of the principles as well as the rules of the right of sacred defense guaranteed by laws is contrary to the truth and reality and what was contained in the case papers, noting that the Disciplinary Council took into account all the procedures that must be followed in the disciplinary trial in terms of asking the appellant about what was assigned to him and discussing the witnesses of the Public Prosecution as well as submitting a written defense statement and personal defense evidence in addition to the oral pleading... yet, and where the aforementioned was referred to the Disciplinary Council, which, after completing the disciplinary trial procedures, imposed the appropriate penalty and recommended to the Judicial Council for imposing a penalty of one degree demotion, as the Judicial Council decided... based on the recommendation of the Disciplinary Council and based on Art. 25/B of the Judicial Independence Law, to downgrade the appellant's grade."[9]

As for the French legislation, the Minister of Justice who has considered a complaint or has become aware of facts likely to lead to dis-

[9] Supreme Administrative, Iyad Anwar v. Jordanian Judicial Council, 24 May 2016, D 2016, 158 (The Jordanian Supreme Administrative).

ciplinary action, may, if there is an emergency and after consulting the heads of the hierarchy, propose to the Supreme Judicial Council, to prohibit the court judge who is subject to an administrative or criminal investigation from exercising his/her duties until a final decision is issued regarding disciplinary measures. The Supreme Judicial Council considers the facts that permit taking disciplinary measures directed to him/her by the Keeper of the Seals, the Minister of Justice. The Supreme Council of Judges also considers the facts that justify the disciplinary measures addressed to it by the first presidents of the Court of Appeal or the presidents of the Supreme Court. Copies of the documents shall be sent to the Custodian of the Seals, the Minister of Justice, who may call for an investigation by the Inspectorate General of Justice. Yet, and upon referral to the Supreme Judicial Council, the first president of the Court of Cassation, in his capacity as the head of the Disciplinary Council, appoints a rapporteur from among the members of the Council. He orders him, if necessary, to conduct an investigation. The Supreme Judicial Council may prohibit the accused judge, even before being notified of the investigation file, from exercising his/her duties until a final decision is issued. Yet, and during the investigation, the statements of the concerned judge shall be heard from a judge of a rank at least equal to the rank of the accused judge. The judge shall have the right to present his/her defense in writing or orally while he/she shall have the right to discuss witnesses and may request an expert opinion" (Art. 50, 51, Ordinance on the organic law relating to the status of the judiciary, 2019).

Accordingly, it is clear that the investigation with the judge in Jordan and France, whose misuse of social media is proven, is carried out in accordance with procedures defined by law taking into account the guarantees of the investigation, the right to question and the summoning of witnesses. The disciplinary board or the member delegated by the authority authorized by the courts with regard to summoning witnesses deemed necessary to hear their statements or request any other evidence and after completing the investigations, and if the disciplinary board does not find a reason to proceed with the case, may decide to close it while this constitutes one of the guarantees of the investigation with the judge.

V.2. Confidentiality of Disciplinary Hearings for Judges' Misuse of Social Media

All judicial disciplinary hearings related to judges' misuse of social networking sites are confidential and may not be disclosed, as Art. 34/A of the Jordanian Judicial Independence Law and its amendments provides: "The disciplinary hearings shall be confidential, and the judge shall appear in person before the Disciplinary Council or be represented by one of the judges from Judges who are not judges of the Court of Cassation or by one of the lawyers while the Disciplinary Council has the right to order the judge to appear. Yet, and if not showing or having delegated someone, then he/she shall be subject to trial in absence."

As for the French legislation, the session of the disciplinary council is public. However, if the protection of public order or privacy so requires, or if there are special circumstances likely to prejudice the interests of justice, access to the courtroom may be denied to the public during each or part of a hearing by the decision of the Disciplinary Board..." (Art. 57, Ordinance on the organic law relating to the status of the judiciary, 2019).

Accordingly, it is noted that the investigation sessions with the judge regarding the disciplinary violations committed by him/her related to the misuse of social media in Jordan and France are conducted in secret and the investigation proceedings may not be published which reason is due to the preservation of the impartiality and independence of the judiciary.

VI. Disciplinary Penalties for Judges' Misuse of Social Media

Disciplinary penalties mean that they are procedures established by the legislator and imposed by the competent disciplinary authority on the employee who committed the disciplinary offense in accordance with specific legal controls while such penalties aim at protecting the public interests of the state and to guarantee the running of the state's public institutions regularly and smoothly" (Al-Qaisi, 2017, p. 285).

Hence, the Jordanian legislator regulated the disciplinary penalties resulting from judges' misuse of social networking sites. So, Art. 37 of the Jordanian Judicial Independence Law provides, "The Disciplinary Council may impose the following disciplinary penalties: A — Forewarning. B — Warning. C — Degrading the degree. D — Dismissal from service. E — Removal."

Further, the Jordanian Supreme Administrative Court, in its ruling No. 117/2019 issued on 1 May 2019, stated, "We find that the legislator has granted the disciplinary council the right to impose any of the penalties mentioned in Art. 37 of the Judicial Independence Law, but it provided that a decision be issued from the Judicial Council permitting the imposition of the penalty of degrading of the judge explicitly according to the provision of Art. 25/B of the same law, as it stipulated additional conditions than what was mentioned when making the decision regarding the two penalties mentioned in Para D and E of the aforementioned Art. 37. Yet, the administrative decision that is subject to appeal for cancellation is the decision issued by an administrative body in which it discloses its binding will with its authority under the laws and regulations and it would create a legal position after it had exhausted all the stages of the administrative hierarchy for its issuance and them such an effect occurs only after ratification by a higher authority by which it is not considered a final executive administrative decision which feature distinguishes the final administrative decision from the preparatory legal management work that precedes the final stage of administrative decision-making."[10]

On the other hand, the French legislator regulated the disciplinary penalties resulting from judges' misuse of social networking sites and the media for which Art. 41-15 and 45 of the Decree No. 58-1270 of 22 December 1958 on the Basic Law related to the Status of the Judiciary provides, "Judges appointed under this subsection shall be disciplined by a disciplinary authority to be determined under the terms of Chapter VII and that the authority may, notwithstanding the penalty provided for in the first paragraph of Art. 45, order any other

[10] Supreme Administrative, Suzan Kamal v. Disciplinary Board formed by the Judicial Council, 1 May 2019, D 2019, 117 (The Jordanian Supreme Administrative).

disciplinary sanction including termination of the judge's services. Yet, the disciplinary penalties applied to judges are: 1 — A blame with keeping in file; 2 — Exclusion from the job; 3 — Withdrawal of certain positions; 4 — Suspension of his/her appointment for a maximum period of five years; 5 — Demotion; 6 — Temporary exclusion from all positions for a maximum period of one year, with total or partial deprivation of retirement; 7 — Demotion; 8 — Compulsory retirement or termination of his/her services when a judge is not entitled to a pension; 9 — Removal."

In fact, it is noted from the foregoing that the Jordanian and French legislators have taken into account the gradation of punishment according to the gravity of the disciplinary violation committed by the judges. In fact, the disciplinary offense committed by judges related to the use of social media may be of a degree of gravity and may affect the independence and impartiality of the entire judiciary which calls for the termination of the judge's services.

VI.1. The Authority Competent to Impose a Disciplinary Penalty on Judges' Misuse of Social Media

The authority concerned with imposing disciplinary punishment on judges' misuse of social media means, "The authority appointed by the legislature to impose legally prescribed penalties on employees who are proven to be responsible for disciplinary crimes" (Al-Ajarmah, 2007, p. 37; Al-Qaisi, 2017, p. 283).

So that the disciplinary council is composed of at least three judges of the Court of Cassation appointed by the council from other than its members for a period of two years while the council may form more than one disciplinary council. The disciplinary board issues its decisions unanimously or by majority within a period not exceeding four months (Art. 30, The Judicial Independence Law, 2014).

In application of this, the Jordanian Supreme Administrative Court ruled in its judgment No. 1/2020 dated 29 January 2020, "We find the authority of the Judicial Council to lower the degree of the judge is a discretionary authority in the event that the judge performs acts that affect the prestige of the judicial authority and the high position

of the judiciary because the judge's work is not measured by other public servants, as his/her behavior must be more strict and firm, so that he/she is well-behaved, characterized by integrity, committed to what is stated in the Law on the Independence of the Judiciary and the Code of Judicial Conduct rules approved by the Judicial Council distancing the judicial work from being surrounded by suspicions under penalty of disciplinary responsibility. Yet, and since it is established in jurisprudence and the judiciary that every administrative decision has a valid reason based on it, and the claimant to the contrary must provide evidence that the decision is not based on a reason or that its reason is contrary to the law, we find that the Judicial Inspection Department, and after investigating with the challenger, it concluded that his acts constitute a violation of the provisions of Art. 4 of the rules of the Code of Judicial Conduct and that the Disciplinary Council arrived at the same conclusion and decided to impose a penalty to degrade the appellant with its authority."[11]

In France, the Disciplinary Council is composed of the judges of the Supreme Court, in accordance with the provisions of Art. 65 of the Constitution and Art. 14 of Basic Law No. 94-100 of 5 February 1994 regarding the Supreme Council of the Judiciary and when a decision is taken regarding the existence of a disciplinary offense, the competent body in the Supreme Council issues a restricted vote, on the basis of the absence of a penalty. Yet, and in the event of equal votes, the violation is re-investigated, and when the vote is in the presence of a disciplinary offense, then the opinion issued on the penalty is taken by a majority of votes, and in the event of a difference of votes on choosing the penalty, the vote of the president is casting (Art. 49, Ordinance on the organic law relating to the status of the judiciary, 2019).

It is noted from the foregoing that the disciplinary penalty for misuse of social media by judges in Jordan and France is carried out by the authority appointed by the legislator to impose legally prescribed penalties on judges who are proven responsible for disciplinary crimes, so that the disciplinary council constitutes a guarantee of disciplinary trials.

[11] Supreme Administrative, Sami Irsheed v. Jordanian Judicial Council, 29 January 2020, D 2020, 1 (The Jordanian Supreme Administrative).

VI.2. Appealing the Disciplinary Decision Issued regarding Judges' Misuse of Social Media

The disciplinary decision issued by the Disciplinary Council regarding judges' misuse of social media is subject to the control of the administrative judiciary as the judge has the right to appeal the disciplinary decision issued against him/her (Krawitz, 2014, p. 206), as Art. 35 of the aforementioned Jordanian Judicial Independence Law provides, "The judgment issued in the disciplinary case shall include the reasons on which it is based, and its reasons are recited when pronounced while the judgment is subject to appeal before the competent administrative court."

So that the Administrative Court, exclusively, is competent to consider all appeals related to final administrative decisions, including: appeals against any final decisions issued by administrative bodies with judicial jurisdiction, except for decisions issued by conciliation and arbitration bodies in labor disputes and the appeals that are within the jurisdiction of the Administrative Court under any other law" (Art. 5, The Judicial Independence Law, 2014).

Further, Art. 25 of the same aforementioned law provides, "The Supreme Administrative Court has jurisdiction to consider appeals submitted to it in all final judgments issued by the Administrative Court and that it considers appeals from both substantive and legal aspects."

In fact, appealing the Disciplinary Council's decision regarding judges' misuse of social media before the Administrative Court constitutes an essential guarantee for the judge, considering that the Administrative Court is an independent judicial body that considers the legality of the procedures and the legality of the penalty as well as its suitability to the behavioral violation committed by the judge and that the Administrative Court considers the reasons for the appeal that affect the disciplinary decision. And stipulated in Art. 7 of the mentioned Jordanian Administrative Judiciary Law (such as lack of jurisdiction, violation of the constitution, laws or regulations or error in their application or interpretation, and the association of the decision or procedures for its issuance with a defect in form, abuse of authority, and defect of reason). Actually, the guarantees of the judge who is

subject to a disciplinary penalty are enhanced by that the decision of the Administrative Court is subject to appeal before the Supreme Administrative Court and that the Court considers the appeal from the objective and legal aspects (Mufleh and Al-Thneibat, 2017, p. 236).

Hence, the Jordanian Supreme Administrative Court ruled, in its judgment No. 1/2020 issued on 29 January 2020, "We find the authority of the Judicial Council to lower the rank of the judge is a discretionary authority in the event that the judge performs actions that affect the prestige of the judicial authority and its high ranking because the judge's work is not measured by other public servants, as his/her behavior must be more strict and firm, so that a well-behaved person of good conduct is characterized by integrity, committed to what is stated in the Law on the Independence of the Judiciary and the Code of Judicial Conduct rules approved by the Judicial Council, distancing the judicial work from being under suspicion under penalty of responsibility. Yet, and since it is established in jurisprudence and judiciary that every administrative decision has a valid reason based on it, and the claimant to the contrary must provide evidence that the decision is not based on a reason or that its reason is in violation of the law. Yet, and in this case, we find that the Judicial Inspection Department, and after investigating with the challenger, did find that the act of the challenger to the effect of issuing a decision to return the weapon that had previously been decided in the penal judgment to be confiscated as a result of influence on him by other persons, constitutes a violation of the provisions of Art. 4 of the rules of the Code of Judicial Conduct. Further, the disciplinary board arrived at the same result and decided to impose the penalty of lowering the degree of the challenger with its authority under Art. 32 and 37 of the Judicial Independence Law No. 29 of 2014 and that the Judicial Council issued its challenged decision based on established facts that constitute a violation of the rules of the Code of Judicial Conduct which the Law on the Independence of the Judiciary obliged judges to abide by."[12]

In France, the authority competent to review the appeal against the decision to impose the disciplinary penalty resulting from the misuse of

[12] Supreme Administrative, Sami Irsheed v. Jordanian Judicial Council, 29 January 2020, D 2020, 1 (The Jordanian Supreme Administrative).

their personal accounts on social networking sites by ordinary judges is to resort to the administrative judiciary. The decision issued shall be notified to the competent judge in an administrative form. It is effective from the day of notification. He may appeal the decision of the Disciplinary Council (Art. 58, Ordinance on the organic law relating to the status of the judiciary, 2019).

Therefore, it becomes clear that the appeal against the decision of the Disciplinary Council regarding judges' misuse of social media in Jordan and France is before the administrative judiciary which constitutes an essential guarantee for the judge, given that the administrative court is an independent judicial body that considers the legality of the procedures and the legality of the penalty as well as its suitability to the behavioral violation committed by the judge.

VII. Conclusion

Judges in Jordan and France must take care that their expression of personal opinions or beliefs does not adversely affect their official duties, and that they do not raise doubts about their impartiality and duties that require them to demonstrate loyalty and responsibility towards their position and to always respect and honor the judicial position when expressing their views and opinions on the Internet and the need to strive to preserve and enhance trust in the judicial system and to avoid any electronic activity that undermines public confidence in the judiciary or raises doubts about its independence and impartiality.

Further, social media occupy an important place all over the world, including the judges and represents a great means of awareness and public education for which the same can contribute to enhancing public confidence in the judiciary, as the use of social media can generate new challenges and ethical concerns about the extent of validity of the content of the published material, unintentional manifestation of bias or inclination and unintended consequences arising from the judge's interaction with other parties.

Yet, judges are sometimes subject to disciplinary sanctions, including suspension and removal from office for exercising their right

to freedom of expression, either alone or with others in a courtroom or on a social media platform, and in the vast majority of cases disciplinary measures are applied based on an alleged breach by judges of the duties binding on them, especially the exercise of restraint in exercising their fundamental freedoms in order to preserve the prestige of their position and the impartiality as well as independence of the judiciary.

Hence, we recommend that Jordanian legislation related to the organization and functioning of the judiciary should include specific provisions that establish the permissibility of judges to exercise the right to freedom of expression, belief, assembly and association, as is the case in French legislation and the exercise of political rights on an equal basis with others and that restrictions on these freedoms are to preserve the judicial authority's image and the preservation of the independence and impartiality of judges and that professional associations of judges in Jordan put specific provisions in codes of conduct and set specific guidelines on the exercise of basic freedoms by judges while these provisions should serve as standards for self-regulation that help judges to make their own decisions on how to exercise human rights and fundamental freedoms in a manner consistent with the prestige of their position and the independence as well as impartiality of the judiciary and that these principles be separate from the disciplinary rules applicable to judges.

In fact, judges in Jordan and France should be involved when developing legislation and ethical standards related to the exercise of fundamental freedoms and political rights within an open and transparent process, taking into account existing international standards relating to the exercise of fundamental freedoms and the jurisprudence of courts as well as regional human rights mechanisms and subjecting judges to adequate training on ethical principles for the exercise of freedoms essential, both in relation to their profession and activities outside the profession while such training in particular shall include practical guidance on the use of social media and the media.

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Parallel Imports and the International Principle of Exhaustion of Rights under Sanctions

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Abstract: In the modern world, parallel imports implemented in compliance with the international principle of exhaustion of intellectual property rights can and should become a mechanism for developing free trade, ensuring international competition and protecting the interests of consumers around the world. The sanctions adopted in early 2022 and imposed against the Russian Federation, as well as suspension of the activities of a number of foreign companies in the Russian Federation, encouraged the author to examine the current trajectories of introducing the international principle of exhaustion of rights into legislation and the possibility of parallel imports applied in order to provide Russian consumers with goods that have ceased to be available on the domestic market. The author reviews legislative regulatory acts adopted in Russia for the purpose of ensuring parallel imports and implementing the international principle of exhaustion of rights, analyzes possible problems of its implementation and ways to solve the problems under consideration, examines foreign experience, international legal and regional foundations for the introduction of the exhaustion of rights regime.

Keywords: parallel import; principle of exhaustion; sanctions; sanction restrictions; exclusive rights; intellectual property

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Contents

I. Introduction

The mechanism of exhaustion of rights in relation to intellectual property — primarily trademarks and patentable objects — mediates a parallel import that, as a rule, becomes one of the main tools for overcoming restrictive economic measures and encouraging trade relations after supply chains disruption.

The procedure for introduction of the principle of exhaustion — the regime itself (international, regional or national levels), the possibility of a differentiated approach to different IP objects, establishment of a list of goods in respect of which one or another type of the principle of exhaustion of rights is applicable — depends on: 1. economic, political, and integration factors; and 2. the system of national legislation. At the same time, each country has its own approach to solving the problems of exhaustion of intellectual property rights. The problem of the parallel import is directly related to the problem of exhaustion of IP rights, since the parallel import implies the possibility of importing original goods when the rights of the rightsholder of the intellectual property object are considered exhausted for a specific product or consignment of goods.

Russia has adopted the differentiated approach to the exhaustion in relation to different IP objects. Thus, the international principle of exhaustion of rights is applied to geographical indications, names of

the place of origin of goods,[1] topologies (layout designs) of integrated circuits,[2] and selective animal and plant breeding results,[3] which seems justified and fair in the context of freedom of trade, international competition for the economy of States and reasonable pricing of products sold by copyright holders (or with their consent) in different countries.

With regard to the key IP objects, while maintaining the national exhaustion regime[4] and the regional principle of exhaustion of trademark rights with due regard to the norms of the EAEU, the possibility of the parallel import in Russia is consolidated in a number of separate regulatory legal acts adopted in 2022 because of the sanctions imposed against Russia, and suspension and termination of activities of a number of foreign companies in the territory of the Russian Federation. In addition, the sanctions 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, which also led to the restriction of trade relations (Kanashevskiy, 2023).

II. International Legal Framework for the Introduction of the Exhaustion of Rights Regime

To clarify the reasons for introducing the regime of exhaustion of rights into national legislation, it is worth analyzing the international law foundations of the parallel import. At the universal (multilateral) international law level, relations regarding the exhaustion of rights are consolidated in the provisions of a number of treaties and international agreements. The WIPO, as a key international organization in the field of intellectual property, pays special attention to the issues of the parallel import and exhaustion of rights. Indeed, when considering legal

[1] Para 5 Art. 1519 of the Civil Code of the Russian Federation and Para 3 Art. 1516 of the Civil Code of the Russian Federation. (In Russ.).

[2] Para 3 Art. 1456 of the Civil Code of the Russian Federation. (In Russ.).

[3] Para 6 Art. 1422 of the Civil Code of the Russian Federation. (In Russ.).

[4] Art. 1487 of the Civil Code of the Russian Federation regarding trademarks, Para 6 Art. 1359 of the Civil Code of the Russian Federation regarding patents. (In Russ.).

relationships in the context of parallel imports, intellectual property issues are presented and should be considered as fundamental and key issues from the point of view of the choice and implementation of economic approaches to the establishment of exhaustion regimes. The few and ambiguous provisions of international agreements in the field of exhaustion of rights still seem to be evaluated from the point of view of the will of the States to interact on issues of the parallel import and the possible application of relevant legal instruments.

International instruments and treaties containing provisions regulating exhaustion of rights (the term "parallel import" is practically not used and is not considered at the international level) include: 1. The United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices of 1980, 2. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of 1994 adopted under the auspices of the WTO, 3. The WIPO Copyright Treaty of 1996, and 4. the WIPO Performances and Phonograms Treaty of 1996.

Moreover, the Paris Convention for the Protection of Industrial Property of 1883 contains some provisions that, as noted by the WIPO, can be considered as affecting the establishment of exhaustion regimes.[5] These provisions are enshrined in Art. 4bis regulating the independence of patents granted in the territories of different States Parties to the Paris Convention in respect of the same invention and Art. 6(3) regulating the independence of trademarks registered in different States Parties to the Paris Convention.

The study highlights problems arising in interaction between relevant provisions of the international agreements enumerated above, since, taking into account different purposes of their adoption and functioning, as well as the scope of their application, these provisions may have different meanings.[6] Indeed, the provisions of Art. 4bis of the Paris

[5] Interface between exhaustion of intellectual property rights and competition law. WIPO. Committee on Development and Intellectual Property (CDIP). Eighth Session Geneva, November 14 to 18, 2011. Available at: https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_8/cdip_8_inf_5_rev.doc [Accessed 07.01.2023].

[6] Interface between exhaustion of intellectual property rights and competition law. WIPO.

Convention on the Independence of National Patents initially concern relations in the field of obtaining and maintaining patents for the same invention on the territory of different States, including the States that are not Parties to the Paris Convention. Its purpose was not to consider the patent rights protection in the context of international trade in patented goods, and the wording of Para 2 Art. 4bis of the Convention ("This provision should be considered without any restrictions") should not be perceived as focused on any approaches to the establishment of parallel import regimes and exhaustion of rights. The provision concerning the independence of national patents is primarily focused on establishing the territorial principle of protection for inventions. It reflects a significant internationally accepted approach to the IP protection through the implementation of domestic mechanisms for claiming protection, establishing infringements of industrial property rights and their protection. The original purpose of the Paris Convention in the context of patent relationships coordination was to ensure the interaction among national patent systems, and not to strive for their harmonization.

Provisions of Para 3 Art. 6(3) of the Convention concerning trademarks, due to their legal nature, may initially be perceived as aimed at trade relations. However, similar to the provisions of Art. 4bis, provisions of Para 3 Art. 6 were enshrined in the Paris Convention not in order to protect exclusive rights in connection with international trade in goods. They were approved with the purpose of resolving the issue of national trademarks' registration and bringing them to force, since they are granted "protection as is" (Art. 6quinquies). The interrelationship between Para 3 Art. 6 and Art. 6quinquies is complex, and it stems from gradual evolution of the legal regime of trademarks under the Paris Convention from recognizing the origin of goods protected by trademarks to a more modern concept of brands, including their reputational component, which ultimately has led to the abolition of a connecting factor for trademarks based on the source of the designated goods under Para 1 Art. 15 of the TRIPS Agreement.[7]

[7] Interface between exhaustion of intellectual property rights and competition law. WIPO.

At the same time, a certain cross-border connection between independent trademark protection systems in the Paris Convention can still be seen, since Subpara 1 Para A Art. 6quinquies sets forth an important rule that has not lost its relevance so far, namely: each trademark duly registered in the country of origin can be declared in other countries of the Union and it is protected as it is, with the reservations specified in this Article. This cross-border connection and purpose of the provisions of the Paris Convention is also evident, for example, in the provisions of convention priority (as applied to inventions, utility models, industrial designs and trademarks).

All the provisions under consideration form an attempt to provide the foundations for the international protection of IP objects, and not only to unify national approaches to the IP protection. At the same time, there is also an indirect tendency of the provisions under consideration to ensure international trade relations, taking into account the large number (about 180) of parties to the Convention, as well as the economic component of intellectual property in general, the need to disseminate the latest technologies and goods in the world while ensuring uniform protection of the rights of copyright holders in the States Parties to the Paris Convention.

It is worth noting that there is also a more static conservative approach to the interpretation of the provisions of the Paris Convention with emphasizing the independence of the industrial property protection in different States. Thus, based on a cumulative analysis of the provisions of Art. 4bis and Para 3 Art. 6 of the Paris Convention, we can conclude that protection of patentable objects and trademarks is related to the jurisdictional boundaries of the territory of each State Party to the Convention. If we take into account this factor, commercial actions carried out on the territory of one State cannot affect the rights of intellectual property rights holders on the territory of another State in the context of the independent nature of protection of the same industrial property object in different states.

The international law rules analysis in the sphere of relations under consideration shows that they do not establish direct comprehensive regulation of relations in the field of exhaustion of rights, and they do not use the concept of the parallel import as a term. At the same

time, there are still a number of international law rules relevant to the problem of exhaustion of rights. The effect of the territorial principle of protection of IP objects (the principle of independence of protection) is logically seen as the main obstacle to the widespread dissemination of the international principle of exhaustion of rights. Even now at the national level, different States are introducing and applying the international principle of exhaustion of rights in various formats (in particular, as applied to individual IP objects (groups of objects) or according to the list of goods; at the legislative or law enforcement level), focusing primarily on protecting the interests of their own citizens-consumers, the constitutional and legal foundations and the need to develop international competition, since the provisions of international agreements do not prevent such a perception of the international principle of exhaustion of rights at the national level.

III. The Regional Principle of Exhaustion of Rights: The EAEU as a Case Study

In the Eurasian Economic Union (EAEU), the ground for the introduction of the regional principle of exhaustion of rights is set forth in the Treaty on the Eurasian Economic Union (Para 16 Annex No. 26 to the Treaty on the Eurasian Economic Union of 2014). Before the EAEU Treaty the issues under consideration and the regional regime of exhaustion of rights were regulated under Art. 13 of The Agreement on Uniform Principles of Regulation in the field of Protection of Intellectual Property Rights (terminated on 1 January 2015 and extended to the Russian Federation, Belarus, and Kazakhstan). According to the mentioned provision (Para 16 Annex No. 26), the EAEU Treaty on the territories of the member States applies the principle of exhaustion of the exclusive right to a trademark or a Union trademark. According to this principle, the use of the trademark or the Union trademark in respect of goods that have been lawfully introduced into civil circulation on the territory of any of the Member States by the trademark owner and (or) by other persons with the rightsholder's consent does not constitute the infringement of the exclusive right to the trademark or the Union trademark.

The regional principle of exhaustion of rights should be extended to the EAEU trademark, the protection of which is provided for under The Agreement on Trademarks, Service Marks and Appellations of Origin of Goods of the Eurasian Economic Union dated 3 February 2020. The Agreement entered into force on 26 April 2021 and it is a fundamental act for the formation of a regional system of trademarks, service marks and appellations of origin for the EAEU goods.

We should separately emphasize that Art. 89 of the EAEU Treaty draws attention to cooperation between States in intellectual property protection. Thus, it is noted that the EAEU Member States cooperate in the field of protection of intellectual property rights and ensure protection to IP objects in accordance with the provisions of international law, international agreements and instruments constituting the law of the Union, and the legislation of the member states.

In this sense, the regional principle of exhaustion of trademark rights is seen as a reasonable and economically justified step aimed at developing regional competition, increasing the availability of goods on regional markets. Moreover, it correlates with the framework of possible ways to impose restrictions — the exhaustion of the rights of copyright holders provided for by international agreements.

Taking into account the relevance of the Eurasian Patent System in the context of the fact that the problems of the parallel import also affect the patent objects, effective legal regulation in the field of exhaustion of rights is an extremely important direction for the development of national and regional economies. As a result of the sanctions imposed on Russia in 2022, a significant part of the parallel import of goods to Russia was carried out by the EAEU countries in compliance with the regional principle of exhaustion of rights. At the same time, many companies from the States that had imposed sanctions on Russia did not seek to conclude contracts for the supply of goods with counterparties from the EAEU countries, taking into account the prospects for the further supply of goods to Russia. Thus, in addition to the EAEU member states, goods have been actively imported from Turkey, United Arab Emirates and other States (Gaiva, 2022).

It should be noted that since 2014, the EAEU has been discussing the possibility of introducing exceptions to the applicable regime of

exhaustion (Sysoeva, 2018). Thus, in 2014, a working group was established to develop proposals for the further application of the principle of exhaustion of the exclusive right to intellectual property objects. 17 expert meetings were held. As the result, more than forty draft decisions were reviewed in order to, first, assess the feasibility of introducing the principle of exhaustion of rights to certain goods and, second, the consequences of the transition. Within the framework of the discussions, various formats for the introduction of exceptions were discussed, since the issue is complicated by the fact that this affects not only the national legislation of each of the five States of the Union, but it also reaches the supranational level of the EAEU. In this regard, the working group discussed the issue of introducing a mixed (differentiated) principle in the conditions of existing international agreements where the EAEU member states participate.

US legislation can serve as an example of such an approach to the implementation of a mixed system of exhaustion of exclusive rights. US laws proceed from the fact that after the sale of the goods by the rightsholder within the country of the goods, this particular product can be further sold by any person without restrictions. As an exception, after the sale of the goods outside the USA by the rightsholder from the USA or a person closely related to the rightsholder, the goods can be imported into the USA without restrictions. If the first sale in the USA was made by a person not related to the American rightsholder or by a person not closely related to the US rightsholder, then the goods cannot be imported into the USA (Reed, 2002, p. 185; Masalina, 2015). Importing will not be allowed if the goods differ significantly from the goods sold in the United States by a local rightsholder or a person closely related to him.

At the same time, the so-called mixed system of exhaustion of rights can also be implemented by establishing the general regional principle of exhaustion of rights and the international principle of exhaustion of rights in relation to certain categories of goods. In relation to individual IP objects, different regimes of exhaustion of rights may be established. The mixed and differentiated approach (when an individual list of goods in respect of which the international principle of exhaustion applies is introduced and different modes of exhaustion of rights in relation to

the IP objects are determined) has been implemented, for example, in Russia in 2022 by means of adoption of Para 13 Art. 18 of the Federal Law No. 46-FZ dated 8 March 2022 "On Amendments to Some Legislative Acts of the Russian Federation." Under this provision, the Russian Government has actually received the right to restrict provisions of the Civil Code of the Russian Federation concerning protection of exclusive rights to IP objects expressed in specific products (product groups) and the means of individualization, labeling the listed goods approved by the Government of the Russian Federation. This approach was also exercised in the Government Decree of the Russian Federation No. 506 dated 29 March 2022 "On products (product groups) in respect of which provisions of the Civil Code of the Russian Federation on protection of exclusive rights to intellectual property expressed in such goods, and means of individualization labelling such goods cannot be applied." Following this Government Decree, the Ministry of Industry and Trade of the Russian Federation issued the Order No. 1532 dated 19 April 2022 "On approval of the list of products (product groups) with regard to which provisions of Para 6 Art. 1359 and Art. 1487 of the Civil Code of the Russian Federation, provided the listed products (product groups) are introduced in circulation beyond the territory of the Russian Federation by rightsholders (patent) and with their consent, shall not be applied."

The EAEU Working Group mentioned above failed to implement any specific proposals concerning the issue of exhaustion of exclusive rights and introduction of the designated mixed system. On 21 August 2015, the meeting of the Council of the Eurasian Economic Commission was held, where the Working Group was instructed to develop a decision-making mechanism on the possible introduction of "parallel" imports categories of goods and to prepare an appropriate draft of amendments to the EAEU Treaty by 31 December of 2015. Thus, it was expected that the Working Group would manage to replace the existing system of the uniform regional principle of exhaustion of rights with the mixed system: the regional principle as the main one and the international principle as an exception (Masalina, 2015).

As a result, the Order of the Eurasian Intergovernmental Council No. 6 dated 13 April 2016 "On application of the principle of exhaustion of the exclusive right to a trademark, a trademark of the

Eurasian Economic Union" was adopted. According to the Order, the Eurasian Economic Commission was instructed, together with the governments of the EAEU member States, to develop a draft protocol on amendments to the EAEU Treaty dated 29 May 2014, vesting the Eurasian Intergovernmental Council with the authority and power to establish exceptions for certain types of goods to the application of the principle of exhaustion of the exclusive right to a trademark or a trademark of the Eurasian Economic Union.

The Draft contained provisions for the Eurasian Intergovernmental Council to establish temporarily the principle of exhaustion of the right to a trademark or a Union mark in relation to certain types of goods. The Draft was sent for approval to the state bodies of the member States of the Union. In March 2017, the Council of the Eurasian Economic Commission was instructed by its Order to send the draft protocol for internal approval by 1 July 2017. However, it has never been approved within the framework of the EAEU, primarily due to the non-approval of documents by the Republic of Belarus that claimed that there was no need to introduce exceptions to the regional principle of exhaustion of rights established by the EAEU Treaty due to possible risks of negative consequences for the industrial sector in terms of deteriorating conditions for foreign investment and localization of production of international companies (Sysoeva, 2018).

IV. Evolution of Approaches to the Exhaustion of Rights in the Russian Federation

Regulatory and law enforcement approaches to the parallel imports in Russia have their own history in the context of their legal analysis. In the landmark Resolution of the Constitutional Court of the Russian Federation No. 8-P dated 13 February 2018 "Constitutional Review of Provisions of Para 4 Art. 1252, Art. 1487 and Paras 1, 2 and 4 Art. 1515 of the Civil Code of the Russian Federation following the complaint of 'PAG' Ltd,"[8] the Constitutional Court of the RF emphasized that if

[8] The official website of the Russian Newspaper (Rossijskaja gazeta). Available at: https://rg.ru/2018/02/22/postanovlenie-ks-dok.html [Accessed 15.05.2022]. (In Russ.).

the trademark owner follows the sanctions regime to the detriment of the Russian Federation and its economic entities, such a behavior must be considered as unfair. At the same time, such actions should be expressed in the position adopted by the copyright holder in relation to the Russian market.

In other words, the issue of sanctions in the context of assessing the legality of actions related to parallel imports has already become the subject of consideration at the highest judicial level in Russia. At the same time, the Constitutional Court in its standing relied on the criterion of good faith behavior of the rightsholder to evaluate the commitment of the rightsholder to the sanctions' regime.

In the above case, the Court also explained what actions would be regarded as the unfair use of the mechanism of national (regional) exhaustion of the exclusive right to a trademark: first, actions restricting the import of specific goods into the domestic market of the Russian Federation; second, actions implementing a pricing policy of inflating prices on the Russian market as compared with other markets to a greater extent than is typical for ordinary economic activity and that is necessary to satisfy the reasonable economic interest of the copyright holder.

It should be noted that the above trademark owner's actions will be considered as disapproved if they result in restricting access of Russian consumers to certain goods.

In addition, the Court singled out the goods the availability of which on the domestic market is a vital necessity (e.g., certain categories of medicines, equipment for the life support of the population, etc.).

It is noteworthy that the Court did not recognize as unconstitutional the provisions of the rule in Art. 1487 of the Civil Code of the Russian Federation and repeatedly emphasized the nature and importance of the national (regional) principle of exhaustion of rights.

Nevertheless, one of the most important conclusions of the Court was the conclusion enabling the courts to refuse in whole or in part to apply the consequences of importation into the territory of the Russian Federation of a particular consignment of goods without the consent of the trademark holder if the trademark is placed by the copyright holder himself or with his consent, and if the consignment is legally released

into circulation outside the Russian Federation in cases when, due to the unfair behavior of the trademark owner, the application of such consequences at the right holder's request may pose a threat to the life and health of citizens and other publicly significant interests. At the same time, the compliance of the trademark owner with the sanctions regime against the Russian Federation can be considered as unfair.

This Resolution is also interesting because the Constitutional Court of the Russian Federation, although it did not recognize the national principle of exhaustion of rights as the principle contradicting the Constitution, in fact, in certain cases, permits the parallel import of goods (original goods) at inflated prices on the Russian market as compared with the markets of other countries, if the availability of such goods on the domestic market constitutes vital necessity (certain categories of medicines, equipment for life support of the population, etc.). In this context, the actions of exclusive rights' holders to protect their rights may be recognized as abuse of the right. In the Resolution, the interests of parallel importers are taken into account to a much greater extent than the interests of copyright holders, and the Constitutional Court gave an interpretation that largely neutralizes the effect of the norms in question by establishing restrictions on the application of civil sanctions to parallel importers as the mechanism that is reasonable and appropriate in such situations. It is proposed that the copyright holders should recognize such a way of protecting an exclusive right as a ban on the import of goods and its distribution (Ivanov, 2019, pp. 127–128).

Sanctions imposed against the Russian Federation and adopted in early 2022, as well as the suspension of the activities of a number of foreign companies in the Russian Federation, the trajectories of introducing the international principle of exhaustion of rights into legislation resulted in discussions concerning the possibility of parallel imports in order to provide Russian consumers with goods that have ceased to be available on the country's market.

Thus, according to Para 13 Art. 18 of Federal Law No. 46-FZ dated 8 March 2022 "On Amendments to Certain Legislative Acts of the Russian Federation," the Government of the Russian Federation was authorized to limit the effect of the provisions of the Civil Code of the Russian Federation concerning protection of exclusive rights to

the results of intellectual activity expressed in certain goods (groups of goods), and the means of individualization by which such goods are labeled according to the list of goods approved by the Government of the Russian Federation (Koshkin, 2022).

Federal Law No. 213-FZ dated 28 June 2022 "On Amendments to Art. 18 of the Federal Law 'On Amendments to Certain Legislative Acts of the Russian Federation'" supplements the above-mentioned Art. 18 with Part Three, according to which the use of the results of intellectual work is not a violation of the exclusive right to the results of intellectual activity or means of individualization goods (groups of goods), the list of which is established in accordance with Para 13 of Part 1 of the Article, as well as means of individualization with which such goods are marked.[9]

On 7 May 2022, the Ministry of Industry and Trade of the Russian Federation passed the Order No. 1532 (dated 19 April 2022) "On Approval of the List of Goods (Groups of Goods) for which the Provisions of Subparagraph 6 Art. 1359 and Art. 1487 of the Civil Code of the Russian Federation do not Apply, provided that these Goods (Groups of Goods) are put into Circulation outside the Territory of the Russian Federation by the right holders (patent holders), as well as with their consent."

Thus, the Ministry of Industry and Trade approved and published a list of goods that contains 96 items (groups of goods) allowed for parallel import. The list includes: sound recording equipment, photo and film equipment, smart watches (*Apple, Asus, HP, GoPro, Panasonic, Samsung, Nokia, Sony, Intel, Dell, LG, Toshiba*); musical instruments and game consoles produced by a number of manufacturers (*XBox, PlayStation, Nintendo*); household appliances (*Electrolux, Miele, Siemens, Dyson, Philips*); cosmetic components; clothing and footwear; chemical industry goods; salt, sulfur, soil and stone, ores, ash and slag; cars (*Bentley, Cadillac, Land Rover, Jaguar*, etc.), engines (*Volvo, Hyundai, Nissan, Volkswagen*) and spare parts for them (including *Michelin, Goodyear, Continental, Bridgestone tires*), etc.

[9] Available at: https://sozd.duma.gov.ru/bill/127049-8 [Accessed 21.06.2022]. (In Russ.).

Speaking about the format of the list introduction, it is worth noting that the problems of parallel imports and the possibility of switching to the international principle of exhaustion of rights, primarily in relation to trademarks, were discussed in the Russian Federation earlier in the context of freedom of trade. Introduction of a list of specific goods allowed for parallel imports, at first glance, looks illogical, since it discriminates against certain rights holders. Moreover, it could be introduced as a retaliatory restrictive measure in the context of retorts and application of relevant provisions of Art. 1194 of the Civil Code of the Russian Federation. At the same time, the parallel import and its legalization in the context of free trade and increased international competition among producers of goods cannot be called a restriction, since the parallel import is and should be about the goods lawfully put into circulation by the right holder (and not about counterfeit, fake goods). At the same time, according to the opinions of the Ministry of Industry and Trade of Russia: "One of the principles of forming the list was the protection of the interests of domestic consumers of products of those foreign companies that left the Russian market in the conditions of the sanctions imposed by 'unfriendly' countries."[10] In this context, such an approach to the legalization applying parallel imports for the purpose of providing consumers with missing goods looks justified. However, it is worth mentioning that it is advisable to enshrine the international principle of exhaustion of rights expressly by means of introducing this mechanism into the provisions of the Civil Code of the Russian Federation (even with the targeted format of introducing parallel imports), since there are risks of law enforcement practice contradicting the original intention of legislators. However, the list of goods in respect of which the provisions of Para 6 Art. 1359 and Art. 1487 of the Civil Code of the Russian Federation do not apply has been formally introduced. These provisions do not apply to goods launched into civil circulation abroad. The relevant provisions also stipulate which actions (actions related to the use of intellectual property by other persons in relation to goods put into civil circulation

[10] Order of the Ministry of Industry and Trade and the full list of goods. Available at: https://rg.ru/2022/05/06/minpromtorg-prikaz1532-site-dok.html [Accessed 19.05.2022]. (In Russ.).

on the territory of the Russian Federation) do not constitute a violation of exclusive rights, i.e., formally exclude the effect of these provisions, and may lead to recognition of the fact of violation of exclusive rights. In addition, as implementing the international principle of exhaustion of rights we are primarily talking about trademark rights, it is advisable to determine a list of goods with references to specific trademarks, classes of goods, copyright holders, also taking into account various types of trademarks (graphic, combined, etc.).

It seems that there are also the risks of blocking the effective parallel import of goods by copyright holders in countries from which the relevant goods are planned to be imported. We can talk about "self-sanctions," restrictive measures or measures aimed at refusing to permit the use of certain goods introduced by individual companies in relation to Russian entities, the Russian market, various difficulties (disrupted logistics, supply chains, lack of former opportunities for insurance, etc.) and bans on the sale of goods for export to the Russian market (a ban on the import of goods to a specific country can be implemented as an essential term for initial distribution contracts, supply contracts, as a provision in assurances and guarantees, assurances about circumstances, etc.). Measures under consideration also include suspension of services, software utilities, restrictions preventing activation[11] and use of goods and products in Russia. In relation to a number of certain goods, such actions can be critical and they can block the ability to effectively use the goods imported through parallel import. These problems can be solved through the mechanisms of sanctions clauses, i.e., provisions aimed at compensating losses, using the opportunities provided under the EAEU in the context of the EAEU single market, as well as WTO instruments mediating freedom of trade.

The problem of parallel import in relation to goods in the production of which patentable objects are used is also relevant and has been

[11] For example, in June 2022, Russians faced with the remote blocking of Samsung smartphones imported into Russia through parallel import. Samsung confirmed that, indeed, they were taking such measures. At least every fifth smartphone is subject to blocking, which makes it impossible to activate it. Parallel import: Samsung smartphones do not switch on in Russia. How to solve a problem. Available at: https://www.cnews.ru/news/top/2022-06-17_parallelnyj_import_ne_rabotaet [Accessed 19.05.2022]. (In Russ.).

manifested in international practice for quite a long time. A restrictive nature of the mechanism of exhaustion of rights mediating parallel import of goods is often discussed.

Thus, in the context under discussion, there is the doctrinal approach according to which the exhaustion of rights means a restriction of the exclusive right and the opportunities with respect to the subsequent use of IP objects. Under this approach, the exhaustion of the right is considered as a restriction similar to cases of free use (Sagdeeva, 2017, p. 56). The exhaustion of rights can only be conditionally called a restriction of the right, since a specific exclusive right has already been implemented with regard to a certain product.

The issue of exhaustion of rights has already been the subject of consideration in a variety of high-profile litigation in the world (Barraclough, 2017), e.g., the dispute between the companies Lexmark and Impression Products.[12] The dispute arose as a result of the actions of the Defendant (Impression), undertaken to refill cartridges of the Plaintiff (Lexmark). The Plaintiff claimed the violation of its patent rights by such actions of the defendant. The US Supreme Court, overturning the decision of the lower court, refused to satisfy the Plaintiff's claims, referring to the doctrine of exhaustion of rights, concluding that the exhaustion of patent rights is uniform and automatic, regardless of any restrictions, including the place of sale of the goods.

The US Supreme Court, in fact, adopted the international principle of exhaustion of rights, which might reflect the interests of consumers (for consumers in this context, refilling cartridges is often much more convenient and profitable than buying new ones), the protection of whose rights through the international doctrine of exhaustion of rights in this case seems to be an indicative tool.

The international principle of exhaustion of rights also stimulates international competition, protecting the interests of consumers around the world. Continuing the analysis of foreign experience in regulating relations in the field of parallel imports, it is worth noting that the EU and the EAEU apply a regional principle of exhaustion of rights, which

[12] Supreme Court of the United States. Impression Prods., Inc. v. Lexmark Int'l, Inc., No. 15-1189, 581 U.S. (2017) Available at: https://www.supremecourt.gov/opinions/16pdf/15-1189_ebfj.pdf [Accessed 25.06.2019].

implies the possibility of parallel imports between the member states of the corresponding regional association.

Regarding the sanctions imposed on one of the member states of such integration associations, this means that goods lawfully introduced into civil circulation on the territory of one member state (i.e., the goods are legally sold with the permission of the copyright holder by an authorized distributor, dealer or other seller) are allowed for free circulation, movement across state borders to the territory of the other member states of the integration association without the permission of the copyright holder. Participation in such integration associations can be considered as a trajectory of leveling the consequences of the imposed sanctions, but at the same time it can be blocked or dramatically complicated by possible measures restricting the import and service of products to a particular country.

Some countries permit parallel imports in certain areas of trade turnover, which proves that legitimation of parallel imports in the Russian Federation is not a new phenomenon. Most often, such derogations are used in the market of medicines to make them more accessible to people. For example, in Denmark, parallel import of medicines is allowed. As the result of this mechanism application, the citizens of the country saved 81 million euros in 2018 (Artamonov, 2022).

However, domestic policies on IP exhaustion are not the only barrier to parallel imports of pharmaceuticals, as these imports are also subjected to national marketing approvals, import authorizations, and other formalities. In addition, in many instances, national governments exert price control on the sale of pharmaceuticals, in particular prescription medications (Calboli, 2022, p. 31).

In this context, the standing of the Association of European Businesses (AEB) that appealed to the Russian authorities with the request expressed in the Memorandum dated 17 May 2022 to abandon the application of the parallel import regime for certain goods, including special, road and agricultural machinery, telecommunications equipment for building cellular networks, cosmetics and perfumes, does not look entirely justified. In the Memorandum, the AEB points out the risks to security and organization of high-quality services and to telecom equipment due to impossibility of providing licensed services and risks to the

stable functioning of the critical information infrastructure, to perfumery and cosmetic products due to the threats to consumers' health in case of import of counterfeit products.[13]

V. Experience of Other Countries Regarding the Parallel Import

China has actually implemented the international principle of exhaustion of rights. In the USA, the decision on the admissibility of parallel imports in each case is made by the court, and such decisions can be completely different. Thus, in 1923, the French cosmetics company *A. Bourjois & Co*. brought a claim against an American entrepreneur who bought a batch of powder from the manufacturer in France and resold it in the USA. They reached the US Supreme Court that decided in favor of the French company and, in fact, the national principle of exhaustion of rights and strict territoriality. At the same time, American courts often support the international doctrine of exhaustion of rights. For example, in 2015, the American court rejected a lawsuit brought by the Swiss watch company *Omega* against the largest American retailer *Costco* that purchased goods from an official dealer in Europe and sold them in America for a third cheaper. The court opined that such parallel imports were legitimate, since *Costco* purchased official products, not counterfeit ones (Artamonov, 2022).

Iran is an illustrative example of the state where parallel imports are implemented under the conditions of sanctions, where goods from many world manufacturers that do not carry out official sales on the territory of Iran are available. *Apple* equipment, for example, is brought, as a rule, from the UAE, where taxation is optimal for these purposes, while private service centers operate in Iran and they purchase spare parts and components through third countries.[14]

[13] AEB asked not to extend parallel imports to the Russian Federation for a number of goods. Available at: https://www.interfax.ru/business/841308 [Accessed 19.05.2022]. (In Russ.).

[14] Legalization of "gray" imports: the Ministry of Industry and Trade agreed on a list of goods for import without the consent of the manufacturer. 23 April 2022. Available at: https://www.bfm.ru/news/498419 [Accessed 19.05.2022]. (In Russ.).

VI. Conclusion

Thus. parallel import introduction in Russia by means of determining a list of goods subject to the international exhaustion regime is aimed at solving the problem associated with the resulting shortages of goods in certain Russian markets of goods and services. In this context, the admission of parallel imports in Russia according to the fixed list of goods seems to be a forced anti-sanctions measure introduced to overcome the consequences of restrictive measures (sanctions), including secondary sanctions. At the same time, it is worth emphasizing that the introduction of any format of exhaustion of rights in national legislation is the prerogative of the member States of the universal international organizations relevant to this issue (WIPO and WTO). Thus, the Paris Convention for the Protection of Industrial Property of 1883 does not resolve the issue of exhaustion of rights and it does not provide for provisions explicitly permitting or prohibiting parallel imports. Art. 6 of the Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPS Agreement) de facto excludes the issue of exhaustion of rights from the scope of the Agreement and does not extend the Agreement's provisions to the solution of the issue of exhaustion of rights. Thus, the issue of exhaustion of rights and parallel imports remains at the discretion of the WTO member States.

The introduction of parallel imports and a targeted international regime of exhaustion of rights (through the enumerative approach) in the context of sanctions restrictions in Russia seems to be an anti-sanctions measure applied to ensure the sustainability of international trade and it does not contradict the provisions of international treaties.

At the same time, according to their legal nature, the rules of law under consideration mediating the introduction of parallel imports under sanctions can be characterized as special norms that establish special rules for specific cases and they have priority over the general provisions of the Civil Code of the Russian Federation (Art. 1487 and Para 6 Art. 1359) concerning the national regime of exhaustion of rights in relation to trademarks and objects of patent rights, respectively.

The problem of different approaches to the exhaustion of rights in different countries really persists. In the current circumstances, the

limits of the principle of exclusive protection of intellectual property should be limited to an objective single expression (realization) of property rights in a particular product, regardless of which of the copyright holders and in which country has launched the corresponding product into civil turnover. However, introduction of such goods into trade and their full use may be complicated by political decisions, in particular, by decisions to terminate support services of relevant goods because of sanctions. Under these conditions, States that have been subjected to such sanctions need to develop their own centers for the provision of relevant services, to improve their quality and professional competence, to constantly maintain the assortment in warehouses for the storage of goods in order to ensure the interests of consumers and access to the necessary goods of consumers in a particular market.

Under the point-by-point approach (by means of introduction of a list of goods) to the application of the international principle of exhaustion of rights, the creation and maintenance of a register of intellectual property objects (and more specifically, the existing exclusive rights to the results of intellectual activity, whose copyright holders abuse them) is acknowledged as an effective measure to prevent the entry of goods into the market of a particular country for political and sanction reasons. In Russia, with regard to the exclusive rights of such copyright holders, in the context of the development of the provisions of the Civil Code, it is possible to introduce restrictions that prevent unilateral termination of contracts (and primarily, license agreements) and a continued abuse of exclusive rights (including measures to introduce a special procedure for settlements under contracts; assessment of ways of using exclusive rights that lead to blocking the market from the right holder's goods, as an abuse of the right). This approach complies with the purpose of strict observance of the balance of interests between foreign right holders and consumers, as well as maintaining the functioning of the system of protection of the rights primarily on the basis of the national treatment principle and prevention of its restriction. The mechanism of retorsions — mutual, mirror restrictions in response to the equal restriction of the rights of their own citizens in a particular foreign state — can become the only exception to the national treatment principle in exceptional cases.

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