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DOMESTIC AFFAIRS

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HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT

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CONTENTS

EDITORIAL

Vladimir I. Przhilenskiy 178

BIOETHICS

Vladimir I. Przhilenskiy
Bioethics: Epistemic Capabilities and Legal Frameworks 180

DOMESTIC AFFAIRS

Suhail Khan
Bridging the Labour Regulation Gaps in India's Informal Migrant Economy amid Covid-19 Pandemic: Uncovering Challenges and Results ... 199

Irina Z. Ayusheeva, Alexey V. Anisimov
Civil Liability for Damages Caused by Unmanned Vehicles in Russian and Foreign Law 222

Vladimir A. Kanashevskiy
Legal Challenges Surrounding Participation of Big Tech Companies in the Russian Social Networking Market 246

Vasiliy A. Laptev
Integrating Digital Technologies into Russian Legal Arbitrazh Proceedings: Current State and Prospects for Development 268

INTERNATIONAL AFFAIRS

Damir K. Bekyashev, Elizaveta G. Umrikhina
Jurisdiction of the International Tribunal for the Law of the Sea in Terms of Giving Advisory Opinions and Prospects of the Delivery thereof on Combating Climate Change 295

Rustam A. Kasyanov, Vladislav A. Kachalyan
Evolution of the Legal Framework for UCITS Funds in the European Union (1985–2023) 325

HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT

Sangar S. Asaad
The Balance of Justice: The Water Right and Large Dams in the Tigris and Euphrates Basin 370

Thai Thi Tuyet Dung, Vu Kim Hanh Dung
The Right to Access Information: Perspectives from Lawsuits of Refusal to Information Supply in Selected Countries and Vietnam 386

EDITORIAL

Dear Readers and Authors,

It is no exaggeration to say that this issue is devoted to very different and rather special areas of legal regulation, which by no means makes it uninteresting for the international academic community, not to mention the broad strata of practicing lawyers and experts in the area of legal education.

The topic of the relationship between morality and law in the process of regulating genetic research encounters a number of difficulties, primarily related to the existing disciplinary boundaries between different fields of human knowledge. The trend towards interdisciplinarity that has emerged in recent decades has not yet been able to overcome the *demarcation lines* separating ethics from law, as well as philosophical knowledge from legal science. Meanwhile, the development of molecular biology, medicine and genetic technologies actualized the birth of a new field of human knowledge and a new institution that combined moral and regulatory, socio-administrative and regulatory functions despite all disciplinary restrictions. In his paper **Vladimir I. Przhilenskiy** considers this phenomenon in the context of combining epistemic and institutional perspectives.

The following paper by **Suhail Khan** is devoted to identifying gaps in the field of labor law and Indian legislation that do not adequately regulate the activities of migrant workers in such a specific area as the informal economy. In the paper, **Suhail Khan** analyzes the problems of the development of this area, which have worsened in the context of the Covid-19 pandemic and assesses the prospects for legal improvement of national legislation in this area.

The development of technology poses new challenges to lawmakers and law enforcement officers. Recently, the production and use of unmanned aerial vehicles has become widespread, which has raised questions about civil liability for damage caused by their use. **Irina Z. Ayusheeva** and **Alexey V. Anisimov** attempted a comparative study of Russian and foreign experience in this field, dedicating the paper published in this issue to this problem.

Damir K. Bekyashev and **Elizaveta G. Umrikhina** elucidate the jurisdiction of the International Tribunal for the Law of the Sea and subject it to a thorough review in terms of advisory opinions of the institution under consideration and the prospects for their use regarding issues related to combating

climate change. This topic has become especially relevant due to the changes in the global climate, which many experts in the field of environment consider extremely dangerous, and some researchers even call them irreversible. All this strengthens the general interest in the activities of the International Tribunal for the Law of the Sea.

Disputes about the nature of justice and the diversity of its understanding in resolving legal and economic disputes are still relevant. **Sangar Samad Asaad** made the right to water and large dams in the Tigris and Euphrates basin the topic of his research in the context of a sustainable development model.

The right to access to information is no less relevant in the modern era. Considering the prospects of lawsuits on refusal to provide information in Vietnam, **Thai Thi Tuyet Dung** and **Vu Kim Hanh Dung** outline the overall picture of exercising the right to access information and show the national specifics of this issue.

The latest challenges for national and international law related to the development of modern technologies remain in the field of attention of Russian researchers. The legal problems associated with the participation of large technology companies in the Russian social media market are presented in the paper by **Vladimir A. Kanashevskiy**.

Vasiliy A. Laptev draws readers' attention to the process of integrating digital technologies into Russian legal proceedings, consistently analyzing the current state and prospects for the development of this branch of legal regulation. The issue ends with an article by **Rustam A. Kasyanov** and **Vladislav A. Kachalyan** on the evolution of the legal framework for UCITS funds in the European Union (1985–2023).

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

BIOETHICS

Article

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Bioethics: Epistemic Capabilities and Legal Frameworks

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> It seems to me for some reason
> that you are not much of a cat, —
> the Master answered hesitantly.
> *M.A. Bulgakov*

Abstract: The paper examines the problem of the binary nature of bioethics as both a field of scientific research and a social institution designed to deal with administrative and legal regulation of medical and research activities in the field of biomedical technologies. Regarding the epistemic capacity of bioethics, the author defines its relationship with both philosophical concepts and the latest advances in the life sciences, anthropology, and sociology. This relationship is not just a theory, but can be applied to biomedical technologies. When considering the institutional status of bioethics, the author focuses on the difference in bioethical traditions formed in North and South America, Europe and Asia under the influence of administrative, legal, economic, philosophical and cultural factors. The paper discusses arguments of two main approaches to the formation of principles and norms of bioethics, one of which can be called universalist and globalist, and the second —

civilizational-pluralistic. The author considers the main function of bioethics, the organization of ethical expertise to authorize problematic solutions included in research programs, projects of technological and pharmacological innovations, and medical practices. The author discusses validity of the proposal to define ethical expertise as a type of humanitarian expertise, as well as alternative points of view.

Keywords: ethical review; bioethics; biomedicine; regulation; institution

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Contents

I. Introduction 181
II. Institutional Status of Bioethics 183
III. Bioethics as a Field of Study 183
IV. Institutional Functionality of Bioethics 186
V. Bioethics as a Deductive-Axiomatic System 187
VI. Bioethics and Value Systems 188
VII. Ethical Expertise is the Main Function of Bioethics 190
VIII. The Problem of Distinguishing between Ethical and Humanitarian Expertise 192
IX. Heterogeneity of Ethical Expertise: Between Epistemology, Axiology and Praxeology 194
X. Conclusion 196
References 197

I. Introduction

Is bioethics a science? If it is, what kind of a science is it? Can it be considered one of the sections of ethical, that is, philosophical knowledge? There is, after all, *ethics* in this word. Or does bioethics refer more to

biology or even medicine, as the part *bio* indicates? Or is it not about any knowledge at all, but about a social institution that is part of legal institutions of the modern society? And what do bioethicists, scientists, lawyers, philosophers, and sociologists themselves say about this? According to the authors of the authoritative philosophical encyclopedia, the term *bioethics* has two meanings. Firstly, bioethics is a field of interdisciplinary research, and secondly, it can be viewed as a social institution. Therefore in its first meaning, the field of interdisciplinary research, bioethics is aimed "at understanding, discussing and resolving moral problems generated by the latest achievements of biomedical science and health care practice," and the tasks of bioethics as a social institution include solving problems and regulating conflicts that arise "in relationships between the sphere of development and application of new biomedical knowledge and technologies, on the one hand, and the individual and society, on the other" (Ignatiev and Yudin, 2010).

The definition of bioethics can be also found in encyclopedias on medicine, biology, sociology, psychology and even theology. Thus, the compilers of Evangelical Dictionary of Theology call bioethics "a discipline within which doctors, philosophers, lawyers and theologians are trying to solve complex moral questions that arise in connection with the development of modern healthcare... At the same time, questions of bioethics that seem topical today can be considered eternal. What is human life? What is its price? How can we understand the causes of human suffering and imperfections? How should we respond to them? Should doctors, for example, artificially prolong the life of obviously non-viable newborns? And who should make decisions on such issues? Theologians and philosophers? Doctors? Family? Court?" (Treier and Elwell, 2017). The concern of theologians is easy to understand, as they are looking for answers to questions that are often addressed not to a priest, but to the court today. However, we cannot find any definition of bioethics as a legal institution in dictionaries, even in specialized dictionaries on law. The mention of the institutional status of bioethics did not prompt lawyers to define it as a legal institution and recognize its regulatory functions.

II. Institutional Status of Bioethics

The situation with bioethics is unique, and in some ways even paradoxical. All other branches of scientific knowledge, be it physics or history, biology or linguistics, could never claim the status of an entire institution — only science as a whole has its institutionality. Even philosophy, which had the institutional status of the Antiquity, was able to acquire it at the cost of losing it. Philosophy as a type of intellectual activity in the Middle Ages was able to survive and survive only by becoming a *handmaiden of theology*, and then, in modern times, it had to become a branch of scientific knowledge. Bioethics, from the very beginning, was an institution that openly claimed the status of a social regulator, and it automatically put it on a par with such social regulators as law or morality. An institution (Latin *institutum* — establishment, custom, establishment) cannot be identified with a branch of knowledge, which, by definition, is part of another institution. This means that bioethics as an institute, and bioethics as a field of research activity are two different bioethics, albeit interrelated. Public morality quietly grows out of reflection on various social practices. Bioethics can be seen as a kind of hybrid of morality and law, as well as an amazing ability to act either in the role of morality or in the role of law. And just as Bulgakov's character was "not much of a cat," bioethics seems to be not much of a science, not much of an institution, not much of a regulator. All this requires additional consideration of the social, administrative, legal and epistemic status of bioethics.

III. Bioethics as a Field of Study

Bioethics as a separate type of knowledge, allowing us to evaluate the actions of doctors and biologists, did not appeared in line with the general logic of the development of science, but rather it contradicts it. The German theologian and philosopher Fritz Jahr is believed to be the author of the term. He published his book "The Science of Life and Morality" in 1926, and a year later he wrote the article "Bio-ethics: on the ethics of human relations with animals and plants." Continuing the tradition of Kantian ethics, he proposed a "bioethical imperative,"

extending Immanuel Kant's theory of the categorical imperative to human's relationship to all living things.

Later, the ideas of the German theologian were picked up by the American doctor Van Rensselaer Potter, whose book "Bioethics: Bridge to the Future" was published almost half a century later with this then unusual word for the title. It is no coincidence that it has become extremely popular due to the ever-increasing need for some new guidelines to solve problems arising in the field of medicine. Previous methods of determining what can and cannot be done seemed hopelessly outdated to doctors and managers, biologists and legislators. New practices of treatment and study were not regulated by laws, but were suppressed. Moral reasoning was conducted based on the outdated ethical norms of the previous centuries, alternately appealing to Christian or humanistic values. Many philosophical doctrines and concepts that dominated the minds of the intellectuals of that time failed to help in generalizing and formulating something suitable for a medical concilium. This forced interested scientists to independently compose new maxims and imperatives.

Van Rensselaer Potter in the preface to his book clearly expressed the goals and objectives of the new field of knowledge he designed. According to him, humanity, which not only needs a better life, but continues to struggle for survival, urgently needs "knowledge of how to use knowledge." The new science or science of survival he proposed "must be built on knowledge of biology and at the same time go beyond the boundaries of its traditional ideas; include in the scope of its consideration the most essential elements of the social and human sciences, and philosophy, understood as 'the love of wisdom,' is of particular importance" (Potter, 1971).

Van Rensselaer Potter noted that bioethics should not be a new science, but a new wisdom in which science will be combined with values, that is, biological knowledge will be integrated with universal values. "We need biologists who can explain what we can do, what we should, and what we shouldn't do to survive if we hope to maintain and improve life on Earth over the next three decades." One can see in this postulate a consonance with the ideas of Russian cosmists,

in particular, with the teachings of Vladimir Vernadsky about the Noosphere. The outstanding Russian geologist and philosopher wrote that previous scientific concepts of life turned out to be untenable due to their dependence on the disciplinary organization of knowledge. According to Vernadsky, "a living organism of the biosphere should now be empirically studied as a special body, not entirely reducible to known physicochemical systems. Whether it can one day be entirely based on them, science cannot decide now" (Vernadsky, 1967).

The interdisciplinarity or, as some researchers call it, transdisciplinarity deserves special consideration. According to Grebenshchikova, "Orientation towards solving applied, mostly practical, problems, usually in the 'here and now' mode, characterizes the phenomenon of bioethical knowledge, the context of which shows not only why this knowledge is relevant, significant, what are the mechanisms of its effective functioning, but also makes it possible to trace the prospects for its further development. Becoming a reflexive process, obtaining knowledge in bioethics acquires a recursive character and manifests itself as a factor in the attitude towards knowledge as a communicative process, considered in various aspects in modern epistemology" (Grebenshchikova, 2010, p. 81). The author further adds that, in contrast to the usual standards and ideals of the objectivity of scientific knowledge, the specificity of bioethics is the fact that it consists of positions and opinions. These positions and opinions, which then form the basis of an assessment or decision, are inseparable from the subjective dimension. Grebenshchikova argues that it is a confirmation of the hypothesis about the genetic connection of bioethics with the "anthropological turn" of post-non-classical science, which allows us to talk, if not about the complete elimination of non-evaluative judgments from bioethical knowledge, then at least about their reduction in epistemic status. And since value systems and universals of culture are thought today outside the classical opposition "objective-subjective," they should be recognized as intersubjective, and the space of symbolic action correlates with the constants of the life world.

IV. Institutional Functionality of Bioethics

If we remember that bioethics is not only a type of knowledge, but also an institution, then the question arises of what kind of social need it is intended to satisfy. As we know, the sociological definition of an institution implies exactly this: a social institution is a set of roles and statuses designed to satisfy some social needs. To paraphrase the title of the famous work of Friedrich Nietzsche, we can say that the bioethics institute owes its birth to the spirit of American insurance medicine. The emergence, almost simultaneously with the publication of the mentioned book, by The Hastings Center and the Kennedy Institute for Ethics at Georgetown University made it possible to fill the term "bioethics" with a different meaning. Now it was not so much about the survival of a human as a biological species, but about biomedical research and medical practice. The problem of determining the responsibility of the attending physician and the experimenting scientist to patients and subjects turned out to be urgent. Since the latter could (and did) charge doctors and researchers with violating moral standards or laws in the future, it was necessary to create some mechanisms that would protect the rights of participants in the experiment, as well as relieve responsibility from those who carried out the experiment. And since in the United States the development of insurance medicine in the second half of the twentieth century turned a representative of a medical insurance company into the main intermediary between a doctor and a patient, as well as between a researcher and a subject, the formation of the institute of bioethics was largely due to this fact.

Thus, bioethics is a completely unique institution that should perform the functions of ethics, law and administration in completely new conditions. Prohibitions and regulations of bioethics must ensure effective interaction between the doctor and the patient, on the one hand, and the researcher with his "research object," on the other. Ultimately, bioethics is intended to regulate newly emerging aspects in the relationship between people and society associated with progress in the field of technology and the resulting rapid development of genetic and other biomedical technologies. It intricately combined the doctor's

desire to avoid claims from the patient and the health insurance companies with the desire of society to protect itself from too risky interventions in the natural order of life, such as genetic editing or other influences on reproductive practices.

V. Bioethics as a Deductive-Axiomatic System

Aristotle described in detail the principle of operation of deductive-axiomatic systems for constructing knowledge, although it can be considered the result of the development of all Hellenic wisdom. His famous saying "wisdom [or philosophy] is the science of certain causes and principles" does not simply record the intention to always seek the causes of phenomena in need of explanation. He formulated the requirement to trust only those thoughts, judgments or decisions that are derived from certain principles, correspond to these principles, and are their implementation.

Meanwhile, Siluyanova and Pishchikova provide an example of not just different, but also diametrically opposed interpretations of one of the most important principles of bioethics, the principle of human dignity respect. Based on a comparative analysis of scientific conferences materials, handbooks on bioethics for judges and statements of the Church-Public Council on Biomedical Ethics, the authors come to the conclusion that the interpretation of the norms and principles of medical ethics is connected with the political, ideological or worldview attitudes of those who interpret them. According to Siluyanova and Pishchikova, "Conservative and liberal bioethics solve the issue of implementing the principle of the human dignity respect in different ways. Conservative bioethics is based on the traditional principles of medical ethics, while liberal bioethics, as a rule, breaks away from tradition, proposing new regulators for resolving controversial situations in medical practice" (Siluyanova and Pishchikova, 2020, p. 15). In other words, the liberal bioethics admits that as the world changes, so do the values, and therefore the principles governing the activities of a doctor or researcher. The conservative bioethics affirms the approach according to which the world changes, but the human essence does not. Therefore, the values remain unchanged, along with the principles that fix them.

Bryzgalina provides one clear example of how the same area of research can be assessed differently from an ethical point of view. This is an example of the development of neo-eugenics (Bryzgalina, 2016, p. 28). Neo-eugenics focuses on the means of implementing plans, their moral evaluation and ethical acceptability. Not intervention at the genotype level, but changing the entire environment is the main means of this type of genotype improvement. However, there are arguments to emphasize the inhumane essence of any eugenics, too.

VI. Bioethics and Value Systems

The development of medicine and medical technology changed the very concept of medical treatment, expanding it to actually erasing the line between treatment as the fight against disease or its prevention, on the one hand, and the management of human life, on the other. Can genetic correction of human characteristics, the deprivation of life of an embryo or a hopeless patient be included in the field of medicine without reservation, even if this deprivation is passive in the form of termination of medical care? Therefore, the classical definition of medicine as a set of sciences about diseases, their treatment and prevention is undoubtedly outdated. But if we are talking about the possibility of correlating with established moral values and principles of certain decisions related to the treatment of a patient or even the management of their life, then the question arises as to whether we have these norms and principles that are universal for the whole world. It would seem that the world community can work together to develop a kind of consensus option that takes into account all socio-cultural and ethno-confessional traditions through their partial generalization and partial compromise. If the American bioethics is a symbiosis born from the traditions of Protestant ethics, common law and American medical practice, then in the countries of continental Europe the principles and standards born by the Americans raise many objections. It is no coincidence that in a number of Central European and Latin American countries a whole movement arose for a return to the ideas of Fritz Jahr, in which bioethics as a system of knowledge about the boundaries of what is permissible when searching for answers to questions about

the boundaries of intervention in processes associated with human life and death are viewed in a completely different way. It is well-known that Fritz Jahr expressed his ideas in a book that did not become popular and was soon forgotten, as well as in a journal article that accidentally caught the eye of a German scientist decades later along with old files of the *Cosmos* journal. Thus, in 1997, a professor at the Humboldt University in Berlin, Rolf Letter, and then an employee of the University of Tübingen, Eva Maria Engels, began to popularize an approach to bioethics that seemed to be an alternative to the American one. According to Belyakova, this approach became popular in countries where other sociocultural, confessional and legal traditions dominated. Thus, an alternative was gradually formed, in which Catholic, Lutheran, Confucian and other value influences were visible. Belyakova writes: "In 2017, Muzur and Sass released a collection in a series on practical ethics of the Austrian-Swiss publishing house *LIT 1926–2016 Fritz Jahr's Bioethics: A Global Discourse* with the involvement of a wide range of researchers from Asia and Latin America, where the very heterogeneous texts were united by one persistent the idea of abandoning the North American bioethical narrative" (Belyakova, 2020, p. 96).

What did doctors and philosophers from Central and Eastern Europe, Asia and Latin America dislike so much about the North American bioethical narrative? Ethics of Protestantism or utilitarianism, logic of pragmatism, case law, practice of insurance medicine? Or the entire alloy, born in specific socio-economic and administrative-legal conditions, not to mention a different culture and mentality? But then what kind of common bioethics can we talk about? Supporters of universalism are convinced that behind all the diversity of traditions and cultures, faiths and value systems, there are some universals, such as human rights and the ideal of humanism.

This thesis is disputed today from the point of view of cultural pluralism. So, Smirnov formulated the "universal — all-human" controversy, turning not only to the philosophy of late Slavophilism, but also to the ideas of the Eurasians. The central figure around which the thought of a modern Russian philosopher moves is the figure of Trubetskoy, who was the first to openly oppose the canons of universalism and Eurocentrism. "European" is denied not because it

is “Catholic” or “Protestant,” not because it is “hostile to Orthodoxy.” Not at all. To be convinced of this, just read “Europe and Humanity.” This is very revealing: it means that the point is not in the rejection of the cultural values of the European, not in their rejection (the same is true for Danilevsky and Dostoevsky); the point is only to resist the expansion of the European under the guise of the universal (Smirnov, 2019, p. 175).

VII. Ethical Expertise is the Main Function of Bioethics

The task of ethical expertise that evaluate research and treatment practices in the field of genomic research and the use of genetic technologies is to assess the risk for subjects. To carry out ethical expertise in biomedicine, a simple mechanical combination of three independent expert opinions (administrative and managerial, moral and ethical, and regulatory) is not enough. These conclusions cannot overcome the subject, disciplinary and methodological isolation of management, morality and law. To organize and conduct ethical examination in biomedicine, special structures are created: ethical committees that integrate the regulatory capabilities of administration, ethics and law.

No research involving humans or laboratory animals should be conducted without the approval of an ethics committee because its purpose is to fairly resolve the conflict between the interests of science and the individual subject. Clinical drug testing, collection and processing of personal genetic information, and all other types of biomedical research carry a potential threat to the health, dignity, and even life of the subject. At the same time, without gaining new knowledge in this area, society misses the chance to acquire unique medical technologies and methods of treating patients. Ethical expertise should be organized in such a way that the subject or patient participates in making decisions, the implementation of which involves a risk to their health and well-being. In addition to this participation, society should be involved in assessing risks and making decisions related to them, not directly, but through a specially selected expert team, which should include representatives of different social and professional

groups involved in the formation of ethical discourse. We are talking about historically established social practices associated with religious, philosophical, scientific and artistic and everyday-practical types of knowledge, which requires the inclusion of clergy, representatives of the academic community and creative intelligentsia, as well as doctors, lawyers, and managers among the participants in the ethical expertise. Of particular importance is the inclusion of laypersons in expert groups, that is, representatives of everyday practical knowledge, whose presence helps balance the opinion of experts.

The traditional understanding of expertise connects this concept with the possibility of attracting specialists in a particular field of knowledge necessary for the most accurate definition of the subject (process, phenomenon) being studied, as well as assessing its future prospects. The specificity of ethical expertise is that its organizers have to deal with a subject with a high degree of uncertainty. If, in the process of legal examination of decisions or actions, orders or regulations, subjects related to the sphere of fact are subject to assessment: actions are recorded, words and statements are interpreted in the context of their correlation with written law. Both the first and the second allow, in the process of assessment, the subsuming of a single fact under the current norm in accordance with the formula of a simple categorical syllogism or an affirmative mode. Just as in the course of forensic, ballistic or chemical expertise, material facts are compared with biomedical or physical theories. In case of the ethical expertise, the situation is completely different, a moral assessment is made by correlating committed or only planned actions with ethical discourse, which, although it contains a normative component, cannot be reduced to it in principle. All attempts to formulate moral norms as clearly and unambiguously only lead to their conscious or unconscious transformation into norms of law, and that means that they are eliminated from the sphere of morality. But then the question arises as to whether ethical expertise is not just a type of legal expertise, and not a separate type of expertise that can equally participate in the identification, assessment and qualification of the events, words or actions under consideration.

A decade and a half ago, a discussion broke out in Russian science about how to understand ethical expertise, its place in the structure of

scientific knowledge and its role in expert activity. In a certain sense, it was provoked by Yudin's proposal to consider ethical expertise to be a special case of humanitarian expertise. He defined both the first and second as two varieties of social practices and believed that they relate to each other as a genus (humanitarian) and a species (ethical). Referring to the provision according to which, "in medical research on humans, considerations related to the well-being of the subject must prevail over the interests of science and society" (Campbell, Gillett, and Jones, 2004, p. 382),[1] Yudin proclaims the mandatory inclusion of laypersons in the ethics committee as a guarantor.

VIII. The Problem of Distinguishing between Ethical and Humanitarian Expertise

The idea of involving laypersons in the expertise is not new. It has both its advantages and its disadvantages. *Quis custodiet ipsos custodes*,[2] said Roman lawyers, wondering how to ensure the independence of the court. According to Yudin "A non-professional, or a layperson can be a lawyer, ethicist, psychologist, social worker, priest, etc. It is only important that he or she is in no way connected with the researchers or the institution conducting the research, and, thus, evaluates the meaning and content of the research precisely from the point of view of the risks and hardships that it entails for the subjects. Moreover, a particular problem turns out to be the preservation among laypersons of that 'naivety,' inexperience in relation to scientific issues themselves, which allows them to remain unbiased when participating in the expertise" (Yudin, 2005, pp. 127–128).

Sogomonov and Bakshtanovsky expressed an alternative point of view. They believe that ethical expertise is primarily public or even civil expertise (Bakshtanovsky and Sogomonov, 2009). According to Sogomonov, thereby his co-author and he brought ethical expertise "out of the 'silence' of armchair ethical reflection and gave it a 'high'

[1] *See* World Medical Association Declaration of Helsinki. In: Campbell, A., Gillett, G., and Jones, G., (2004). Medical ethics. Moscow.

[2] From Latin "Who will guard the watchmen themselves?" or "Who is watching the observers themselves?".

public status" (Sogomonov, 2012, p. 31). In other words, the experience of the development of bioethics as an institution reveals a distinction between two types of experts: professional experts who carry out their functions on the basis of professional knowledge and experience, and lay experts who derive their legitimacy from appealing to the general public. All this has already been repeatedly expressed in the structure of power and even marked the beginning of a real division of powers, elected non-professionals and appointed professionals. The last time, in our time, these ideas were picked up by the authors of technocratic concepts from the engineer William Henry Smith and the economist Thorstein Veblen to the Russian-Soviet philosopher and revolutionary Alexander Bogdanov. Actually, the same idea lies at the foundation of the institution of jury trials. This serves as another argument in favor of the fact that bioethics claims to be a social and even political institution.

A question that cannot but arise in connection with the concept of a professional expert in the interdisciplinary field of bioethics. It was no coincidence that the doctor turned to the help of a philosopher, and the philosopher wanted to compare his reasoning with a priest and a lawyer, as a result of which an ethics committee was born. Therefore, none of the representatives of these professions can be an expert in the field of bioethics, but only the entire team, whose collegial decisions will be based on a sufficient body of knowledge and a sufficient set of competencies, can claim the status of an expert.

At the same time there are other differences between the ethical and the humanitarian in the context of their expert institutionalization. First of all, the difference between ethical expertise and humanitarian expertise is that ethical expertise is a means of protecting human nature from the negative impact of new technologies, and humanitarian expertise is a type of a new technology, social engineering. Experts and participants in these two types of expertise play fundamentally different roles. According to Sinyukova and Smirnov, "As part of the ethical expertise, the expert carries out procedures for verifying and matching the case, precedent and existing norms described in the documents. Within the framework of humanitarian expertise, all the procedure participants are forced to actually go through a development step and build a model of interaction between a person and a smart environment,

in which the human norm is seen to be restored and the connections between humans and the world are re-established" (Sinyukova and Smirnov, 2021, p. 643). Thus, the authors emphasize the project-based nature of humanitarian expertise, while ethical expertise can only be evaluative, but not constructive of reality.

The scientific expertise has been and remains one of the most important institutions of modern science and medical practice, but the question of who can act as an expert still remains unclear. The Latin word *expertus* originally meant experienced, knowledgeable. The simplest case of the need for expertise arises when someone fears their own incompetence: an experienced and knowledgeable person in a certain area is involved by less experienced and knowledgeable people for the most accurate and correct assessment of any event or phenomenon. These could be researchers or investigators, managers or designers, i.e., people who are competent in one area need the help of those who are competent in something else. In other words, individuals or teams engaged in searching for answers to theoretical and practical questions requiring special knowledge are forced to attract specialists from various fields of knowledge.

IX. Heterogeneity of Ethical Expertise: Between Epistemology, Axiology and Praxeology

Expertise related to the resolution of controversial issues between subjects of law, when clarification of the legal relationship is required based on the establishment of factual circumstances, should be distinguished from ordinary expertise. Then the expert's opinion acts as legally binding evidence, on the basis of which the court makes a legally binding decision.

It is important to understand that, unlike scientific research or technical design, an expert does not simply help stakeholders gain new knowledge or find a promising technical solution. Of course, here too, a specialist hired to carry out the examination, using their experience, knowledge and competence, undoubtedly helps the court get closer to the truth. But during the trial, the assessment given by the expert almost always turns out to correspond to the interests of one of the opposing

parties, the prosecution or the defense. This circumstance is due to the fact that modern legal proceedings are adversarial in nature and this affects the peculiarities of organizing a forensic examination. A forensic expert is limited in their activities by a significantly larger number of regulations and prohibitions than a scientific or technical expert. Their objectivity, impartiality and non-partisanship are ensured by strict adherence to rules and procedures that are completely unnecessary in research and design practices. This is the main difference between forensic expertise and scientific or technological expertise.

Ethical expertise is a very special case. It seems to be in the middle between research and design expertise, on the one hand, and judicial one, on the other. The borderline nature of medical expertise has been noted by many scientists. According to Sedova, "The place of ethical expertise is at the intersection of epistemological, axiological and praxeological currents in medical knowledge, value judgments and specific actions. Consequently, ethical expertise must exist to evaluate medical practice, even more necessary than in assessing epistemological components and assessing the possibility of their practical testing" (Sedova, 2022, pp. 6–11). Sedova concludes that it is necessary to share the practice of some countries where ethical committees are divided by specialization into two groups: some are research, others are hospital.

In recent years, problems arising in the organization of ethical expertise and negative trends in this area of medical activity have become increasingly clear. Along with the limitation of the subject of the expertise, one can often encounter a lack of communication between different types of examinations. Sedova calls formalism and incorrect interpretation of collegiality in work a real disaster in the field of ethical expertise. Formalism in assessing the activities of the medical ethics committee here means reducing all the efforts of a group of experts, for example, members of the ethics committee, to checking the correctness of the application and the compliance of its content with general principles of ethics and various international declarations. The ability to evaluate the prospects of a study and, most importantly, to separate the actual research part from the series of ongoing clinical trials that needs separate consideration in order to test them for compliance with human rights protection requirements is an

important part of overcoming excessive formalism. A serious problem is also the fact that specialists competent in medicine or biology turn out to be completely unprepared to participate in ethical examination, which requires completely different competencies. Familiarity with the basics of philosophical knowledge and the key problems of bioethics is not enough for the qualified use of the tools and methods of modern philosophy, not to mention the newly discovered possibilities of cognitive science and interdisciplinary research in the field of ethics. Often, when creating specialized expert groups and ethical commissions, they forget that their medical or biomedical competencies do not guarantee possession of bioethical competencies.

X. Conclusion

The task of ethical expertise is to protect human rights, and human rights are determined based on the essence of a person. The essence of a person is revealed in the course of self-knowledge. Despite the duration and historicity of this process, in recent decades the question of human nature, its norm and boundaries was posed in a completely different sense than before: for the first time in human's knowledge about the humanity, we moved from observation to intervention. The Galilean revolution, which radically changed the nature of natural science, was associated with the transition from observation of nature to experimental intervention in the natural course of events. A scientific revolution of equal scale is taking place today in genetic laboratories, where for the first time the boundaries of a person, our nature, and therefore the meaning of our existence became accessible to intervention. The search for appropriate solutions in the institutionalization of ethical expertise is not only an organizational, managerial and rule-making problem. Most of the questions that arise here cannot be resolved without resorting to the means and methods of philosophy. And the question of whether ethical expertise is a kind of humanitarian expertise is really important.

Appealing to the concept of existence in determining the boundaries of what is permissible in the course of biomedical research has not yet been fully realized. The concepts of principles, norms, and laws were formulated during the development of the universalist philosophy of

essence and based on it. But the spirit and letter of the philosophy of essence can be expressed in the formula: behind the infinite variety of individual things lies a single reality, subject to intelligible laws and principles or, as it was argued in ancient and medieval metaphysics, a countable number of simple essences. In the history of philosophy and science, we can observe various attempts to go all the way in the implementation of the program of philosophy of essence, from the desire of the Neoplatonists to comprehend the First One to the "Einstein's dream" of the discovery of fundamental physical interaction. But in the same history of philosophy and science there are many opposite examples, anti-universalist movements periodically arose, wanting to preserve the category of the unique.

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DOMESTIC AFFAIRS

Article

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Bridging the Labour Regulation Gaps in India's Informal Migrant Economy amid Covid-19 Pandemic: Uncovering Challenges and Results

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***Abstract*:** Globalisation and liberalisation have enabled the promotion of the working force, leading to an increase in migrant labourers due to social, economic, and political factors responsible for the displacement from rural to urban areas within India and outside India. The author focuses on the jurisprudence and case law favouring the interests of labour, human dignity and social security, constitutional imperatives ensuring the human rights of migrant workers and the obligations of the State, social security legislation and the labour law curbing the exploitation of migrant labourers at national and international levels. The author examines the work of the International Labour Organisation (ILO) and UN specialised agencies regarding protection of migrant labour from exploitation, which have been brought in various covenants, conventions and instruments to uphold human rights of migrant labour and social security. Emerging trends in labour regulation have also been covered. The issues and perspectives of the condition and demography of the migrant labour prove that migrant labour are still not free from the exploitation and ill-treatment and deprived of socially beneficial measures, namely, minimum wages,

allowances for disabilities, unemployment, etc. The paper focuses on the recent trends that emerged due to the spread of Coronavirus disease and lockdown along with the judicial response and a critical appraisal of the new Labour Code.

***Keywords*:** human rights; migrant labour; social security; unorganised sector; labour codes; India

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Contents

I. Introduction 201
II. Conceptualizing Social Security: A Tool for Alleviation of Migrant Labour Crisis 202
III. Historical Background and Development 204
III.1. The First Formal Social Protection Laws 204
III.2. Developments in India and the International Law 205
III.3. Efforts by ILO and the Onset of Indian Labour Laws 206
IV. Constitutional Imperatives and Legislative Scheme 208
IV.1. Constitutional Dimensions 208
IV.2. Legislative Scheme 209
V. Recent Issues and Concerns 211
V.1. Maintenance of the National Database of Unorganized Workers 211
V.2. One-Nation-One-Ration Card Scheme, Community Kitchens for Migrants .. 212
V.3. Right to Shelter 212
V.4. Food, Medicine and Other Necessities 213
V.5. The Role of National Human Rights Commission 213
V.6. Dangers to Migrant Workers 214
V.7. Shortcomings of Inter-State Migrant Workmen Act and Unorganized Workers' Social Security Act 215
V.8. Hardships Faced by Migrant Labourers in the Event of Covid-19 Lockdown 215
V.9. Re-thinking the Social Security Regime 217
VI. Suggestions and Recommendations 219
VII. Conclusion 219
References 220

I. Introduction

The onset of liberalization, privatization and globalization have indeed led to the enhancement of interaction between countries of the world in terms of trade and services, which, in turn, has proved to be beneficial for the labour workforce as regards the reaping of those benefits. We have also witnessed various aspects of social, economic and legal nature that have led to the migration of labour. The Republic of India (hereinafter India) has been proactive in implementing various socially beneficial legislation to allow the migrant labourers to be protected from employers' or contractors' exploitation. The International Labour Organization (ILO) has also been instrumental in providing various safeguards to this particular problem but the problem persists.

The organized sector mostly located in the urban areas is less prone to the exploitation as compared with the unorganized sector mainly located in the rural areas where the forms of exploitation range from closures, loss of livelihood, lack of assurance of minimum wages, bonded labour, etc. The informal sector, which is broadly unorganized, plays a very important role in terms of economic standing and other major considerations such as gross domestic product, formation of capital and employment opportunities. The irony is that this sector is the one that is marred by the crisis. The ills that surround the labourers in this sector are mostly due to the lack of awareness of their rights and it is important to notice that the right to livelihood is affected by how other rights are enjoyed what pertains to health, culture, etc. to name a few.

Social security has to be ensured at various levels, as it is important for the assistance to the needy, insurance based upon the social front at par with the contributions and by the virtue of being a welfare state, providing the labourers from their contributions, development programs, schemes, etc. While ensuring the income of labourers, it is also important to protect more individualistic human rights that are in play, namely, personal development and dignity, as there is an apparent inequality between the employer and labourers. This gap has to be bridged by the grant of social security and effective exercise of rights of association and collective bargaining. India, being a socialist state,

to achieve its goals sets out to ensure the rights to work according to choice, fair conditions of work, protection of wages, social security, the right against discrimination along with various regulations that also take the center stage in its implementation.

This paper will encapsulate the recent migrant labourer crisis and social security. Recently India has struggled to maintain and hold on to the protection of migrant labourers on the social and economic levels. With the rapid increase in Coronavirus disease, the economic impact has deteriorated the structures for protection and the lack of consideration in terms of policy has further weakened the whole human rights outreach of the situation. An effective social security net has not been able to be maintained as the economic and social issues of the migrant labourers have not been adequately addressed. The paper deals with the information relevant to the background of the study about the problem of ensuring a comprehensive social security regime followed by a historical background of the subject matter and legislative framework of the same. The issues and perspectives that have led to the need for a rethinking of the social security regime of India in light of the migrant labour crisis are covered in the subsequent paper's sections, followed by suggestions and recommendations from the author's side.

II. Conceptualizing Social Security: A Tool for Alleviation of Migrant Labour Crisis

The concept of social security rests upon the possibilities that can arise in the future and how those have to be countered adequately. The complex nature of the society and the dynamism in social change leads to the conceptual groundwork of this phenomenon and it embodies cultural, economic and social rights with ensuring dignity on the touchstone of social justice (Prakash, 2009). It also rests on the reality that if people have contributed to the welfare of the country, they have to be safeguarded against the perils that exist in their life. It refers to the prevention of social risks and allocation of resources to alleviate hardships and includes social insurance, subsidy schemes and the right necessary to fulfil minimum taxation needs (Mishra, 2016).

It seeks to achieve the preambulatory goal of the welfare state and it also helps in the improvement of the position of migrant labour in that regard by ensuring labour efficiency, keeping the conflict of interest in check and reducing disputes. There was no mention of "social security" in the labour law legislation previously, but very recently it has been mentioned in Section 2(78) of the Code on Social Security, 2020,[1] to mean healthcare, income security for elderly people, sickness, injury, unemployment, etc. On the international front, the Social Security (Minimum Standards) Convention enacted in 1952[2] embodied basic principles and various standards of common nature that are responsible for ensuring social security.

In the long run, social security helps to deal with the migrant labour crisis as it can go a long way in ensuring the adequate identification of the migrant workers as opposed to previous definitions by the International Labour Organization (ILO) that refers to a person who moves from one place to another for the motive of finding work (Usher, 2004). Another definition provided by the United Nations Convention, 1990,[3] defines migrant workers as ones who migrate to another state for an activity that is based on remuneration. Further, the International Organization for Migration (IOM) classifies them into economic migrants and migrants of labour that move because of the search for employment as opposed to economic activity.[4] In the Indian context, to enhance the outreach of social security, the definition has been expanded, which previously stood as in Section 2(e) of the Inter-State Migrant

[1] Available at: https://labour.gov.in/sites/default/files/ss_code_gazette.pdf [Accessed 18.02.2023].

[2] Available at: https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-jakarta/documents/publication/wcms_116148.pdf [Accessed 21.02.2023].

[3] United Nations Convention of the Rights of all Migrant Workers and Members of their Families 1990. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers [Accessed 03.04.2023].

[4] United Nations Convention of the Rights of all Migrant Workers and Members of their Families 1990. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers [Accessed 03.04.2023].

Workmen Act, 1979,[5] that defined inter-state migrant worker as the one employed by a contractor, on an agreement or other arrangement in case of one state to another, without the employer's knowledge. This definition has been broadened to include various workers in the net of social security. Under Section 2(zf) of the Occupational Safety, Health and Working Conditions Code, 2019,[6] and Section 2(41) of the Code on Social Security, 2020, migrant workers include workers whose family income is less than eighteen thousand rupees, who migrate from one state to another and get employed directly or are self-employed. The other ways by which social security can help in providing a helping hand to the migrant labourer include providing affordable housing facilities, a system for grievance redress, protection against accidental death, pensions, financial assistance, health benefits, adequate livelihood, development of skill and efficient training, services relating to food and nutrition, etc.[7] They can also help in addressing the migrant labour crisis.

III. Historical Background and Development

The concept of social security needs to be traced from a historical point of view and it is connected to how it has come to the rescue of migrant workers providing them with a net to be secure in social standing.

III.1. The First Formal Social Protection Laws

The concept of social security first originated when the Greeks used to treat the amphorae of olive oil and stockpile them as a means of social security as it was nutritious and could be stored for a longer duration. In

[5] Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act 1979. Available at: https://www.indiacode.nic.in/bitstream/123456789/13209/1/the_inter-state_migrant_workmen_regulation_of_employment_and_conditions__of_service_act_1979.pdf [Accessed 24.02.2023].

[6] Available at: https://labour.gov.in/sites/default/files/osh_gazette.pdf [Accessed 27.02.2023].

[7] Committee Report: Social Security and Welfare Measures for Inter-state Migrant Workers (2021). Available at: https://prsindia.org/policy/report-summaries/social-security-and-welfare-measures-for-inter-state-migrant-workers [Accessed 04.01.2023].

medieval times, the European feudal system used to be the moving force and the feudal lords used to provide for serfs on their estate. The charity also remained a positive feature for the means of security. Thereby, various organizations based on guilds, friendly societies, and fraternities came to be known as the ones that could secure social protection for disadvantaged groups. The first formal law in this regard was the English Poor Law of 1601 that recognized economic protection at the social level from the State[8] that was followed by French's Declaration of Rights of Man in 1793 recognizing the assistance of the public as a sacred duty (Salwe, 2003).

III.2. Developments in India and the International Law

The developments in Germany in 1883 where tradesmen were required to contribute into special fund and that fund was used as social insurance had deeply influenced the world regarding social security. The position in India relating to social security in the present subject matter was provided under the Workmen's Compensation Act, 1923[9] that was aimed at financial protection in the context of certain events like fatal accidents and bodily injuries. This was soon followed by establishing the International Social Security Association in the year 1927 that aimed at bringing the social security administrations and agencies around the world together under the aegis of the ILO.

The Indian response to this was met by Labour Ministers Conferences whereby sickness insurance legislation and examination of the industries for the application of the scheme was done, which led to the growth of health insurance and comprehensive social insurance set up in this context (Babu, 2010); this, in turn, led to the enactment of Employees' State Insurance Act, 1948.[10] An express mention of the human rights of the migrant workers has also been stated in the

[8] Social Security History (2004). Available at: https://www.ssa.gov/history/50ed.html#:~:text=Roosevelt%20signed%20the%20Social%20Security,work%20begun%20by%20the%20Committee [Accessed 14.07.2023].

[9] Available at: https://labour.gov.in/sites/default/files/theworkmenact19231.pdf [Accessed 12.01.2023].

[10] Available at: https://labour.gov.in/sites/default/files/theemployeesact194 8_0.pdf [Accessed 15.01.2023].

Universal Declaration of Human Rights, 1948, granting the freedom of movement as well as the attainment of social security under Art. 22. Other international instruments like International Covenant on Civil and Political Rights, 1966[11] recognize the right to self-determine what allows them to migrate and International Covenant on Economic, Social and Cultural Rights, 1966[12] that contributed to the social security rights under Art. 9 and 10 and gave a legal foundation.

III.3. Efforts by ILO and the Onset of Indian Labour Laws

The ILO's contribution in this domain is also worth mentioning. It came up with the labour standards by the virtue of Declaration of Philadelphia for effective labour laws across the world and in particular, the Social Security (Minimum Standards) Convention, 1952, that also mentioned medical care, unemployment benefits, injury and so on as the relevant social security measures. Along with this, the ILO has also been instrumental in enacting the Migration for Employment Convention in 1949 (ILO Convention No. 97),[13] the Supplementary Provisions of 1975 concerning migrations in abusive conditions and the promotion of equality and opportunity and treatment of migrant workers (No. 143)[14] that provides medical services and appropriation of wages, and Migrant Workers Recommendations (No. 86[15] and 151[16])

[11] Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights [Accessed 18.01.2023].

[12] Available at: https://www.ohchr.org/en/instruments-mechanisms/instru ments/international-covenant-economic-social-and-cultural-rights [Accessed 20.01.2023].

[13] Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C097 [Accessed 19.03.2023].

[14] Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C143#:~:text=Each%20Member%20for%20which%20this%20Convention%20is%20in%20force%20shall,migrants%20are%20subjected%20during%20their [Accessed 23.03.2023].

[15] Migration for Employment Recommendation (Revised), 1949 (No. 86). Available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312424#:~:text=On%20arrival%20in%20the%20country%20of%20destination%2C%20and%20at%20a,as%20information%2C%20instruction%20and%20advice [Accessed 21.03.2023].

[16] Migrant Workers Recommendation, 1975 (No. 151). Available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:::NO:12100:P12100_INSTRUMENT_ID:312489 [Accessed 27.03.2023].

ensuring the reunification of migrant workers with their families. Another instrument called the Forced Labour Convention No. 29[17] and No. 105[18] worked persistently for the same cause. Another ILO initiative in this direction was effected in the year 1990.[19] It protected from the human rights violations and trafficking of migrant labourers. The ILO Declaration on Fundamental Principles and Rights at Work recognizes labour rights as human rights and makes them universal while giving various standards against exploitation, e.g., freedom of association, collective bargaining, and eradication of forced labour, etc.

The other social security measures taken by the national legislation were based upon the maternity benefits under the Maternity Benefit Act, 1961,[20] and retirement benefits covered by the Employees' Provident Fund and Miscellaneous Provisions Act, 1952.[21] Moreover, we can refer to the Factories Act, 1948[22] that contained various provisions providing security to the workmen from employer tactics like retrenchment and lay-off, and Minimum Wages Act, 1948[23] etc. The Inter-State Migrant Law[24] in India has also worked for the organization of migrant workers, various allowances under this law (e.g., displacement, journey, etc.) are

[17] Forced Labour Convention, 1930 (No. 29). Available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C029 [Accessed 30.03.2023].

[18] Abolition of Forced Labour Convention, 1957 (No. 105). Available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105 [Accessed 01.04.2023].

[19] United Nations Convention of the Rights of all Migrant Workers and Members of their Families, 1990. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers [Accessed 03.04.2023].

[20] Available at: https://labour.gov.in/sites/default/files/the_maternity_benefit_act_1961_0.pdf [Accessed 19.01.2023].

[21] Available at: https://www.epfindia.gov.in/site_docs/PDFs/Downloads_PDFs/EPFAct1952.pdf [Accessed 21.01.2023].

[22] Available at: https://labour.gov.in/sites/default/files/factories_act_1948.pdf [Accessed 03.02.2023].

[23] Available at: https://clc.gov.in/clc/sites/default/files/MinimumWagesact.pdf [Accessed 05.02.2023].

[24] United Nations Convention of the Rights of all Migrant Workers and Members of their Families, 1990. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers [Accessed 03.04.2023].

also paid but there was a lack of compliance (Swapna, 2022) with the social security; the Unorganized Workers' Social Security Act, 2008[25] (hereinafter Social Security Act) also worked for the application of the welfare schemes to the workers of unorganized sector.

IV. Constitutional Imperatives and Legislative Scheme

The Constitution of India gives impetus to the rights of migrant workers and social security; these are characterized as human rights that provide for the specific subject matter.

IV.1. Constitutional Dimensions

Social security to the labour in general can be accorded as protection by attributing it to the Preamble which mentions India to be a "socialist" state that ensures social justice, equality and maintenance of the standard of life of working people.[26] Under Schedule VII of the Indian Constitution,[27] where List III is referred to as the Concurrent List, both the state and the center are empowered to make laws on Entry nos. 21–24 and 26 that are based upon regulation and control of monopolies, trade unions, disputes in industry and labour, social security, insurance, employment and unemployment, labour welfare, etc.

In *Mangalore Ganesh Beedi Works v. Union of India*,[28] it was made clear that labour welfare includes regulation of conditions of employment, wages, compensation, etc. Under Part III of the Constitution, formations of associations within the meaning of Art. 19(1)(c) in case of migrant

[25] Available at: https://www.indiacode.nic.in/bitstream/123456789/15481/1/the_unorganised_workers_social_security_act%2C_2008.pdf [Accessed 23.01.2023].

[26] D.S. Nakara v. State of Andhra Pradesh AIR 1983 SC 130; Samantha v. State of Andhra Pradesh AIR 1997 SC 3297.

[27] Subject matter distribution under Art. 246 of the Indian Constitution, 1950. Available at: https://cdnbbsr.s3waas.gov.in/s380537a945c7aaa788ccfcdf1b99b5d8f/uploads/2023/05/2023050195.pdf [Accessed 13.01.2023].

[28] AIR 1974 SC 1832.

labour crisis and according to *Kameshwar Prasad v. Union of India*[29] have the right to form associations or unions. The right to livelihood[30] under Art. 21 of the Indian Constitution also holds good ground in the case of denial of the right[31] to the migrant workers. The imperatives under Art. 39(a) and 41 also explain that there can be a challenge to the deprivation of the right to livelihood.[32] The *Asiad Worker's* case[33] also recognized the right against forced labour and ensured dignity[34] for the human rights regime of labour welfare. Articles 23 and 24 provide for the right against exploitation that also includes the ascertainment of payment that labourer is entitled to in exchange for the work done.

According to Part IV of the Constitution of India within the scope of Art. 38 that highlights the State's obligation to provide for social order and the promotion in the context of welfare, the State's idea of welfare and social justice was underlined in *Air India Statutory Corpn. v. United Labour Union*[35] as it can mitigate the sufferings of deprived sections of society. Further, Art. 39 seeks to provide equal opportunities to adequate livelihood means and distribution of wealth and other resources that are material for serving the common good. The right to work, education and public assistance is ensured in case of unemployment, sickness, etc., under Art. 41. Article 42 also provides for just and humane conditions for the work, Art. 43 guarantees a living wage for workers and so on.

IV.2. Legislative Scheme

The legislations regarding social security in general have been discussed above but the position in context of the migrant labour is discussed in this section. To this day, the Inter-State Migrant Workmen

[29] AIR 1962 SC 1166.

[30] Olga Tellis v. Bombay Municipal Corporation 1985 SCC (3) 545.

[31] Bandhua Mukti Morcha v. Union of India AIR 1997 SC 2218.

[32] Equal pay for equal work ensured vide Arts 14 and 16; Randhir Singh v. Union of India AIR 1982 SC 879.

[33] People's Union for Democratic Republic v. Union of India AIR 1982 SC 1473.

[34] *See* Francis Coralie v. Union Territory of Delhi AIR 1981 SC 746 and reaffirmed in Justice KS Puttaswamy (Retd) v. Union of India AIR 2017 SC 4161.

[35] AIR 1997 SC 645.

Act, 1979 (ISMA) stays in force and covers the aspects of protections and entitlements in the case of migrants and it is conjoined with the Occupational Safety, Health and Working Conditions Code, 2019 (OSH Code). The ISMA has 7 chapters that have relevant provisions for the registration of establishments that deal with the employment of inter-state migrant workmen, conferment of licenses upon contractors, their obligations and other facilities regarding welfare. The Payment of Wages Act, 1936[36] helps for the timely payment of wages and prevents exploitation along with arbitrary fines. Employees' Compensation Act, 1923[37] works for compensation in dire cases of accidents and other hardships. The Equal Remuneration Act, 1976[38] ensures the rule of equal pay for equal work for migrant labourers. The Minimum Wages Act, 1948[39] is also useful for the fixation of minimum wages to migrant labourers and reviews it. Another means of social security as stated above appears in the form of maternity[40] that is also ensured in the letter of law and the Social Security Act applies on the migrant labour of the unorganized sector.

The Factories Act, 1948, the Contract Labour (Abolition and Regulation) Act, 1970,[41] and Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996[42] provide for various basic rights such as the right to shelter and other facilities like water, latrine facilities, etc. It is pertinent to note that the OSH Code provides well for the migrant workers that are generally hired as contract labourers under Section 59 that deals with the

[36] Available at: https://labour.gov.in/sites/default/files/thepaymentofwagesact1936_0.pdf [Accessed 14.02.2023].

[37] Available at: https://www.indiacode.nic.in/repealed-act/repealed_act_documents/A1923-08.pdf [Accessed 14.02.2023].

[38] Available at: https://www.indiacode.nic.in/bitstream/123456789/17141/1/equal_remuneration_act_1976_0.pdf [Accessed 14.02.2023].

[39] Available at: https://clc.gov.in/clc/sites/default/files/MinimumWagesact.pdf [Accessed 05.02.2023].

[40] Maternity Benefit Act, 1961.

[41] Available at: https://www.indiacode.nic.in/bitstream/123456789/1467/1/A1970-37.pdf [Accessed 17.02.2023].

[42] Available at: https://clc.gov.in/clc/acts-rules/building-and-other-construction-workers [Accessed 14.02.2023].

establishments that employ at least 10 migrant workers and it also defines the role of contractor in this regard wherein in the ISMA, there was the role of the contractor that would be charging from both sides to fulfil his obligations. On the contrary, under the OSH Code, the role of that intermediary is done away with and extra cost is saved. The OSH Code applies to the workers that belong to the class below the range of Rs. 18,000 under Section 2(zf)(ii) of the same, the ISMA recognized the social security measures such as displacement allowance vide Section 14 and journey allowance under Section 15 of the same, the displacement allowance is not recognized by the OSH Code.

V. Recent Issues and Concerns

There are various issues with the newly assembled codes and the previously existing ISMA concerning social security of migrant workers. Thus, their human rights are in peril. The issues and perspectives are dealt with hereby:

V.1. Maintenance of the National Database of Unorganized Workers

It is very much evident that in the cases of adversity, it is the unorganized workers who are the most affected. Hence, in *Re Problems and Miseries of Migrant Labourers*[43] the Supreme Court held that there had to be a National Database for Unorganised Workers (NDUW). The Court found that the benefit of social security schemes should trickle down to them which would be ensured by this portal as unorganized workers were also hit severely by the Covid-19 pandemic. A very big problem underlined ensuring the identification of unorganized workers as there was no effective system to ensure identification that was necessary to target for social upliftment of the workers and provide them with their basic amenities of life, rehabilitate them and get them back to their homes.

[43] LL 2021 SC 274. Available at: https://main.sci.gov.in/supremecourt/2022/2157/2157_2022_11_16_36554_Judgement_21-Jul-2022.pdf [Accessed 14.02.2023].

V.2. One Nation One Ration Card Scheme, Community Kitchens for Migrants

The Supreme Court[44] has been very proactive in recognizing the plight of migrant workers and due to that reason, they were given the privilege of One Nation, One Ration Card Scheme that enabled them to get benefit in any part of the country. The major problem of the unorganized workers was the one that required their recognition and that was not possible as they went untraced in the majority of cases. The food grains and dry ration were also ensured to the migrant workers who were marred by poverty. A community kitchen was also ordered to be set up by the State whereby the migrant workers who cannot get two meals a day, were ensured to cater to those who got stranded in the lockdown. An order was also passed to license all contractors and register all establishments in the context of migrant workers to expedite the process of recognition of migrant labour. The order for *One Ration Card* was necessary to ensure that the universalization of the PDS system for the migrant workers all over the country is made possible and they can get their basic right to food. Setting up of community kitchens was required to ensure meals for at least two times for the migrant labourers who could not afford it. Thus, it was all made possible in this regard.

V.3. Right to Shelter

A huge development in this regard was done when the Supreme Court noticed that there is a fundamental right to life under Art. 21 of the Constitution that includes the right to have food and other necessities. In the migrant workers' context they had to be re-assured and re-affirmed for the better functioning of the human rights framework in the context of migrant workers. There was also recognition of the rights of migrant labourers to be given shelter to ensure that they do not have to suffer and that they have a place for their head. An assurance was given in the Telangana High Court order in *R. Sameer Ahmed v. State*

[44] LL 2021 SC 274.

of Telangana[45] that allowed the setting up of night shelters for the stranded migrant labourers in the wake of lockdown. The basic right to shelter was necessary for the migrant labourers who were stranded and could not reach their homes and had nowhere to live.

V.4. Food, Medicine and Other Necessities

There was a huge outcry when it was brought to the forefront that the Delhi government had not been able to keep up with the miseries of migrant labourers in the context of them seeking food and medicines despite the resources available to them under the Building and Other Construction Workers Act, 1996. The Delhi High Court came down heavily on the Delhi government in the case of *Rakesh Malhotra v. Govt. of NCT of Delhi*[46] whereby the steps to counter the Covid-19 situation were explained to the Court. Later the Supreme Court along with the National Human Rights Commission (NHRC) in the *suo motu* case recognized this need, came to the rescue of migrant labourers and gave them their dues by ordering food, medicine and other necessities while ensuring the guidelines regarding the same.

V.5. The Role of National Human Rights Commission

The National Human Rights Commission also participated and gave short-term measures of collecting data on migrant workers, proper implementation of ISMA by ensuring journey allowance, ensuring menstrual hygiene products to women, functioning of shelter homes, identification of industries of migrant labour, help-line to rescue, medical facilities and grant of compensation. Other long-term issues were also mentioned by the NHRC that can help a lot in the alleviation of human rights violations of migrant workers, e.g., amendment of the ISMA to deal with situations like Covid-19, the appointment of

[45] WP (PIL) No. 58/2020. 2021. Available at: https://www.livelaw.in/pdf_upload/telangana-high-court-covid-19-elections-392584.pdf [Accessed 14.02.2023].

[46] WP (C) 3031/2020. 2021. Available at: https://www.livelaw.in/pdf_upload/pdf_upload-381174.pdf. [Accessed 15.02.2023].

a claim commissioner to monitor recovery, creation of employment opportunities in the home state, maximum benefits under Social Security Act, formation of Affordable Rental Housing Complex (ARHC), etc.[47]

V.6. Dangers to Migrant Workers

A lot of migrant workers are put in the perils of exploitation and abuse of the worst kind. There are several instances when they are not even paid their minimum wages and they are usually the victims of abuse. Very recently, it was reported that sexual assault cases in the context of women migrant workers had become very frequent and it was frowned upon by the court in the case of *A.P. Suryaprakasam v. Superintendent of Police*[48] where a migrant worker who had come to Madras in search of work and got sexually assaulted in an unfortunate state of affairs. Another problem that the women migrant workers had categorically faced was the non-access to hygiene and sanitation concerning washrooms (Azeez et al., 2020). There was no system of transportation for migrant workers to their native places. That led to a huge outcry, but, it was stated by the Supreme Court that the workers will be identified and transported within 15 days and special trains called "Shramik" trains[49] were also organized that would aid in the same. But the dangers of hunger, absence of shelter, etc. faced by the workers were extreme and it required swift action. Apart from this, various negative mental health conditions were also underlying this issue. The migrant workers have already suffered from illnesses due to their occupations, susceptibility to new communicable infections, loss of employment and the subsequent debt traps and absence of family support (Jesline et al., 2021).

[47] Re Problems and Miseries of Migrant Labourers IA No. 51637/2020.

[48] HCP No. 738/2020. 2020. Available at: https://www.livelaw.in/pdf_upload/pdf_upload-378033.pdf [Accessed 16.02.2023].

[49] Suo Motu Writ Petition (C) No. 6/2020.

V.7. Shortcomings of Inter-State Migrant Workmen Act and Unorganized Workers' Social Security Act

The ISMA and Social Security Act were the only legislations regarding the migrant labour crisis that could have been instrumental in ensuring that social security was at play adequately. The problem with the Social Security Act though was the inability of boards to direct welfare schemes as it was under various ministries and there was a huge lack of information and resources to the migrant workers. It was a tool for exploitation for the employers and contractors for a very long time and this was done by the heads who used to facilitate the migration of a large number of labourers outside the state and the contractor used to promise them wages, which were ultimately not paid and there used to be no holidays, structure of wages, etc., The migrant labourers were made to work throughout the week in very poor conditions and, thus, a blatant disregard of human rights used to take place. Though, the Compact Committee which was formed out of the 28th Labour Ministers Conference, 1976, led to the enactment of the 1979 Act that allowed employers to employ workers who were skilled but were outside the state and there could be employment opportunities for the workers. The major problem with the implementation of this Act is the non-awareness in the working class who were deprived and they could not fight for their rights as they could not compromise on their livelihood. Thus, it was necessary to recalibrate the social security regime in light of the crisis and fine-tune it.

V.8. Hardships Faced by Migrant Labourers in the Event of Covid-19 Lockdown

There are at least 5 crore inter-state migrants according to 2011 Census, and the majority of them were in the unorganized sector, they are usually daily wagers and do not have access to basic facilities like identity cards, too. A large number of migrants have to move to the big cities for their subsistence in the quest for work. At least 37 % of the population, according to the 2011 Census, are interstate migrant workers and this value includes also those who migrate within the state.

The migrant workers were stalled in the events of lockdown that were imposed in the pandemic as they had come to a state for their work and the borders of the state were shut and they could not go back to their homes. There was a lack of systematic protection for the migrant labourers and the ISMA could not effectively come to the rescue. The major issue is that most of the migrant workers are not even aware of their rights and there is a complete disregard for human rights by the employers and the contractors keep their existence based on hand-to-mouth. In the event of the pandemic, the migrant labourers lost their dignity as they had to walk towards their homes and cover miles, a case in Aurangabad was brought to the notice where migrants halted a railway track and got run over by a goods train.[50] The state borders were locked and there was a huge disregard of migrant workers' due share. The displacement allowance, basic amenities, health facilities, etc., were not paid to the migrant workers and it led to the poor implementation of the ISMA. Even in the OSH Code, it was stated that the displacement allowance which was equal to 50 % of the monthly wage of the migrant workers, was also legitimate to be paid to them; according to the Committee that was made for the monitoring of this Code, it was put forth that there have to be separate provisions for the upliftment of migrant labourers and their welfare, a helpline needed to be put to work for them, a hostel for the child migrant workers and anti-trafficking mechanisms were also suggested. The universalization of the PDS system was also an issue and hygienic shelter facilities with community life and access to healthcare were also done which needed to be incorporated.

There had to be an efficient regime allowing the migrant workers to reach their homes without hardships that meant an effective transportation system during the Covid times, which was missing on the issue. At least 22 migrant workers[51] died while walking back to their homes, the situation was very grave as there was rampant

[50] Legal framework relating to migrant workers need to reconfigured in India, 2022. Available at: https://www.livelaw.in/columns/legal-frame-work-relating-to-migrant-workers-needs-to-be-reconfigured-in-india-16086 [Accessed 09.01.2023].

[51] Twenty-two migrants die while trying to get home during lockdown, 2021. Available at: https://scroll.in/latest/957570/covid-19-lockdown-man-collapses-dies-

unemployment and a lack of food and shelter. There were instances of help being provided to them in the manner of counselling, etc., but necessities were met with a lot of delay. The PILs lacked a proactive approach to some extent in addressing the issues of migrant labour; the dictum in the *BALCO Employees Union*[52] *case* that stated PIL are of the nature to secure justice for poor sections of the society which cannot defend their interests. A glaring issue that was put forth in the court was of *Harsh Mander v. Union of India*[53] that at least 11,000 migrant workers were not paid minimum wages even before the lockdown. There were at least 6,800 crores of rupees which were not paid as wages to the migrant workers.[54] The situation was so dreadful for the migrant workers that there was no shelter and they were struggling to find food. Another report established that at least 96 % of migrant workers did not get rations from the government and almost 90 % did not receive wages during the time of lockdown.[55]

V.9. Re-thinking the Social Security Regime

The Social Security Act had the aim of protecting unorganized workers who are defined as self-employed, home-based and wage workers. Under Section 3 the Central Government works for the life and disability cover for these workers. Although this Act envisages a process of registration of workers, the Boards do not function correctly, as they do not have adequate powers. In *Shramjivi Mahila Samiti v. NCT*,[56] the Central Government clarified that there has to be a single point of contact for the welfare schemes of unorganized labour

halfway-while-walking-home-300-km-away-from-delhi#:~:text=While%20the%20deaths%20of%20at,and%20shelter%20in%20large%20cities [Accessed 11.01.2023].

[52] (2002) 2 SCC 333; also reiterated in PUDR v. Union of India AIR 1982 SC 1473.

[53] WP (C) No. 10801/2020. 2020. Available at: https://www.livelaw.in/pdf_upload/pdf_upload-372004.pdf [Accessed 17.02.2023].

[54] Aruna Roy v. Union of India & Anr WP (C) No. 10846/2020.

[55] Survey of the migrant labour amidst lockdown, 2021. Available at: https://www.thehindu.com/data/data-96-migrant-workers-did-not-get-rations-from-the-government-90-did-not-receive-wages-during-lockdown-survey/article31384413.ece [Accessed 11.01.2023].

[56] SLP (Crl) No. 150 of 2012. 2020. Available at: https://www.livelaw.in/pdf_upload/pdf_upload-379150.pdf [Accessed 19.02.2023].

which are scattered under the various ministries, but the problem of lack of awareness, incentive, etc. remains. It is difficult for unorganized workers to get their dues. Similarly, a universal healthcare scheme like Rashtriya Swasthya Bima Yojna (RSBY) that could have been proved to be beneficial for domestic workers is marred by a lack of information, professionals to manage it, coverage in rural areas and lack of quality of hospitals. Another problems are the problem of the frequent frauds and the problem of untimely allocation of funds of the government (Banka, 2021).

Even in the Building and Other Construction Workers Act, the Supreme Court issued directions related to the registration of establishments and workers to ensure that the benefits trickle down to the vulnerable sections.[57] It has also been observed that there is a need for a centralized scheme for education, health, social security and old age or disability benefits to ensure life with dignity, and the practice of collecting cases from employers and using it for personal benefits should be stopped.[58] The extension of Employees' State Insurance has to be done for the compensation in matters of wage loss. It generally applies to the non-seasonal undertakings that employ at least 10 persons voluntarily, but that limit has to be extended for a better regime of social security. Universalization also needs to be done in that regard. The Social Security Code needs to be more welcoming of the changes and every district must be included in the comprehensive scheme. The gig workers and unorganized sector should also be incorporated in this regard to allow social security benefits that include pension, provident fund, etc. to the workers. A re-skilling of the retrenched employees also needs to be done in that regard, presently the last drawn wages for 15 days are to be utilized by the employer in this domain. There needs to be universalization of minimum wages too, to be applied to migrant workers also.[59]

[57] National Campaign Committee for Central Legislation on Construction Labour (NCC-CL) v. Union of India 2018 5 SCC 607.

[58] Dewan Chand Builders and Contractors v. Union of India and Others (2012) 1 SCC 101.

[59] Proposed Labour Law Changes: Foundation for Global Manufacturing Hub. 2022. Available at: https://www.livelaw.in/law-firms/articles/proposed-labour-law-changes-foundation-for-global-manufacturing-hub-158150 [Accessed 11.01.2023].

VI. Suggestions and Recommendations

After the study of various issues and concerns of the migrant labour crisis, the following suggestions and recommendations have come to light:

— The Boards under various social security and welfare legislations must be reorganized, and the appropriation of funds should be met with close and stricter enquiry and that needs should be met in a very swift manner.

— The migrant workers, in cases of contingencies like Covid-19, must not be cumbersomely charged by the authorities and should be provided with necessities free of charge.

— The allowances of displacement and that of journey should be swiftly appropriated to the migrant workers and there should not be any delay in ensuring the same. If they were paid in advance, it would help a lot in making the labour welfare scheme more robust and comprehensive.

— The intermediaries in the legislations like ISMA should be reduced and kept to a bare minimum and there should be an all-inclusive approach for the protection of the interests of migrant workers as such.

— The judiciary should be more conscious of providing facilities to migrant workers during such events as Covid-19 and especially during lockdown; they should be more proactive and effective, and efficacious and speedy justice should be provided to the migrant labourers.

— There is a looming unawareness of the rights of the migrant workers in the case of social security. They should be made more aware of their rights and sensitization programs; the same must be launched along with the effective mechanism of grievance redress by the government in the manner educating the migrant workers about their interests.

VII. Conclusion

It can be stated in conclusion that there have been many states in the country that have pro-actively come out in defense of the rights of migrant workers. However, the efforts remained ineffective as the

actions were not swift enough and the anomalies in the legislations and the systems were not adequately covered. There is a plethora of labour rights for migrant workers' welfare and various labour standards that have been set up by the ILO at the international level and the legislation at the domestic level but there is still no effective address for the human rights of the labourers and the effective contemplation of all the issues of migrant labourers. A more comprehensive approach is required by the policymakers to address the problems of migrant labourers and alleviate their social position. Only then, the social security can be adequately granted to the migrant labourers and ensured more prolifically. The ILO standards for labourers and their welfare provide commendable inputs for the countries of the world to follow, but due to the peculiar social realities of the states, they cannot inculcate them effectively. Thus, it leads to imbalance in the regime as there is uneven protection accorded to migrant workers. We have examined the national and international positions and we can effectively conclude that India should be more inclined to achieve the internationally accepted labour standards. Issues and concerns of the migrant labour crisis should be adequately covered to ensure that the whole regime of labour welfare and social security is ensured and India reaches a zenith in protecting the basic human rights of the migrant workers and that a situation similar to Covid-19 will be better handled in the future.

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Article

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Civil Liability for Damages Caused by Unmanned Vehicles in Russian and Foreign Law

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Abstract: The paper is devoted to the identification and exploration of the legal regime of unmanned vehicles as objects of civil rights. The purpose of the study is to develop an adequate mechanism for the legal regulation of relations using innovative digital technologies (unmanned vehicles) in the transport industry. To achieve this goal, the following tasks were set: 1) to analyze the provisions of the current legislation regulating relations regarding the use of unmanned vehicles; 2) to determine the features of the civil law regime of unmanned vehicles as an object of civil rights; 3) to identify the conditions of liability for damages caused by using unmanned vehicles.

The main issue with identification of unmanned vehicles as objects of civil rights is the broadness and vagueness of the terms used in the legislation, including the questionable term *vehicle*. The category of unmanned vehicles is not precisely defined and might or might not include not only unmanned transport, but also such objects as drones, wheeled robots, etc. The study proposes new regulation with identification of its scope and clear principles for the discernment of unmanned vehicles as means of transportation.

For the development of new regulation, the issue of liability is especially critical. The study shows how the inclusion of strict liability, risk-balancing, and other mechanism of liability allocation can influence the norms, and how governing bodies in different countries apply strategies that include the legislative methods, self-regulation, and the usage of existing liability models.

Keywords: vehicle; unmanned transport; autonomous vehicle; artificial intelligence; unmanned device; digitalization of the transport industry; unmanned aerial vehicles; intelligent transport system

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Contents

I. Introduction 223
II. Methodology 225
III. Analysis of Current Legislation in the field of Regulation of Relations regarding Unmanned Vehicles 225
IV. The Civil Law Regime of Unmanned Transport as an Object of Civil Rights ... 229
V. Conditions for Liability for Damages Caused when Using Unmanned Vehicles 234
VI. Conclusion 242
References 244

I. Introduction

One of the long-term goals of the Transport Strategy of the Russian Federation until 2030[1] is the digital and low-carbon transformation of the industry and accelerated introduction of new technologies. The most important task for the formation of the Unified Backbone Network in this strategy is the preparation of the infrastructure and telecommunication components of key road, railway, and inland waterways for the operation of unmanned transport.

[1] Order of the Government of the Russian Federation No. 3363-R dated 27 November 2021 "On the Transport Strategy of the Russian Federation until 2030 with a forecast for the period until 2035." Collection of Legislation of the Russian Federation, (2021). No. 50 (Part IV). Art. 8613. (In Russ.).

In connection with the projects implementation in the fields of unmanned vehicles and artificial intelligence in the transport industry and considering the widespread introduction of new technologies and the need for their unhindered application, it is necessary to develop an adequate mechanism for legal regulation. Currently, experience is being gained in introducing innovative digital technologies into the transport industry. Therefore, it is important to know scientifically the categories used, to generalize best practices, to analyze the current legislation regulating the area under consideration, and to determine trends in its development. Certain problems that need solutions can be identified when developing rules and regulations for the use of unmanned vehicles.

Moreover, it is important to determine the grounds and conditions of civil liability imposed in the event of accidents involving unmanned vehicles, including the issues of insurance.

This issue is not the only one and it is mainly related to how the operation of unmanned vehicles should be carried out, which is based on the definition of its civil law regime. An important point in determining the legal regime of unmanned vehicles are the rules of admission of unmanned vehicles to operation, while the most urgent is the need to establish rules for the operation of these types of transport, standards and safety criteria for the operation of unmanned vehicles and their control, and methods for regulating the use of unmanned vehicles on the roads, monitoring of their compliance with traffic rules, speed limits, etc.

In addition, it is essential to establish principles for protecting users' personal data when using unmanned vehicle technologies, to develop and establish procedures for identification and subsequent authentication of users when employing innovative digital technologies in the operation of unmanned vehicles.

The purpose of the study is to develop an adequate mechanism for the legal regulation of relations using innovative digital technologies (unmanned vehicles) in the transport industry. This will facilitate a comfortable living environment, develop a transport and energy infrastructure, and ultimately contribute to strengthening the economic security of the State through effective transport connectivity in the

country. To achieve this goal, it is necessary to analyze the provisions of the current legislation regulating relations regarding the use of unmanned vehicles, determine the features of the civil law regime of unmanned vehicles as an object of civil rights, and identify the conditions of liability for damages caused by using unmanned vehicles.

II. Methodology

The research is based on review and analysis of the provisions of legal, technical, economic sciences, as well as studies of empirical material and judicial practice. The main research methods include general philosophical methods of deduction when the authors explored general legal provisions and their application to certain types of objects of civil rights, primarily vehicles, induction when the authors examined the features of the legal regime of certain types of unmanned vehicles and subsequent identification of general principles, analysis and special legal methods including the formal legal method, the method of legal modeling and the methods of comparative law analysis.

III. Analysis of Current Legislation in the field of Regulation of Relations regarding Unmanned Vehicles

In the Russian Federation, increased attention is being paid to the development of the transport industry in the context of the economy digitalization. Innovative technologies are considered as one of the most important tools for solving transport problems, as well as establishing and improving the connectivity between various regions of a large country.

To date, many documents highlighting the importance and growing role of the use of unmanned vehicles in the development of the country's economy in general and the transport industry in particular have been adopted and are in force in the Russian Federation. Primarily these documents include program documents, strategic planning documents, documents aimed at stimulating innovative development and facilitating scientific research, including documents regulating the use of unmanned

vehicles,[2] as well as industry strategic planning documents of the Russian Federation.[3]

The Government of the Russian Federation approved the Concept of Ensuring Road Safety with the Participation of Unmanned Vehicles on Public Roads[4] (hereinafter referred to as the Concept). An analysis of the Concept allows us to conclude that the term "unmanned vehicle" is not homogeneous. Such vehicles include both highly and fully automated vehicles that can be driven without human intervention in an unmanned mode using an automated driving system. However, highly automated vehicles can be driven by a human as a backup option, while fully automated vehicles do not require human intervention in their operation. Conventional automated vehicles controlled by humans using technology are not classified as unmanned vehicles if they have a low (1st and 2nd) level of automation. The 3rd, 4th and 5th levels of

[2] *See* Decree of the Government of the Russian Federation No. 1596 dated 20 December 2017 (as amended on 16 January 2023) "On approval of the state program of the Russian Federation 'Development of the transport system.'" Collection of Legislation of the Russian Federation, (2018). No. 1 (Part II). Art. 340; Order of the Government of the Russian Federation No. 2146-r dated 31 December 2009 (as amended on 3 March 2022) "On approval of the program of activities of the State Company 'Rossiyskie avtomobilnye dorogi' for the long-term period (2010–2020)." Collection of Legislation of the Russian Federation, (2010). No. 7. Art. 765; Decree of the Government of the Russian Federation No. 1415 dated 26 November 2018 (as amended on 7 February 2022) "On conducting an experiment on trial operation of highly automated vehicles on public roads" (together with the Regulation on conducting an experiment on trial operation on public roads of highly automated vehicles). Collection of Legislation of the Russian Federation, (2018). No. 49 (Part VI). Art. 7619, etc.

[3] *See* Order of the Government of the Russian Federation No. 20-r dated 17 January 2020 "On approval of the Strategy for the Development of the Electronic Industry of the Russian Federation for the period until 2030." Collection of Legislation of the Russian Federation, (2020). No. 4. Art. 410; Order of the Government of the Russian Federation dated 21 June 2023 No. 1630-r "On approval of the Strategy for the Development of unmanned aviation in the Russian Federation for the period up to 2030 and for the future up to 2035 and the action plan for its implementation," etc.

[4] Order of the Government of the Russian Federation No. 724-r dated 25 March 2020 "On approval of the Concept of ensuring road safety with the participation of unmanned vehicles on public roads." Collection of Legislation of the Russian Federation, (2020). No. 13. Art. 1995.

automation refer to automated driving systems and they are defined in the Concept as unmanned vehicles.

When determining the grounds for liability for damage caused due to the use of unmanned vehicles, the Concept proposes to take into account both the qualitative characteristics of the object itself, and the state of the road transport infrastructure, as well as the participation of the driver in driving.

In the transport industry, various experimental legal regimes have been established.[5] Recommendation systems themselves and intelligent decision support systems (technologies that make independent decisions based on environmental data used, for example, in service robots, unmanned vehicles) are classified by current legislation as artificial intelligence technologies.[6]

These documents are mainly of a conceptual or strategic nature, aimed at establishing experimental legal regimes, and they do not contain rules that would make it possible to unambiguously determine the legal regime of unmanned vehicles and establish the conditions of liability for damage caused during their operation. Thus, the development of the legal framework for the use of unmanned vehicles in Russia has not yet been completed, and some rules and regulations have not yet been established. Addressing these issues requires a comprehensive approach and participation of various regulatory authorities.

[5] *See* Decree of the Government of the Russian Federation No. 309 dated 3 September 2022 "On the establishment of an experimental legal regime in the field of digital innovations and approval of the Program for an experimental legal regime in the field of digital innovations for the operation of highly automated vehicles." Collection of Legislation of the Russian Federation, (2022). No. 12. Art. 1817; Decree of the Government of the Russian Federation No. 1849 dated 17 October 2022 (as amended on 17 April 2023) "On the establishment of an experimental legal regime in the field of digital innovation and approval of the Program for an experimental legal regime in the field of digital innovation for the operation of highly automated vehicles in relation to the implementation of the initiative 'Unmanned Logistics Corridors' on the public highway of federal significance M-11 'Neva'." Collection of Legislation of the Russian Federation, (2022). No. 43. Art. 7409, etc.

[6] Order of Rosstat No. 538 dated 29 July 2022 (as amended on 21 November 2022) "On approval of forms of federal statistical observation for organizing federal statistical observation of activities in the field of education, science, innovation and information technology." ConsultantPlus Law Reference System. The document was not published.

At the same time, an analysis of current regulatory legal acts shows that a larger number of norms and rules are regulating unmanned aerial vehicles that are fully automated, since they pose the greatest threat to safety, despite them being one of the breakthrough technologies, playing crucial role in the technological development.[7]

Acts aimed at regulating relations regarding the use of unmanned aerial vehicles, including unmanned aerial vehicles, can be divided into a separate group. While the Ministry of Labor and Social Protection of the Russian Federation has adopted a professional standard for workers operating unmanned aerial vehicles, it has not yet been adopted for workers servicing unmanned vehicles. Therefore the employer is forced to rely on outdated regulations that, taking into account the rapid development of artificial intelligence, do not meet the modern needs of society (Blagodir, 2023, pp. 19–22).

Thus, at the present stage, most of the regulatory legal acts regarding the use of unmanned aerial vehicles deal with regulating operation of unmanned aircraft: basic requirements have been established for their development, production, operation, maintenance, and access to the ability to control such a device. Many acts contain provisions prohibiting the use of unmanned aircraft either in a certain territory or over a certain object. These restrictions can be either permanent or temporary. Relations regarding the use of other unmanned devices, including other types of vehicles, are more unsettled.

The acts adopted are primarily of an administrative nature and contain mainly mandatory norms. At the same time, as a rule, the peculiarities of civil law regulation of the relevant relations are not highlighted. Article 128 of the Civil Code of the Russian Federation contains an exhaustive list of types of objects of civil rights where neither unmanned vehicles nor artificial intelligence are named. Thus, it is currently relevant to find an answer to the question of what types

[7] *See* The Air Code of the Russian Federation No. 60-FZ dated 19 March 1997. Collection of Legislation of the Russian Federation, (1997). No. 12. Art. 1383; Decree of the Government of the Russian Federation No. 658 dated 25 May 2019 (as amended on 12 August 2022) "On approval of the Rules for state registration of unmanned civil aircraft with a maximum take-off weight from 0.15 kilograms to 30 kilograms imported into the Russian Federation or produced in the Russian Federation." Collection of Legislation of the Russian Federation, (2019). No. 22. Art. 2824, etc.

of existing objects they can be attributed to or whether the allocation of their independent types is required. In particular, special rules regulating the issues of liability for damages caused through usage of unmanned aerial vehicles, including the vehicles that can be classified as unmanned vehicles, are not developed.

IV. The Civil Law Regime of Unmanned Transport as an Object of Civil Rights

The difficulty of determining the legal regime for unmanned vehicles is associated with several factors. First, it is necessary to determine whether unmanned devices are vehicles under current legislation. Second, an important factor is the establishment of a legal regime for the technologies that define a specified device as unmanned. In this sense, it is also problematic to define artificial intelligence and its technologies as objects of civil legal relations. At the same time, it is impossible to identify the categories of an unmanned vehicle and artificial intelligence. Artificial intelligence can be objectified as intellectual property, while an unmanned vehicle is a thing in which this result of intellectual activity can be embodied. However, this is not a mandatory requirement for unmanned vehicles. Therefore, it is certainly important to develop the norms on artificial intelligence, but this alone will not fully determine the specifics of the legal regime of unmanned vehicles. In addition, it is important to determine the subject of responsibility for the damage caused by unmanned vehicles. Consequently, the concept of the owner of a source of increased danger should be reconsidered.

In the literature (Ananenko, 2022, pp. 71–74), unmanned vehicles are defined as a subtype of vehicles that has certain qualitative characteristics, namely:

— autonomy (automation) of control;

— a high-tech nature and the need for special education and training for subjects managing them;

— the need for the operation of an unmanned vehicle within a certain system, which also includes means of control and monitoring;

— classifying such a vehicle as a source of increased danger.

The vehicle itself is considered to be a thing as an object of civil law. It is a composite thing. The activity of operating the vehicle, but not the vehicle itself, can be recognized as an activity that creates an increased danger to others.

According to the judicial interpretation of Art. 1079 of the Civil Code of the Russian Federation, any activity the implementation of which creates an increased likelihood of causing harm due to the impossibility of full human control over it, as well as activities involving the use, transportation, storage of objects, substances, and other objects of production for economic or other purposes, having the same properties[8] can be regarded as the source of increased danger.

The spreading and increased danger of drones led to proposing unification of the judicial practice decisions to include to the objects enlisted in Art. 1079 of the Civil Code of the Russian Federation new sources of increased danger, such as remotely controlled vehicles, drones, quadcopters, etc. (Antonov, 2021, pp. 7–10). However, it seems that identifying the activities involving the operation of unmanned vehicles as creating an increased danger to others is possible under the current norms and judicial practice, since the law does not contain an exhaustive list of sources of increased danger.

The definitions of *a vehicle* and *transport* used in civil legislation are not stipulated in the Civil Code of the Russian Federation. It has been noted in the literature that in civil law a unified approach to understanding a vehicle cannot be developed, since this definition is used in various institutions of civil law and the term *vehicle* is defined in each specific case taking into account the peculiarities of emerging legal relations, in particular, property, contractual or tortious. At the same time, a decisive role in defining a vehicle in a particular legal situation is given to the court and judicial practice (Martynov, 2005, p. 38).

In the legal literature, many attempts of defining a vehicle have been made, as a rule, in relation to specific types of legal relations. For

[8] Resolution of the Plenum of the Supreme Court of the Russian Federation No. 1 dated 26 January 2010 "On the application by courts of civil legislation regulating relations under obligations resulting from harm to the life or health of a citizen." Bulletin of the Supreme Court of the Russian Federation, (2010). No. 3.

example, the subject of a vehicle rental agreement involves technical devices, the use of which:

— is possible only with qualified management and proper technical operation by a professionally trained crew;

— intended for the transportation of goods, passengers, luggage, or towing objects and capable of moving along with them;

— possessing the properties of a source of increased danger (Em, 2011, pp. 315–383).

It was proposed to define a vehicle that is the object of a lease agreement as a vehicle, the ownership and use of which requires its management and ensuring its proper technical operation (Braginsky and Vitryansky, 2000, p. 505).

In current legislation, definitions of a vehicle are given in various regulatory acts of an administrative nature. It should be borne in mind that their content also varies depending on the specifics of social relations included in the subject of regulation of a particular normative legal act.

Under Federal Law No. 16-FZ dated 2 September 2007 "On Transport Safety,"[9] vehicles are defined as devices intended for the transportation of individuals, cargo, luggage, hand luggage, personal belongings, animals, or equipment installed on the said vehicles and devices in the meanings defined by transport codes and charters. This law does not specifically name unmanned vehicles, although other types are listed.

When referring to self-driving vehicles, such terms as autonomous vehicle, highly automated vehicle, driverless car, unmanned vehicle, fully automated vehicle, robotic car, self-driving vehicle, unmanned aerial vehicle are used.

Unmanned devices intended for transportation can be divided into unmanned vehicles, unmanned aircraft, unmanned wheeled vehicles for road delivery, etc. Obviously, these objects, on the one hand, must have different legal regimes (requirements for registration, certification, recognition or non-recognition as a vehicle, permission to drive, etc.); while in general, as objects of civil rights, they can have similar features

[9] Collection of Legislation of the Russian Federation, (2007). No. 7. Art. 837.

as well as differences. In addition, current regulation refers autonomous vehicles, and forklifts for transport terminals to autonomous devices such as autonomous rail transport and autonomous water transport.

Prof. Evgeniy V. Vavilin rightly noted that the term "unmanned vehicle" is inherently inapplicable for regulating relations related to the creation and use of highly automated or fully automated vehicles, since it does not reflect an essential characteristic for a given legal object, which, in turn, leads to confusion of heterogeneous concepts of "unmanned vehicle" and "autonomous vehicle." Therefore, in order to form effective legal regimes for these objects, it was proposed to fundamentally distinguish them depending on the degree of their autonomy (Vavilin, 2023, p. 3).

The content of the terms "unmanned vehicle" and "autonomous vehicle" do not coincide, which requires determining the relationship between these two objects. In addition, the definition of an unmanned device that may include, for example, both unmanned aerial vehicles that are not vehicles, and those that are, is also questionable. Not every unmanned device can be recognized as a vehicle. Thus, it is necessary to differentiate the legal regime of unmanned devices that are recognized as vehicles under the current legislation and other unmanned devices that do not have a vehicle regime. Obviously, unmanned vehicles can be recognized as vehicles if they fall within the characteristics of vehicles as determined in the above-mentioned regulatory legal act.

Currently, the concepts of an unmanned vehicle and an unmanned aircraft are enshrined in regulatory provisions. Moreover, the concept of an unmanned aircraft is defined in the Air Code of the Russian Federation, and an unmanned vehicle is defined in the Concept of Ensuring Road Safety with the Participation of Unmanned Vehicles on Public Roads that formally narrows the category of an unmanned vehicle, in fact, to unmanned cars.

In this case, an unmanned vehicle in a broader sense can include both unmanned aircraft, unmanned vehicles and, obviously, other types of transport.

An analysis of the categories available in existing regulatory sources that denote certain types of unmanned devices allows us to conclude

that there are differences in the definition of their main features and a lack of unity in determining their legal regime.

On the one hand, this is justified by the need to consider the specifics of various types of transport and infrastructure requirements; on the other hand, it complicates the determination of their legal regime. In connection with the above, it is necessary to ensure uniformity of terminology in terms defining the category of "unmanned vehicle" and to highlight the differences in its individual types (unmanned vehicle, unmanned aircraft, and other unmanned vehicles).

It is also necessary to determine the relationship between the categories "unmanned device" and "autonomous device," including the identification of the term of "autonomous railway transport" and "autonomous water transport" in strategic documents. It may also be justified to define the category of other unmanned devices that do not have the characteristics of a vehicle.

The legal regime of autonomous devices and the legal regime of unmanned devices may have similar features, but the content of the designated categories still has differences. When developing regulations, it is desirable to use uniform terminology in order to avoid problems of interpretation of various regulations.

Currently, the operation of highly automated vehicles on public roads, as well as the consolidation of these concepts in regulatory legal acts, is still of an experimental nature. Based on the results of the experiment concerning admission of fully automated vehicles on public roads, corresponding regulatory legal acts defining legal regime for their use will be developed.

However, it is now necessary to systematize the accumulated experience, determine the relationship between definitions, and theoretically comprehend the accumulated problems of legal regulation of unmanned vehicles in order to, upon completion of the experiment, select the most adequate mechanism for legal regulation of the relations under study and resolve the fundamental issue of the possibility of using innovative objects, or prohibiting or restricting their us.

We also must not forget that the features of unmanned vehicles as objects of civil rights today cannot be determined without resolving the issue of the legal regime of artificial intelligence and its technologies.

The emergence of risks in the use of unmanned vehicles is due, among other things, to the fact that the artificial intelligence system has a high degree of autonomy and can make decisions independently (Russkevich and Tikhomirov, 2023, pp. 35–47). It seems that, in general, digital objects, including artificial intelligence, are not new independent objects of civil rights today. They can be objectified as already named objects, considering the peculiarities of their fixation in the digital environment.

V. Conditions for Liability for Damages Caused when Using Unmanned Vehicles

The issue of liability in the field of unmanned transport (intelligent transport systems, ITS) comes from the use of artificial intelligence technologies and the possibility of imposing legal liability on persons using these technologies. For this study, the most important classifications are the classifications of legal liability based on industry affiliation, the subject held accountable, the scope of implementation of legal relations and the nature of coercive measures. In this study, the main emphasis was placed on civil, administrative, and criminal liability in the context of the development, production, implementation and use of artificial intelligence and robotics systems in unmanned vehicles.

According to the direction of legal liability, it is possible to distinguish: (1) positive liability, considered as a manifestation of social responsibility and the quality of a responsible subject who exercises self-control and conscientiously fulfils his duties; (2) negative liability for the offenses committed. The meaning of liability in law is not limited to punishment for illegal actions but is also aimed at developing a responsible attitude towards the fulfilment of duties by the subject. However, positive liability is possible only if information duties are formally defined and there is a system of incentives for their compliance. Negative legal liability, because of an identified offense, is aimed at the forced restoration of violated rights and the imposition of sanctions on the perpetrators. Consequently, it is a form of legal liability in the narrow sense.

Different industries have different legal responsibilities. Administrative and criminal liability differ in that they arise before the state when the law is violated by individuals or legal entities. Civil liability is traditionally of a monetary or compensatory nature.

In the field of development, production, operation and use of artificial intelligence and robotics systems as an element of unmanned transport, the following situations arise that require the introduction of liability:

— Errors in the development and production of artificial intelligence systems, leading to damage and violations of the law.

— Unauthorized access to the artificial intelligence system and related databases.

— An artificial intelligence system with the ability to self-learn commits an offense based on its decisions.

— Creation of artificial intelligent systems for the purpose of committing offenses or abuse of rights.

Liability may apply to an entity (an individual or a legal entity) required to comply with certain rules and precautions when creating and using objects containing elements of artificial intelligence. Until now, the legal status of developers, manufacturers, owners and users (operators) of artificial intelligence systems, including the obligations to take reasonable care, has not been defined, which creates a certain legal vacuum.

The European Parliament Resolution notes that "whereas the more autonomous robots are, the less they can be considered to be simple tools in the hands of other actors (such as the manufacturer, the operator, the owner, the user, etc.)."[10]

Additionally, the characteristics of certain types of systems and devices operating using artificial intelligence should be considered in terms of their degree of autonomy from both humans and other devices. Thus, unmanned vehicles are often not completely autonomous, but act by entering into a certain complex, interacting with other unmanned

[10] Resolution of the European Parliament "Civil law on robotics" dated 16 February 2017. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017IP0051&rid=9 [Accessed 20.06.2023].

vehicles, a control centre, control rooms, relay nodes, etc. In many cases, it is possible to adjust and (or) control "actions" of the vehicle.

The researchers note that self-driving vehicles, as classified by the Society of Automotive Engineers SAE International, vary in terms of autonomy and driver assistance as follows:

1. zero level: completely manual control and the presence of a notification system about dangerous situations on the road;

2. first level: the driver is ready to take control at any time. In this case, the vehicle may contain the following automation elements: cruise control, automatic parking system, lane departure warning systems;

3. second level: the driver does not control the movement of the vehicle on roads with predictable traffic, but is ready, if necessary, to take control at any time;

4. third level: similar to the previous level, but does not require constant driver attention;

5. fourth level: no action is required on the part of the driver other than starting the system and selecting a destination (Korobeev and Chuchaev, 2019, p. 22).

A similar system of grading vehicles by level of automation is observed in the draft Preliminary National Standard IEC 62290-1: 2014 Control and monitoring systems for railway passenger transport in urban and suburban traffic.[11]

What has been described once again demonstrates the need for potential prosecution in connection with the development, production, operation, and use of artificial intelligent systems to take into account the degree of their autonomy from humans.

Bringing to legal liability involves establishing the grounds for liability and the elements of crimes in the legislation. One of the mandatory elements of the crime is the subject of the crime.

[11] Preliminary national Standard (draft) (IEC 62290-1: 2014) Management and control systems for railway passenger transport in urban and suburban traffic. Part 1: Principles and fundamental concepts of system design (IEC 62290-1:2014, Railway applications — Urban guided transport management and command/control systems — Part 1: System principles and fundamental concepts, MOD), (2014). Moscow: Standartinform Publ.

Traditional subjects of crimes in the field of relations related to artificial intelligence include developers, manufacturers, sellers, operators and users of solutions and devices using artificial intelligence, as well as persons committing crimes in which these objects are the subject or object of such an offense. New and still controversial subjects include the devices and solutions with artificial intelligence themselves.

Various mechanisms of responsibility can be represented in the Fig. 1.

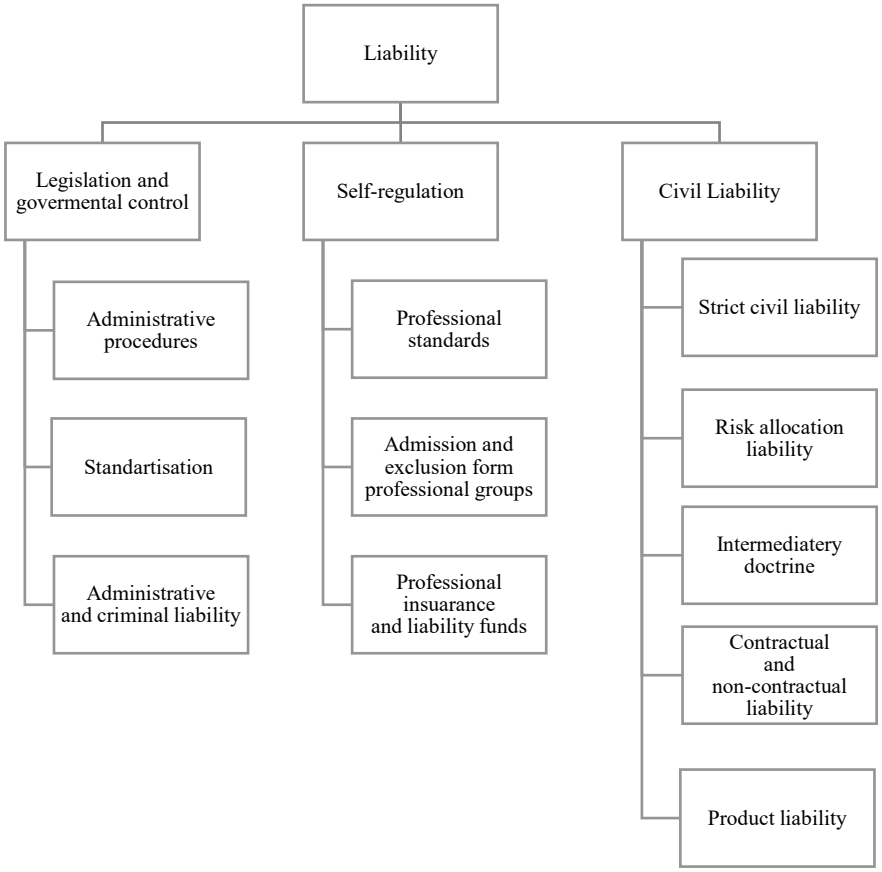

Figure 1. *Liability mechanisms and regulations. Source: Compiled be the authors*

Summarizing global approaches to liability, we can identify several different mechanisms:

— legislative methods/state control,

— self-regulation,

— civil liability.

Self-regulation is most applicable when low-risk technologies are used. As the risk increases, the level of responsibility and the strictness of the rules must increase. Additionally, the person responsible for delegating decisions to artificial intelligence should be held accountable.

EU approaches to liability are outlined in 2019 report.[12] When allocating liability, consideration should be given to the fair and effective distribution of losses, especially in cases where it is unclear whose wrongful conduct caused the loss, or who benefited from the acts that caused the harm, or who controlled the risks, or who is the person for whom insurance is most beneficial and profitable. Access to justice should not be difficult for the injured party since the evidentiary procedure is expensive and complex. Guilty and innocent liability regimes can coexist because they give the victim more tools to defend himself. The operator and manufacturer of artificial intelligence technology bear strict liability as risk controllers. In case of unforeseen losses, the operator is liable under the doctrine of agency. The strict liability policy is reflected in the regulation of Art. 401 of the Civil Code of the Russian Federation: an entrepreneur is liable as long as losses were not the result of Force Majeure.

Responsibility does not always fall on the developer/manufacturer of the ITS; sometimes the driver's actions and especially his negligence may be the cause of liability. For example, the case in Florida (Smith, 2017) where a driver was negligent and his negligence resulted in damage. The Arizona Uber case, where the operator of an autonomous vehicle was even punished for manslaughter (Shepardson and Somerville, 2019).

Liability in Germany can be assigned to the driver even if the decision was made by the vehicle. Fault is not a prerequisite for liability. In addition, the amount of compensation for damage is higher than the

[12] Liability for Artificial intelligence and other emerging digital technologies. Available at: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/DV/2020/01-09/AI-report_EN.pdf [Accessed 22.06.2023].

usual amount: for damage to health and life, compensation should be 10 million euros instead of 5 million for ordinary cars; in the case of paid passenger transport, an additional 2 million euros are required (instead of 600 thousand euros for ordinary cars). The general approach is that at every stage of the vehicle's use it should be clear who is driving the vehicle so that the fault and liability can be assigned. Thus, even in a fully automated vehicle someone must be in control, e.g., an operator, who is responsible in case of any damage. The German Civil Code allows for the imposition of liability on an innocent person in a number of cases, including in relation to the ownership of a car. However, there are some exceptions to this rule, such as unforeseen circumstances. In addition, Criminal Code of Germany, 1982[13] states that careless behaviour must be specifically prescribed in order to be punished by law. Otherwise, criminal liability is possible only for culpable behaviour. In the case of automated vehicles, such provisions mean that only if the driver could have foreseen and could have taken steps to prevent the damage, he will be held liable.

Singapore does not recognize the responsibility of the autonomous vehicle and its operator, placing full responsibility on the driver for what happens while driving; however, it is the operator's responsibility to check that the vehicle has appropriate insurance and make a deposit with the traffic authority.

Taiwan, through adoption of the 1968 Vienna Convention on Road Traffic, recognizes the responsibility of the driver, who must be able to take control of the vehicle at any time. In 2018, Taiwan passed the Autonomous Vehicle Technology Experimentation Innovation Act,[14] but the law omitted liability issues. To minimize the risk, the law requires obtaining permission for testing from the authorities and ensuring sufficient insurance coverage. It is possible to exclude the application of certain rules for the testing process of unmanned aerial vehicles, but these exceptions cannot be made for civil and criminal liability.

[13] Available at: https://www.gesetze-im-internet.de/stgb/ [Accessed 22.06.2023].

[14] The Unmanned Vehicles Technology Innovative Experimentation Act. 19 December 2018. Available at: https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=J0030147 [Accessed 22.06.2023].

In Canada, there are local regulations such as the Ontario Automated Vehicles Pilot, that contains rules for the use of Level 3–5 automated vehicles, including transferring the whole responsibility to the driver regardless of whether the system was on autopilot or manually operated. Under the Ontario Highway Traffic Act, 1990 (Part XI, Section 192),[15] the driver is responsible for all losses and liabilities incurred by a third party due to the negligent operation of the vehicle. Therefore, the driver is always responsible, even if he did not drive the vehicle. As an additional rule, Ontario laws require vehicle insurance and liability insurance (for automated vehicles, the amount of coverage cannot be less than C$ 5,000,000), insurance must cover damage to the health and life of third parties, as well as damage to the property of a third party.

All liability rules are aimed at potential participants: designers, manufacturers, service agencies/operators and drivers. There are already some existing rules and regulations that may apply to these entities, such as Product Liability and Civil Damage Laws. However, some rules should be developed for accidents related to the nature of ITS and unmanned vehicles. Currently, Russia does not have a special law dedicated to the liability of technologies related to artificial intelligence, but it is a matter of time before such a law is proposed. Liability issues are closely intertwined with insurance issues. Thus, the current legislation should also include some rules on compulsory insurance of all the ITS subjects.

At the moment, Russian legislation has only the most basic regulation of ITS in the form of acts on data protection and legal liability for damages. Thus, in Russia, unified standards have not been developed for the use of artificial intelligence technologies in ITS. All documents regulating liability in the case of the use of unmanned vehicles are more declarative in nature. As part of national technical initiatives, an AVTONET working group has been created that, among other things, should:

1. establish safety requirements and appropriate methods for assessing the conformity of wheeled vehicles with a high degree of automated control;

[15] Available at: https://www.ontario.ca/laws/statute/90h08 [Accessed 22.06.2023].

2. establish the features of transporting goods by vehicles with a high degree of automated control;

3. establish requirements for the network interaction of vehicles with a high degree of control automation with road infrastructure and requirements for road infrastructure elements that ensure the safe operation of wheeled vehicles with a high degree of control automation on roads.

However, these instruments have not been developed so far.

If we imagine potential legislative regulation in the form of a matrix, then it is necessary to consider the possibility of different types of liability for the owner of an autonomous vehicle (in this case, we mean both the legal owner and the person who was driving the vehicle at the time of the incident), the operator of the vehicle and the creator of the vehicle software. Bringing specific persons to responsibility should be based on the general conditions for the occurrence of one or another type of liability.

Liability		Level of autonomy of the vehicle				
		1	2	3	4	5
Civil	Strict	Owner	Owner	Owner	Operator / Software developer	Operator / Software developer
	General	Owner	Owner	Owner	Owner	Owner
Administrative		Owner	Owner	Owner	Owner / Operator / Software developer	Owner / Operator / Software developer
Criminal		Owner	Owner	Owner	Owner / Operator / Software developer	Owner / Operator / Software developer

Figure 2. *Responsibility matrix. Source: Compiled by the authors*

The possibility of bringing the operator and software developer to any type of liability is based on their ability to foresee the occurrence of negative consequences. In the absence of such possibility, liability of persons other than the owner of the vehicle should not arise.

It seems possible at this stage of legislative development to use the existing mechanisms of tort liability in civil law and general provisions on criminal and administrative liability. In the future, it will be possible to develop industry standards and special norms for the selection and evaluation of regulatory mechanisms.

Also interesting is the possibility of liability of artificial intelligence as a subject of legal relations and the development of norms that would establish criteria and types of such liability.

VI. Conclusion

Based on the conducted research, the authors can make the following conclusions.

First, at the present stage, many acts aimed at regulating relations in the field of the use of unmanned vehicles are conceptual in nature: they determine the main directions of development of the transport industry, as well as the features of establishing experimental legal regimes in the area under study. At the same time, most of the regulatory legal acts in the field of the use of unmanned aerial vehicles regulate relations regarding the operation of unmanned aircraft. These acts are primarily of an administrative law nature and contain mainly mandatory norms. At the same time, as a rule, the features of civil law regulation of the relevant relations are not highlighted. In particular, special rules devoted to issues of liability for harm caused when using unmanned devices, including those that can be classified as unmanned vehicles, are not highlighted.

Second, a heterogeneous nature of the term "unmanned vehicle," contradictions in the understanding of its content are manifested in the fact that in current sources such vehicles include both highly and fully automated vehicles that can be controlled without human intervention in an unmanned mode with using an automated driving system. However, highly automated vehicles can be driven by a human as a backup option, while fully automated vehicles do not require human intervention in their operation.

Third, an analysis of current regulations has shown that it is necessary to distinguish between the legal regime of unmanned devices

(unmanned mobile vehicles) that are recognized as vehicles in accordance with current legislation as well as other unmanned devices that do not have a vehicle regime. Thus, ethereal vehicles constitute a type of unmanned devices (unmanned mobile vehicles).

Forth, unmanned vehicles can include various types of vehicles: unmanned cars, unmanned aircraft, unmanned water transport, unmanned railway transport. Currently, the concepts of an unmanned vehicle and an unmanned aircraft are enshrined in regulations. However, the concept of an unmanned vehicle is enshrined in *the Concept of Ensuring Road Safety with the Participation of Unmanned Vehicles on Public Roads* that formally narrows the category of an unmanned vehicle, in fact, to unmanned vehicles.

Fifth, analysis of the categories available in current regulatory sources denoting certain types of unmanned devices allows us to come to the conclusion that there are differences in the definition of their main features and a lack of uniformity in determining their legal regime. On the one hand, this is justified by the need to take into account the specifics of various types of transport and infrastructure requirements. On the other hand, it complicates the determination of their legal regime. In connection with the above, we believe it is necessary to ensure uniformity of terminology in terms of defining the category of "unmanned vehicle" and to highlight the differences in its individual types (unmanned vehicle, unmanned aircraft, other unmanned vehicles).

Sixth, it is necessary to determine the relationship between the categories "unmanned device" and "autonomous device," in particular, in relation to the identification of the concepts of autonomous railway transport and autonomous water transport in strategic documents. It may also be justified to define the category of other unmanned devices that do not have the characteristics of the vehicle. When developing regulations, it is necessary to use uniform terminology to avoid problems of interpretation of various regulations.

Seventh, when determining the grounds for liability for damage caused when using an unmanned vehicle, it is necessary to take into account that its safe operation is associated both with the qualitative characteristics of the object itself (a vehicle equipped with modern

technologies that allow its automated control) and with the state of the corresponding transport infrastructure, as well as with the involvement of a person admitted to driving directly in the process of driving a vehicle.

Eighth, it seems possible, at the present stage of development of legislation, to use the existing mechanisms of tort liability in civil law, in particular, liability for harm caused by a source of increased danger, and general provisions on criminal and administrative liability. In the future, it will be possible to develop industry standards and special norms for the selection and evaluation of regulatory mechanisms.

Also, in the future it could be of interest to consider the possibility of liability of artificial intelligence as a subject of law and the development of norms that would establish criteria and types of such liability. However, now artificial intelligence is not considered as a subject of law, it can be recognized only as an object.

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Article

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Legal Challenges Surrounding Participation of Big Tech Companies in the Russian Social Networking Market

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Abstract: This article outlines the regulatory landscape surrounding the participation of global technological companies in the Russian social network market. These companies include Alphabet (Google), Meta/Facebook,[1] X (former Twitter),[2] Apple, Microsoft and Amazon. However, this article primarily concentrates on those that provide computing social network services, i.e., Google, Meta/Facebook and X/Twitter. The author considers a number of topics. Firstly, the Russian law requirements on the mandatory physical presence of foreign companies which provide social networking services in Russia. Secondly, the issues surrounding the storage of personal data in a foreign data base or cloud, particularly retention obligation and the cross-border transfer of personal data. Thirdly, obligations for Internet providers with regard to the blocking or deletion of information that violates Russian law. There are many obstacles for Big Tech companies to work in the Russian networking market, including lack of general regulation of these services, information security requirements, restrictions contained in Personal Data Law and Information Law. An analysis of the European and Russian regulation shows that both legal systems contain similar obligations. Furthermore, if relations between EU and Russia were better, it would be beneficial to accept EU rules (such as the Digital Services Act (DSA)) as binding.

[1] Note: Meta Platforms Inc. is recognized as extremist and banned in the Russian Federation.

[2] Note: X platform is banned in the Russian Federation.

This could be done by concluding an international agreement that would extend the sphere of application of some of the DSA rules, which are in the mutual interest of both parties. However, in the current political situation this goal is difficult to achieve.

Keywords: social networking services; retention obligation; personal data; information security; confidential information; cross-border transmission; data processing center; foreign cloud; database

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Contents

I. Introduction 247
II. Mandatory Physical Presence of Foreign Companies
Which Provide Social Networking Services 249
III. Localization of Personal Data of Russian Citizens as Challenges
for Big Tech Companies 253
III.1. Retention Obligation and Cross-Border Transfer Issues 253
III.2. Sanctions for Breach of Retention Obligation and Their Impact
on Big Tech Companies 255
III.3. Implementation of the Retention Obligations in Russian Practice 258
III.4. Requirements for Information Distributors as to the Distributed
Content: Restriction of Public Access to Unauthorized Information 260
IV. Storing Internet Content in Foreign Clouds and Databases
belonging to Big Tech Companies 263
V. Conclusion 265
References 266

I. Introduction

Until recently, many companies, especially large and medium sized ones, which provide social networking services were active in the Russian market, notably the major players such as Google, Meta/Facebook and X/Twitter. These companies, known as “large communication intermediaries” and “dominant platforms” (Moore and Tambini, 2022,

pp. 12, 18) have developed famous and effective social networking platforms. They are so powerful that there are even suggestions that these companies could be regulated as utilities or brought into public ownership (Moore and Tambini, 2022, p. 2). Many Russian companies have also developed competitive social network platforms, such as VKontakte (vk.com) or Odnoklassniki (odnoklassniki.ru), which are more popular among local users than Meta/Facebook and X/Twitter. Most of the major players (they are also named as Big Tech companies) are the US companies, whereas EU countries are represented primarily by small and medium enterprises (SMEs) (Hadebe, 2022, p. 4).

Because of the Special Military Operation (SMO), many foreign major players have closed their local offices in Russia and stopped providing social network services in Russia. They no longer advertise their services to Russian customers and do not localize their websites in order to be competitive in the Russian market. However, some Russian users continue to use foreign network social platforms via different virtual private networks (VPNs).

Foreign companies, including Big Tech companies, who are targeting their activities on Russian territory, must comply with the retention obligation. They are not allowed to transfer information to foreign databases or store it in data processing centers situated outside Russia without localization in Russia.

It should be noted that the activities of some Big Tech companies in the territory of the Russian Federation were prohibited because of their alleged non-compliance with Russian laws. Their apps and websites were blocked as they restricted access of Russian users to certain information. These and other issues surrounding the regulatory framework of the use of services of Big Tech companies in Russia will be addressed in detail below. We will start with an analysis of the requirements regarding mandatory physical presence that were recently introduced in Russia. Then, we will review the issues surrounding the storage of personal data in foreign clouds and databases that Big Tech companies own or use. In particular, we will discuss the retention obligation, sanctions applicable to its breach, its potential impact on cloud services, implementation of the retention obligations in Russian practice and the storage of Internet content in foreign clouds or databases. Finally, we will explore the issues

regarding the blocking or deletion of information that is distributed by the Big Tech companies in violation of Russian laws.

Roskomnadzor[3] maintains a list of foreign companies whose informational resources have been prohibited from advertising their services in Russia. As of February 2024, the list includes 26 companies, such as Google LLC, Twitter Inc., TikTok Pte Ltd., Zoom Video Communications Inc, and Viber Media S.à r.l. For example, Google LLC was prohibited from advertising its resources (google.ru; google.com; youtube.com; mail.google.com; gmail.com, etc.).[4] The same companies have been prohibited from placing advertisements on their resources in Russia.[5] Basically, this means that Big Tech companies, along with some other listed foreign entities, have been excluded from providing any Internet services in the Russian segment of the Internet. This happened because of various requirements that were introduced in Russian law in recent years. The first requirement, which appeared in 2021, is that foreign companies involved in the Internet industry must be physically present in the Russian territory. Another requirement, introduced in 2015, is that personal data of Russian citizens must be localized. Finally, there were some restrictions on the distributed information itself.

In this article, we are going to address these and other related issues.

II. Mandatory Physical Presence of Foreign Companies that Provide Social Networking Services

Russian law does not contain any definition of social net-working services. The most relevant definition is one suggested by Nicole Ellison in 2007, who defined them as "web-based services that allow individuals

[3] Roskomnadzor is the Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communication of the Russian Federation, which is the data protection supervisory authority in Russia. Available at: https://rkn.gov.ru/ (In Russ.). [Accessed 06.02.2024].

[4] List of Foreign Persons Conducting Their Activity on the Internet in the Territory of the Russian Federation. Available at: https://236-fz.rkn.gov.ru/agents/list (In Russ.). [Accessed 06.02.2024].

[5] List of Foreign Persons Conducting Their Activity on the Internet in the Territory of the Russian Federation.

to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and transverse their list of connections and those made by others within the system" (Daxton, 2017, p. ix).

Starting from the early 2010s, the Big Tech companies became very active in the Russian social networking market. The share of Meta/ Facebook and X/Twitter in the country was significant, around 40 %. Google's YouTube remains one of the main video hosting tools in Russia. However, these companies did not have a physical presence in the country, except Google, who had a small office in Moscow, which mostly performed marketing activities. The Russian authorities were interested in the legal presence of Big Tech companies for two main reasons:

A) Taxation of the sales which the Big Tech companies made in Russia, and

B) The enforcing of mandatory rules which prohibit distribution of certain information by the Big Tech companies or their involvement in political activities in Russia.

As a result, on 1 July 2021, Federal Law "On the Activities of Foreign Persons involved in the Internet industry in the territory of the Russian Federation (RF)" No. 236-FZ[6] was adopted and came into effect. This Law covers the activities of foreign individuals and entities who own Internet sites, software programs and informational resources and have more than 500,000 users who have access to those resources during the day. In addition, they render their services in the Russian language, process the data of Russian users, collect money from Russian customers, or place advertisements that are targeted at Russian users. In particular, Law No. 236-FZ covers the following three types of subjects:

a) Internet providers, whose users are located in the territory of the Russian Federation;

b) Information distributors who transmit electronic messages of Russian users; and

c) Distributors of advertisements targeted at Russian customers through the Internet.

[6] Available at: http://www.consultant.ru/document/cons_doc_LAW_388781/ (In Russ.). [Accessed 06.02.2024].

Under Law No. 236-FZ, the persons above must create a branch office or a representative office or an entity under Russian law, which would represent them in courts and be held liable to the full extent of their assets under the courts' judgements issued against foreign persons. They should interact with Russian customers and restrict public access to unauthorized information. If a foreign person does not comply with this Law, the regulators may take measures against it, such as prohibiting the placement advertisements, or restricting the transborder transfer of personal data, or blocking its websites. The obligation to create a branch or a representative office or entity has been in force since 1 January 2022.

There is no doubt that Law No. 236-FZ is aimed at regulating the activities of the IT giants, such as Google, Meta/Facebook, X/Twitter, Amazon and Apple. Furthermore, Roskomnadzor issued a list of companies which should create their local offices in Russia. Initially, 13 companies were included in this list: Apple, Discord, Meta/Facebook, Google, Likeme, Pinterest, Spotify, Telegram, TikTok, Twitch, X/Twitter, Viber and Zoom.[7] Many of these companies did not have offices in Russia which would represent them in their relations with customers, and basically were beyond the control of Russian regulators. Thus, it was almost impossible to enforce the judgements of Russian courts against these companies for breaches of Russian laws such as the Personal Data Law.[8] Because of the SMO, many of the big players in the market, such as Google, X/Twitter, Meta/Facebook have suspended their commercial activity in the Russian market. Those companies that had offices in Russia have closed them, or are in the process of liquidation (as in the case of Google LLC[9]). Nevertheless, some companies, such as Viber and Apple, have opened and maintained their offices in Russia.

[7] Roskomnadzor published the List of the Foreign Internet Companies that should open their local offices in Russia. Available at: https://rkn.gov.ru/news/rsoc/news73944.htm (In Russ.). [Accessed 06.02.2024].

[8] Federal Law "On Personal Data" No. 152-FZ dated 27 July 2006 (as amended on 6 February 2023). Available at: https://www.consultant.ru/document/cons_doc_LAW_61801/ (In Russ.). [Accessed 06.02.2024].

[9] *See* Extract for Google LLC (reg. number 1057749528100) from the Russian Unified Register of Legal Entities. Available at: https://pb.nalog.ru (In Russ.). [Accessed 10.02.2024].

How does the requirement of physical presence correspond to international practice? We can find a similar approach in some countries.

The European law operates with the concept of "very large online platforms,"[10] which have more than 45 million active monthly users in the EU. However, there is no requirement about the mandatory physical presence of these platforms in the territory of the EU or its member-states.

It should be noted that OECD[11] elaborated a special incentive (Pillar One), supported by more than 130 countries, which suggests that the multinational enterprises (MNEs) should be taxed regardless of their physical presence in the country.[12] Pillar One applies to approximately 100 of the biggest MNEs and distributes part of their profit to countries where they sell their products and services.[13] Big Tech companies are also among these companies.

It was envisaged that the local offices which should have been created by Big Tech companies in Russia would help the local authorities to tax Big Tech companies because their income would be mostly associated with the sales activities of their local offices. As a result, in 2016 "Google Tax" was introduced in Russia and came into effect in 2017. According to the law, if foreign companies sell digital services to Russian companies and entrepreneurs, these foreign companies must be registered with the Russian tax authorities and pay VAT themselves.[14] Prior to 2017, it was the obligation of the Russian counterparts who bought digital services

[10] *See* Digital Services Act (Art. 33). Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065. [Accessed 05.02.2024].

[11] OECD is the Organization for Economic Cooperation and Development.

[12] OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. Available at: https://doi.org/10.1787/beba0634-en. P. 10. [Accessed 06.02.2024].

[13] OECD. Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy Frequently asked questions. July 2022. Available at: https://www.oecd.org/tax/beps/faqs-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2022.pdf. [Accessed 06.02.2024].

[14] The Russian Tax Code, Art. 174.2. Available at: https://www.consultant.ru/document/cons_doc_LAW_28165/ (In Russ.). [Accessed 06.02.2024].

from a foreign company to pay the VAT. They acted as tax agents in these cases. Now, Russian customers are released from this obligation since they are no longer considered to be VAT tax agents. However, the practical effect of this rule has been undermined by the fact that Big Tech companies have been prohibited from providing services in Russia and have suspended their activities here.

As of today (January 2024), the most popular internet resources in Russia are Yandex (82 % of the Russian population), Google (81 %), YouTube (78 %), WhatsApp[15] (78 %), VKontakte (74 %) and Telegram (68 %).[16]

III. Localization of Personal Data of Russian Citizens as Challenges for Big Tech Companies

III.1. Retention Obligation and Cross-Border Transfer Issues

Before Big Tech companies ceased their activity in Russia in 2022, one of the biggest obstacles for them was the requirements of Russian personal data protection laws. Under Personal Data Law, personal data is defined as any information related directly or indirectly to an identified or identifiable individual, i.e., a personal data subject. This definition is similar to the one under the European data protection legislation and typically includes the name, date and place of birth, address, job, education, income and other information based on which an individual can be identified.

According to Personal Data Law, *"at the time of the collection of personal data, inter alia over the Internet, the operator [i.e., the controller of personal data within the meaning of European data protection legislation] must ensure that the personal data of Russian citizens is recorded, systematized, accumulated, stored, specified (updated or modified) and retrieved in databases located in the Russian Federation."*

[15] Part of Meta that is recognized as extremist and banned in the Russian Federation.

[16] Mediascope. Available at: https://mediascope.net/data/ (In Russ.). [Accessed 20.02.2024].

Once this rule was introduced in Personal Data Law in 2015, there was a discussion as to whether the personal data of Russian citizens could be firstly recorded abroad and then reproduced in Russian databases. The Ministry of Digital Development issued clarifications[17] and explained that personal data should be *initially* recorded and stored in databases located in Russia.

However, this does not prevent the controller from making copies of such data and storing and further processing these copies elsewhere (i.e., the creation of backup copies). Nonetheless, the Russian database should be regarded as the primary storage location and the foreign databases only as secondary databases. Therefore, the same approach should be taken when updating personal data, i.e., the copies stored in Russian territory should be updated first and only then should the controller proceed with updating the foreign database.

Personal Data Law applies solely to the territory of the Russian Federation and/or to the personal data of Russian citizens. As the Ministry of Digital Development clarified, Personal Data Law does not have extraterritorial effect and any borderline cases should be evaluated on an individual basis.

The commentary on Personal Data Law which was placed on the Roskomnadzor website, states that *"parallel insertion of the collected personal data into a Russian information system and a system located on the territory of a foreign state does not comply with the requirements [of Personal Data Law] because the data may be transferred to a foreign information system only after their collection by way of a cross-border transfer."*[18]

However, many service providers (controllers) implement solutions involving parallel (simultaneous) storage of personal data in Russian and foreign databases. This conclusion can also be supported by the technical aspect — in today's technologies, it may, on occasion be

[17] The clarifications by the Russian Ministry of Digital Development, Communications and Mass Media were initially published on Roskomnadzor's site (https://digital.gov.ru/en/personaldata/). As of today, these clarifications are no longer available on Roskomnadzor's site but still play practical role.

[18] Commentary on Federal Law No. 242-FZ dated 21 July 2014. Available at: https://pd.rkn.gov.ru/library/p195/ (In Russ.). [Accessed 06.02.2024].

difficult to distinguish between the primary and secondary databases and it may thus lead to the interpretation that simultaneous storage is acceptable even if, strictly speaking, it may be found not to fully adhere to Personal Data Law as interpreted by the regulators.

It should be noted that transfers abroad to a secondary database are permissible to countries that either are party to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data No. 108,[19] or mentioned in the special list of the countries, approved by Roskomnadzor in 2022.[20] For the transfer of personal data to other countries, such as the United States, it is necessary to obtain permission from Roskomnadzor. These amendments were introduced in 2022.[21]

III.2. Sanctions for Breach of Retention Obligation and Their Impact on Big Tech Companies

Until recently, there were no specific monetary sanctions linked to the breach of the retention obligation. However, a company could be subject to a fine of EUR 50, if it breached the obligation to provide the supervisory authority with information relating to the implementation of the retention obligation.[22]

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[19] Chart of signatures and ratifications of Treaty 108. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/signatures. [Accessed 06.02.2024].

[20] Roskomnadzor Order No. 128 dated 5 August 2022. Available at: https://www.consultant.ru/document/cons_doc_LAW_426970/ (In Russ.). [Accessed 04.02.2024].

The list currently includes 34 states: Australia, Gabon, Israel, Qatar, Canada, Kyrgyzstan, China, Thailand, Malaysia, Mongolia, Bangladesh, New Zealand, Angola, Belarus, Benin, Zambia, India, Kazakhstan, Costa Rica, Republic of Korea, Ivory Coast, Mali, Niger, Peru, Singapore, Tajikistan, Uzbekistan, Chad, Vietnam, Togolese Republic, Brazil, Niger, Republic of South Africa, Japan.

[21] Federal Law "On the Introduction of Amendments to Personal Data Law and Certain Legislative Acts..." No. 266-FZ dated 14 July 2022. Available at: https://www.consultant.ru/document/cons_doc_LAW_421898/3d0cac60971a511280cbba229d9b6329c07731f7/ (In Russ.). [Accessed 05.02.2024].

[22] Art. 19.7 of the Administrative Code of the Russian Federation. Available at: https://www.consultant.ru/document/cons_doc_LAW_34661/ (In Russ.). [Accessed 05.02.2024].

However, in December 2019, amendments were introduced to the Russian Administrative Code that prescribe that an administrative penalty should be imposed if the retention obligation is breached. Today, the monetary penalty for a legal entity for a breach of the retention obligation can range from EUR 9,500 to 56,500. In the case of a repeated violation, a fine ranging from EUR 56,500 to 170,000 may be imposed.[23] The supervisory authority may also apply to the court in order to request that the website of the breaching company should be blocked. Upon obtaining the court decision, the supervisory authority can block the relevant website by an order addressed to the relevant Internet service provider(s). This is, however, an extreme measure which can be applied only in specific circumstances as you can see from the reasoning below. If the breach is attributable to an officer of the breaching entity (i.e., a company director or the person who is responsible for the company's compliance with Personal Data Law requirements), the law stipulates fines that can amount to between EUR 1,000–2,000 for the breach of the retention obligation; and between EUR 4,700 and 7,500 for repeated violations.

Roskomnadzor has blocked the websites of some major players due to a prior breach of their retention obligation. On 10 November 2016 (case No. 33-38783/2016) the Moscow Court decided that the LinkedIn website and app should be blocked. This has effectively ended LinkedIn's operations in the Russian territory due to continuous violations of their retention obligation. Since then, LinkedIn has not been accessible from Russia.

Two other global social media companies have also been found to be in breach of their retention obligations — Meta/Facebook and X/Twitter. In December 2019, Roskomnadzor imposed a fine of EUR 50 on each of the companies for not providing information about the implementation of their retention obligations. The imposition of these relatively light sanctions, instead of blocking the companies' websites, happened presumably because of the significance of both companies in the Russian market and the regulator's connected fear of negative

[23] Art. 13.11(8) of the Administrative Code of the Russian Federation. Available at: https://www.consultant.ru/document/cons_doc_LAW_34661/ (In Russ.). [Accessed 05.02.2024].

publicity. For more than four years, the regulator has been seeking an amicable resolution to the problem, instead of blocking the Internet services of Meta/Facebook and X/Twitter. The amendments to the Administrative Code introduced in December 2019 were likely to serve as an incentive for both companies to comply with the retention obligation under Personal Data Law. As a result of these amendments, on 13 February 2020, the magistrate judge of the Moscow court imposed a fine of RUB 4 million (approximately EUR 40,000) on each company.[24] The decision against X/Twitter was upheld by the court of cassation in July 2020.[25]

Similarly, on 29 July 2021, the magistrate judge of the Moscow court imposed a fine of RUB 3 million (approximately EUR 28,500) on Google Corporation.[26] In June 2022, the magistrate judge of the Moscow court again considered the cases against the foreign companies for not complying with their retention obligations under Personal Data Law. Google LLC was fined RUB 15 million (approximately EUR 142,500) for their repeated refusal to localize the personal data of Russian users as required by Art. 13.11 of the Administrative Code.[27]

There were doubts whether the fines imposed by the Russian courts could be effectively enforced against Google, X/Twitter and Meta/ Facebook. Russia has never had an agreement with the United States on the recognition and enforcement of court judgements. Moreover,

[24] *See* Decision in case No. 05-0167/374/2020 dated 13 February 2020 issued against Twitter Inc. Available at: https://mos-sud.ru/search?formType=shortForm&uid=&caseNumber=05-0167%2F374%2F2020&participant= (In Russ.). [Accessed 06.02.2024]; Decision in case No. 05-0168/374/2020 dated 13 February 2020 issued against Facebook Inc. Available at: https://mos-sud.ru/search?formType=shortForm&uid=&caseNumber=05-0168%2F374%2F2020&participant= (In Russ.). [Accessed 07.10.2023].

[25] *See* Resolution of the 2nd Court of Cassation in case No. 16-3770/20 dated 7 July 2020. Available at: http://www.consultant.ru/ (In Russ.). [Accessed 06.02.2024].

[26] *See* Decision in case No. 05-2010/422/2021 dated 29 July 2021 issued against Google. Available at: https://mos-sud.ru/search?formType=shortForm&uid=&caseNumber=&participant=google (In Russ.). [Accessed 06.02.2024].

[27] Court Penalizes Foreign Companies for Their Refusal to Localize the Personal Data of Users in Russian Territory. Available at: https://rkn.gov.ru/news/rsoc/news74356.htm (In Russ.). [Accessed 05.02.2024].

the aforementioned companies did not have sufficient assets in Russia. There was a common understanding that the judgements would have not been enforced, unless the companies had paid the fines voluntarily. However, as we can see from the Federal Service of Bailiffs' website, there is no information about unpaid fines by Google, X/Twitter and Meta/Facebook. This means that these companies have all paid their billion-ruble fines (Mironenko, 2024).

In February and March 2022, X/Twitter, Meta/Facebook and Instagram were blocked from their activity on the Russian market under decisions of the Russian courts. The courts ruled that these companies had breached the principles of free distribution of information and had restricted access of Russian users to Russian mass media on their Internet platforms. X/Twitter was also blocked for the distribution of illegal content. Following this, the issue of the payment of fines for breach of retention obligations by these companies basically becomes irrelevant.

III.3. Implementation of the Retention Obligations in Russian Practice

As Russian practice shows us, many multinational corporations with operations in Russia ensure their compliance with Personal Data Law requirements by outsourcing the technical solution to third-party providers. Russian practice shows that many multinational corporations with operations in Russia ensure their compliance with Personal Data Law requirements by outsourcing the technical solution to third-party providers. Personal Data Law allows foreign Internet service providers to store the personal data of Russian citizens simultaneously in Russian and foreign databases. However, according to the official interpretation of this law by regulators, there should be an initial recording of all personal data in a Russian database (the "initial database") and then the subsequent transfer and recording of the same data in a foreign database (the "secondary database"). In other words, there should be a time lapse between the recording and storage of the data in Russia and its subsequent export abroad.

This requirement of Personal Data Law can make it difficult to implement international informational solutions that are based on blockchain technology. These solutions provide the simultaneous updating of information contained in different databases in all nodes of such systems (Saveliev, 2021).

According to Personal Data Law, a personal data operator (a data controller in the European sense of this word), who is also acting as an Internet service provider, should undertake all technical and organizational measures to protect the confidentiality of the information, such as data encryption and data anonymization.[28] However, it is difficult to implement these measures in practice since foreign data controllers cannot be bound by Russian technical requirements. The national law of the country where foreign providers have their domicile sets forth its own rules and technical requirements regarding the protection of information. However, in view of the provisions of Russian law, foreign personal data controllers should advise their Russian clients (personal data owners) to choose a convenient data center where the respective personal data is to be stored. Specifically, such a data center should be located in a country that provides adequate protection of personal data from the point of view of Personal Data Law.

It should be noted that notion of a data localization rule is also known to some other national legal systems. Thus, in the European Union (EU), there is a general rule, established by GDPR,[29] which provides that any transfer of personal data is permissible if the adequate level of protection is guaranteed (Art. 44). According to the EU Data Retention Directive Retention of 2006, all EU member states must store electronic communications for at least six months. These rules have been further developed in subsequent legislation of EU countries (FRA, 2017). This can be regarded as the EU response to the expansion of the US Big Tech companies, such as Amazon, Microsoft and Google whose

[28] *See* Roskomnadzor Order "On the Requirements and Methods of Personal Data Anonymization" No. 996 dated 5 September 2013; Guidelines on the Application of Roskomnadzor Order No. 996 (approved by the Roskomnadzor on 13 December 2013). Available at: http://www.consultant.ru/ (In Russ.). [Accessed 06.02.2024].

[29] General Data Protection Regulation. Available at: https://gdpr-info.eu/. [Accessed 18.02.2024].

share in the market of cloud computing services as high as 92 %. As a result (Hadebe, 2022, p. 12). Such countries as "Bulgaria, France, Germany, Luxembourg, Poland and Sweden have already sanctioned 'data localisation' measures that prevent certain types of data from being held abroad" (Hadebe, 2022, p. 13).

In Russia, data center services are required to store specific information on Russian territory, notwithstanding economic sanctions, any increase in equipment cost, and lack of qualified employees. Since 24 February 2022, the situation has deteriorated because of many of the Big Tech companies as well as small and medium sized Internet service providers have left the country. Today, there is a common understanding that the problem of the lack of facilities for storing data can be resolved by building data centers in Russia rather than using foreign databases. Russia should not rely exclusively on foreign facilities, even though their use is commercially profitable. The use of US data centers was convenient for Russian providers because of the time difference between the US and Russa: the US facilities were free and easily accessible during the night.

Russia has obvious competitive advantages in building data centers in its territory. These are relatively cheap energy and cold climate. The new data centers are to be built in regions with low-cost energy and low temperature, since the storage and processing of data requires a lot of energy and low temperatures (Ivanov, 2023).

III.4. Requirements for Information Distributors as to the Distributed Content: Restriction of Public Access to Unauthorized Information

In the years 2021–2023, Russian courts issued numerous judgements against Big Tech companies for not taking appropriate measures with regard to the restriction of public access to unauthorized information. For example, Google was obliged to pay RUB 26 million (EUR 245,000), Meta/Facebook RUB 66 million (EUR 625,000), and X/Twitter RUB 38 million (EUR 360,000) in administrative penalties as stipulated in the Administrative Code (Trushina, 2021). The companies actually paid these fines (Kommersant, 2021). The penalties were imposed for breach

of Information Law,[30] which prohibits the dissemination of information that violates Russian laws, such as information that promotes extremist activity, child pornography, drug production and drug dealing. For example, on 27 May 2021, the magistrate judge of the Moscow court penalized Google corporation (1600 Amphitheatre Parkway Mountain View, CA 94043, USA) for not disabling access to certain resources containing information the dissemination of which is prohibited in the Russian Federation. Access to these resources had been restricted by the Russian authorities, but were still available for Google users.[31]

Recently, Google and Meta/Facebook were brought to more strict liability. According to Art. 13.41 of the Administrative Code, the penalties for repeated violation should amount to between one twentieth (1/20) and one tenth (1/10) of the company's annual turnover. For example, on 24 December 2021, the magistrate judge of the Moscow court fined Google and Meta/Facebook RUB 7,2 billion (EUR 85,6 million) and RUB 2 billion (EUR 23,8 million) respectively for repeatedly failing to remove unauthorized information. These penalties were calculated based on Google and Meta/Facebook's turnover for the year 2020. For example, Google LLC's turnover in 2020 was approximately RUR 85 billion (EUR 1 billion) (Stepanova, 2021).

The aforementioned measures adopted by the Russian authorities are not unique and can be found in the U.S. practice. For example, US federal investigators issued a subpoena to X/Twitter for personal information of users suspected of collaborating with WikiLeaks to publish confidential U.S. documents (Daxton, 2017, p. viii). However, it is worth noting that in the U.S. to date social network sites have been treated as private spaces rather than public ones, and they are allowed to make their own rules, even if those rules are more restrictive than is allowed under U.S. law (Henderson, 2017, p. 23). This is also largely true in respect of most European countries.

[30] Federal Law "On Information, Information Technology and Protection of Information" No. 149-FZ dated 27 July 2006, as amended on 12 December 2023. Available at: https://www.consultant.ru/document/cons_doc_LAW_61798/ (In Russ.). [Accessed 06.02.2024].

[31] *See* Decision in case No. 05-1584/422/2021 dated 27 May 2021 issued against Google. Available at: https://mos-sud.ru/search?formType=shortForm&uid=&caseNumber=05-1584%2F422%2F2021&participant= (In Russ.). [Accessed 06.02.2024].

Similar instruments can be found in EU law, specifically in the Digital Services Act (DSA) and the Digital Markets Act (DMA), which changed the way of providing digital services in the EU. Both documents were adopted in 2022 and now are in force in EU countries.[32] The DSA contains rules on how platforms such as Meta/Facebook and YouTube should handle content that has been signaled to them as illegal, and the DMA intends to empower European authorities to prevent anticompetitive behavior from digital companies (Penfrat, 2020). A new regulatory regime established by the DSA and the DMA is a reaction to years of harmful practices on Big Tech online platforms, ranging from terrorist activities to widespread sharing of child sexual abuse and anti-competitive practices on global platforms (Goujard and Stolton, 2021).

Like Russian law, the DSA established the key principle of the moderation of social medium platforms — "delete first, think later" (Penfrat, 2021). According to the DSA, a service provider should immediately remove illegal content or restrict access to it.[33] National authorities may also order providers to act accordingly once they discover any illegal content.[34] These obligations are similar to those that exist in Russian law. If relations between EU and Russia were better, it would be beneficial to accept the DSA rules as binding. This could be done by the conclusion of an international agreement which would extend the sphere of application of the DSA. According to Art. 2(1) of the DSA, this Regulation applies if the recipients of intermediary services have their place of establishment in the EU, whereas the place of establishment of the providers of those services is not relevant. Therefore, the conclusion of an international agreement would be necessary to extend the application of the DSA outside the EU. As it is rightly noted by S. Hadebe, the significance of the DMA is that it represents the "rules that target few companies — the digital environment is in the hands of powerful companies. It may be easier to regulate the behavior of a few

[32] The Digital Service Act package. Available at: https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package [Accessed 06.02.2024].

[33] Para. 22 of the Preamble to the DSA. *See* also: Art. 18 of the DSA.

[34] Para. 31 of the Preamble to the DSA. *See* also: Art. 9 ("Orders to act against illegal content") of the DSA.

players, especially when there is concentration in the economy […].” (Hadebe, 2022, p. 21).

Apart from political considerations that are not analyzed here, it is obvious that the main obstacle to the conclusion of such an international agreement is the different views as to the information which could be qualified as “illegal” between the countries. As a starting point, one recommendation would be to include in the list of illegal information the most obvious actions and crimes, such as those mentioned in the DSA: crimes against children, hate speech, sale of prohibited goods, and other obviously illegal activities).[35] As regards other information, such as extremist actions, political and religious activities, this should be left for later discussion and possible future negotiations. In this context, the appropriate self-regulatory codes, such as codes of hate speech, disinformation, and terrorism (Moore and Tambini, 2022, p. 6) would also play a key role.

IV. Storing Internet Content in Foreign Clouds and Databases belonging to Big Tech Companies

Information Law provides that organizers of information distribution via the Internet (the “Information Distributor”) must:

a) store meta-data (i.e., information about the details of receiving, transmitting, delivering and/or processing voice information, written texts, images, voices, video and other electronic messages of Internet user) on Russian territory for a period of one year, and

b) store the content of the data itself (i.e., texts, images, voices, video, etc.) in the Russian databases for a period of six months, and

c) provide such information to the law enforcement authorities on their demand.[36]

The Information Distributors must design the equipment and software used in their information systems in such a manner that

[35] *See* Paras 17–20 of the Preamble to the DSA.

[36] Art. 10.1 of Federal Law “On Information, Information Technology and Protection of Information” No. 149-FZ dated 27 July 2006, as amended on 12 December 2023. Available at: https://www.consultant.ru/document/cons_doc_LAW_61798/ (In Russ.). [Accessed 06.02.2024].

would allow the law enforcement authorities to exercise their statutory competencies (i.e., the equipment and software must be designed in a way that allows for easy access by the police and the FSB[37] to the stored content).

The Information Distributor is defined as a party that *ensures the functioning of information systems and/or computer programs designed and/or used for receiving, transmitting, delivering and// or processing of the Internet users' electronic messages*. In European law, the closest equivalent to Informational Distributor is the term "provider of intermediary services."[38] The Information Law defines "electronic messages" as *any information transmitted or received by users of information-telecommunication network*. Such electronic messages include *"voice information, written texts, images, voices and other electronic messages of the Internet users."* These all-embracing definitions support the conclusion that, for the purposes of the Information Law, electronic messages are any messages transmitted over the Internet, such as e-mail messages, instant messages, and chats. Under the current prevailing view, this definition is purposefully broad to cover any user-generated content, and providers would qualify as Information Distributors. Earlier, before ceasing their activity in Russia, such players as Google (email service Gmail, social networking service Google+), Microsoft (instant messages Outlook, and voice-over-IP services Microsoft Lync), Meta/Facebook (private messages, discussion boards), and X/Twitter (social network) were qualified as Information Distributors.

One can conclude that the idea of these provisions of Information Law is to ensure that the relevant information is kept in the territory of the Russian Federation in order to allow the Russian law enforcement agencies to gain access to this data within a certain period of time. This is necessary for the investigation of different types of crimes, specifically related to cyberspace, terrorist activities, illegal trafficking of human organs and child abuse.

[37] FSB is the Federal Security Service of the Russian Federation.

[38] *See* e.g.: Digital Services Act.

The Information Law does not prohibit the transmission of electronic messages outside Russia, including the use of foreign clouds to proceed with the relevant services (email services, instant massages, social networks, etc.). However, the law imposes a retention obligation so that electronic messages remain available and accessible in Russia after being transferred. It also requires the Information Distributor's equipment and software to be designed in such a way as to allow an easy access by the law enforcement and security authorities, namely the FSB.

V. Conclusion

Currently, there are certain restrictions and difficulties for the Big Tech companies in providing their social networking services in Russia. The first one is the lack of statutory regulation in this sphere and this circumstance does not allow players in this market to effectively predict all legal consequences of using their social platforms. The second impediment is the strict Personal Data Law rules that are not designed to regulate social networking services. This obstacle also restricts the use of public cloud solutions provided by Big Tech companies. The Russian Government needs to enact and implement some general guidance regarding the use of public social platforms. Such guidance could be created based on the respective foreign practice. Specifically, it would be beneficial if the DSA rules were accepted as binding in cross-border relations between the EU and Russia.

Based on the analysis of the current regulation of the Internet industry, we can conclude that foreign providers, including Big Tech companies, may provide Russian customers and users with social networking services, provided that certain conditions are met. Firstly, they must abide by Russian law and delete or restrict access to information that contains illegal content, such as child pornography and extremist activity. Secondly, they should take measures to protect sensitive information, such as the personal data of Russian citizens. Finally, it is much more beneficial to cooperate with local regulators rather than arguing with them.

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Article

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Integrating Digital Technologies into Russian Legal Arbitrazh Proceedings: Current State and Prospects for Development

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Abstract: The high demand of contemporary society for digital technologies application in legal proceedings is evidenced in legal practice. Advancements in technologies enabling remote participation in court proceedings and interaction of trial participants with the court have ensured procedural efficiency at all stages of case hearings. The article delves into the information technologies currently utilized in Russian arbitrazh courts, as well as potential pathways for further development of digitization. This study also examines the experiences of foreign countries and the extent of integration of digital technologies into legal proceedings. The article provides an overview of the information technologies utilized at various stages of judicial proceedings in Russian courts, starting from filing a claim in court, then during its substantive consideration by the court, and concluding with the issuance of a judicial act. The author suggests digitizing a significant portion of the judicial process, including electronically filing lawsuits and processing documents, paying court fees and expert examination costs, as well as sending court notifications to the parties involved in the process. During court hearings, it is proposed to only maintain an electronic record of the court session (electronic secretary), as well as actively utilize electronic evidence. The article discusses further enhancement of automated decision-making technology (smart judicial decisions), with subsequent implementation of digital mechanisms for the enforcement of judicial acts. In conclusion, the author emphasizes the effectiveness of the existing convergence of legal and technological aspects, enabling

transparency, openness, and impartiality in justice at the current stage of social development.

Keywords: electronic justice; digital court; artificial intelligence; electronic case; electronic notifications; electronic evidence; digital records; digital secretary; GPT digital chat; machine decision

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Contents

I. Introduction 269
II. Case Management in Court 271
II.1. Electronic Filing of a Lawsuit and Electronic Case Form 271
II.2. Payment of the State Duty and Depositing Funds into the Court's Account ... 274
II.3. Electronic Notifications 276
II.4. Electronic Case 281
II.5. Digital (Telephone) Secretary and Court Chatbot 283
III. Court Session 284
III.1. Electronic Court Records of a Court Session 284
III.2. Court Session Recess 286
IV. Judicial Acts 287
IV.1. "Smart Decisions" and Court Orders 287
IV.2. Electronic Signing of Court Decisions (Electronic Judicial Acts) 289
V. Execution of a Judicial Act 290
VI. Conclusion 292
References 292

I. Introduction

The development of digital justice in Russia is a priority task for the state aimed to increase confidence in the judicial system, particularly in the context of digital inequality.[1] Over the past decade, the integration

[1] Resolution of the Government of the Russian Federation "On the federal target program 'Development of the Russian Judicial System for 2013–2024'" No. 1406 dated 27 December 2012 and Order of the Government of the Russian Federation

of elements of electronic justice into arbitrazh proceedings has been evident in procedural legislation and acts of Russian highest courts, in particular, Resolution of the Plenum of the Supreme Court of the Russian Federation "On certain issues of applying the legislation regulating the use of documents in an electronic form in the activities of courts of general jurisdiction and arbitrazh courts" No. 57 dated 26 December 2017, Order of the Judicial Department at the Supreme Court of the Russian Federation "On approval of the Procedure for Submitting Documents to the Arbitrazh Courts of the Russian Federation in an Electronic Form, including in the Form of an Electronic Document" No. 252 dated 28 December 2016 and Resolution of the Plenum of the Supreme Arbitrazh Court of the Russian Federation "On approval of the Instructions for Case Management in Arbitrazh Courts of the Russian Federation (First, Appellate, and Cassation Instances)" No. 100 dated 25 December 2013.

Russian arbitrazh courts employ a system of electronic document submission, including through the offices of Multifunctional Centers (MFC), electronic registers of court cases, an automated system for distributing cases among judges, depending on the specialization of judicial panels, video conferencing and online court hearings, as well as many other elements of digital justice (Vorontsova et al., 2020; Burdina et al., 2021; Laptev and Solovyanenko, 2022; Rusakova et al., 2022). However, there is a long-term task ahead for legal experts to collaborate with engineers and programmers for the future development and optimization of digital justice, including by implementing artificial intelligence and cloud computing, as well as electronic interdepartmental interaction between the court and executive authorities.

The potential pathways for promoting digitalization in domestic arbitrazh proceedings explored in this research will ensure significant procedural savings for both the participants and the court and will help eliminate a number of technical and legal errors caused by human factors (Laptev, 2023, pp. 168–187).

"On approval of the Spatial Development Strategy of the Russian Federation for the period until 2025" No. 207-p dated 13 February 2019. (In Russ.).

II. Case Management in Court

II.1. Electronic Filing of a Lawsuit and Electronic Case Form

The procedural legislation enshrines the claimant's right to file a lawsuit in court in both paper form and electronically, including in the form of an electronic document.[2] To that end, the claimant independently determines the optional form of application to court, which corresponds to the constitutional right to judicial protection and access to justice.[3]

The analysis of foreign legal systems and their experiences shows that certain countries require that all court filings be submitted exclusively in an electronic form (Mutovina, 2018, pp. 537–540; Kapustin, 2019, pp. 86–94). For example, according to Art. 10-1 of the Civil Procedure Code of the Republic of Azerbaijan[4], judicial proceedings for *commercial disputes*, including the submission and receipt of applications, complaints, and other documents, as well as the provision of court documents to the court and trial participants, are conducted through an electronic account created on the Electronic Court information system (paperless document management form). In Singapore, following the implementation of the *Electronic Filing System (EFS)* and eLitigation system[5] in 2000, the submission of documents to the court and provision of information about the progress of legal proceedings became fully automated in electronic format. This practice is also supported by judicial systems in other countries.

England is developing a specialized system for digital dispute resolution based on the application of digital methods and innovations

[2] Part 1 Art. 125 of the Arbitrazh Procedure Code of the Russian Federation (hereinafter referred to as the APC RF). (In Russ.).

[3] Art. 46 of the Constitution of the Russian Federation, Subpara. 2 of Para. 1 of Resolution of the Plenum of the Supreme Court of the Russian Federation "On certain issues of the application by courts of the Constitution of the Russian Federation in the administration of justice" No. 8 dated 31 October 1995. (In Russ.).

[4] Available at: https://continent-online.com/Document/?doc_id=30420065 (In Russ.). [Accessed 15.06.2024].

[5] Available at: https://www.elitigation.sg/_layouts/IELS/HomePage/Pages/Home.aspx [Accessed 15.06.2024].

(*Digital Dispute Resolution Rules. Version 1.0*, 2021[6]). The subject of disputes considered are digital relationships with respect to crypto-assets, crypto-currencies, and smart contracts, which are resolved in a digital environment using the Internet and artificial intelligence.

According to Parts 2, 4–6 Art. 27 of the APC RF qualified lawyers represent the participants in the domestic arbitrazh procedure typically including manufacturing and investment companies, shareholders and members of corporate organizations, trustees in bankruptcy, professional participants of the stock market, and other individuals. The level of digital literacy among members of the legal community indicates their proficiency in using information technologies, including personal computers, laptops, tablets, or other gadgets. In this respect, there are no objective barriers to establishing a legislative requirement for the electronic submission of lawsuits to arbitrazh courts for specific categories of cases, particularly:

— for claims involving the recovery of monetary funds, where the parties are commercial legal entities;

— for corporate disputes;

— for court orders, etc.

It is proposed to introduce an *electronic case form* making it possible to fill in the respective "windows" containing the following information:

— details of the individuals involved in the case (Taxpayer Identification Number, Primary State Registration Number, Individual Insurance Account Number, email, address, etc.);

— grounds for the claims (in contract, not in contract, in tort, etc.);

— the amount of the monetary claim (distinguishing between the principal debt or unjust enrichment; contractual penalties or statutory interest; judicial penalties, etc.);

— the amount of the state duty paid upon filing the lawsuit (or for which a deferral or installment plan has been requested under Art. 333.41 of the Tax Code of the Russian Federation);

— the date of sending a pre-action letter to the respondent;

[6] Available at: https://35z8e83m1ih83drye28009d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Lawtech_DDRR_Final.pdf [Accessed 15.06.2024].

— jurisdiction (contractual, exclusive, alternative, or general) and any other relevant information.

To implement this proposal, it will also be necessary to *structure the interface of the My.Arbitr* portal in such a way as to ensure that upon the submission of documents to court, there is an option to attach files to each of the listed pieces of information (electronic form), for example, a claim calculation to the Claim Amount section or a payment order to the State Duty section. Additionally, when the judge downloads the electronic case, all previously attached documents should be compiled into a single case stored in the judicial cloud (Laptev and Solovyanenko, 2019, pp. 195–204; Kartskhiya, 2018, pp. 162–172).

For the convenience of filling out the electronic case form, it is possible to create specialized programs integrated into the electronic case form. For instance, in the USA, AI featured service *DoNotPay*[7] is used for automatic completion of the complaint form. In recent years, Europe has been actively promoting online case processing and electronic communication with courts, as well as electronic submission of claims using e-CODEX technology through email linked to a registered user account.[8]

In Germany, requirements for electronic documents, the procedure for creating a special user account linked to an email inbox, and other aspects are regulated by Resolution of 24 November 2017 on the technical framework terms for electronic legal transactions and a special electronic mailbox.[9]

When technologically synchronized with the databases of the Federal Tax Service of Russia (Transparent Business, Unified State Register of Legal Entities, Unified State Register of Individual Entrepreneurs, etc.), the electronic form of the information platform of arbitrazh courts will make it possible to automatically determine the status (legal capacity)

[7] Available at: https://donotpay.com/ [Accessed 15.06.2024].

[8] Online processing of cases and e-communication with courts. Available at: https://e-justice.europa.eu/280/EN/online_processing_of_cases_and_ecommunication_with_courts [Accessed 15.06.2024].

[9] Verordnung über die technischen Rahmenbedingungen des elektronischen Rechtsverkehrs und über das besondere elektronische Behördenpostfach. Available at: https://www.gesetze-im-internet.de/ervv/ (In Germ.). [Accessed 15.06.2024].

of the parties involved in the case; the jurisdiction of the court, etc. As a result, the court will faster respond to incoming applications by modifying the corresponding draft court rulings, for example, a ruling to refuse to accept an application for a court order upon liquidation of the defendant,[10] or a ruling on the return of a statement of claim due to a violation of the rules on the jurisdiction of corporate disputes in the event of filing a claim not at the corporation's address.[11]

The electronic case form, when diligently and conscientiously filled out by the plaintiff (claimant), will also eliminate technical errors on the part of the court (typos or clerical errors in judicial acts). However, such an innovation will require the establishment of the risk of adverse consequences for the party[12] that made errors when filling out the form.

II.2. Payment of the State Duty and Depositing Funds into the Court's Account

Violation of the requirements for the statement of claim and the list of documents attached thereto[13] entails corresponding procedural consequences.[14] A mandatory document to be attached to the claim is a document confirming the payment of the state duty (payment order, Sberbank cashier's check, etc.), except where a deferral (installment plan) for its payment is requested.

The amounts of the state duty for cases considered by the Supreme Court of the Russian Federation and arbitrazh courts are determined in Art. 333.21 of the Tax Code of the Russian Federation and depend on the nature of the claims (property or non-property claims).

[10] Para. 21 of Resolution of the Plenum of the Supreme Court of the Russian Federation "On certain issues of the application by courts of the provisions of the Civil Procedure Code of the Russian Federation and the Arbitrazh Procedure Code of the Russian Federation on writ proceedings" No. 62 dated 27 December 2016. (In Russ.).

[11] Art. 38 and 129 APC RF. (In Russ.).

[12] Art. 9 APC RF. (In Russ.).

[13] Art. 125, 126 APC RF. (In Russ.).

[14] *See,* for example, Para. 19 of Resolution of the Plenum of the Supreme Court of the Russian Federation "On the application of Part Four of the Civil Code of the Russian Federation" No. 10 dated 23 April 2019; Para. 21 of Resolution of the Plenum of the Supreme Court of the Russian Federation "On the consideration by arbitrazh courts of cases arising from relations complicated by a foreign element" No. 23 dated 27 June 2017. (In Russ.).

Taking into account the proposal to introduce an electronic case form, which includes information about the amount of monetary claims and details of the state duty payment, it is necessary to implement digital technology that would allow for algorithmic comparison of the provided information and making electronic notations (conclusions) regarding the proper calculation and actual payment of the state duty.

For the technology to work correctly, integration with the Federal Treasury database will also be required to verify the fact of payment of the state duty with the data of the electronic file. Not only the court but also the applicant should see the information about the correct calculation and payment of the state duty in the electronic case form.

Similarly to the proposal regarding the state duty, record should be kept in the electronic case file concerning the funds deposited by the case participants into the arbitrazh court's account, which are to be paid to experts and witnesses,[15] as well as to trustees in bankruptcy cases and for applications for the appointment of a procedure for the distribution of the liquidated organization's assets.

First, such technologies will enable the court to promptly establish whether the funds are deposited (credited) to the deposit account. It is known that the absence of funds in the court's deposit account is the ground for rejecting a motion to appoint a judicial examination.[16]

Second, the interface of the electronic case will enable the trial participant to deposit funds electronically (i.e., by modifying a QR code) using the current details of the deposit account, which include the corresponding codes. For example, when paying to the deposit account of the Moscow Arbitrazh Court in accordance with the Procedure for Authorizing Operations with Funds Temporarily Placed at the Disposal Recipients of Funds from the Federal Budget,[17] the payment order is to include the code of the regulatory act (RA) — 0026 (APC RF) or 0030

[15] Art. 108 APC RF. (In Russ.).

[16] *See*, for example, Resolution of the Plenum of the Supreme Court of the Russian Federation "On certain issues of the practice of application by arbitrazh courts of legislation on expert examination" No. 23 dated 4 April 2014. (In Russ.).

[17] Approved by the Order of the Ministry of Finance of the Russian Federation No. 119n dated 23 June 2020. Available at: https://base.garant.ru/74504705/ (In Russ.). [Accessed 15.06.2024].

(Bankruptcy Law) in gap 22.[18] If such information is absent from the payment document, this interferes with the correct transfer of funds to the court's deposit account.

Similar integrated payment systems are used, particularly in Israel, enabling swift and convenient payment transactions and fee settlements in favor of the courts via the Net HaMishpat portal.[19]

Based on the outcome of the case, it is proposed to enhance the functionality of the judicial platform to automatically request up-to-date banking details from the parties and return any remaining funds from the court's deposit (for example, where the court refuses to secure a claim if the applicant provides counter security). The time spent by the court staff on routine tasks related to inventorying the deposit account decreases.

II.3. Electronic Notifications

The provisions of Art. 125 of the APC RF (as amended by Federal Law "On amendments to certain legislative acts of the Russian Federation" No. 417-FZ dated 21 December 2021), concerning the identification of persons participating in the case, established the obligation for the plaintiff to provide detailed information about the trial participants. Thus, they must include the defendant's (who is a citizen) last name, first name, and patronymic (if any), date and place of birth, residence or place of stay, place of employment (if known), and one of the identifiers (SNILS, INN, passport or driver's license number, or the Primary State Registration Number of the Individual Entrepreneur (OGRNIP)); or organization's name, address, INN, and OGRN. Exceptions occur when the plaintiff is unaware of the defendant's date and place of birth or one of their identifiers, which should be specified in the claim. The court obtains this information on its own by requesting it from the Russian Pension Fund, the tax authority, or the internal affairs bodies. For example, in practice, requests for information about a citizen to the

[18] *See* Moscow City Arbitrazh Court news feed. Available at: https://msk.arbitr.ru/node/16057. (In Russ.). [Accessed 15.06.2024].

[19] Available at: https://www.court.gov.il/NGCS.Web.Site/FolderFinancial/Payment.aspx. (In Hebrew). [Accessed 15.06.2024].

Federal State Institution "Main Informational and Analytical Center of the Ministry of Internal Affairs of Russia" are effective.

It is proposed to implement a system for automatic notification of participants about the initiation of proceedings in an arbitrazh court, including by *electronic mail via Pochta Rossii (the Russian Post),*[20] *email notifications, SMS alerts*, and other means of communication.

The electronic mail from the Russian Post will ensure prompt notification of all parties involved in a dispute, as indicated (stated) in the electronic case form of the arbitrazh case. It will allow not only the defendant but also the plaintiff themselves (for operational control purposes, including cases of fraudulent lawsuit submission to court on behalf of a legal entity without its consent) to be informed of the lawsuit filing (similar to Electronic Guardian) and to track information about it.

Despite that certain regions of Russia have objective limitations as to access to digital technologies (for example, the Far North regions), most trial participants, in particular, individual entrepreneurs, when registering with tax authorities, indicate email addresses in a corresponding column when modifying an extract from the Unified State Register of Individual Entrepreneurs. Founders and general directors of organizations, when submitting registration application forms to tax authorities, indicate email address of a legal entity (Page 4 of Form No. R11001, Page 2 of Form No. R13014), INN for an individual founder (Sheet B of Page 1 of Form No. P11001), the applicant's contact phone number (Sheet I of the form, Page 2 of Form No. P11001, Sheet P of the form, Page 3 of Form No. P13014), etc.[21]

Therefore, tax authorities accumulate information that enables real communication with legal entities or individual entrepreneurs. Similar information is also contained in the respective registries of the Central Bank of Russia, registrars (regarding issuers and their shareholders), the antimonopoly authority, national associations of self-regulatory

[20] Pochta Rossii official website. Recorded Delivery. Available at: https://zakaznoe.pochta.ru/ (In Russ.). [Accessed 15.06.2024].

[21] The Order of the Federal Tax Service of the Russian Federation "On approval of forms and requirements for the execution of documents submitted to the registration authority for the state registration of legal entities, individual entrepreneurs and farm business" No. ED-7-14/617@ dated 31 August 2020. (In Russ.).

organizations (NOSTROY, NOPRIZ), and other entities. It appears that the participants themselves would be interested in the accuracy and relevance of the information, as such data would be deemed reliable until proven otherwise.[22]

The Judicial Department of the Supreme Court of the Russian Federation has launched a Software and Technical Complex for experimental information exchange between the Unified Automated Information System "Justice" ("Pravosudie") and other (external) information systems (PTK VIV) to facilitate interdepartmental cooperation,[23] which could potentially serve as the foundation for the future development of the digital justice sector in question.

SMS notifications are actively employed in general jurisdiction courts.[24] However, it should be noted that such messages are sent with the consent of the trial participants to be notified in such a way (by selecting a receipt with the mobile phone number indicated) and with the recording of the sending and delivery of the SMS notification to the recipient.

Cases of incorrect provision of such information (due to typos or inaccuracies) cannot be excluded, which does not prevent the overall implementation of the proposal.[25] Business entities will be required to exercise diligence and ensure updating of their contact information in a timely manner. In the event of a loss of a phone (tablet or any other communication device) due to unlawful actions by third parties, they must promptly report this to the appropriate authorities.

This innovation could be taken into account when addressing the issue of mandatory out-of-court settlement of disputes regarding monetary

[22] *See* Para. 2 Art. 51 of the Civil Code of the Russian Federation; Para. 22 of Resolution of the Plenum of the Supreme Court of the Russian Federation "On the application by courts of certain provisions of Section I Part One of the Civil Code of the Russian Federation" No. 25 dated 23 June 2015. (In Russ.).

[23] Judicial Department at the Supreme Court of the Russian Federation. Red Soft Operating System website. Available at: https://www.red-soft.ru/en/node/61 (In Russ.). [Accessed 15.05.2024].

[24] *See* Para. 36 of Resolution of the Plenum of the Supreme Court of the Russian Federation "On the preparation of civil cases for judicial examination" No. 11 dated 24 June 2008. (In Russ.).

[25] Part 2 Art. 9 APC RF. (In Russ.).

claims.[26] It is known that in order to dismiss a claim for reasons of non-compliance with the out-of-court (pre-action) procedure, as stated by the defendant, the court should take into account two circumstances. First, the petition to dismiss the claim must be filed no later than the day the defendant submits the first statement on the merits of the dispute and the defendant expresses the intention to resolve it. Second, if, at the time of filing the petition, the period for out-of-court settlement has not expired and there is no response to the application or other document confirming compliance with such a settlement.[27] Automatic notification of the defendant about the filing of a lawsuit can also facilitate out-of-court settlement of the dispute (before the preliminary court hearing) or establish the fact of the defendant's evasion from genuine out-of-court resolution of the disagreement (conflict or dispute).

Notification of the filing of a lawsuit in court will also serve as an additional technological tool, ensuring that the trial participants are informed about a case in the arbitrazh court. Thus, the notification of a preliminary court hearing, which must be sent to the party at least 15 business days in advance,[28] allows the court to start a court session upon the completion of the preliminary stage and proceed to considering the case on its merits.[29] In practice, the publication of a court ruling on the acceptance of a lawsuit for consideration and the scheduling of a preliminary hearing may take a long time to be uploaded to the external circuit of the Judicial Arbitrazh Case Management software complex — KAD.Arbitr information portal. Besides, an electronic mail from Pochta Rossii may be delayed in reaching its recipient for various reasons. The electronic notification in question may be recognized as proper notification of the party.

[26] Part 5 Art. 4 APC RF. (In Russ.).

[27] *See* Para. 28 of Resolution of the Plenum of the Supreme Court of the Russian Federation "On certain issues of out-of-court settlement of disputes considered in civil and arbitrazh proceedings" No. 18 dated 22 June 2021. (In Russ.).

[28] Art. 121 APC RF. (In Russ.).

[29] *See* Art. 137 APC RF and Para. 27 of Resolution of the Plenum of the Supreme Court of the Russian Federation "On the preparation of a case for judicial examination" No. 65 dated 20 December 2006. (In Russ.).

In arbitrazh proceedings, there is a rule that when the participants in the arbitrazh proceedings receive the first judicial act related to the case, such as a notification of a lawsuit filing in court, they must further monitor the information about the case on their own on the KAD.Arbitr portal.[30]

Understanding the procedural complexity of notifying certain categories of individuals, particularly foreign individuals or organizations, procedural legislation includes a range of "tools." Thus, in corporate disputes, the court has the authority to compel the corporation itself (the issuer) to notify members of the civil law community, particularly members of the corporation's bodies.[31] Similar and other transparency mechanisms can be further detailed and expanded in light of the considered innovations.

The procedural efficiency resulting from the considered forms of electronic notifications and service of judicial documents through users' personal accounts has led to their adoption abroad as well, for example, such a norm can be found in the Republic of Azerbaijan.[32] In Kazakhstan, there is a rule as to electronic court notification of trial participants (via email address or mobile phone number, as well as using other electronic means of communication that ensure the notification or summons be recorded). Only where such information is unavailable, the court notifies participants in a traditional way through paper summonses or notifications sent to the last known place of registration or address.[33] In several countries, Uzbekistan in particular, legislation recognizes as appropriate electronic court notifications sent to email addresses

[30] *See* Para. 15 of Resolution of the Plenum of the Supreme Court of the Russian Federation "On certain issues of applying the legislation regulating the use of documents in an electronic form in the activities of courts of general jurisdiction and arbitrazh courts" No. 57 dated 26 December 2017; Para. 13 of Resolution of the Plenum of the Supreme Arbitrazh Court of the Russian Federation "On procedural deadlines" No. 99 dated 25 December 2013; etc. (In Russ.).

[31] Part 3 Art. 225.4 APC RF. (In Russ.).

[32] *See* Art. 135 of the Civil Procedure Code of the Republic of Azerbaijan.

[33] *See* Art. 127 of the Civil Procedure Code of the Republic of Kazakhstan. Available at: https://adilet.zan.kz/rus/docs/K1500000377 (In Russ.). [Accessed 15.06.2024].

provided by the parties themselves in their procedural documents[34] or in their personal accounts, such as in the *Integrated Case Management Program*[35] in Moldova.[36]

It is advisable to explore the integration of the court notification system regarding case progress with the databases of mobile operators concerning the owners of phone numbers (such as MTS, Megafon, Beeline, Tele2, etc.), which could be considered as an additional tool for informing trial participants. It seems that, as far as this matter is concerned, amendments to Federal Law "On communications" No. 126-FZ dated 7 July 2003[37] will be necessary in order to strengthen the identification of actual owners of phone numbers.

In Russia, the implementation of electronic notification of trial participants will be facilitated by information platforms such as GosUslugi, Mos.ru, and others (Kurbanov, Gurbanov and Belyalova, 2019, pp. 56–63; Ponomarenko, 2015).

II.4. Electronic Case

Currently, the Instructions for Case Management in Arbitrazh Courts[38] prescribe the following. The judicial staff specialist must compile and bind case files as soon as materials are received; number the pages of the case file (Para. 1.4). There is the requirement to number the pages of the case file when the parties are familiarizing themselves therewith (Para. 12.6). The numbering should be done with a ballpoint

[34] *See* Art. 159 and 189 of the Civil Procedure Code of the Republic of Uzbekistan. Available at: https://lex.uz/docs/3517334 (In Russ.). [Accessed 15.06.2024].

[35] Moldova Informational Portal on the Justice Sector. Available at: https://www.justitietransparenta.md/ru/ (In Russ.). [Accessed 15.06.2024].

[36] *See* Art. 102 of the Civil Procedure Code of the Republic of Moldova. Available at: https://www.legis.md/cautare/getResults?doc_id=143277&lang=ru# (In Russ.). [Accessed 15.06.2024].

[37] Available at: https://www.consultant.ru/document/cons_doc_LAW_43224/ (In Russ.). [Accessed 15.06.2024].

[38] *See* Resolution of the Plenum of the Supreme Court of the Russian Federation "On approval of the Instructions for Case Management in Arbitrazh Courts of the Russian Federation" (first, appeal and cassation instances) No. 100 dated 25 December 2013 (as of 11 July 2014). Available at: https://www.consultant.ru/document/cons_doc_LAW_159645/3fdbb0ce42026c90ed283a0cd95f4cc442561e5a/ (In Russ.). [Accessed 15.06.2024].

pen using black, blue, or purple ink, in Arabic numerals in the upper right corner, without interfering with the text of the document (Para. 22.11). The numbering of case file pages with letters (for example, 5a, 5b, etc.) is not permitted. The mentioned functionality requires a significant amount of time from the specialist and constitutes "technical" work that does not necessitate legal expertise.

The development of the electronic document filing system in court allows for the automatic generation of an *electronic arbitrazh case,* which includes electronic pagination of case materials in a chronological order. The creation of an electronic case will also ensure the accurate transfer of the case to higher instances in the event of an appeal against a judicial act.

The transfer of an electronic case from an arbitrazh court to a general jurisdiction court will present a challenging issue. If a unified judicial cloud system is implemented for all Russian courts, there will be no technical obstacles to a swift transfer of cases, as it will only require granting the judges access to cloud data.

The issue of technological connectivity among Russian courts requires addressing the overarching task of building a *cloud-based system for exchanging cases* between arbitrazh courts and courts of general jurisdiction, particularly when transferring cases based on jurisdiction or making judicial requests. It is proposed to supplement the Instructions for Case Management in Arbitrazh Courts with provisions regulating the procedure for creating an electronic case, transforming certain paper documents into electronic format, and vice versa.

The implementation of an electronic case system does not impede the exercise of procedural rights when assessing written evidence.[39] In particular, in the event of a motion alleging evidence forgery under Art. 161 APC RF, the court requests the party to provide the original document, explains the relevant criminal consequences, and then evaluates the evidence accordingly. Thus, the provisions of the current procedural legislation do not require significant amendments with the introduction of an electronic case system, and the assessment of evidence can be conducted within the framework of the existing norms under Chapter 7 of APC RF.

[39] Art. 75 APC RF. (In Russ.).

II.5. Digital (Telephone) Secretary and Court Chatbot

The Instructions for Case Management in Arbitrazh Courts stipulate the possibility of obtaining information about the progress of arbitrazh cases through oral telephone inquiries throughout the working day (Para. 45.6), the operation of the hotline (Para. 41.3), and so on.

Existing information platforms include separate elements of a digital secretary, assisting in finding answers to applicants' questions (for example, *Arbitr-bot* or *MyArbitr Bot* (@my_arbitr_bot) in Telegram, developed by the Pravo.ru team.

It is proposed to utilize the *digital (telephone) secretary* for the phone lines of judicial departments, the information service, and the hotline, as well as the *chatbot of the arbitrazh court*, administered by a specific arbitrazh court, taking into account their case management specifics. Certainly, this does not exclude the possibility of traditional voice communication with a court staff member when necessary, which can be initiated by dialing a specific command on the phone.

To a certain extent, many phone calls are aimed at obtaining information about:

— the date of uploading (erroneous upload) of court documents in the KAD.Arbitr system;

— sending enforcement orders to the claimant's address or issuance thereof to a representative (for example, when a ruling on securing the claim is made);

— scheduling (or rescheduling) the time for reviewing case materials (including in the form of electronic access);

— the progress of the case through judicial instances;

— the receipt of responses to the court's requests and rulings on the collection of evidence in the case;

— the crediting (or return) of funds to the arbitrazh court's deposit account, and so on.

The digital secretary should notify about recording the phone conversation and inform that court staff do not provide legal advice.

In practice, neural networks and chatbots based on *Bidirectional Encoder Representations from Transformers* (BERT) programs (Devlin, Chang, Lee, and Toutanova, 2018) or GPT-3 and GPT-4 (Ivtushok, 2020;

Kopiev, 2023) have demonstrated high efficiency in not only processing natural language but also in self-improvement (learning).

Providing prompt responses to inquiries from parties in an automated manner will help reduce the number of complaints about the actions of judges and the court administration.

III. Court Session

III.1. Electronic Court Records of a Court Session

Pursuant to Parts 4 and 5 Art. 58 APC RF, the session secretary keeps records of a court session, including using audio recording devices.

Despite the duty assigned to the session secretary to accurately and fully record the actions and decisions of the court and the trial participants in the court records, this obligation does not entail the requirement for stenographic recording, which is the court's prerogative in certain cases (for example, during the stenographic recording of the examination of an expert or witness). Additionally, the audio records of a court session serves as the primary means of recording information about the course of the court session and ensuring the transparency of the judicial proceedings.[40] The physical medium of the audio recording is attached to the case[41] and the presiding judge and the secretary of the court session or the judge's assistant sign the written court records.

Thus, procedural legislation mandates that the court of first instance and the appellate instance maintain two forms of court records: *written (hardcopy)* and *electronic*.

The question of the advisability of maintaining a hardcopy court records is quite debatable. First, in some judicial instances, particularly in the appellate courts, the judicial process does not necessarily involve keeping court records. Certain procedural actions (such as statements and motions of the parties involved and the outcomes of their consideration) are contained within the case materials or simply

[40] *See* Para. 16 of Resolution of the Plenum of the Supreme Arbitrazh Court of the Russian Federation "On certain issues of the application of the Arbitrazh Procedure Code of the Russian Federation as amended by Federal Law 'On amendments to the Arbitrazh Procedure Code of the Russian Federation' No. 228-FZ dated 27 July 2010" No. 12 dated 17 February 2011. (In Russ.).

[41] Part 6 Art. 155 APC RF. (In Russ.).

must be reflected in the judicial acts.[42] At the same time, considering an appeal by regional cassation arbitrazh courts without keeping records of a court session is not deemed by the Supreme Court of the Russian Federation as a procedural defect, as the regional court can reflect all legally significant actions in its judicial act.

In practice, there are cases where the regional arbitrazh court suspends the consideration of an appeal until the entry into force of a court decision on a related dispute or for other reasons, i.e., postponement of a court hearing, and so on. However, such actions are not reflected in the court records (as no records are kept), but this does not deprive the judicial process of legal force.

Second, in some cases, there are no court records keeping at all. Thus, there is no audio recording or written records if a case is examined in simplified proceedings without summoning the parties,[43] as well as during a court session where none of the participants appears.[44]

In this article, we do not propose that the practice of keeping a court records be abandoned completely. Instead, we suggest that keeping records should be exclusively in electronic format, namely in the form of an audio recording, for instance, by utilizing the Court Session Secretary workstation or activating it automatically on the judge's hearing day through keyword recognition (such as announcing the case number at the beginning of the session).

Overall, this proposal implies some reassessment of the necessity of having a court session secretary or a deputy performing their duties. Digital recording of a court session encompasses all the elements of record keeping. The lack of expediency in having a court session secretary is particularly evident during online sessions (web conferences) and video conferencing. Thus, pursuant to Part 5 Art. 153.2 APC RF, the physical medium of the video records (video recording) of a court session, obtained through the use of a web conferencing system, is appended to the case materials.

[42] *See* Para. 16 of Resolution of the Plenum of the Supreme Arbitrazh Court of the Russian Federation "On certain issues related to the implementation of the Arbitrazh Procedure Code of the Russian Federation" No. 11 dated 9 December 2002. (In Russ.).

[43] Part 6 Art. 228 APC RF. (In Russ.).

[44] *See* Subpara. 4 Para. 16 of Resolution of the Plenum of the Supreme Arbitrazh Court of the Russian Federation No. 12 dated 17 February 2011. (In Russ.).

In Israel, as part of the judicial process digitization, courtrooms utilize "voice-to-text" programs that, basically, make it possible to automatically keep a transcript of court proceedings in an electronic format.[45] In fact, such technologies eliminate the practice of "records objections" in the judicial proceedings.

It is also proposed to ensure automatic uploading of the audio recording of the court session to the KAD.Arbitr system, allowing the parties to download and listen to the session recording (without additionally applying to the court) using the access code to the case file provided by the court, similarly to the provision of access codes to case materials in an electronic form for cases considered under simplified proceedings according to Part 2 Art. 228 APC RF. Abroad, particularly in Azerbaijan, during the consideration of commercial disputes by a court, as well as in courts where the Electronic Court system is implemented, continuous video and audio recording is maintained, which is subsequently attached to the case materials (on a tangible medium) and can be accessed by the parties.[46]

Certainly, a separate issue is the need for powerful DATA centers capable of storing a colossal amount of information in an electronic form. However, in the context of digital technology development, including data compression and archiving, this is only a matter of time.

III.2. Court Session Recess

The Supreme Court of the Russian Federation recently clarified the court's right to repeatedly declare a recess during a court session, each of which cannot exceed five days.[47] In this case, individuals participating in the case and present in the courtroom before the recess is announced are considered duly informed about the time and place of the court

[45] *See* Welcoming Remarks from the Director of the Courts at the 64th Annual Meeting of the International Association of Judges. Available at: https://www.gov.il/en/departments/news/judjespeech18092022 (In Russ.). [Accessed 15.06.2024].

[46] Art. 272 of the Civil Procedure Code of the Republic of Azerbaijan.

[47] *See* Art. 163 APC RF, Para. 46 of Resolution of the Plenum of the Supreme Court of the Russian Federation "On the application of the Arbitrazh Procedure Code of the Russian Federation in the examination of cases by the courts of first instance" No. 46 dated 23 December 2021. (In Russ.).

session[48] and their absence from the court session after the recess does not prevent its continuation.[49]

Currently, the Court Session Secretary information system provides for a prompt posting of information about the recess announced by the court on the KAD.Arbitr portal in a separate section.[50] At the same time, the implementation of electronic case management, including an electronic form about trial participants, would allow for additional automatic notification via electronic mail to the legal entity's address, SMS notification, or email about the matter under consideration, with a corresponding entry made in the electronic case file. This proposal would also help avoid procedural errors, for example, by relying on the information provided in the electronic notification in the event of miscommunication of the date or time of the recess by the judge or failure to upload data to KAD.Arbitr in a timely manner.

IV. Judicial Acts

IV.1. "Smart Decisions" and Court Orders

Testing the technological capabilities of applying weak artificial intelligence in court for the consideration of "estimated claims" demonstrates the high potential of this area for the digitalization of the domestic judiciary (Momotov, 2021, pp. 188–191). The foundation of the future "online justice" will rely on digital technology of preparing draft judicial acts based on case materials.

To a known extent, the implementation of this direction will be facilitated by the proposed *Concept of Machine-Readable Law*[51] and

[48] Subpara. 3 Para. 13 of Resolution of the Plenum of the Supreme Court of the Russian Federation No. 99 dated 25 December 2013. (In Russ.).

[49] Para. 5 Art. 163 APC RF; as well as Ruling of Supreme Court of the Russian Federation No. BAC-5371/10 dated 13 May 2010. Available at: https://ras.arbitr.ru/ (In Russ.). [Accessed 15.06.2024].

[50] KAD.Arbitr portal. E-justice system. Recess. Available at: https://recess.arbitr.ru/ (In Russ.). [Accessed 15.06.2024].

[51] *See* Concept of Machine-Readable Law. Approved by the Government Commission on Digital Development, the Use of Information Technology to Improve the Quality of Life and Business Environment, Protocol No. 31 dated 15 September 2021. Available at: https://www.economy.gov.ru/material/file/792d50ea6a6f3a9c75f95494c253ab99/31_15092021.pdf (In Russ.). [Accessed 15.05.2024].

Law Automation (proposed by the Skolkovo Foundation),[52] under which mathematical algorithms will be able to analyze legal norms expressed in a formal language (in the form of computer code), based on which machine decisions will be made — the terms of contracts, draft judicial acts, draft laws, etc. will be formulated. The idea is not to completely replace *the norms written in natural language with machine-readable norms*, but rather to introduce them as a "logical control formula" to prevent legal errors made by government bodies in their law enforcement practices. In a number of foreign countries, such as Kazakhstan, automated systems are being developed to verify the legality and correctness of judicial acts and procedures in criminal proceedings (Information and Analytical System of the Court and Prosecutor's Office "Zandylyk."[53]

On a legislative level, there is a proposal to permit using the technologies of smart decision-making and court orders in the activities of Russian arbitrazh courts, because currently, the traditional concept of dispensing justice solely by human judges has been in place.[54]

In China, each judge's workstation is integrated with a "smart court" system, which serves as an assistant to the human judge, helping to verify decisions against legal norms and generate drafts of judicial acts. However, the final decision is made by the judge themselves.[55] What seems important is the technological capability to identify deviations of a judge's actions from the rules established by legislation, which may in certain cases require judges to provide explanations for such deviations (the discrepancies between the judge's actions and the machine's decision) which, as a result, excludes "human errors."

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[52] Skolkovo. Law Automation. Draft Concept. Available at: https://sk.ru/legal/automation-of-law/ (In Russ.). [Accessed 15.05.2024].

[53] The Supreme Court presented the project of the Court and Prosecution Office information system "Zandylyk." The Supreme Court of the Republic of Kazakhstan [official website]. News. Available at: https://sud.gov.kz/rus/news/v-verhovnom-sude-prezentovan-proekt-informacionno-analiticheskoy-sistemy-suda-i-prokuratury (In Russ.). [Accessed 15.05.2024].

[54] *See* Part 3 Art. 167 APC RF and Para. 1 and 3 Art. 1 of Law of the Russian Federation "On the status of judges in the Russian Federation" No. 3132-1 dated 26 June 1992. (In Russ.).

[55] Pleasance, C. China uses AI to "improve" courts — with computers "correcting perceived human errors in a verdict" and JUDGES forced to submit a written explanation to the MACHINE if they disagree. MailOnline.

IV.2. Electronic Signing of Court Decisions (Electronic Judicial Acts)

The use of a qualified electronic digital signature to sign a judicial act has relieved the court of the obligation to provide it to the parties in paper form,[56] and such a decision may only be provided to the party in the form of a copy upon the party's request.[57] However, the issuance of a judicial act in the form of an electronic document did not exempt the court from the traditional signing of the operative part of the court decision[58] (Laptev, 2022, pp. 39–46) and its full text[59] on paper, followed by its attachment to the case materials.

Thus, the materials of the arbitrazh case include *two originals*:

— a judicial act signed as an electronic document (in the digital space) (Solovyanenko, 2017, pp. 162–175);

— a judicial act in hardcopy signed by the judge personally (on a tangible medium).

It is assumed that both originals are identical, as the judicial act is signed by the judge personally after being signed electronically, and then printed on paper. Furthermore, we must consider that according to Art. 6 of Federal Law "On electronic signature" No. 63-FZ dated 6 April 2011, an electronic document signed with a qualified electronic signature is equated to a document signed personally by a judge. In the context of having two legally equivalent documents but in different forms, "double" work becomes unnecessary. Legislation does not clarify cases where the texts of electronic and paper court decisions differ in practice, and which one would take precedence in such situations. For example, when after reviewing and signing a judicial act with an electronic signature, the judge accidentally presses a key on the keyboard and the paper copy is signed with an error.

We consider it possible to reconsider the provisions of procedural legislation that allow higher courts (appellate and cassation courts) to overturn the decisions of lower courts on unconditional grounds specified in Para. 5 Part 4 Art. 270 and Para. 5 Part 4 Art. 288 APC RF.

[56] Part 1 Art. 177 APC RF. (In Russ.).

[57] Para. 3 Part 1 Art. 177 APC RF. (In Russ.).

[58] Para. 2 Part 3 Art. 176 APC RF. (In Russ.).

[59] Part 5 Art. 169 APC RF. (In Russ.).

The issue concerns cases where a judge does not sign a judicial act. Thus, it is proposed to supplement the aforementioned provisions by stating that unconditional reversal of a judicial act is only possible if there is no judicial act executed in the form of an electronic document, because when a judge signs a document with a qualified electronic signature, the document is considered valid and does not have any legal defects. By analogy, the rule regarding the recognition of an application for issuing a court order signed with a qualified electronic signature as equivalent to a document with a handwritten signature can be applied.[60]

V. Execution of a Judicial Act

For the past decade, legal scholars have been actively discussing the necessity of introducing digital execution writs, as this aspect of judicial proceedings can undoubtedly be optimized through the application of digital technologies (Andreev, Laptev and Chucha, 2020, pp. 24–25; Kirsanova, 2021, pp. 24–29). This provision was reflected in the amendment of Art. 319 APC RF that introduced the option of issuing (sending) an execution writ by the court for enforcement in the form of an electronic document signed by the judge with an enhanced qualified electronic signature.[61]

The established practice of signing judicial orders with an electronic signature and sending them through the KAD.Arbitr system can be applied by analogy when issuing execution writs.

In most cases, writs of execution in cases related to the recovery of monetary funds are issued solely upon the motion of the creditor. An exception includes cases where the court awards monetary funds to be collected as state revenue, in which case a writ of execution is sent by the arbitrazh court to the tax authority or another authorized government body at the debtor's address, that is, without the creditor's motion.[62]

[60] Subpara. 4 of Para. 18 of Resolution of the Plenum of the Supreme Court of the Russian Federation "On certain issues of the application by courts of the provisions of the Civil Procedure Code of the Russian Federation and the Arbitrazh Procedure Code of the Russian Federation on writ proceedings" No. 62 dated 27 December 2016. (In Russ.).

[61] Federal Law "On amending certain legislative acts of the Russian Federation" No. 41-FZ dated 8 March 2015. (In Russ.).

[62] Part 3 Art. 319 APC RF. (In Russ.).

The procedural legislation regulates the right of the claimant or applicant to petition for the issuance of a writ of execution for enforcement to the relevant department of the Federal Bailiffs Service of Russia.[63]

In arbitrazh courts, upon the issuance of writs of execution, a separate record is kept:

— of blank forms in the Register of Writ of Execution Forms, where, among other things, a note is made of their loss (Paras 17.7, 17.16, 17.18, and 42.10, and Appendix No. 25 to the Instructions for Case Management in Arbitrazh Courts);

— of dispatches (including postal identifiers) in the Register of Issued (Sent) Writs of Execution for Enforcement by the Judicial Panel (Para. 17.7, Appendix No. 26 to the Instructions for Case Management in Arbitrazh Courts);

— official seals affixed (Para. 17.13, Appendix No. 52 to the Instructions for Case Management in Arbitrazh Courts);

— in the electronic centralized register (for example, an electronic log of writs of execution is maintained in the Judicial Arbitrazh Case Management software program; registers of form transfers);

— individually at the judicial department (maintained by the judge in a Word format, for example, at the Moscow Arbitrazh Court, each judge's judicial department compiles a document titled "Register of Writ of Execution Forms" in the form approved by Order of the Arbitrazh Court No. 25-k-3 dated 10 October 2000).

Thus, by performing one legally significant action, namely issuing a writ of execution, multiple electronic and written records are maintained simultaneously. We propose amending the Instructions for Case Management in Arbitrazh Courts in terms of establishing a unified electronic register containing all the above information. Furthermore, it is proposed to automate the recording of information about the writ of execution in the electronic register following the modification of the draft writ of execution by the judge's office.

In the near future, the digitalization of judicial case management will entail a complete abandonment of paper writs of execution and a

[63] For example, pursuant to the general provision of Part 3 Art. 319 APC RF or in corporate disputes when recovering damages from a company director pursuant to Part 2 Art. 225.8 APC RF.

transition to electronic documents, namely digital writs of execution, which will also reduce government expenditures.[64]

Furthermore, we consider it necessary to integrate the judicial software complex with executive authorities, the prosecutor's office, and other organizations. Similar integrated systems in foreign legal systems demonstrate effectiveness when operating within a unified centralized electronic network, as seen in Turkey with the *National Judiciary Informatics System*, UYAP (Tuzcu Ersin, Kurar and Necipoglu, 2021).

VI. Conclusion

The proposed paths for the development of digital judicial proceedings should be implemented gradually as information technologies evolve and their regulatory framework is developed. These proposals will require legal experts to thoroughly address the legal regime of personal data, as access to them and their processing will undergo significant changes in light of the fundamental principles of arbitrazh proceedings regarding transparency and openness of the judicial process.

The digital technologies discussed in this article require guarantees to eliminate the digital divide. Participants in the trial acquire the opportunity to exercise procedural rights equally throughout the country.

The development of digital justice will increase the speed and enhance the quality of judicial proceedings, reduce expenses, and other costs borne by the state associated with judicial litigation. The implementation of the proposed elements of digitalization in arbitrazh proceedings will increase trust in the court system and foster a favorable investment climate in Russia.

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Article

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Jurisdiction of the International Tribunal for the Law of the Sea in Terms of Giving Advisory Opinions and Prospects of the Delivery thereof on Combating Climate Change

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Abstract: On 25 September 2023, the landmark request for an advisory opinion addressing issues of State responsibility for the ongoing climate crisis took a new turn — oral hearings were concluded in the International Tribunal for the Law of the Sea (ITLOS). The article explores on what exactly rests the jurisdiction of the Tribunal, allowing it to issue the sought advisory opinion. The article outlines the main arguments, presented by the States parties to the United Nations Convention on the Law of the Sea (UNCLOS), which question the conclusiveness of ITLOS's jurisdiction to some extent. The article reveals that despite a very debatable nature of the aforementioned advisory jurisdiction of the full Tribunal, it is highly probable that ITLOS will eventually formulate the sought opinion given that the subject matter of the case is quite resonant. The authors also argue on the potential influence the climate-related advisory opinions of international judicial organs may have on the development of international law.

Keywords: advisory opinions; International Tribunal for the Law of the Sea (ITLOS); Commission of Small Island States on Climate Change and International Law (COSIS); climate change; jurisdiction; competence; progressive development; State responsibility; international law

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Contents

I. Introduction 296
II. Legal Analysis of the Basis for the International Tribunal for the Law of the Sea's Jurisdiction to Provide Advisory Opinions on Climate Change Issues 301
III. Role of Future Advisory Opinions of the International Tribunal for the Law of the Sea in Filling Legal Gaps in the International Legal Responsibility of States for Non-Compliance with Climate Commitments ... 314
IV. Conclusion 321
References 322

I. Introduction

Formulation of advisory opinions is one of the functions of many international judicial organs granted with such powers. According to the contemporary doctrine of international law, advisory opinion is considered to be a non-binding interpretation of a legal question. Despite advisory opinions having a legally non-binding nature, they contribute to the clarification and development of international law (Abashidze, Solntsev and Syunyaeva, 2012, p. 74).

In the words of J. Brownlie, the uses of the advisory jurisdiction are to assist the political organs in settling disputes and to provide authoritative guidance of points of law arising from the function of organs and specialized agencies (Brownlie, 2003, p. 691).

As A.Ya. Kapustin points out, "judicial interpretation of the norms of international law possesses an immense advantage over any other type of interpretation, as it is a process of professional crystallization of understanding the content of an international legal rule, embodied in implementing the latter in a specific situation, it is a presentation of a norm at the highest professional level" (Kapustin, 2018, p. 129).

Proceeding from all of the above, the authors consider it would be safe to say that advisory opinions are of somewhat conflicted nature, as on the one hand, their contents are not to be imperatively followed, but on the other hand, they are formulated by the professional judiciary of the international level, which results in the highest credibility of the opinion's content.

It has a somewhat distinct circumstance at the disposal of the International Tribunal for the Law of the Sea (ITLOS). Its jurisdiction, in addition to disputes, is established by Art. 21 of the Statute that states the organ having thereof in relation to "all applications, submitted to it in accordance with this Convention"[1] (the 1982 United Nations Convention on the Law of the Sea), as well as "all matters, specifically provided for in any other agreement which confers jurisdiction on the Tribunal." ITLOS itself affirmed in the context of the request for an advisory opinion from the Sub-Regional Fisheries Commission that "the use of the word 'disputes' in Art. 21 of the Statute is an unambiguous reference to the contentious jurisdiction of the Tribunal."[2] In addition, it was emphasized that "one should not interpret the Art. 21 of the ITLOS Statute as featuring only 'disputes,' because if this was the case, then this very term would have been used."[3] Therefore, the phrase "all matters" is to mean something else, which implies advisory opinions "if specifically provided for in any other agreement,"[4] as ITLOS affirms.

[1] Statute of the International Tribunal for the Law of the Sea, 1982. Available at: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf [Accessed 02.02.2024].

[2] ITLOS, Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, 2 April 2015, Para. 55. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/2015_21-advop-E.pdf [Accessed 02.02.2024].

[3] ITLOS, Request for an advisory opinion submitted by the SRFC, Para. 56.

[4] ITLOS, Request for an advisory opinion submitted by the SRFC, Para. 56.

All of this underlines that the delivery of advisory opinions should fall directly in the context of the jurisdiction of the Tribunal. Moreover, in the view of Ye. S. Orlova, since ITLOS began to function it has become the one and only body to formulate advisory opinions regarding the matters of the international maritime law (Orlova, 2020, p. 137). At the same time, such a look on the authority of ITLOS to issue advisory opinions, while seemingly unambiguous, cannot be universally accepted, as will be discussed in more detail below.

It is worth mentioning that two advisory opinions have been issued by ITLOS so far, namely "Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area" (Case No. 17)[5] and Case No. 21 at the request of the Sub-Regional Fisheries Commission.[6]

In our view, it is necessary to disclose the definition of the phenomenon of advisory opinion. Thus, R. Kolb provides the following definitions (Kolb, 2013, pp. 1019–1020):

— opinion of an international court or tribunal given at the request of a body, authorized to make such a request, with the intention of clarifying a legal question in the interest of the aforementioned body;

— statements of the Court on questions of law referred to the Court by UN bodies and other authorized international legal bodies.

Having analyzed the above given formulations, it is possible to suggest that advisory opinion is an interpretation on a legal matter of a non-binding nature (Abashidze, Solntsev and Syunyaeva, 2012, pp. 73–74) and, simultaneously, a special type of act of an international body of justice distinct from a judgment. Accordingly, the authors believe that there is a need to enumerate the differences that distinguish advisory opinions of a court from its decisions. Modern international legal doctrine highlights several key inconsistencies, namely:

— *The advisory opinion is non-binding on the body requesting the opinion*. Consequently, "the requesting organ to some extent remains

[5] Responsibilities and obligations of States sponsoring persons and Entities with Respect to Activities in the Area: Request for Advisory Opinion Submitted to the Seabed Disputes Chamber, 6 May 2010. Available at: https://www.itlos.org/en/cases/listof-cases/case-no-17/ [Accessed 02.02.2024].

[6] ITLOS, Request for an advisory opinion submitted by the SRFC.

free to decide how to react to the opinion" (Kolb, 2013, p. 1095). Nevertheless, when it comes to the International Court of Justice (ICJ) opinion, it is worth mentioning a certain nuance, namely "the good faith obligation under Art. 2, Para. 2 of the Charter of the United Nations. Hence also the duties of mutual consideration, respect and cooperation between the organs of the United Nations" (*organtreue principle* cited in Kolb, 2013, p. 1095). Accordingly, in view of all the above, it must be stated that the organ seeking an advisory opinion from ICJ should treat the opinion formulated by the Court with due deference. With all this, there are instances when advisory opinions will nevertheless have a binding force — for instance, it happens when a State unilaterally takes any type of commitment upon itself, if an agreement is concluded, or when an international treaty explicitly enshrines so (Convention on the Privileges and Immunities of the Specialized Agencies, 1947[7]). In addition, ITLOS itself gave a kind of assessment of the legal nature of advisory opinions of the International Court of Justice, noting that the positions formulated therein should not be disregarded merely because opinions themselves are non-binding, as the latter "do have a legal effect."[8] Furthermore, ITLOS definitively stated that "an advisory opinion entails an authoritative statement of international law on the questions with which it deals."[9] The Tribunal even goes beyond that, claiming the necessity to delimit such notions as binding nature and authoritative nature as "an advisory opinion is not binding because even the requesting entity is not obligated to comply with it in the same way as parties to contentious proceedings are obligated to comply with a judgment. However, judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigor and scrutiny by the 'principal judicial organ' of the United Nations with competence in matters of

[7] Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-2&chapter=3&clang=_en [Accessed 02.02.2024].

[8] ITLOS, Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives), Case No. 28, Preliminary Objections, Para. 205. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf [Accessed 02.02.2024].

[9] ITLOS, Mauritius v. Maldives, Para. 202.

international law."[10] The main takeaway from all this, in the view of the authors, is that while not being binding legally, advisory opinions sure possess a large amount of authoritative power;

— *Non-recourse to the res judicata principle with respect to advisory opinions:* in other words, the terms of the Art. 59 of the ICJ Statute[11], according to which the Court may not examine twice the same dispute between the same Parties, do not apply to advisory opinions. It follows that, in fact, the Court is entitled to examine twice an identical legal question from the same organ, while formulating different opinions. Nevertheless, such a situation is hardly possible in practice, for no other reason that that "an advisory opinion is a jurisdictional act. As a court of justice, the Court must not contradict itself," thus ensuring the unity of jurisprudence (Kolb, 2013, p. 1096). It was showcased by the Advisory Opinion of ICJ of 7 June 1955, concerning South-West Africa, in which the Court essentially reinterpreted expressions that it had already used in an earlier Advisory Opinion of 1950 on a similar subject.[12] The Court thus considered that the opinion it had previously expressed on a similar legal question in the course of delivering the advisory opinion did not need to be modified and was fully usable. With this in mind, the authors presume that in case any new legal element or changes in the law were present or in the event that any brand new, unknown before facts became clear to the Court, there is an extremely high probability that the Court would change its previous conclusions;

— *Two legal procedures are distinct from one another:* when comparing analytically judgments and advisory opinions, the procedural criteria must not be overlooked. A judgment is always the outcome of a dispute, in which the Parties are undoubtedly the primary participants. The inherent feature of this status, in turn, is nothing but procedural

[10] ITLOS, Mauritius v. Maldives, Para. 203.

[11] Statute of the International Court of Justice, 26 June 1945. Available at: https://www.un.org/en/about-us/un-charter/statute-of-the-international-court-of-justice [Accessed 02.02.2024].

[12] ICJ, Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion of 7 June 1955, pp. 9–16. Available at: https://www.icj-cij.org/sites/default/files/case-related/24/024-19550607-ADV-01-00-EN.pdf [Accessed 02.02.2024].

rights, which are most often enshrined in the statute and rules of procedure of the relevant judicial body. Meanwhile, there are no Parties as such in the process of formulating an advisory opinion, and therefore it is logical to conclude that no special protection of their inherent rights is required — this fact makes the procedure itself much less burdensome. The absence of an Applicant and Respondent also means that "there is no formal burden of proof" (Kolb, 2013, p. 1116);

— *Distinguishing the process into stages:* characterizing the procedure available in ICJ, it is essential to specify that the Court does not divide the algorithm into two stages concerning jurisdictional issues and the examination of the merits, respectively. Moreover, the process of rendering an advisory opinion does not include a procedure similar to the preliminary objections referred to in Art. 79 of the Rules of Court.[13]

Thus, the authors make a conclusion that an advisory opinion, whose possibility of delivery derives from the competence (in case of ICJ) or jurisdiction (ITLOS) of a court, is an opinion formulated by an international judicial body on a legal question, which is requested by an authorized body and is in essence a judicial act. However, this act by its nature differs significantly from a judicial decision in certain aspects. The main one of them is the absence of a binding force as a general rule, the non-use of the *res judicata* principle, the absence of parties to the process as such, as well as the distinction of the latter at the stage of determining jurisdiction and resolving the dispute on the merits.

II. Legal Analysis of the Basis for the International Tribunal for the Law of the Sea's Jurisdiction to Provide Advisory Opinions on Climate Change Issues

Last year ITLOS received a one-of-a-kind request for delivering an advisory opinion on behalf of the organization named Commission of Small Island States on Climate Change and International Law (hereinafter the Commission, or COSIS), which is an acronym for the Commission of Small Island Developing States on Climate Change and

[13] Rules of Court (International Court of Justice): adopted on 14 April 1978, Art. 79. Available at: https://www.icj-cij.org/rules [Accessed 02.02.2024].

International Law.[14] The entity in question, whose activities include, *inter alia*, "assisting Small Island States to promote and contribute to the definition, implementation and progressive development of rules and principles of international law concerning climate change, in particular the protection and preservation of the marine environment, including through the jurisprudence of international courts and tribunals" is by its nature an international intergovernmental organization and was established in 2021, on 30 October.[15] In addition, the constituent agreement of this organization provides that "the Commission shall be authorized to request advisory opinions from the International Tribunal for the Law of the Sea (ITLOS) on any legal question within the scope of the 1982 United Nations Convention on the Law of the Sea in accordance with Art. 21 of the ITLOS Statute and Art. 138 of its Rules."[16]

Based on all the above provisions of the constituent instrument, the Commission has taken the step of seeking an advisory opinion from the Tribunal. Since COSIS expected that the outcome of this inquiry should be a clarification by the judiciary organ of the specific obligations of States under the UN Convention on the Law of the Sea, the organization compiled the following questions:

"What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea ('the UNCLOS'), including under Part XII:

(a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?

[14] ITLOS, Request for advisory opinion, 12 December 2022. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf [Accessed 02.02.2024].

[15] Agreement for the establishment of the COSIS, 31 October 2021, Art. 2, Para. 1. Available at: https://commonwealthfoundation.com/wp-content/uploads/2021/12/Commission-of-Small-Island-States-on-Climate-Change-and-International-Law.pdf [Accessed 02.02.2024].

[16] Agreement for the establishment of the COSIS, 31 October 2021, Art. 2, Para. 2.

(b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?"[17]

Rightfully so, one may wonder (as did the authors of this very article) if there is a credible basis for confirming that ITLOS has the necessary jurisdiction to initiate advisory proceedings in response to the COSIS request?

Article 191 of the 1982 United Nations Convention on the Law of the Sea stipulates that "the Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities."[18] It is worth mentioning that in its advisory opinion concerning the responsibilities and obligations of States with respect to activities in the Area, the Tribunal identified three conditions for the Chamber to have this type of jurisdiction, namely: "(a) that there is a request from the Council; (b) that the request concerns legal questions; and (c) that these very questions have arisen within the scope of the Council's activities."[19]

"The more controversial question relates to the advisory jurisdiction of ITLOS as a full tribunal. An explicit provision under UNCLOS and the ITLOS Statute conferring advisory jurisdiction to ITLOS as a full tribunal is absent, giving rise to much debate regarding the full ITLOS's advisory jurisdiction" (Nguyen, 2023, p. 240). The Tribunal resolved the controversy in a rather paradoxical way by basing its advisory jurisdiction through combinedly interpreting Art. 21 of the Statute and Art. 138 of the Rules (Nguyen, 2023, p. 241). In details, it was emphasized

[17] Re: Request for Advisory Opinion, COSIS, 12 December 2022. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf [Accessed 02.02.2024].

[18] United Nations Convention on the Law of the Sea, adopted 10 December 1982, Art. 191. Available at: https://jusmundi.com/en/document/pdf/treaty/en-united-nations-convention-on-the-law-of-the-sea-1982-unclos-friday-10th-december-1982 [Accessed 02.02.2024].

[19] Reports of judgments, advisory opinions and orders. Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for advisory opinion submitted to the seabed disputes chamber). Case No. 17. Advisory Opinion, 1 February 2011, Para. 32. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf [Accessed 02.02.2024].

by ITLOS that Art. 21 of its Statute, which "should not be considered as subordinate to Art. 288 of the Convention" and "stands on its own footing," states that the Tribunal has jurisdiction over "all matters, specifically provided for in any other agreement."[20] "All matters" here are also supposed to display jurisdiction for issuing advisory opinions. The Tribunal clearly declared that the aforementioned agreement and Art. 21 are intertwined and thus they proof that ITLOS does have required advisory jurisdiction.[21] Moreover, the fact that Art. 138 of the Rules served as a foundation for its advisory jurisdiction was denied by ITLOS which considered that it rather "furnishes the prerequisites that need to be satisfied before the Tribunal can exercise its advisory jurisdiction."[22] "These prerequisites are as follows,

— an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion;

— the request must be transmitted to the Tribunal by a body authorized by or in accordance with the agreement mentioned above;

— and such an opinion may be given on 'a legal question'."[23]

Judging by some of the written statements, presented by States parties to UNCLOS in the context of this advisory opinion request, the authors concluded that the Tribunal's arguments had convinced not all countries. To illustrate the thesis, in its corresponding statement France articulated the idea that the factual background of the case in question predetermined the limits which ITLOS would inflict upon itself while also bearing in mind that the Tribunal's jurisdiction here amounted exclusively to *ratione materiae* one. Considering the above, the French side's reasoning consisted of the following,[24]

[20] ITLOS, Request for an advisory opinion submitted by the SRFC, Para. 52.

[21] ITLOS, Request for an advisory opinion submitted by the SRFC, Para. 58.

[22] ITLOS, Request for an advisory opinion submitted by the SRFC, Para. 59.

[23] ITLOS, Request for an advisory opinion submitted by the SRFC, Para. 60.

[24] ITLOS, Request for an advisory opinion submitted by the COSIS, Written statement of France, 2023, Para. 11. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-19-France_translation_ITLOS.pdf [Accessed 02.02.2024].

a) The Tribunal was constituted and functions in accordance with UNCLOS, as set out in Art. 1, Para. 1, of the Statute of the Tribunal and as follows from Part XV of the Convention. [...] As the Seabed Disputes Chamber and later the Tribunal have emphasized, the advisory jurisdiction they exercise is intended to contribute to the implementation of the Convention's regime.[25] In such a way, the authors underscore that it so happens that these conditions determine the existence of limitations inherent in the Tribunal's jurisdiction.

b) The COSIS Agreement in Art. 2(2) clearly defines the relative limits of the Tribunal's jurisdiction by providing that COSIS "shall be authorized to request advisory opinions from the International Tribunal for the Law of the Sea (ITLOS) on any legal question *within the scope of the 1982 United Nations Convention on the Law of the Sea*." This limitation is stricter than that reflected in Art. 138 of the Tribunal's Rules, which cites "an international agreement *related to the purposes of the Convention*."[26]

In our view, in discussing the Agreement establishing COSIS, the following should be added. As already established, the Special Agreement requires ITLOS to demonstrate jurisdiction to render an advisory opinion, but Art. 2(2) of the Agreement does not apply in this case because it merely cites the provisions of Art. 21 of ITLOS Statutes and Art. 138 of the Tribunal's Rules, which hardly clearly establish that the latter has the necessary jurisdiction. Moreover, assuming that the Agreement did grant this type of jurisdiction upon ITLOS, it would be an abuse of Art. 21 of the Statute of the Tribunal — the sole purpose of the Agreement, signed by some certain States, was to confer advisory jurisdiction on ITLOS without considering interests of other States, which totally contradicts the dispute settlement system of the Convention itself.[27] Global warming caused by the radical changes in the climate

[25] ITLOS, Request for an advisory opinion submitted by the COSIS (France), Para. 12.

[26] Available at: https://www.itlos.org/fileadmin/itlos/documents/basic-texts/Itlos_8_E_17_03_09.pdf [Accessed 02.02.2024].

[27] The Advisory Jurisdiction of the ITLOS in the Request Submitted by the COSIS. Available at: https://blogs.law.columbia.edu/climatechange/2023/04/12/the-advisory-jurisdiction-of-the-itlos-in-the-request-submitted-by-the-commission-of-small-island-states/ [Accessed 02.02.2024].

represents a universal predicament which directly and indirectly affects each and every member of the international community. In addition, the unclear procedural framework has the potential to undermine the credibility of both the Tribunal itself and its advisory opinion, thus undermining the remaining efforts of States to confront the global rise in the Earth's temperature.

c) Among other things, jurisdiction *ratione materiae* was limited by the language contained in the Commission's request.[28] First, ITLOS was requested solely to highlight existing obligations and not an opinion as to on those obligations, their implementation or any other factual circumstance.[29] In this case, the French side reasonably refers to the ICJ point of view from the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, where it is highlighted that the consultative function of the Court is that "it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify the scope and sometimes note its general trend."[30] However, the Tribunal itself also noted in the 2015 Advisory Opinion that it does not express its stance on matters "beyond the scope of its judicial functions"[31] and can therefore operate only with existing law (*lex lata)* and not future law *lex ferenda*.

d) The substantive content of the request plays a vital part here as it is evident that it features the word combination in plural — "States Parties," implying that the purpose of the request was to ascertain the specific commitments of all States combined together. Having analysed that, French international lawyers came up with three main ideas. The first one is about the fact that since the request outlines "States parties" and not "State party" in singular, its purpose is to determine the

[28] ITLOS, Request for an advisory opinion submitted by the COSIS (France), Para. 14.

[29] ITLOS, Request for an advisory opinion submitted by the COSIS (France), Para. 15.

[30] ICJ, Advisory Opinion, 8 July 1996, Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996, Para. 18. Available at: https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf [Accessed 02.02.2024].

[31] ITLOS, Request for an advisory opinion submitted by the COSIS (France), Para. 15.

specific obligations of each and every State of the world community in accordance with the United Nations Convention on the Law of the Sea. The authors of the article, in turn, agree with the exegesis, since this literal interpretation of the said phrase seems to be the most reasonable. The main thesis of the second one is that there is indeed no explicit or implicit mention of the commitments under the COSIS Agreement which should have served as the grounds for the submission of the request. Correspondingly, the specific obligations under the Convention were the only thing subject to the ITLOS jurisdiction and in addition, judging by the request's context, one should interpret such commitments as a mean to identify the way to construe and then apply the Convention's obligations with respect to the pollution, conservation and protection of the marine environment towards adverse effects and impacts of climate change and ocean acidification "caused by anthropogenic emissions of greenhouse gases into the atmosphere."[32] In this context the authors consider it necessary to add that such a conclusion also suggests that Commission is thus presuming an undoubted and direct impact of climate change on the state of the marine environment. From where the authors stand, such a statement would be premature. Although, some scientists tend to challenge this thought, alluding to that the definition of the pollution of the marine environment in Art. 1 of UNCLOS contains the phrase "is likely to result" as applied to the harmful effects, so a clear causal link is not required by the definition.[33]

It is further noted by the authors that the Tribunal will inevitably find itself in a position where it would have to ascertain the specific obligations of a non-Party States to COSIS without their consent in response to the raised questions. ITLOS itself has already expressed its position on the matter, noting that, since the advisory opinion is auxiliary in nature, the consent of all other States not requesting an opinion is not required at all. It is also pointed out that the purpose of

[32] ITLOS, Request for an advisory opinion submitted by the COSIS (France), Para. 17.

[33] Legal Analysis: Request for an Advisory Opinion from the International Tribunal for the Law of the Sea, p. 8, Para. 34. Available at: https://www.clientearth.org/media/c1spsafh/itlosao_legal-briefing_final.pdf [Accessed 20.02.2024].

the request for an advisory opinion by an organization is precisely to clarify its further course of action.[34]

In France's view, applicable law and jurisdiction must be distinctly separated from one another[35] to solidly demonstrate the necessity to set apart these two notions. ITLOS cites the *Norstar case*, where it was said that "Art. 293 of the 1982 Convention on Applicable Law cannot be used to extend the Tribunal's jurisdiction."[36] In this particular case, the Tribunal's jurisdictional capacity is limited solely to clarifying obligations under the UN Convention on the Law of the Sea and, more specifically, Part XII of the international legal instrument. Nevertheless, pursuant to Art. 31 of the 1969 Vienna Convention on the Law of Treaties[37], headed "General rule of interpretation," when interpreting the Convention's terms "in their context and in the light of its object and purpose," the Tribunal may need to refer to provisions of other international treaties, since the latter may assist in interpreting the relevant obligations under the 1982 Convention. Nevertheless, according to French international lawyers, the functionality of ITLOS, in turn, does not include the possibility of interpreting obligations under international treaties other than the Convention. Moreover, France considered that if the Tribunal were to be allowed such interpretation, it would be equal to granting the judicial body unlimited *ratione materiae* jurisdiction, which would be contrary to the Convention itself and to the Statute and Rules of Procedure of ITLOS.[38] The authors cannot completely agree with the stated point, since in their opinion, the interpretation of the postulates of the Convention will still be paramount in this case, and reference

[34] ITLOS, Request for an advisory opinion submitted by the SRFC, Para. 76.

[35] ITLOS, Request for an advisory opinion submitted by the COSIS (France), Para. 18.

[36] ITLOS, Judgment from 10 April 2019, The M/V "Norstar" Case (Panama v. Italy), ITLOS Reports 2019, Para. 136. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no. 25/case_no_25_merits/C25_Judgment_20190410.pdf [Accessed 02.02.2024].

[37] Vienna Convention on the Law of Treaties: adopted on 23 May 1969. Available at: https://www.ilsa.org/Jessup/Jessup17/Batch%201/Vienna%20Convention%20on%20the%20Law%20of%20Treaties.pdf [Accessed 02.02.2024].

[38] ITLOS, Request for an advisory opinion submitted by the COSIS (France), Para. 18.

to the contents of another international treaty is an auxiliary tool for fulfilling the main task.

In conclusion, the French party resumes that while any valid reasons for the Tribunal not to undertake its advisory jurisdiction are lacking (unless ITLOS itself decides otherwise), all of the above factors must be taken into consideration with the purpose to determine exactly how such jurisdiction would be carried out in this particular request.[39]

Of equal interest in this regard is China's written statement, which also reflects skepticism about the existence of the ITLOS jurisdiction. The representatives of that State presented the following arguments.

(1) China fundamentally disagrees with the Tribunal's view that the phrase "all matters" encompasses advisory opinions. Their respective rationale, by analogy to their French counterparts, relies heavily on the general rules of interpretation contained in Art. 31 and 33 of the Vienna Convention on the Law of Treaties. Article 31 provides that international treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty" of the provisions of the treaty, whereas "all matters" generally refers to the basis of the Court's *ratione materiae* jurisdiction and not to the competence or anything else, so that advisory opinions cannot in any way come under the scope of that concept.[40] In turn, under Art. 33 of the Vienna Convention, "the terms of the treaty shall be presumed to have the same meaning in each authentic text." Presented wording is of utmost importance, inasmuch as it is through it the accurate interpretation of the Art. 21 of the Statute can be exercised — the thing is, the direct equivalent of the word "matters" ("matières") is never used in the second half of the French version of the article, while there is a unique passage "toutes les fois que cela,"[41] in return making a reference to the line "all disputes

[39] ITLOS, Request for an advisory opinion submitted by the COSIS (France), Para. 20.

[40] ITLOS, Request for an advisory opinion submitted by the COSIS, Written statement of the People's Republic of China, 2023, Para. 12. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-8-China__transmission_ltr._.pdf [Accessed 02.02.2024].

[41] Statut du Tribunal International du Droit de la Mer, 1982, Art. 21. (In French). Available at: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_fr.pdf [Accessed 02.02.2024].

and applications" from the beginning of the article. As it is seen, given that the Statute through its French translation does not comprise any record of an advisory opinion and that the English and French versions of the Statute have the same degree of authenticity, the notion "matters" by no means imply advisory opinions either, especially according to the primary treaty interpretation rules.[42] The authors, for their part, consider it fully appropriate to agree with this point of view while also finding quite interesting the fact that it was China and not France who discerned this peculiar variance within the two authentic texts of the Statute.

Article 31 of the 1969 Vienna Convention provides that "a special meaning shall be given to a term if it is established that the parties so intended." On this point, China's statement made certain comments on the *travaux préparatoires* of the 1982 Convention. Thus, it was mentioned that some States (in particular, the United States and Germany, among others) had indeed made proposals to grant the full Tribunal advisory jurisdiction, but none of them were ultimately included in the final text of the Convention, reflecting the Parties' lack of intention to grant the Tribunal such jurisdiction.[43]

(2) China's next observation concerns the fact that advisory jurisdiction cannot be conferred on ITLOS on the basis of "implied powers." ICJ has characterized this kind of power as a "subsidiary" power of international organizations, which they possess "to achieve their purposes."[44] Thus, the exercise of this power is limited by the essential need to give effect to the already existing functions of the judicial body, and the presence of implied powers cannot, in turn, be used to expand the jurisdiction (competence) of the Tribunal.[45] It seems appropriate to

[42] ITLOS, Request for an advisory opinion submitted by the COSIS (China), Para. 14.

[43] ITLOS, Request for an advisory opinion submitted by the COSIS (China), Para. 17.

[44] ICJ, Advisory Opinion, 8 July 1996, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, I.C.J. Reports 1996, Para. 25. Available at: https://www.icj-cij.org/sites/default/files/case-related/93/093-19960708-ADV-01-00-EN.pdf [Accessed 02.02.2024].

[45] ITLOS, Request for an advisory opinion submitted by the COSIS (China), Para. 21.

agree with this statement, since in reality there is no direct indication in any international legal instrument of the advisory jurisdiction of the full Tribunal and such cannot in any way be an implied one.

(3) In China's view, the Rules of ITLOS cannot in any way exceed the "authorization" contained in the Convention as well as the Statute as an integral part thereof. Accordingly, in the absence of an indication to that effect in its constitutive documents, ITLOS itself is not entitled to confer advisory jurisdiction on the full Tribunal, nor to prescribe preconditions for the exercise of that jurisdiction.[46] That is a totally valid point where the authors stand, as it would be absurd if the rules of procedure of an organization could so drastically modify its functions in comparison to the ones enshrined in the constituent document. Nonetheless, certain international lawyers contravene this take, for example, Carlos Espósito assumes the following: "The possibility of this kind of consensual (advisory) jurisdiction is in harmony with the general freedom to choose a means of dispute settlement provided for in Art. 280 of the Convention, and more specifically with Art. 288(2) which refers to international agreements related to the purposes of the Convention as valid grounds for the jurisdiction of the Tribunal" (Espósito, 2011, p. 6).

Based on all of the foregoing, China concluded that the full Tribunal is incompetent to consider COSIS's request for an advisory opinion.

The position contained in the written statement of Italy is also of interest. According to the document, the Conference of the Parties to the 1982 UN Convention on the Law of the Sea approved without objection the Report through which ITLOS notified the adoption of the Rules containing Art. 138. In this, they believe, there is an implicit manifestation of the acceptance by the Parties of the possibility for the Tribunal to exercise full advisory jurisdiction.[47]

[46] ITLOS, Request for an advisory opinion submitted by the COSIS (China), Para. 24.

[47] ITLOS, Request for an advisory opinion submitted by the COSIS, Written statement of Italy, 2023, Para. 7. Available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-7-Italy-rev_s.pdf [Accessed 02.02.2024].

Commenting on the above thesis, it shall be stressed that "Art. 138 of the ITLOS Rules did not appear in any of the draft of the Rules prepared by the ITLOS Preparatory Commission, and no such proposal was made in that context. Rather, it was added first by the Tribunal in 1996" (Prölss, 2017, p. 2381). Already in 1998, as noted in Italy's declaration, the States Parties to the 1982 Convention adopted a Report in which the Parties took note "with appreciation" (rather than approving, as indicated by Italy) the Tribunal's Report[48] in which ITLOS announced the adoption of the Rules of Procedure.[49] However, in this context, the authors also think it is worth emphasizing that none of the mentioned reports specifically refers to such an innovation of the Tribunal as Art. 138, which is quite interesting given the ambiguous nature of its provisions. In the end, in the view of some experts, it was "rather contentious whether the adoption of Art. 138 of the ITLOS Rules has been a lawful exercise of the regulatory powers conferred to the Tribunal under Art. 16 Annex VI" (Prölss, 2017, p. 2381).

Some international lawyers, however, see the above-mentioned article of the ITLOS Rules in a distinct light as a *motu proprio* act of ITLOS. They argue that "the extension carried out by the Tribunal has not been done 'against' the Convention but 'beyond its contents;'" among other things, they also suggest that in this way the ITLOS is filling a lacuna in the law (García-Revillo, 2015, p. 311). If we refer to the dissertation of Ousmane Diouf, there it was claimed that such mechanism invented by ITLOS is "an important procedural novelty which introduces a supple and fresh approach to the issue of entities entitled to request advisory opinions" (Diouf, 2014, p. 37).

Moreover, there are specialists who present yet another rendition of the ITLOS advisory function by citing the ICJ which underlined that "in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the

[48] Report of the ITLOS for the period 1996–1997, SPLOS/27, 23 April 1998, Para. 42–48. Available at: https://www.itlos.org/fileadmin/itlos/documents/annual_reports/ar_199697_e.pdf [Accessed 02.02.2024].

[49] Report of the eighth meeting of States Parties, SPLOS/31, 4 June 1998, Para. 14. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/161/23/PDF/N9816123.pdf?OpenElement [Accessed 02.02.2024].

power to interpret for this purpose the instruments that govern the jurisdiction" while adding that neither UNCLOS nor the Statute fix for the Tribunal any kind of restriction in terms of exercising advisory jurisdiction (Platjouw and Pozdnakova, 2023, pp. 241–242).

To summarize, interestingly, the Tribunal's own determination of the actual existence of the necessary jurisdiction (competence) to issue advisory opinions has elicited a very contradictory reaction from the States Parties to the 1982 UN Convention. Thus, a number of countries, including France and Italy, although they did not come to the unequivocal conclusion that ITLOS had no such jurisdiction, outlined certain aspects that should be taken into consideration by the Tribunal when establishing its own jurisdiction. However, there were also those States (China) that completely rejected the existence of the Tribunal's jurisdiction, mainly referring to the excesses of the jurisdiction of ITLOS under the Convention, the inconsistency with the general rule of interpretation and the non-applicability of the "implied powers" doctrine. It is also reasonably outlined that the Tribunal has not in any way taken into account the Convention's *travaux préparatoires* in justifying the existence of its advisory competence, which makes the reasoning of ITLOS much less convincing, as supported by the opinion of a number of specialists. The authors of this research, however, mostly agree with the position of China, who found that there are enough compelling reasons to state the lack of advisory jurisdiction of the Tribunal in its full. It seems necessary to agree with Jonh E. Noyes on that "because the ITLOS is not a judicial arm of any international oceans organization with broad powers, its lack of general advisory jurisdiction is unsurprising" (Noyes, 1999, p. 137). To crown it all, as Yoshifumi Tanaka has put it, "overall it is debatable whether Art. 21 of the Rules of the Tribunal, along with the 'other agreement' conferring jurisdiction on ITLOS, can provide an adequate legal basis for the advisory opinion of the full Tribunal" (Tanaka, 2015, p. 328).

III. Role of Future Advisory Opinions of the International Tribunal for the Law of the Sea in Filling Legal Gaps in the International Legal Responsibility of States for Non-Compliance with Climate Commitments

With regard to the discussion of the advisory opinion of ITLOS under consideration, the following may be stated by the authors. Despite some States having justly underscored in their written statements a substantially questionable character of the full ITLOS jurisdiction to present advisory opinions, it is anyhow quite likely that the Tribunal will issue one. Such an assumption is justified mainly by the fact that global warming caused by climate change has recently acquired the status of a planetary issue. Accordingly, if the Tribunal were to refuse to deliver an advisory opinion on climate change, citing its lack of jurisdiction (competence), this would inevitably cause a wave of public outcry and such a decision by ITLOS would be severely criticized.

Moreover, it seems possible to take into account another interesting aspect — the lack of discretion of the judicial body in question to abandon the formulation of an opinion. If we discuss the algorithm in the Seabed Disputes Chamber, it does not possess discretionary powers due to the fact that it is expressly prescribed that the Chamber "shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities" and, moreover, "such opinions shall be given as a matter of urgency."[50] In comparison, Art. 65 of the ICJ Statute postulates "the Court may give advisory opinions," vividly illustrating the Court's ability to refuse to formulate the latter. Thus, the Tribunal in the present case could potentially invoke the same principle of lack of discretion to give an advisory opinion.

With an understanding that the opinion sought will nevertheless be rendered, it is worth outlining the importance attached to advisory opinions in defining international legal norms. The International Law Commission in Chapter 7 of its Report adopted at the end of the 74th session in 2023 explains that "judgments of courts and tribunals,"

[50] United Nations Convention on the Law of the Sea: adopted on 10 December 1982, Art. 191.

as a supplementary to the determination of rules of international law category, "include not only final judgments rendered by a court, but also advisory opinions and any orders issued in collateral or interlocutory proceedings."[51] Consequently, the authors of the article suppose that the Commission essentially equates advisory opinions with judicial decisions in terms of their potential influence on the formation and clarification of the essence of international legal rules.

Turning to the anticipated impact of the future ITLOS advisory opinion at the COSIS request, we can agree with the viewpoint of L.P. Baars, who distinguishes its direct and indirect aspects. To the former she attributed those legal adjustments that directly result from the clarification of rules of law. Thus, in her view, if the Tribunal adopts an integrated approach, it will actually be able to clarify the coveted communication of international law of the sea and international legal regulation of climate change, which will in turn constitute a progressive development of international law (Baars, 2023, p. 598).

L.P. Baars also includes in this cohort "the clarification and contextualisation of States' obligations under Part XII of the LOSC [UNCLOS]" which "can encourage States to adopt or amend their domestic policies to bring them in line with the advisory opinion, especially in States that want to be regarded as responsible international actors" (Baars, 2023, p. 598). Such behavior by States would be quite natural, since "this aspiration to 'conform' to advisory opinions has been observed after both previous ITLOS advisory opinions, in both requesting and non-requesting States" (De Herdt and Ndiaye, 2019, pp. 374–375). We believe that it would also be reasonable to include here the hypothetical possibility of ITLOS providing some clarity as to the mechanism for holding accountable States that fail to fulfill in any way the obligations under the Convention specified by the Tribunal — this may also constitute progressive development progressive development of international law, since at present there are no similar algorithms in the international law.

[51] Report of the International Law Commission, 74th session, 2023, Chapter VII "Subsidiary means for the determination of rules of international law." Available at: https://legal.un.org/ilc/reports/2023/english/chp7.pdf [Accessed 02.02.2024].

L.P. Baars mentions the following as likely indirect aspects of the influence of the forthcoming advisory opinion (Baars, 2023, pp. 599–600). Firstly, the act drawn up by the Tribunal will serve as a springboard for detailed discussions and negotiations on the topic of reducing harmful greenhouse gas emissions, the outcome of which can positively affect the marine environment condition. Secondly, to date, three international judicial bodies (ITLOS, ICJ and the Inter-American Court of Human Rights) have been asked to issue "climate-related" opinions, and it is clear from all available evidence that ITLOS will be the first in delivering a climate-related advisory opinion. Therefore, in her view, the Tribunal will be able to open the way for the other two courts to rely on its ideas in formulating their own opinions (Baars, 2023, p. 600).

It seems reasonable for the authors to agree with this statement, but it is nevertheless impossible not to mention the flip side of the coin, which may well occur in this case. ICJ and ITLOS present different views on the obligations of States within the meaning of the 1982 UN Convention on the Law of the Sea in this situation. Such circumstances are not new in practice, an example being the *Mox Plant* case, which was heard by the European Court of Justice[52] in parallel with the two arbitrations established by the 1982 UN Convention on the Law of the Sea and the 1992 OSPAR Convention.[53] Such an outcome has the potential to integrate into the so far ongoing process of international law fragmentation, which could effectively make a contribution to some additional legal uncertainty in the area. Consequently, in case the International Court of Justice does not follow the path completely alien to the view expressed by the Tribunal the result, as appears, will be more favourable. By contrast, according to Ye. S. Orlova, "the negative effects of intra-branch competition of jurisdiction to issue advisory opinions in the field of international law of the sea between the UN International

[52] The Mox Plant Case (Ireland v. United Kingdom). Case 2002-01. Instituted in November 2001 and terminated through a tribunal order issued on 6 June 2008.

[53] Kto zaplatit za izmeneniye klimata? Mezhdunarodnyy sud OON vyskazhetsya ob otvetstvennosti gosudarstv. Available at: https://zakon.ru/blog/2023/7/14/kto_zaplatit_za_izmenenie_klimata_mezhdunarodnyj_sud_oon_vyskazhetsya_ob_otvetstvennosti_gosudarstv (In Russ.). [Accessed 02.02.2024].

Court of Justice and the International Tribunal for the Law of the Sea should not be expected, due to the special role of the Tribunal in issuing advisory opinions and because, in the field of international law of the sea, these international judicial bodies operate under the same treaty-law regime" (Orlova, 2020, p. 148). Orlova also considers that as ITLOS is *de facto* the exclusive judicial body to formulate advisory opinions on the matters of international maritime law, which is confirmed by its successful practice, the level of jurisdictional competition between the conventional international judiciary bodies within the industry is therefore reduced (Orlova, 2020, p. 148). Our point of view lies somewhere in between, as despite the rationality of Orlova's take on the matter, it would be erroneous to state that there is an established hierarchy between the judicial organs in the field of international maritime law.

With regard to the possible conclusions that the judicial bodies may reach in the framework of advisory opinions, we want to highlight the following. It is known that ICJ has the power to award material compensation in inter-State disputes, and this has occasionally happened, as evidenced by the judgment rendered on the claim filed by the Democratic Republic of the Congo against Uganda.[54] Accordingly, if the Court were to recognize the liability of major greenhouse gas emitting States towards small island developing countries, the latter would have a strong legal basis to bring subsequent compensation claims before the same ICJ or other international judicial bodies. However, given the small number of proceedings before ICJ, which resulted in material compensation being awarded to a party to the dispute, this march of events should be recognized as hardly admissible.

The authors believe that another possible scenario, although much less likely, is that climate change commitments could be given the status of *erga omnes*, "common concern for all States," and the norms establishing this category of commitments could become peremptory norms of *jus cogens*. For example, this was realized by the previously mentioned Inter-American Court of Human Rights with

[54] 2022: itogi mezhdunarodnogo pravosudiya. Available at: https://zakon.ru/blog/2022/12/29/2022_itogi_mezhdunarodnogo_pravosudiya (In Russ.). [Accessed 02.02.2024].

regard to a significant number of norms relating to various human rights[55] (prohibition of slavery and discrimination, the right to access to justice, etc.) (Kadysheva, 2022, p. 223). However, as I.I. Sinyakin and A.Yu. Skuratova rightly emphasize, despite the fact that international legal science lacks both a list of such norms and clear criteria for their classification, it is extremely unlikely that the provisions on the responsibility of states for the global increase in the earth's temperature can be put on a par with other *jus cogens* norms (Sinyakin and Skuratova, 2018, p. 531). There are several basic reasons for this, but in this case, it is sufficient to focus on two of them.

The first is that the inadmissibility of evading peremptory norms is based on "universal ideas that have never been criticized, questioned, reevaluated or denied among States and therefore objectively determine the quality of international law as jus cogens" — climate change mitigation does not fully meet the criteria sought, since authors presume it would be wrong to claim that this idea has never been at least questioned in the international community. For example, according to the Global Climate Intelligence Group, an authoritative group of global warming researchers, the current climate situation is not an emergency at all, because natural and anthropogenic factors have a symmetrical effect on the global warming process and, in general, the Earth's temperature is rising much less rapidly than predicted.[56]

The essence of the second justification, according to I.I. Sinyakin and A.Yu. Skuratova, is that it is all about the absence of essential divergences among the actors of the world community regarding the foundations of this concept, thanks to which its uniform understanding has managed to be established (Sinyakin and Skuratova, 2018, p. 542). Consequently, one comes to the conclusion that by the present moment, there is simply no clear need for the progressive development of the

[55] Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-18/03 de 17 de septiembre de 2003, Solicitada por Los Estados Unidos Mexicanos, Condición Jurídica y Derechos de los Migrantes Indocumentados. Available at: https://www.refworld.org/pdfid/4f59d2a52.pdf (In Span.). [Accessed 02.02.2024].

[56] World Climate Declaration "There is no climate emergency:" adopted on August 2022. Available at: https://clintel.org/wp-content/uploads/2022/06/WCD-version-06272215121.pdf [Accessed 02.02.2024].

system of *jus cogens* postulates, and thus it stands to reason the extreme unlikelihood of that peremptory international law norms will in the nearest future be replenished by the terms on States' responsibility for insufficient efforts in tackling climate change.

Another factor that we assume needs to be analyzed in detail is the political dimension of the impact of a future advisory opinion — it is easy to assume that states favored by the perception of the Tribunal's findings will actively refer to it, while dissenting countries will somehow try to boycott its status and relevance. A prime example of the tendency is one of the advisory opinions of ICJ ("Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory"), the circumstances of which predetermined that "the Court notes that Israel is first obliged to comply with the international *obligations it has breached* by the construction of the wall in the Occupied Palestinian Territory."[57] The Court also observed that "Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. Moreover, having found that Israel's violations of its international obligations stem from the construction of the wall and from its associated régime, ICJ claims that cessation of those violations entails in practice the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem."[58] "Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned."[59] Such findings provoked an opposing reaction from the Israeli Supreme Court, which, while noting that the Court's opinions should be given appropriate weight, also stated that the factual data on

[57] International Court of Justice, Advisory Opinion, 9 July 2004, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J. Reports 2004, Para. 149. Available at: https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf [Accessed 02.02.2024].

[58] International Court of Justice, Advisory Opinion, 9 July 2004, Para. 151.

[59] International Court of Justice, Advisory Opinion, 9 July 2004, Para. 152.

which ICJ based its opinion was incomplete (Kadysheva, 2022, p. 222). In addition, the Israeli Supreme Court concluded that the construction of the Wall was justified by military necessity, and that the construction must be analyzed based on a breach of the principle of proportionality (Kadysheva, 2022, p. 222). In view of all of the above, the ICJ opinion has been characterized by some experts as a "Pyrrhic victory" (Schmid, 2006, p. 455), since all the work done by the ICJ judges in formulating it was subsequently *de facto* overturned by the highest national court of the state opposing the opinion, shattering its respectability. States that disagree with ITLOS's opinion may behave in a similar manner in the context of the request under consideration in this study.

In summarizing the above, the following conclusions can be drawn. First of all, the importance of the Tribunal's issuance of an advisory opinion at the request of the COSIS organization should be noted in view of the widespread resonance acquired by the problem of global warming. Given that the International Law Commission referred to advisory opinions as an auxiliary means of determining international legal norms, it is useful to outline the potential effect of the Tribunal's previously mentioned opinion, in which it is worth distinguishing between direct and indirect aspects. The former includes the Tribunal's interpretation of the scope of the obligations of the States Parties to the 1982 UN Convention on the Law of the Sea with respect to combating climate change, as well as the potential clarification of possible mechanisms to hold these countries accountable in case of disregard of these obligations — all of which would be a progressive development of international law. The second group of aspects includes the intensification of the negotiation process on the subject among all interested players in the international arena, as well as the "pioneering" function of ITLOS as apparently the first judicial body to form an opinion on climate change problematic. However, this depends on the outcome of all the international courts to which requests for "climate-related" advisory opinions have been submitted. It is also reasonable to assume the possibility of attempts to sabotage the opinion by those States that are not satisfied with the Tribunal's position on the issue sought.

IV. Conclusion

Advisory opinions of international judicial bodies represent an interpretation of legal issues distinct from judicial decisions — they are not binding. Nevertheless, because they are issued by the most authoritative international judicial bodies, they are highly respected in the international community. In addition, this year's report of the International Law Commission introduced the concept of the term "judgment" as an auxiliary instrument for the definition of international legal rules, as provided for in Art. 38 of the ICJ Statute.

There are all bases to suggest that ITLOS has advisory jurisdiction. In its earlier opinion ITLOS declared the full ITLOS advisory jurisdiction by means of simultaneously interpreting Art. 21 of the Statute and Art. 138 of the Rules as a whole. Nevertheless, some States Parties to the UN Convention on the Law of the Sea were not sufficiently convinced by this very justification, resulting in them expressing their objections in relevant written statements within the framework of the advisory procedure. In our opinion, it seems reasonable to agree that the arguments of ITLOS on the issue of its advisory jurisdiction in its entirety cannot be called sufficiently convincing, since there are certain aspects of it that need to be clarified.

In predicting the significance of forthcoming advisory opinions on climate issues, it should be emphasized that, despite the ambiguity of the ITLOS advisory jurisdiction, there is full confidence that the Tribunal due to the sensitive nature of the subject matter involved will ultimately render an advisory opinion. At the same time, there are both potential beneficial effects of an opinion formulated by an international judicial body (contribution to the progressive development of international law, stimulation of general discussion and negotiation) and possible future difficulties (divergence in the approach of the courts, leading to further fragmentation of international law and explicit expressions of disagreement by certain States with the advisory opinion issued).

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Article

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Evolution of the Legal Framework for UCITS Funds in the European Union (1985–2023)

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Abstract: A major driver of global economic growth since the mid-1950s, investing activities have substantially bestowed to the development of the EU Member States, some of which, e.g., Luxembourg, have even risen to the top of the European economic pyramid. The year 2025 will mark the 40-year anniversary of the legal framework for collective investment funds, which prompts the researcher to turn to the roots of the system and assess the weaknesses and strengths of EU relevant legislation. The first stop of the journey is the Directive 85/611/EEC, which allowed creating the UCITS sub-sector as a part of the single market for financial services. In fact, one can identify four key stages the European regulatory system related to collective investment has so far passed through. With every new stage, the fund industry got a big boost, and regular updates to the legal system resulted in 29 thousand UCITS funds holding more than € 8 trillion in assets in 2022. In recent decades, the regime for UCITS has been conducive to European economic success. This is the strong reason why the 40-year-long evolution of the system should be at the forefront of our attention.

***Keywords*:** the European Union; European Union law; financial law; investment law; financial integration; internal market; single market for financial services; UCITS; legal framework for UCITS

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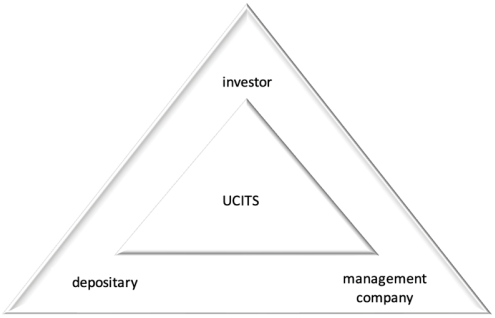
Contents

I. Introduction 326
II. Investor 327
III. UCITS 328
IV. Depositary and Management Company 348
V. Conclusion 362
References 364

I. Introduction

Nowadays the European Union (EU) boasts a large network of collective investment funds (CIFs) that fall under the undertakings for collective investment in transferable securities (UCITS) legal framework. This can be accounted for by two factors: 1) the necessity to ensure the appropriate level of investor protection and 2) the Member States' (MS) commitment to increasing the number of UCITS as an instrument to attract more investment and ensure stable economic growth on a national scale.

The European Court of Auditors estimates that the significant part of the operational funds in question were established in Luxembourg, Ireland, Germany and France, with Luxembourg and Ireland managing the biggest part of all net assets of UCITS. By late 2020, € 11.6 trillion[1] was invested in UCITS, which testifies to their reliability and effectiveness.



[1] The European Court of Auditors. Special report 04/2022 "Investment funds EU actions have not yet created a true single market benefiting investors" (Luxemburg, 21.02.2022).

Before moving on to the analysis of the regulatory framework, let us emphasize the following points. Firstly, from a legal standpoint, all investment relations can be characterized as a triangle, with the funds being at the center of this arrangement and the three corners constituting 1) the investor, 2) the depositary and 3) the management company (MC) (Zetzsche, 2012, p. 13). This structure is key to understanding the sub-sector of UCITS and represents the object of the study. Secondly, foreign scholars tend to categorize all the adopted directives and directive proposals governing UCITS into different types, identifying UCITS I–IV and at times even UCITS I–V. The classifications mentioned hereinbefore are at the core of this paper.

II. Investor

The road to integrated financial services markets in Europe has at times been somewhat bumpy. The year 1973[2] saw the emergence of a single market for financial services (SMFS) in what is now the European Union; yet certain steps towards financial integration had been taken even earlier. Article 67 of the 1957 EEC Treaty[3] obliged its MSs to remove restrictions and abolish discriminatory treatment affecting capital movements between them, but yielded little to no result. In 1960s, at the dawn of European integration, the Segré Report (Segré, 1966) prepared by the highly qualified expert panel held that the economic growth was continuously becoming more dependent upon capital markets with the convergence of the MSs economic policy facilitating such growth (Shokhin and Kudryashova, 2023, p. 97). At the time, it became obvious that universal approaches to CIFs would serve as a catalyst for integrating the financial markets, benefiting in the long run both the European economy and investors, where new investment opportunities for the latter could contribute to the growth opportunities for the former.

Scaling up investment required European lawmakers to address poor investor protection. It is clear that investor protection is

[2] Communication from the Commission "Implementing the framework for financial markets: action plan" (Brussels, 11.05.1999). COM/99/0232. P. 1.

[3] Treaty establishing the European Economic Community. Rome. 25.03.1957.

fundamental to the natural and wholesome evolvement of financial marketplaces (Pimlott, 1985, p. 154), and countries where investors are duly protected are associated with higher valuation of corporate assets, financial development and economic growth (La Porta, 2000, pp. 13–15).

The major problem of inadequate investor protection was to be solved at a supranational level. The fact is that by the mid-1980s, each MS had developed their own legal frameworks for the regulation of CIFs, sometimes varying markedly from country to country. The differences could be linked to, amongst other things, legal forms of funds, investment objects, the legal status of investors, so as the protection level of the latter. The plan was to harmonize the patchwork of legal rules governing CIFs by means of directives. In reality, being far from an ideal form of legal approximation in terms of its predictability (Kurcz, 2001, p. 290), this "soft" approach did not bridge the existing gaps between the ways in which a fund operated in a MS where it was established and the ways in which it engaged in cross-border activities.

Another important aspect of the problem is the classification of all CIFs into two types, namely open-ended and close-ended funds. This must be taken into account, because the legislative acts below apply exclusively to the former allowing private investors to buy and sell units at any time. With very few exceptions, such investors lack the relevant expertise and therefore need additional layers of protection in most cases. This is regardless of the fact that they tend to embrace conservative investing strategies.

III. UCITS

The Commission's Proposal of 14 April 1976 for a Council Directive regulating collective investment undertakings for transferable securities[4] (CIUTS) represents a stepping-stone to creating a sub-sector of CIFs. As is clear from the instrument's title and content, the authors employed

[4] Proposal for a Council Directive for the coordination of laws, regulations and administrative provisions regarding collective investment undertakings for transferable securities. COM/76/152. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A51976PC0152&qid=1718799869211. [Accessed 15.05.2024].

the term for some theoretical reasons. Indeed, the acronym "CIUTS" was used to refer to all the CIFs within the Community, including, for example, unit trusts in the UK or mutual funds in France.

In accordance with Art. 198 of the 1957 Treaty of Rome, the Proposal was submitted for consultation to the European Economic and Social Committee (EESC). Generally speaking, the document which would mark the first step to establishing the sub-sector of CIFs was welcomed by the Committee, the Council, and the Parliament. At the same time, the Committee made a few important comments on the matter, stating, for example, *"Even if the Directive did bring about complete freedom of movement for securities through rules ensuring equal conditions of competition, freedom of movement might still be impeded by other national rules and regulations,* e.g., *foreign exchange regulations or tax provisions."*[5] This testifies to insufficient harmonization of legal relations covered by the 1976 Proposal. Consequently, CIUTS established in those MSs where the CIFs were subject to stricter financial market rules were less advantageous as compared to CIUTS constituted in the MSs with only minimum requirements applied to CIFs.[6] However, the lack of proper regulation of CIFs increases the likelihood of financial instability and, hence, risks for private investors (Avgouleas, 2009, p. 54), which led the EESC to think of the Directive as a critical step forward towards the coordination of the present legal acts in force in the Community.

Having received a lot of feedback on the 1976 Proposal, the Commission made a number of amendments to it,[7] which was followed by yet another round of lively debate. Notwithstanding that the issue had been brought up at the pan-European level back in the mid-1960s, it was not until 1985 that tangible results were finally achieved.

[5] Opinion of the Economic and Social Committee on the proposal for a Council Directive for the coordination of laws, regulations and administrative provisions regarding collective investments for transferable securities. OJ C 75, 26.03.1977. Pp. 10–16.

[6] Opinion of the Economic and Social Committee on the proposal for a Council Directive… P. 2.

[7] Amendment to the Proposal for a Council Directive for the coordination of laws, regulations and administrative provisions regarding collective investment undertakings for transferable securities. COM/77/227.

The next major step towards providing a supranational framework for the European SMFS is linked to Lord Cockfield's White Paper of 1985,[8] a compendium of almost 300 legislative proposals put forward by the Commission. Dealing with different internal market's sectors, the proposals — and the Paper itself — sought to eliminate the impediments to cross-border commerce by 1992. This, in its turn, would result in greater competition and a wider range of goods and services, thus influencing the latter's prices (Smith and Venables, 1988, p. 1501). As for the financial sector, the Cockfield White Paper envisaged the adoption of about 20 legislative acts covering three major sectors of the SMFS, notably banking and insurance sectors, so as securities market (Kasyanov, 2019, p. 599), and, what is equally important, the explicit reference to the 1976 Proposal was made. However, the 1985 document referred to these establishments as "undertakings for collective investment in transferable securities" (UCITS). It shall be pointed out that 1976 was marked by the European Parliament (EP) accentuating the necessity to elucidate the Proposal, particularly its term "CIUTS," the origins of which remain obscure. This institution recommended adding the wording "of the open-ended type." The Commission must have paid heed to the message, as the title of the 1977 document amending the Proposal had the words "other than of the closed-end type."

The marathon talks produced the Directive 85/611/EEC of 20 December 1985, which came to be known as "the original directive" or "UCITS I" (Anderberg and Bolton, 2006, p. 13). Importantly enough, the terminology "other than of the closed-end type" was not included in the first and subsequent directives.

The necessity to develop the UCITS sub-sector within the SMFS, which would enable private investors to make a greater profit, was stressed by the preamble of the Directive 85/611/EEC. It argued that *"National laws governing collective investment undertakings should be coordinated with a view to approximating the conditions of competition between those undertakings at Community level, while at the same time ensuring more effective and more uniform protection*

[8] Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28–29 June 1985). COM/85/0310.

for unit-holders."[9] In other words, the objective behind the Directive was twofold: to protect UCITS investors and to create a level playing field for such schemes at the supranational and domestic level. For harmonization at the latter level, the document set forth uniform minimum requirements for UCITS related, say, to authorization, legal forms, and the information that the competent financial authorities were supposed to be provided with.

Let us look at Art. 1 of UCITS I offering the definition of the undertakings under analysis. The legislators decided to introduce the term, describing its two key features. Firstly, the Article clearly defines the function of the establishments in question, ascertaining that the sole objective of the latter, judging by the name itself, is the collective investment of funds raised from the public in transferable securities. Secondly, it provides that upon the holders' claim, the units of such establishments shall be repurchased or redeemed out of the UCITS assets. Moreover, the UCITS actions aimed at procuring that the units' stock exchange value does not substantially differ from the net asset value are considered equal to the aforementioned repurchase or redemption. In essence, this requirement constitutes a medium for maintaining an appropriate degree of liquidity, which allowed investors to redeem their investment either at a market price or at an initial purchase price.

The Directive 85/611/EEC, thus, views UCITS as CIFs which seek only to invest in transferable securities of capital raised from private investors and operate the investment portfolio on the principle of professional management and risk-spreading. At the same time, Art. 19 specifies that transferable securities shall be those that are officially listed on the stock exchange or traded on other similar regulated markets. UCITS I did not cover issues regarding the use of derivatives, which, however, does not mean that at the time there were no CIFs investing in them. Rather, such funds in the EEC MSs were governed by national legislation, which, in the final analysis, means that they were excluded from the sub-sector.

[9] Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS). OJ L 375, 31.12.1985. P. 1.

Remarkably, Art. 53 of UCITS I sets up a Contact Committee as the body responsible for ensuring cooperation between the financial supervisory bodies of the EEC MSs. At first, it had a purely advisory function, meaning that it was to provide the Commission with some advice on how to amend or make certain additions to the analyzed Directive, and to assist the MSs in implementing the legislative act or taking extra measures in case a UCITS situated in one MS intended to sell and promote its units in another MS following proper notification (please, see below for more detail). As from 2001, where it was vested with the comitology function, the Committee became a regulatory body under Art. 5 of the Second Council Decision on implementing powers[10] of 28 June 1999. Broadly speaking, being an initial endeavor to enhance cooperation on UCITS, the Contact Committee failed to achieve consistency in law enforcement at the national level and to build bridges between the financial supervisory bodies. To put it another way, the Committee fell short of high expectations, which was admittedly related not only to its performance but also to some flaws of the comitology system.

Although the Directive 85/611/EEC prevented MCs and depositaries from operating in the MSs where they did not have their registered offices (Ciani, 1996, p. 153), the opposite was the case with UCITS. That was the crowning achievement of the Directive, in that it *"opened the door to the single European market for investment funds, enshrining, for the first time, the concept of a European passport based on the free establishment and provision of services"* (Entin and Entin, 2021, p. 152) by UCITS funds. According to this concept, it was mandatory for the national competent authorities of all MSs to recognize the license issued by the UCITS country of origin, which, in its turn, meant that such UCITS was empowered to provide its services within the entire Community. At the very heart of the conception lies the mutual recognition mechanism (Ortino, 2007, pp. 309–338) repeatedly referred to by the analyzed directives. It was first described in the Cockfield White Paper of 1985 adopted by the MSs as part of the preparation for signing the Single

[10] Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission. OJ L 184, 17.07.1999, pp. 23–26.

European Act one year later. Commissioner for Internal Market and Services, Lord Cockfield drew upon the approach advocated by the Commission since the "Rewe-Zentral v. Bundesmonopolverwaltung für Branntwein" case, aka the "Cassis de Dijon" case (Cini and Borragán, 2016, pp. 261–262). It implies that the MSs mutually recognize the regulatory groundwork, trusting each other when it comes to proper supervision of the organizations (Lomnicka, 2000, p. 325).

Yet the mechanism has not always produced the desired result, as detailed below. During the initial stage, a UCITS had to be authorized by the supervisory bodies of the MS of its origin. Depending on the latter, the aforementioned authorities could range from banking regulators to those overseeing the securities market or the UCITS sub-sector. In accordance with the Directive 85/611/EEC, unit trusts were obligated to submit the following data for authorization purposes: 1) the constitutional documents, including the investment policy and financial objectives presentation; and 2) information concerning the MC, the depositary and the directors. As regards investment firms, they could be authorized should the competent authorities in their home MS approve the constitutional documents and the information about the depositary and the directors. There was no need to send the details of MCs, as investment firms might do without them when performing their functions.

In addition, UCITS I unequivocally denotes that the home MS's supervisors shall be empowered not to license the schemes under consideration, unless the MC's, depositary's or investment firm's directors are of good repute and they have a due level of experience required to exercise their respective duties. Authorization implied that the applicant had a business plan and a commercially sound and viable structure, which clearly guaranteed that investment in transferable securities was relatively safe (De Cecco, 2006, pp. 9–30) and retail investors were properly protected.

At first glance, a UCITS could begin to sell and promote its units in the host MS upon receiving permission from its MS's supervisory bodies. In practice, that was not the case. To secure such permission, it was obligatory to apprise the competent bodies of the host MS of the intent to sell units, which involved sending the documentation previously

submitted to the national financial regulator and the information concerning the European passport. The UCITS operations might commence in the host country two months after such communication unless the authorities established that the preparatory activities carried out so that the UCITS could start selling its units did not correspond with the relevant provisions. During the period in question, the regulators were entitled to necessitate the translation of the documents, which could be a costly and time-consuming process. To top it off, the host authorized bodies could raise some objections to the undertaking's marketing strategy, that is to say, the way it provided services and promoted investment products in the market (Buttigieg, 2013, p. 193). Some MSs went so far as to exploit UCITS I to lay down their own passporting rules. Although they justified the measures by claiming that certain characteristics of UCITS did not meet the criteria set forth by the Directive, this was inconsistent with the mutual recognition mechanism. Such policies allowed protecting local CIFs from those situated in other MSs.

Commenting on the notification procedure, the Commission, for its part, lamented that *"difficulties have arisen in respect of its smooth functioning. <…> the formalities, length and complexity of the notification procedure may vary greatly from one Member State to the other. If some of these variations can be explained by different administrative practices, many of them also result from diverging interpretations of the Directive."*[11] Moreover, the EP had turned to this issue as early as during the preparation of UCITS I, which can be exemplified by Lord Ardwick's quote, *"The coordination measures contained in the proposed directive are incomplete, as each Member State will continue to apply its own marketing regulations to units of CIUTS marketed on its territory."*[12]

[11] Interpretative Communication from the Commission "Respective powers retained by the Home Member State and the Host Member State in the marketing of UCITS pursuant to Section VIII of the UCITS Directive" (Brussels, 19.03.2007). COM/2007/0112. P. 2.

[12] European Parliament. Working documents (1976–1977). Report on the Proposal from the Commission to the Council (Doc. 114/76) for a directive for the coordination of laws, regulations and administrative provisions regarding collective investment undertakings for transferable securities. PE 46.460/fin. Pp. 4–6.

Given the aforementioned, one can stress that at the national level, there were regulatory hurdles surrounding the cross-border trade of UCITS units, which not only frustrated the efforts to make use of mutual recognition, but also undermined the credibility of the European passport. It all points to the tentative conclusion that back then the EEC faced three impediments to embracing the mutual recognition mechanism. The list includes inconsistent interpretation of UCITS I, controversial effects of its implementation and the considerable latitude the MSs enjoyed in ensuring that UCITS complied with the national financial regulations arising from the Directive.

With the Directive in effect on 1 October 1989, the MSs should have brought into force the relevant measures by that time. However, the Portuguese Republic and the Hellenic Republic were authorized to postpone the implementation until 1 April 1992, because their financial services eligible under UCITS I fell a long way short of those in the other EEC nations.

Despite the fact that UCITS I is the first important step towards the construction of the UCITS sub-sector, it had only limited, albeit significant, impact in terms of the integration in the financial services industry. The first serious attempt to amend the regulation was made in February 1993 when the Commission tabled a Proposal[13] seeking to remedy the shortcomings of the Directive. More specifically, it proposed to expand its scope to include funds of funds and money market funds. While the former refer to schemes typified by investing in other funds, the latter constitute mutual funds that invest in highly liquid, short-term instruments such as certificates of deposit and government securities.

Seventeen months later, following open discussion with the sub-industry and the EESC's opinion[14] on the Proposal of 1993, the

[13] Proposal for a Council Directive amending Directive 85/611/EEC on the Coordination of Laws, Regulations and Administrative Provisions relating to Undertakings for Collective Investment in Transferable Securities (UCITS). OJ C 59, 02.03.1993. Pp. 14–18.

[14] Opinion of the Economic and Social Committee on the proposal for a Council Directive amending Directive 85/611/EEC on the Coordination of laws, Regulations and Administrative Provisions relating to Undertakings for Collective Investment in Transferable Securities (UCITS). OJ C 249, 13.09.1993. Pp. 15–21.

Commission published an amended Proposal[15] of 20 July 1994. Both documents of 1993 and 1994 are dubbed "UCITS II" (Buttigieg, 2014, p. 85). The Proposal of 1994 contained the amendments related to the new legislative mechanism that had been introduced in November 1993 by the Treaty of Maastricht.[16] The EP was now empowered to make decisions in this realm in conjunction with the Council, which, in its turn, testifies to the extended role of the institution.

Apart from the above-mentioned funds, the Proposal of 1994 extended UCITS I scope to cash funds and master-feeder schemes. While other types of funds are rather familiar, the master-feeder ones require particular consideration. They constitute such CIFs where the funds contributed to several "feeders" by different categories of investors (for example, from different jurisdictions) are pooled into one "master." In other words, investors allocate money to feeder funds, which ultimately invest assets into the centralized master fund responsible for making all portfolio investments (Adema, 2014, p. 653). The scheme is mainly designed to reduce tax burden and enhance operational efficiency. Last but not least, its size offers sufficient scope for the most favourable terms from depositaries, auditors and other financial service providers, which is the case of the economies of scale. When it comes to cash funds, they are defined as CIFs which invest in short-term and low-risk securities. Elaborating on the incorporation of cash funds and money market funds into the UCITS sub-sector in 1995, the European Monetary Institute welcomed the Proposal since *"The new funds will, as a general rule, be subject to the same supervisory standards as are already laid down for UCITS and which have so far proven to be effective."*[17]

[15] Amended proposal for a European Parliament and Council Directive amending Directive 85/611/EEC on the Coordination of Laws, Regulations and Administrative Provisions relating to Undertakings for Collective Investment in Transferable Securities (UCITS). COM (94) 329.

[16] Consolidated version of the Treaty on European Union. OJ C 326, 26.10.2012. Pp. 13–390.

[17] Opinion of the European Monetary Institute on a consultation from the Council of the EC under Art. 109f (6) of the Treaty establishing the European Community and Art. 5.3 of the Statute of the EMI; on a Commission proposal for a EP and Council Directive amending Directive 85/611/EEC on the co-ordination of laws, regulations

With this in mind, one can arrive at the conclusion that the updates to UCITS I as detailed in the Proposal of 1994 would have shaped the market, as the CIFs under the scope of UCITS would have appeared more attractive to private investors. However, amid the controversy surrounding the issue, the negotiations reached an impasse within the Council and the EP. Under such circumstances, a new proposal with a greater number of funds related to UCITS never materialized, even though where March 1995 was marked with the Council's recommendations as to the submission of the amended document by the Commission. The failure to adopt UCITS II arose from the EEC nations' drive to shield their financial industries, the major obstacle to creating a more effective legal framework for the regulation of UCITS.

On 1 January 1999, the Euro was adopted as the official currency in 11 out of 15 EU MSs meeting the Maastricht criteria, which gave fresh impetus to the stalled talks on the Commission's proposals. As Financial Services Commissioner Mario Monti put it, *"The single currency will bring these obstacles into sharp relief by encouraging cross-frontier investment and increasing competition."*[18] By this very idea, a sense of urgency as to the necessity of integrating European financial markets was added. Apart from this, there were objective factors determining the impact of the integrated sub-sector of UCITS. The EU conducted research into CIFs, proving that the following benefits would be at the very core of the sub-sector's evolvement: 1) the implementation of the economies of scale, which would manifest in the reduction of costs, 2) increased competition, and 3) the increased number of financial services for non-institutional investors (Heinemann, 2002, p. 4). This does highlight the relevance of continuous and consistent integration efforts in the sphere at issue.

July 1998 saw the second attempt to update the UCITS regulatory framework, with the Commission publishing two proposals making amendments to UCITS I. Whereas the first, the 1998 MC and prospectus

and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (Brussels, 27.07.1995). CON/94/8. P. 2.

[18] European Commission. Press release. Financial services: Commission proposes to improve and extend rules on collective investment undertakings (Brussels, 17 July 1998). IP/98/673.

Proposal, aimed to regulate MCs and establish a uniform simplified prospectus,[19] the second, the 1998 Proposal on funds, obviously, dealt with a greater number of schemes.[20] As is seen from both proposals, the Commission did not examine the necessity to provide depositaries with the European passport (for more detail, please see below). Having taken into account the poor track record of the previous legislative initiatives, the body prepared two documents, because *"The separation of topics involving different problems could facilitate the negotiating process in the Council. It will not matter if one of the two Directives is adopted more rapidly than the other one."*[21]

The forenamed modification of the mechanism for making amendments became a source of worry for the EP that was outspoken in its support for having two proposals being considered together and transposed concomitantly. Pointing out that some provisions were vague and at times beyond comprehension, the Parliament emphasized the necessity to swiftly prepare a single over-arching document governing UCITS.[22] The European Central Bank also contributed to the discussion, saying the following, *"Given the fact that amendments to one draft Directive may have an impact on the other and the fact that the draft Directives propose substantial modifications to the UCITS Directive, the ECB believes that, for the sake of clarity, transparency and legal*

[19] Proposal for a European Parliament and Council Directive Amending Directive 85/611/EEC on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (UCITS) with a View to Regulating Management Companies and Simplified Prospectuses. COM (1998) 451.

[20] Proposal for a European Parliament and Council Directive Amending Directive 85/611/EEC on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (UCITS). COM (1998) 449.

[21] Proposal for a European Parliament and Council Directive Amending Directive 85/611/EEC... COM (1998) 449. P. 3.

[22] Committee on Economic and Monetary Affairs. Report on the proposal for a European Parliament and Council directive amending Directive 85/611/EEC (COM (1998) 449) and on the proposal for a European Parliament and Council directive amending Directive 85/611/EEC with a view to regulating management companies and simplified prospectuses (COM (1998) 451). A5-0025/2000. P. 29.

certainty, discussion of a complete and integral new version of the UCITS Directive would be preferable."[23]

In fact, the ECB tried to make it clear that the adjustment in the mechanism for amending the financial services directives could do damage to the system of investor protection since the MSs had divergent approaches to the proposed changes back then. This means that the adoption of the two UCITS Directives would have badly disrupted the market. In this context, financial stability was at the top of the agenda. After all, the financial trilemma which states that (1) financial integration, (2) financial stability and (3) national financial policies are incompatible (Schoenmaker, 2011, p. 2) has been part and parcel of the regulatory policy on UCITS. Thus, the euro paired with even more integrated financial markets would have increased the risk of the cross-border domino effect, as the bankruptcy of one financial institution could have influenced institutions elsewhere. Such events, which are now known as the systemic risks, in their turn, would have reduced economic value or consumer confidence in most of the EU financial arrangements.

Additionally, the ECB's remarks reflected the concerns of some Member States' competent authorities regarding the potential negative effect of the default on the financial system at large. This concern emerged after the downfall of LTCM in September 1998.[24] The American fund's investment policy was based on convergence trading, which involved buying undervalued securities and selling overvalued ones, expecting that prices would eventually converge to fair values (Szylar, 2010, p. 173). At that time when the 1998 proposals were under consideration in the EU, the Federal Reserve System made different US financial institutions bail out LTCM, because the creditors feared that the fund's significant losses would cause its default. Fundamentally speaking, the decision to save LTCM was based on the "too big to fail" doctrine postulating that the government has to rescue big funds from

[23] Opinion of the European Central Bank of 16 March 1999 (CON/98/54). OJ C 285, 07.10.1999. P. 1.

[24] ECB. Large EU banks' exposures to hedge funds. 2005. P. 8. Available at: https://www.ecb.europa.eu/pub/pdf/other/largeeubanksexposureshedgefunds200511en.pdf [Accessed 07.12.2023].

insolvency for the very reason that they are big (Moosa, 2010, p. 319). Initially applicable to the banking sector, the principle is not limited to CIFs but extends to other major financial institutions. Without a doubt, the LTCM mishap showed the immediate interdependence between the economy, monetary policy and CIFs.

Not surprisingly, amid such events, European officials, including those from the ECB, shifted their focus on both the systemic risks of CIFs and prudential supervision. It gradually became apparent that the system characterized by the considerable autonomy of MSs, the want of uniform construction of the provision of European legislation, as well as the lack of convergence of supervisory practices at the national level could dilute the efficacy of the domestic competent authorities and, thus, lead to the obstructive actions of the authorized bodies of the host MS (Moloney, 2003, p. 810).

In 1999, the Commission introduced its Financial Services Action Plan (FSAP),[25] which was considered as a crucial move towards the creation of a SMFS (Meshcheryakova, 2019, p. 10) and its UCITS sub-sector. Not only did this lengthy document cover almost all regulatory issues, but it also strove to introduce a more advanced legal framework for European financial markets. Regarding the SMFS available to retail investors, Baron Alexandre Lamfalussy, one of the founding fathers of the euro, was of the opinion that it was still in the making (Lamfalussy, 2002, p. 1289).

Curiously enough, the Committee of Wise Men, an expert panel that produced the Lamfalussy Report in 2001, denoted that *"Integrated European markets with more flexible investment rules, therefore, should improve the risk-return frontier."* Moreover*, "steps to relax regulatory constraints… should sustain a greater presence by European funds."*[26] As a consequence, one of the 42 FSAP legislative measures called for the

[25] Communication from the Commission "Implementing the framework for financial markets: action plan" (Brussels, 11.05.1999). COM/99/0232.

[26] Initial Report of the Committee of Wise Men on the Regulation of European Securities Markets chaired by A. Lamfalussy (Brussels, 9 November 2000). Available at: https://web.archive.org/web/20130405002910/http:/ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/initial-report-wise-men_en.pdf [Accessed 12.12.2023].

swift adoption of the Commission's two proposals of 1998, which was definitely in line with the objectives behind the FSAP and the European institution's policy itself. It is notable that the initiative was named "the political agreement on the proposed Directives on UCITS," which attests that the MSs had divergent political views on the situation.

To some extent, the 1998 Proposal on funds echoed the Proposal of 1994. More specifically, it again recommended extending the list of funds qualifying as UCITS to money market funds, funds of funds, and cash funds. It is worthwhile mentioning that the Proposal in question did not extend the range of permissible investments to allow master-feeder funds in UCITS form. It all means that the endorsement of the Proposal would have removed another constraint of the UCITS legal framework, as now such establishments would have been allowed to invest in a greater number of assets, ranging from common bank deposits to other types of UCITS. It was more of a novelty to see this kind of changes. Along with keeping proper investment protection, introducing extra CIFs would have required the EU to set additional standards and/or update the existing ones, with the aim of cushioning the possible investment risks. To this end, the 1998 Proposal on funds set greater transparency standards.

In reality, one can say with certainty that enabling fund managers to employ more diverse investment strategies was nothing but an attempt to address the ineptitude of UCITS I to create a broader sub-sector of CIFs.[27] During the deliberations of the 1998 Proposal on funds with the ECB and EESC rendering their opinions, some recommendations were made as to the necessity to have some aspects of the Proposal clarified and the list of UCITS investment portfolio's assets extended. Namely, there was general consensus that UCITS partaking in the transactions carried out with derivatives shall not be confined to the standardized instruments, e.g., options and futures, quoted on the stock exchange, but should rather be spread to the OTC (over-the-counter) derivatives. The list includes, for example, forward contracts and swaps. The former stand for the type of bargains, where the underlying asset is agreed to

[27] Initial Report of the Committee of Wise Men on the Regulation of European Securities Markets chaired by A. Lamfalussy. Pp. 4–5.

be traded at a predetermined price on a future date (Rayzberg, 2022, p. 460), while the latter encompass contracts under which the parties exchange different assets for a given period of time (Rayzberg, 2022, p. 386). As regards the EP, it was in favor of the dominant approach to the issue. Against the background of the OTC derivatives market development, it was essential to ensure that the regulation of UCITS-related assets was flexible enough so that the relevant organizations could adjust to the changing market conditions in the most effective way possible.[28]

In 2000, the Commission made amendments to its Proposal on funds primarily related to liberalizing a UCITS ability to use OTC derivatives eligible only where such instruments could be liquidated or sold on a daily basis.[29] Applauded by European policy makers, this change was finally adopted in the Directive 2001/108/EC,[30] Art. 19(1) in particular. Furthermore, one can claim that such legislative modifications set in motion the evolution of UCITS from a simple retail investment product into a widespread investment tool to deal with complex funds with their units traded throughout the Union and other countries to retail investors (Amenc and Sender, 2010, p. 25). This was regulated by Art. 1(9), Art. 19(1), and Art. 53(3) of the document.

Along with propelling the development of the sub-sector of CIFs, the Directive 2001/108/EC brought about a number of investor protection and financial stability problems, as absent proper regulation and supervision and the wider scope of UCITS schemes would have jeopardized the financial markets. That was a particularly burning issue amid the demise of LTCM in the 1990s.

[28] Committee on Economic and Monetary Affairs. Report… A5-0025/2000. P. 30.

[29] Amended proposal for a Directive of the European Parliament and of the Council amending Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS). COM (2000) 329.

[30] Directive 2001/108/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), with regard to investments of UCITS. OJ L 41, 13.02.2002. Pp. 35–42.

As said earlier, the EP, on the one hand, insisted that UCITS should become part of OTC derivative transactions. On the other hand, it stressed the importance of such investments being made taking into account certain qualitative and quantitative criteria for the sake of safeguarding the investor protection.[31] The Council was of the same opinion and produced the minimum capital requirements with which UCITS investing in OTC derivatives were supposed to comply,[32] a crucial step given that the derivatives in question are not liquid in most cases. Article 21 of the amended 1985 Directive, thus, stipulated that the global exposure relating to financial derivative instruments may not exceed 100 % of the UCITS net asset value and that counterparties involved in OTC derivative contracts must adhere to prudential requirements and be authorized to operate in the MS where a UCITS was situated. Additionally, the Directive 2001/108/EC laid down that the management of risks shall be effectuated by UCITS themselves or (as a general rule) by their MCs in order to monitor the balance of payments for one business day, and the methodology applied to calculate such risks was set forth in the Commission Recommendation 2004/383/EC of 27 April 2004.[33] This soft law mechanism is quite often viewed as a first step towards a uniform understanding of risk measurement methodologies in the UCITS area, the attainment of which could furnish uniform investor protection within the entire Community, as well as the level playing field for all market participants (Calverley et al., 2008, p. 59).

When not on paper, unfortunately, the risk management requirements were construed and applied inconsistently by MSs, which is why mutual recognition ran the danger of degenerating into "mutual

[31] Committee on Economic and Monetary Affairs. Report… A5-0025/2000. P. 30.

[32] Committee on Economic and Monetary Affairs. Recommendation for Second Reading on the Council common position for adopting a EP and Council directive amending Directive 85/611/EEC (1998/0243(COD)) and on the Council common position for adopting a EP and Council directive amending Directive 85/611/EEC with a view to regulating management companies and simplified prospectuses (1998/0242(COD)). A5-0324/2001. P. 11.

[33] 2004/383/EC: Commission Recommendation of 27 April 2004 on the use of financial derivative instruments for undertakings for collective investment in transferable securities (UCITS) (Brussels, 27 April 2004). OJ L 144, 30.04.2004. Pp. 33–41.

mistrust."[34] To redress the situation, the Committee of European Securities Regulators (CESR) unveiled a set of criteria for managing UCITS-related risks and elaborated on the ways of how the Directive and the Recommendation should be followed. Seeking to ensure greater investment protection, the Directive 2001/108/EC required investors to act on the fact that the purchaser of OTC derivatives was responsible for checking their risk status. This principle was enshrined in Art. 24(a), which also obligated one to disclose extra information about the risks of acquiring this type of derivatives in their prospectus.

The year 2001 heralded the start of the Lamfalussy Process introducing a new regulatory mechanism within the EU, or rather, a qualitatively and quantitatively new system of comitology committees. The above-mentioned CESR was established (by the Commission Decision 2001/527/EC of 6 June 2001[35]) as one of the Lamfalussy comitology committees. The reference to this committee is vital due to the fact that in 2003 the Commission endorsed two decisions with each comprising of only two articles the purpose of which was that of substituting the Contact Committee with the ESC (i.e., the European Securities Committee) and the CESR (Schaub, 2005, p. 118). As a result, since 2003 the activities of the schemes under analysis started to be regulated by two committees specified. Furthermore, the ESC, which was introduced by the Commission Decision 2001/528/EC of 6 June 2001[36] among the first, belonged to the classical comitology committees. Undoubtedly, the same numbers and dates of the decisions demonstrate that the committees were designed to form a single organizational framework for the financial services across the European Union.

Those modifications provided for by the Directive 2001/108/EC were considered indispensable when expanding the scope of the regulatory regime for UCITS funds, however, they also generated some uncertainty within the market. It was during the transposition stage

[34] CESR. Risk management principles for UCITS, February 2009. CESR-09-178. P. 3.

[35] 2001/527/EC: Commission Decision of 6 June 2001 establishing the Committee of European Securities Regulators. OJ L 191, 13.07.2001. Pp. 43–44.

[36] 2001/528/EC: Commission Decision of 6 June 2001 establishing the European Securities Committee. OJ L 191, 13.07.2001. Pp. 45–46.

when it became obvious that MSs interpreted the provisions laid down by the Directive differently. Some embraced a more flexible approach to the financial instruments at their disposal whereas others opted to scrupulously observe the regulation for the sake of investors,[37] which in practice entails that investments in the same types of assets were allowed in some jurisdictions, but not in other ones. This was recognized in the Commission's Green Paper of 2005.[38] Over time, the conviction of the necessity to reform the mechanism of mutual recognition only intensified, which, in its turn, was a prerequisite to the introduction of a more harmonized UCITS legal framework, which should be combined with the approximation of the MSs supervisory authorities' practices.[39]

Amid the financial crisis of 2007–2008 that produced a bitter economic setback for many countries (Krugman, 2009, p. 184), the Commission carried out around-the-clock monitoring of the macro-economic situation and the UCITS sub-sector itself. It is not a coincidence that in 2008, the adoption of substantial amendments to the legal rules applicable to UCITS was put forward by the Commission[40] for the first time since 1985. This crystallized into the Directive 2009/65/EC of 13 July 2009,[41] known as "UCITS IV" (Yeoh, 2009, p. 189), which marked the birth of modern regulatory legislation on the issue. It would not be remiss to say that it also represents the key source of secondary legislation controlling the use of CIFs.

[37] CESR's Advice to the European Commission on Clarification of Definitions concerning Eligible Assets of UCITS, January 2006. CESR/06-005. P. 3.

[38] Green Paper on the Enhancement of the EU Framework for Investment Funds (Brussels, 12.07.2005). COM/2005/0314.

[39] European Commission. Financial Services: Turning the Corner. Preparing the challenge of the next phase of European capital market integration (Tenth Report) (Brussels, 2 June 2004) P. 11. Available at: https://web.archive.org/web/20160630043557/https:/ec.europa.eu/internal_market/finances/docs/actionplan/index/progress10_en.pdf [Accessed 19.12.2023].

[40] Proposal for a Directive of the European Parliament and of the Council on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS). COM/2008/0458.

[41] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS). OJ L 302, 17.11.2009. Pp. 32–96.

First of all, the new Directive provided a new definition of UCITS. Article 1(2) views a UCITS as an undertaking: 1) the sole objective of which is that of the investment of funds accumulated from the general public in transferable type of securities and some other financial instruments carried out collectively; 2) the actions of which are subject to the risk allocation principle, and 3) the units of which shall be, either directly or indirectly, redeemed or repurchased at their holders' request (Gheorghe, 2022, p. 142). The first point means that the entities shall promote their shares or units to the public at large, and the financial instruments issued by UCITS should be offered across the EU. As for the third point, it suggests that UCITS are entitled to redeem their units through intermediaries, namely investment firms and credit institutions (Buttigieg, 2013, p. 196).

Curiously enough, Art. 3 determines those undertakings that are not subject to the Directive. The list includes: 1) the closed-ended funds, 2) the CIFs which attract funds from the investors, but do not make any public offer as to purchasing their units throughout the EU, 3) the funds the units of which, subject to their constitutional documents, may be sold exclusively in third countries (with certain exceptions provided), and 4) the CIFs that do not meet (a) the uniform standards as to the investment policy implementation applied to UCITS schemes, so as (b) the rules concerning the proper level of borrowings, which shall be maintained by the analyzed establishments.

When it comes to UCITS funds currently regulated by UCITS IV, they encompass money market funds, funds of funds, index-tracking funds, exchange traded funds and the like. The fact that index-tracking and exchange traded funds were now part of the UCITS sub-sector turned out to be one of the greatest achievements of the European legislators, because it entailed a greater number of assets available to investors. Apart from this, the Directive allowed UCITS to operate as umbrella funds characterized by a few distinguishing features. According to Art. 49, they consist of multiple sub-funds regarded as separate UCITS funds, with each of them having their own investment portfolio and strategy (Patassi, 2015, p. 20). Another notable thing is that such structures are managed by one board of directors and entitled to appoint one depositary. It is especially important to regulate umbrella

funds, since nowadays most of establishments, say, in Luxembourg, a European and international financial hub, belong to the category of umbrella funds (Hazenberg, 2016, p. 121). This speaks volumes about their efficiency and effectiveness. The basic difference between umbrella funds and master feeder funds is that in case of the former sub-funds can invest in other funds of the same type, which is subject to some restrictions imposed by the MSs.

Regarding the legal form of UCITS funds, one should say that the classification is included in UCITS IV and seems quite reasonable, because the legal structure determines who has the ownership of the UCITS assets and who is entitled to the income derived from them (Adema, 2009, p. 12). In this case, both investors and entities can be beneficiaries, as the securities purchased through a UCITS fund belong to the fund's assets, making it entitled to a share of profit. According to Art. 1(2) of the 2009 Directive, UCITS can be legally structured as mutual, or common, funds, unit trusts or investment companies.

It shall be worth mentioning that in case UCITS is established as a corporate type CIF one of the ways to consolidate the protection of investors' rights and interests is to hold investor meetings. The CIFs may be obliged to have such meetings where this is provided for by the current legislation of the MSs of the fund's origin. Thus, as it is indicated in the Directive 2007/36/EC on the rights of shareholders,[42] through their participation in general meetings the investors are entitled to make certain adjustments to the agenda, draft resolutions, vote on the issues under consideration or otherwise exercise their rights. However, serious restrictions on the possibility to partake in such meetings still persist. One example is the so called "share blocking" mechanism whereby an investor may be refused to attend a meeting, if the latter does not deposit their shares a few days before such meeting, either annual or extraordinary. Although this practice is explicitly prohibited in Art. 7 of the aforementioned Directive.

Moreover, many investors voluntarily opt out to participate in the relevant meetings as it implies crossing borders or even moving around

[42] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies. OJ L 184, 14.07.2007. Pp. 17–24.

the country. Despite the fact that the Directive 2007/36/EC allows electronic voting, there is no mandatory requirement to set this kind of voting out in the funds' constitutional documents, due to which many MSs of the EU have granted the power to implement this provision of the Directive to CIFs themselves. Besides, virtual meetings, within which direct interaction between investors or between investors and the members of the board of directors is carried out via information and telecommunications network called "Internet," are neither stipulated, nor prohibited by the Directive as it clarifies that the MSs are entitled to identify other forms of participation in the meetings (Wegman, 2016, pp. 159–163).

IV. Depositary and Management Company

Above all, one should point out that the Directive 85/611/EEC heavily focused on the product rather than the MC and the depositary of UCITS. The idea behind that approach was that the regulation did not allow the MC and the depositary to render transboundary services in other MSs (Buttigieg, 2014, p. 66). In other words, both of them were supposed to be formed in the UCITS home MS. This limitation is quite serious, because the establishments in question are closely correlated with retail investment performance. Thus, it is necessary to focus on their role in the financial process.

Let us examine the MC, which, above all, refers to an organization that is directly involved in decision-making about investing in assets. However, apart from this, it is responsible for adopting the fund's investment strategy, which reflects, among other things, UCITS risk assessment and management. The 1985 Directive stipulated that in order to have their business in the natural course such companies were to have a considerable amount of financial resources and were not allowed to engage in any activity other than management of CIFs.[43] This provision sought to avoid risks of a potential conflict of interests between the MC and the UCITS fund, which would have contributed to

[43] Commission of the EC. Towards a European market for the undertakings for collective investment in transferable securities: Commentary on the provisions of Council Directive 85/611/EEC. Office for Official Publications of the EC, 1988. P. 22.

unit holder protection (Turtiainen et al., 2022, p. 866). Noteworthy, the above-mentioned definition of a UCITS clearly states that this kind of establishment operates on the risk allocation principle. By way of setting minimum restrictions as to such allocation in Art. 23, 24 and 25 of UCITS I, the reasonable diversification of the undertakings' assets was guaranteed. This is deemed another conventional measure intended to safeguard the rights of retail investors. In this regard, the restrictions described hereinbefore shall warrant that the UCITS assets at the disposal of the MC are invested in a manner consistent with the objects, so as the investment policy of the establishments under consideration allowing them to mitigate the asset concentration risks.

In another attempt to attain the appropriate level of investor protection, Art. 7 and 14 of the 1985 Directive set down the requirements for entrusting assets to depositaries, entities independent from UCITS funds and MCs. Not only do they engage in safekeeping, but they also serve as a financial liaison between the fund and the investor. Being a part of the investment triangle, this establishment is tasked with restricting the MC's access to money and property of the retail investor. Moreover, UCITS I establishes two basic criteria that all those dealing with the UCITS sub-sector have to meet. On the one side, CIFs of UCITS type are to appoint an independent depositary. On the other side, the depositary is obliged to oversee the MC. In conformity with Art. 9 and 16 the depositary may incur liability for any detriment the UCITS suffered due to the failure to carry out its commitments without a good reason and the improper execution of the latter. At the same time, the Directive does not specify liability measures, meaning that the MSs could determine them on their own.

This regulation was imposed following the Investor Overseas Services, Ltd. episode in the late 1960s. Once a largest player in the US financial market, the corporation found itself mired in a securities fraud, when a legal entity in charge of the CIF's assets managed to withdraw some of them, on demand of certain individuals. On reflection, one can see that the company was nothing but a financial pyramid whose

controlling parties took personal advantage of retail investments, which ultimately led to its bankruptcy.[44]

The Directive 85/611/EEC also provides for substantive disclosure requirements according to which MCs and investment firms are obligated to publish sale or issue / repurchase or redemption prices of units, a prospectus, as well as a half-yearly and annual financial report. This framework for transparency enables investors to take informed and rational decisions and diminishes the risk of getting asymmetric information which can occur whenever individual players have more important information on the subject of a contract, particularly an investment contract (Rayzberg, 2022, p. 29).

As was mentioned above, the first attempt to update the 1985 Directive was made in 1993 and 1994. Alongside the examined changes, the Commission brought forward proposals concerning the necessity to grant a European passport to depositaries. The idea was not new, conceived earlier by the Second Council Directive 89/646/EEC of 15 December 1989[45] and the Council Directive 93/22/EEC of 10 May 1993.[46] Both documents allowed credit institutions and investment firms to engage in cross-border activities according to the European passporting systems. Under such circumstances, the Commission arrived at the conclusion that the time was ripe for UCITS funds to freely choose their depositaries authorized to operate within the EU, regardless of their registered offices.

The 1985 Directive prohibited credit institutions and investment firms which rendered depositary services from doing the same in relation to UCITS funds. Consequently, the MSs with less developed depositary industries were put at a relative disadvantage. The lack of a high level of competition in this realm, firstly, led to the limited impact of national depositary service markets and, secondly, to additional costs

[44] Time. Scandals: One of the Largest Frauds. 1972. Available at: https://time.com/archive/6815833/scandals-one-of-the-largest-frauds/ [Accessed 21.12.2023].

[45] Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC. OJ L 386, 30.12.1989. Pp. 1–13.

[46] Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field. OJ L 141, 11.06.1993. Pp. 27–46.

incurred by the UCITS schemes established in the aforementioned MSs, which eventually affected the consumers of financial services. Thus, it is possible to say that the expansion of the European passport concept to depositaries was necessary to foster competition, which, in its turn, guaranteed the appropriate level of depositary services provided to UCITS structures. This would have been achieved through the increase in supply of such services, proceeding from which the funds under consideration could have benefited from the conclusion of depositary agreements suiting the undertakings' needs to the best advantage. In such cases, this frequently translates into lower prices and costs for retail investors.

One should note that the amendments of the 1994 Proposal to UCITS I were considered too ambitious by MSs. During the Council's deliberations on the matter multiple discrepancies concerning the MSs' approaches to numerous facets of the Proposal were revealed. The most controversial issues were interrelated with qualifying the previously discussed master-feeder structures as UCITS and the provision of a European passport to depositaries. Even the members of the EP eventuated in considerable controversies concerning the latter. For instance, Perreau de Pinninck, the MEP of the third parliamentary term for the Kingdom of Spain, raised certain issues correlated to the depositaries' transboundary activism.[47] Mr. Pinninck asserted that *"the Commission's Proposal to grant credit institutions and investment firms the possibility to passport depositary services on the basis that they were already authorized to provide safekeeping of assets… as confusing the function of mere safekeeping of assets with the complex role that a depositary must fulfil in relation to investment funds"* (Buttigieg, 2020, p. 591), which is a key problem, since the UCITS depositary's duties also imply, for example, monitoring the MC's actions, the fund's investment policy, etc. (Hooghiemstra, 2018, p. 37).

The comments by De Pinninck imply that the application of the mutual recognition would have required European legislators to harmonize the rules governing the duties of a depositary. At the time,

[47] European Parliament. 1993/94 session. Minutes of proceedings of the sitting of Monday, 25 October 1993. OJ C 315, 22.11.1993. P. 16.

that was not something the EU was ready to do. Apart from this, the 1994 Proposal did not contain any provisions for prudential supervision of depositaries that would have minimized systemic risks. These rules, taken together, at the same time, are portrayed as another paramount tool ensuring that the mutual recognition mechanism works properly. Given the MEP's remarks, one can conclude that he suggested that the EP should reject the very idea of granting a European passport to depositaries. In fact, the period from 1985 to 1994 saw a few tentative steps taken towards more integration in the sphere.

It should be indicated that the transparency standards stipulated by the Directive 85/611/EEC emanated from the idea that the investor had the right to access massive amounts of data before making an informed investment decision.[48] As a result, the primary purpose established by the Directive for a prospectus was that of furnishing the UCITS investors with the specific financial instrument's and issuer's particulars in order for such unit-holders to estimate whether the general characteristics of the security offered and risks associated with it correspond to their strategy.[49] Yet the average buyer of UCITS units avoided reading and scrutinizing the prospectus due to its somewhat confusing and non-understandable nature. This was confirmed by the study conducted in the United States, where similar problems occurred. It was proved that at least four years of higher education in economics were required so that the retail investor could comprehend the major portion of a prospectus (Johnson, 2004, p. 61).

Furthermore, not only did the 1985 Directive contain no detailed rules applicable to the activities of the MC and the depositary, but it also forbade the former from providing services other than the collective portfolio management, the motivation for which was to

[48] European Commission. 2006. Frequently Asked Questions (FAQs) on the White Paper on enhancing the Single Market framework for investment funds (Memo). Available at: https://ec.europa.eu/commission/ presscorner/detail/en/ memo_06_431 [Accessed 21.12.2023].

[49] EFAMA. 2005. Comments on the EU Commission Green Paper on the Enhancement of the EU Framework for Investment Funds. SEC (2005) 947. Available at: https://web.archive.org/web/20060923205858/http:/www.efama.org/55PositionPapers/2005/efamacommentsgreenpaperinvestmentfunds/documentfile [Accessed 23.12.2023].

maintain the investors' rights protected by means of supporting a sufficient professional management level, so as through the obviation of the conflicts of interests. However, this was the case, which led to the Directive being construed differently on part of MSs. In this light, the 1998 UCITS MC and Prospectus Proposal looks like an attempt to eliminate the shortcomings of UCITS I. The name of the document suggests the Commission resolved to reach two goals, namely to introduce a simplified prospectus and to harmonize the requirements concerning the MCs and their cross-border activities. It seems reasonable to mention this kind of prospectus for two reasons. Firstly, it fits the purposes of our study. Secondly, it is the MC — or the investment company falling under the definition of UCITS — that is responsible for publishing this document.

The Commission's Proposal outlined a regulatory framework that would have made it easier for retail investors to digest the most important information about their potential purchase. It was quite a timely initiative, because back then, the rule to compose a simplified type of prospectus was already enforced in certain MSs. Having such provisions approximated would have resulted in the decrease of the expenses incurred by the sub-sector due to the MSs, where such type of prospectus was not introduced, not being able to impede the smooth promotion of the UCITS securities through the imposition of extra disclosure requirements.[50] This was also emphasized by the EP.[51] Interestingly enough, UCITS funds were forced by some MSs to submit a plethora of documents about the assets acquired or their internal structure.

Analyzing the simplified prospectus as a concept, it is possible to say that it was rather innovative and forward-looking. It should have improved the position of those getting access to the document before

[50] Amended proposal for a Directive of the European Parliament and of the Council amending Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses. COM (2000) 331. P. 22.

[51] Committee on Economic and Monetary Affairs. Report… A5-0025/2000. P. 37.

purchasing units. The transposition of this very new provision of the Directive 2001/108/EC of 21 January 2002[52] (Art. 21(1)) was not a cakewalk. Meanwhile, all the legislative acts passed between 1998 and 2004, including the two Directives of 2001, are referred to as "UCITS III" (Stefanini, 2015, p. 31). The bone of contention was national differences concerning the manner in which the stipulations of the Directive had to be observed during the simplified type of prospectus being prepared.

This prompted the Commission to endorse Recommendation 2004/384/EC of 27 April 2004,[53] with the aim of clarifying the presentation and content of the particular facets of the prospectus. The simplified version, therefore, was supposed to contain such points as: 1) a concise description of the outcomes sought for any investment in the UCITS, 2) the main categories of eligible investment instruments which are the objects of investment, 3) the information concerning the use of derivatives, an indication of whether this is done in pursuit of the UCITS objectives, or for hedging purposes only, 4) a brief risk profile evaluation, so as 5) the performance over a 10-year period.

Notwithstanding the clear wording of the recommendation, MSs did not adopt a consistence stance on it. It became definitely clear, over time, that the intended results of the transposition of prospectus of this form into European law were never attained. Indeed, what was conceived as a bulletin suitable for retail investors became in reality a long, legally and technically worded document too complex to be comprehended by buyers of units. The situation proved a major headache for all the parties concerned, which prepared the ground for a series of initiatives aimed at replacing the simplified prospectus. In this context, one should quote Charlie McCreevy, European Commissioner for Internal Market and Services, on the issue, *"The simplified prospectus will be*

[52] Directive 2001/107/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses. OJ L 41, 13.02.2002. Pp. 20–34.

[53] 2004/384/EC: Commission Recommendation of 27 April 2004 on some contents of the simplified prospectus as provided for in Schedule C of Annex I to Council Directive 85/611/EEC (Brussels, 27 April 2004). OJ L 144, 30.04.2004. Pp. 42–55.

reconfigured and simplified. It was meant to provide investors and intermediaries with concise and understandable information about the risks, associated charges, and expected outcomes. However, it has been sabotaged by national gold-plating and divergent implementation."[54]

As for the MCs, one should point out that over time the situation, where such companies were put at a less advantageous position compared to other financial services providers, became more and more perceptible due to the constantly increasing pace of the development of the SMFS securities sector. This was persistently condemned by the MSs and the representatives of the sub-sector, since the latter prevented the full-fledged implementation of the economies of scale, and created a hazard of unjustifiable and incoherent capital allocation between collective portfolio management and individual one.[55] The 1998 UCITS MC and Prospectus Proposal was designed to rectify the problem through granting the MCs with the authority to render certain types of auxiliary services, in particular those services which by that time were already provided for by the Investment Services Directive (ISD), and therefore had been provided by the investment firms for at least five years.

To ensure a level playing field and to protect investors, the Commission signified that, firstly, the expansion in the types of services provided by the MCs, is feasible, and, secondly, these services shall be subject to those rules and regulations that apply to investment firms, including the capital adequacy requirements set out by the Directive 93/6/EEC.[56] This is an indication that the Commission sought to prevent the onset of any possible conflicts between those rules that had already been imposed on the investment firms and the novel

[54] European Commission. 2006. Charlie McCreevy, European Commissioner for Internal Market and Services. Current issues in financial services: Investment Fund Policy. SFE Industry Lunch. (Speech, Edinburgh, 20 November 2006). Available at: https://ec.europa.eu/commission/presscorner/detail/en/speech_06_707 [Accessed 25.12.2023].

[55] Proposal for a European Parliament and Council Directive Amending Directive 85/611/EEC on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (UCITS) with a View to Regulating Management Companies and Simplified Prospectuses. COM (1998) 451. P. 5.

[56] Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investments firms and credit institutions. OJ L 141, 11.06.1993. Pp. 1–26.

provisions concerning the types of services rendered by the MCs. Thus, the analyzed 1998 Proposal recommended to encompass a list of such activities. Annex 2, which contains the aforementioned list, stipulated that only 14 types of services may be rendered by the MCs, but not all of them were eventually covered by the Directive. Hence, the following list of services made its way into the final text of the Directive: accounting services, income distribution, record keeping, etc.

Additionally, the MC should be granted the right to devolve a certain portion of its tasks (for more efficient organization of its operations) provided that its home financial supervisor gave the green light to that. The pertinent stipulation of the 1998 Proposal caused much debate at a supranational level. Take, for instance, the EESC which justified its position by explicating that MCs in some MSs were legally obliged to keep accounting records of the funds' transactions, while in others this mission could be entrusted to third parties. Moreover, the established system offered a favorable climate for the MCs' industry at the national level, all of which actually meant that there were no grounds for the introduction of a legal regulation at the European level.[57] The EP drew similar conclusions, highlighting that the rule necessitating the MCs to be preliminary approved by the national supervisor before the delegation of some of their powers would lead to a bureaucratization of the process.

All this prompted the Commission in 2000 to make certain modifications to its Proposal, which superseded the aforesaid requirement with the rule specifying that the MCs must submit all necessary information regarding the outsourcing of some of their functions to the national competent bodies in order to maintain the continuity of supervisory activities, but the advance notification of such authorities was excluded. Nevertheless, the institution insisted upon the necessity to devise the criteria that would allow the MC would have to satisfy to be able to delegate some of its powers. This was reflected in the Directive 2001/107/EC (Art. 5g(1)).

[57] Opinion of the Economic and Social Committee on the "Proposal for a European Parliament and Council Directive amending Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses." OJ C 116/1, 28.04.1999. P. 3.

As far as the European passport is concerned, the Proposal likened the MC to other service providers that had already been passported, namely investment firms and credit institutions that could perform functions similar to those of MCs. Such authorization would have allowed the entities in question to have their services rendered across the Union. This would have boosted the free movement of services because MCs would have been entitled to establish their branches in host MSs under the simplified procedure. The experience and expertise acquired after the transposition of the ISD were in favor of the Commission advocating for the creation of a legal regime, whereby the companies under consideration could have been authorized. It is particularly remarkable that the Proposal articulated the necessity to passport MCs exclusively in those MSs, where such companies carried out the major portion of their activities.[58] This recommendation was incorporated into Art. 5(1) of the Directive 2001/107/EC.

Interestingly enough, not all the parties concerned were outspoken in their support for the MC's passport. For instance, some representatives of the sub-sector believed that enabling MCs to function in host MSs could substantively vary from the UCITS permission on the same issue, which would inject the uncertainty into the market, i.e., potential risks could exceed and outweigh the benefit received. The most vociferous opponents of the Commission's approach were companies based in Luxembourg.[59]

The problem was also discussed by the CESR, thinking that, *"The legislator's intention does not seem to have been to impose to UCITS home Member States to recognize the possibility for a foreign management company to set up an investment company in their own*

[58] Proposal for a European Parliament and Council Directive Amending Directive 85/611/EEC on the Coordination of Laws, Regulations and Administrative Provisions relating to Undertakings for Collective Investment in Transferable Securities (UCITS) with a View to Regulating Management Companies and Simplified Prospectuses. COM (1998) 451. P. 7.

[59] CESR. ALFI contribution to the CESR consultation paper on UCITS management company passport. CESR/08-748. Available at: https://www.esma.europa.eu/file/8101/download?token=cv34X437 [Accessed 27.12.2023].

constituency."[60] Although the statement seems bizarre, CESR members remained committed to the imperative of designating a MC in the same MS of the Union as that of UCITS scheme. Such a state of affairs exemplifies that in some cases the promotion of national interests coupled with the call for protectionism can undermine the European integration within the sub-sector. The view which partially diminished the prospect for the MC passport was challenged by the promulgation of the Directive 2001/107/EC. The organizations could not enjoy the benefits of the passporting system, albeit with some limitations.

Apart from this, the EESC again brought up the depositary passport issue, highlighting its paramount importance in the industry and suggesting that the Commission should explore the ways of how to extend passporting rights to depositaries while ensuring adequate regulatory supervision.[61] Perhaps at the initial stages of development of the sub-sector, there was some political rationale behind the preservation of the requirement as to the depositaries being compelled to get established in the same MS as UCITS, but in the course of the SMFS development, the failure to impart the passporting system to depositaries was regarded as a malfunction or, at least, as a discrepancy between the regulatory regime and the economic realities of that time, which eventually affected the UCITS investors. The EESC's position seemed to have come home to the Council, because while preparing the overall stance on the enactment of the two Directives of 2001, the latter requested the former to lodge a review on the governance of the depositaries' activities.[62] The Commission's work in the field was still ongoing.

[60] CESR's guidelines for supervisors regarding the transitional provisions of the amending UCITS Directives (2001/107/EC and 2001/108/EC), February 2005. CESR/04-434b. P. 9.

[61] Opinion of the Economic and Social Committee on the "Proposal for a European Parliament and Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertaking for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses." OJ C, C/116, 28.04.1999. P. 3.

[62] Communication from the Commission to the Council and to the European Parliament Regulation of UCITS depositaries in the Member States: review and possible developments (Brussels, 30.03.2004). COM (2004) 207.

Thus, UCITS III constituted an attempt to grant a European passport to MCs. At that point, the national competent authorities did not find it reasonable to permit such entities to engage in cross-border activities. However, as was mentioned earlier, MCs were finally authorized to provide some services across the Union, which points to the concept of a European passport having been de facto valid since 2001.

In 2008, the Commission requested that the CESR should come up with its recommendations on giving more rights to MCs. The Committee responded in October,[63] advocating in favor of the delineation of the responsibilities concerning the supervision of the MCs' activities of the home and host MSs. Noteworthy, the package of proposals entailed that the Union's supervisory authorities would conclude bilateral or multilateral agreements, which could address difficulties arising from mutual mistrust and even trigger the creation of the single board for financial supervisory authorities. Unfortunately, no progress has been made towards the latter.

Generally speaking, the regulatory framework laid down by UCITS IV reflected the CESR's advice. Finally, it introduced the MC passport, thus allowing such businesses to render their respective services within the SMFS or to establish their offices in the host MSs. At the same time, authorization may exclusively be bestowed by those MSs where both the registered and head offices of a MC are located, that is to say, the approval of its application to perform the transboundary activities by the home MS's supervisory bodies may not exceed six months (Loesch, 2018, p. 245). In order to obtain admission to the Union's internal market, the MC, which has announced its intention to pursue its respective activities in other MSs, commits itself to informing its home financial supervisor about this. Under Art. 18(1) of UCITS IV, the information required includes the MS where the MC intends to run business and an action program specifying the risk management process. However, the company may be able to perform its scheduled business activities approximately after one month, when the data provided to

[63] CESR's advice to the European Commission on the UCITS Management Company Passport, October 2008. CESR/08-867.

the authorized bodies of the home will be actually transferred to the regulatory authorities of the host. Despite the fact that the Directive also enables MCs to delegate some of the powers to the organizations registered beyond the Union, they are obligated to retain the significant part of them. Looking at Art. 13, one may assume they are liable for the work done by other organizations (Loesch, 2018, p. 246).

Moving on to the issue of supervising MCs, most of the powers reside in their home competent authorities, because Art. 19 of UCITS IV sets forth that the companies have to conform with the exigencies of the MS of the undertaking's origin. According to Art. 21, any breaches identified by the host MS's competent bodies tend to be communicated to the supervisory bodies of the MC's home MS. Yet, in case where the MC's location is in a different MS, it shall abide by the norms of such country as to the passporting of funds, investment policies, limits, etc. The Directive also holds that the requirements the MC has to satisfy at a national level and those which the same MS imposes on MCs authorized in that MS should be equivalent to each other.

Regarding depositaries of UCITS schemes, one can unfortunately state that they still cannot enjoy the benefits of passporting. The requirement that the depositary of EU domiciled investment has to be set up in the home MS where the investment fund is established has been relevant since the 1985 Directive. It remains unclear why this approach dominates the EU. Some believe that it stems from the aspiration of certain MSs to retain control over the depositary market, so as from the plausible distrust between MSs concerning the national supervisory powers for the integrity of a depositary market (Buttigieg, 2020, p. 593). The issue was pushed to the forefront of public debate[64] organized by the Commission in 2012. Having analyzed 97 responses, the body witnessed some public reluctance to embrace the idea, as the majority of advantages depositary passporting are rather hypothetical (Buttigieg, 2020, p. 593). Such feedback seems pretty awkward, especially given the long integration period in the UCITS sphere.

[64] European Commission. Consultation Document. "Undertakings for Collective Investment in Transferable Securities (UCITS). Product rules, Liquidity, Management, Depositary, Money Market Funds, Long-term Investments." (Brussels, 26 July 2012). B-1049.

Since UCITS IV came into force, there has been no significant progress towards finding the solution to the problem. However, based on the 2012 consultations, the Commission put forward another Proposal,[65] which was followed by the adoption of the Directive 2014/91/EC of 23 July 2014 two years later.[66] Sometimes described as UCITS V (Alshaleel, 2016, p. 14), the new Directive concentrated on the depositary. More specifically, certain provisions concerning their liability before UCITS funds and investors were clarified. As it was before, the depositaries are responsible for losses incurred by UCITS, which may arise due to the depositaries' failure to fulfil their obligations or their improper performance. The wording "improper performance" turned out to be another apple of discord, which led to different national interpretations and levels of investor protection. Despite the title of the 2014 Directive, European legislators failed to harmonize the liability-related measures but defined the cases when the depositary may be found liable to UCITS and their investors.

Article 24(1) confers responsibility on the depositary, where 1) the financial instruments, which may be actually deposited, and 2) all other types of assets, such as OTC derivatives, which are subject to record keeping and ownership verification duties, were lost. The forfeiture of the former type makes the depositary liable, unless it can substantiate that such loss occurred due to some events beyond reasonable control (Alshaleel, 2016, p. 19). According to Art. 26b, such cases are determined by the Commission. When it comes to the loss of the latter, the depositary will be liable to the UCITS and its investors only if the situation happened as a result of its negligent or intentional failure to fulfil its obligations in a proper manner. Looking at these two points,

[65] Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions. COM (2012) 350.

[66] Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions. OJ L 257, 28.08.2014. Pp. 186–213.

the following conclusion arises. The legal regime set forth nowadays is indubitably inclined towards harmonization of depositary activity, thus, translating into greater supervisory convergence, which was the key idea behind the 2012 consultations.

V. Conclusion

With UCITS I coming into full effect in 1989, the SMFS saw the emergence of the UCITS sub-sector. From our perspective, the introduction of a passport based on the mutual recognition mechanism constituted the most remarkable achievement of European legislators at the time. It opened up opportunities for financial consumers to invest in the relatively low-risk securities. Indeed, the entire regulatory framework for UCITS is designed to fully safeguard non-institutional investors who are often lacking in relevant experience and expertise, which accounts for its credibility. Undoubtedly, when the legal mechanism governing the funds was in its infancy, one could face a plethora of obstacles to mutual recognition mechanism in the form of inconsistent interpretations of the Directive or the mixed results of its transposition. UCITS II was intended to address all those problems, including through the establishment of depositary passporting, but MSs, in pursuit of their national interests, prevented the document from being passed into law.

Although the Directive 85/611/EEC was generally ahead of its time, a variety of restrictions contained in its text can be called too tight, especially against the background of the fast-paced financial market. That was the very reason why the Commission had been vigorously pursuing the policy of encouraging investment in CIFs, launching different legislative initiatives which did not always resonate with the EP and the Council. Let us remind you that the opposition to the 1994 Proposal at the Council and the EP level kept in place the mutual recognition restrictions stipulated by the 1985 Directive for 16 years.

One can thus conclude that in the beginning the formation of the UCITS sub-sector was compounded by inter-institutional and interstate controversies. This produced the requirements which gave MSs considerable latitude in interpreting the provisions of the documents and badly affected uniform implementation of European legal norms

and rules at a national level. It was fiendishly difficult for MSs to find the common ground, because at the time they were preoccupied with their own financial markets and reluctant to surrender some part of their financial authority to the supranational organization.

With every new regulation controlling UCITS, European legislators sought to expand the scope of communitarian rules. For example, the second generation of the UCITS Directive envisaged granting a European passport to depositaries and designating funds of funds, cash funds and money market funds as belonging to UCITS. Notwithstanding that the former was considered a necessary step to stronger competition in the depositary industry, it became subject to much dispute and debate among MSs adhering to their protectionist policies. Consequently, UCITS II was never adopted. Moving on to the two Directives of 2001, it is possible to say that their implementation was crucial to further financial integration, because they contained the provisions regarding, say, the longer list of permissible instruments, the MC passport, and the simplified prospectus.

In spite of the fact that financial integration was influenced by external factors, e.g., the 2008 crisis, the resulting regulatory framework stipulated by UCITS IV demonstrates that even amid the economic shocks, European legislators managed to strike a balance between the interests of MCs and depositaries, on the one hand, and the interests of supervisory authorities of MSs, UCITS and their investors, on the other hand. They also managed to reconcile the differences, at least for some time, between the Union and its MSs. However, some issues, including giving depositaries access to passporting system, have yet to be resolved. Certain steps have already been taken towards the resolution.

Thus, the legal framework for UCITS is aimed at protecting the rights of retail investors. For almost four decades, the effective mechanisms for the implementation of such protection have been designed, in particular, the rights of the corporate funds' shareholders at investor meetings have been secured, various means of enhancing competition within the sub-sector and avoiding the risk of a conflict of interest have been enshrined, the necessity to resort to depositary has been preconditioned, etc. Despite the fact that a number of legislative gaps not allowing to consider the system for the protection of investors

indubitably perfect remain, say, the limitations of the mutual recognition mechanism, the Commission itself acknowledges that the EU acts governing UCITS activities in their entirety constitute a part of the Union's *"acquis on retail investor protection."*[67] Therefore, almost the 40-year-long development of the legal framework applicable to UCITS can be summed up in the table below.

Directive	Achievements
UCITS I	— Establishment of the UCITS sub-sector as part of the SMFS; — Introduction of uniform minimum requirements the parties concerned must comply with; — Provision of a European passport for UCITS
UCITS II	Never adopted
UCITS III	— Expansion of the types of UCITS schemes; — Introduction of a European passport for MCs; — Adoption of the simplified prospectus
UCITS IV	— Expansion of the UCITS eligible funds; — Extension of the rights of MCs (in fact, full exercise of rights stipulated by the European passport)
UCITS V	Identification of depositary liability cases

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[67] Commission Staff Working Document. Impact Assessment Report Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU and (EU) 2016/97 as regards the Union retail investor protection rules and Regulation of the European Parliament and of the Council amending Regulation (EU) No. 1286/2014 as regards the modernization of the key information document. SWD/2023/278. P. 6.

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HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT

Article

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The Balance of Justice: The Water Right and Large Dams in the Tigris and Euphrates Basin

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Abstract: This research investigates the political dimensions related to the implementation of top-down planning strategies for the development of extensive hydraulic infrastructure within the Euphrates-Tigris basin. Considering an increasingly severe water issues and a deficiency of collaboration among nations sharing transboundary river systems, the presence of dams and reservoirs has become a subject of contention due to conflicting interests in resource depletion and utilization. This analysis draws upon the theoretical perspectives of post-structuralism in the field of human geography, particularly focusing on the politics of scale, as well as the existing body of literature on megaprojects. The key argument put out in this study is that hydraulic infrastructures play a significant role, both physically and rhetorically, in shaping and sustaining waterscapes at various sizes, hence supporting wider political agendas. Utilizing ethnographic fieldwork as a primary source, this paper examines the narratives propagated via both non-state and state actors in relation to the construction of supplementary dams, with a specific emphasis on the autonomous territory of Iraqi

Kurdistan. The Kurdistan Regional Government (KRG) perceives hydraulic infrastructure as a means of ensuring security and promoting wealth, aligning with the broader narrative of Kurdish fate. However, transnational civil society organizations have united to oppose the adverse consequences of large-scale projects and have campaigned for a shared framework in the Mesopotamian region. The hydraulic infrastructure, in every scenario, serves as a structural foundation for political endeavours aimed at securing the acknowledgment of rights and establishing the suitable extent of government. In addition, the implementation of bottom-up defence strategies is complemented by the advocacy for a participatory and inclusive attitude towards the shared water resources management. From this particular standpoint, the spatial politics of large-scale projects overlap with issues pertaining to identity, fairness, and sustainability.

***Keywords*:** water right; water politics; dams; politics of scale; megaprojects; governance

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Contents

I. Introduction 371
II. Dam Construction and Water Allocation Issues 372
II.1. Benefits of Water Allocation 375
II.2. International Law Issues between the Riparian States 377
III. Megaprojects and Spatial Strategies 380
III.1. Nationalism and Water Regionalization 380
III.2. Unifying Vision: Mesopotamia as a Shared Spatial Paradigm 382
IV. Conclusion 384
References 384

I. Introduction

The political aspects of large dams in the Tigris-Euphrates basin are examined in this paper. Dams and reservoirs in river systems are a difficult issue for parties competing for precious water. Hydraulic

infrastructures are supposed to help build political imaginations by creating waterscapes at different levels in the face of a growing water shortage and insufficient collaboration. Mega dams can be seen as both physical locations and discursive tools that can reinforce the spatial distribution of power and the established patterns of collective decision-making within a river system by incorporating post-structuralist perspectives from human geography and megaproject literature.

This research emphasizes the Kurdistan Region of Iraq (KRI), which is a mostly Kurdish territory located in the north of Iraq. It gained recognition as an autonomous area with the adoption of the 2005 federal constitution. The research demonstrates the transformation of the terrain occurring at the state level and beyond. Within the larger context of self-determination, the KRG perceives dams as a crucial element of security of the nation. Conversely, the Save the Tigris and Iraqi Marshes Campaign (STC) appeals to the historical significance of the heritage of Mesopotamia for resisting large-scale projects and advocate for a comprehensive method for managing the shared water resources. Hydraulic infrastructures, in both instances, serve as a structural foundation for political endeavours aimed at safeguarding rights and asserting an optimal degree of governance.

II. Dam Construction and Water Allocation Issues

The utilization of hydraulic infrastructures, which are nourished by the sedimentation of the Euphrates and Tigris rivers, has played a crucial impact on ensuring the prosperity of Mesopotamian societies from the inception of early civilizations. From Mosul to the Shatt al-Arab, the confluence of the twin rivers prior to their discharge into the Persian Gulf, villages, towns were strategically located along the meandering watercourses. These watercourses were meticulously arranged into vast drainage canals and irrigation system, facilitating agricultural cultivation in regions with limited precipitation. Additionally, flood walls were constructed for mitigating the detrimental impacts of seasonal floods that regularly inundated the basins. Nevertheless, following the decline of the Ottoman Empire, the development of contemporary nation-states resulted in the fragmentation of the water

system's unity into distinct national sectors. In Baghdad, Damascus and Ankara, water bureaucracies were established enabling the delineation of state authority and its expansion into novel domains of political and social existence (Stahl, 2014, p. 152).

Various elements play a crucial role in the transboundary basins' management, including legal frameworks, structures, and the involvement of various countries. The intricate nature of this phenomenon necessitates a significant level of coordination among various jurisdictions and sectors, thereby potentially giving rise to conflicts. While the national infrastructure is widely acknowledged for its commendable performance, it is important to note that the advantages and disadvantages of water supply systems are not uniformly dispersed across different geographical regions and user groups. Consequently, alterations in the ecological dynamics of the river system have the potential to intensify pre-existing political divisions or give rise to novel ones. Furthermore, the collision between social and technical imaginaries can function as a platform for the expression of divergent viewpoints regarding identities, economic interests, and eventually power dynamics.

The notion of a static and site-specific structure is supported by these factors, as hydraulic projects are not limited to a singular event or practise in terms of their spatial and temporal reach (Bichsel, 2016, p. 359). Mitchell highlights that the construction of the world's largest dam involved more than the mere application of scientific knowledge and expertise based on a pre-existing blueprint. Instead, it was a dynamic process that incorporated local knowledge and required the resolution of numerous challenges encountered during the construction phase (Mitchell, 2002, p. 21). Similar to contemporary engineering projects like the Three Gorges Dam or the Grand Ethiopian Renaissance Dam, unforeseen adverse effects may arise from the implementation of extensive water schemes. Although the displacement of humans is readily apparent and occurs rapidly, alterations in the ecosystem of the river are transpiring at a more gradual and incremental rate. Firstly, the process of fully isolating a dam can span several months or even years. The parties involved in negotiations regarding water allocation are faced with challenges due to the uncertainty surrounding the construction

and planning of engineering waterscapes. This uncertainty arises from the reliance on volumetric estimations of the river's outflow after filling reservoir. As a result, decision-making becomes more difficult for these parties as they must navigate a changing context with imperfect information.

The dynamic nature of water management practises and their relationship with water infrastructures pose ongoing challenges and transformations in the realm of numerical politics (Menga and Swyngedouw, 2018, p. 482). However, a significant question that persists is how to effectively implement a normative framework when dealing with conflicts arising from dam-related issues. The activation of the scale is difficult to ascertain in numerous studies. A noteworthy instance can be found in the research conducted by Harris and Alatout (2010) in the field of hydrometrics. Their study offers a comprehensive empirical analysis of the profound correlation between extensive construction projects and the processes of state and nation building. The Turkish government has reportedly utilised technical information regarding the Tigris-Euphrates basin to establish it as an unquestionable benchmark for hydrological evaluations. This strategy aims to strengthen the credibility of centralized water management, while simultaneously disregarding and marginalising alternative assertions made by local or regional entities. Notably, this approach has been employed to downplay the significance of claims made by Kurdish communities, historically portrayed as posing a risk to the nation's unity. Nevertheless, it is noteworthy that Ankara regards the two rivers as a watershed, attributing them as the primary sources, despite their contribution amounting to only 40 % of the total flow of the Tigris. Therefore, the expansive nature of the basin allows Turkey to take back and affirms a more prominent position, at the detriment of Iraq. According to Conker and Hussein (2019, p. 229), the Turkish elites have effectively utilized the hydraulic mission as a powerful instrument for both domestic and foreign policy purposes. This observation highlights the utilization of numerical constructions to advance political objectives, while also emphasizing that these constructions vary depending on the specific goals and intended recipients.

II.1. Benefits of Water Allocation

One of the benefits associated with the proposed water distribution approach lies in the provision of a predetermined water distribution for each state, ensuring clarity and certainty. Given that the states will possess knowledge of their designated allocation ratio, they will possess a level of understanding regarding the customary quantity of water they should receive from the shared water sources, which will be informed by long-term statistical data pertaining to the river's discharge during various time intervals. This mitigates the likelihood of unexpected outcomes in both the countries located upstream and downstream. This would additionally enable nations to autonomously strategize and oversee the allocation and administration of their quota. Water distribution will be facilitated in a manner that is both accessible and unrestricted, catering to a variety of applications in accordance with the nation's specific needs. Additionally, this will compel governments to optimise the utilisation of their allocated portion. Water procurement from neighbouring riparian countries can be facilitated through contractual agreements. Nevertheless, there will be a cost associated with it. Additionally, its purpose is to mitigate the potential for reliance or addiction. This measure would effectively optimise water utilisation, thereby fostering heightened vigilance among nations regarding their water consumption practises. This particular strategy also seeks to mitigate conflicts among states. Particularly in arid basins, the implementation of water regulation projects presents a potential for conflict. Nations routinely engage in the surveillance of water infrastructure initiatives undertaken by foreign nations, with the aim of assessing potential impacts on their water resources allocation and the potential environmental ramifications associated with these projects. The Euphrates-Tigris (E-T) basin serves as a compelling demonstration of this particular scenario. Turkey, Iraq, and Syria exemplify instances in which governmental entities have encountered difficulties in achieving a trilateral consensus regarding the allocation of a predetermined volume of water to each respective nation. The construction of water infrastructure projects often leads to heightened tensions among

governments. The hesitancy of numerous nations to engage in the establishment of transboundary freshwater distribution agreements stems from concerns regarding the potential for inter-state conflicts among riparian states. Consequently, it is common for stakeholders to engage in benefit-sharing arrangements, specifically those pertaining to the construction of hydroelectric dams for power generation, flood management, or agricultural irrigation (Lorenz and Erickson, 1999, p. 18). Furthermore, certain governmental bodies may not impose regulations on water sharing due to the abundant water resources within the basin. Water-rich governments, such as certain European countries, aim to establish contractual agreements pertaining to various water-related matters, including but not limited to hydropower, flood management, and water quality. The equitable distribution of water resources is of paramount significance in the basin, given its limited availability. The exacerbation of tensions among countries is primarily attributed to the lack of effective water distribution mechanisms. Scientists have indicated that climate change is anticipated to have varying impacts across different regions of the globe. Nevertheless, it is anticipated that precipitation patterns and climatic conditions will undergo alterations across various global regions, leading to a state of climate unpredictability. According to scientific estimates, there is a projected decrease in precipitation and increased variability in various global regions, potentially resulting in arid conditions. Conversely, certain areas may experience heightened intensity and magnitude of rainfall, thereby increasing the risk of flooding. The effect of temperature and precipitation fluctuations on riparian states can be deleterious, as sudden and uncontrolled alterations in water flow impose challenges on states with constrained capacities for movement. According to the concept of appropriation, nations will undergo transformations in accordance with their respective allocation. Nevertheless, the objective of this proposal is not to impede ongoing collaboration among nations or to forbid potential future collaboration. The majority of basins in which riparian countries engaged in cooperation witnessed improved outcomes in terms of water use and management. Nevertheless, the collaboration

among nations in specific basins poses significant challenges. The aim of this personalization technique is to empower states to exercise independent agency when deemed necessary, while concurrently preserving the possibility of collaboration. The implementation of such a strategy would yield advantageous outcomes for riparian nations.

II.2. International Law Issues between the Riparian States

The dispute about the freshwater resources of the Euphrates River, and to a smaller degree the Tigris River, has spanned many decades of debates and negotiations among the three Riparian States: Iraq, Syria and Turkey. The three nations have substantiated their entitlements based on the requirements of the International Water Laws, numerous hypotheses, and established principles. The principles underlying the International Water Law include the Helsinki Rules (International Law Association, 1967),[1] Berlin Rules (International Law Association, 2004),[2] and the UN Convention on the Law of the Non-navigational Uses of International Watercourses (UN General Assembly, 1997).[3] One of the key elements of this legal framework is the principle of equitable use, which emphasizes fairness and acceptable usage. The second principle is to adhere to the norm of nonmaleficence. Both provisions stem from the concept of restricted regional sovereignty, which limits the control of riparian countries to the portion of an international fresh water system that is situated within its territory. The riparian state must also acknowledge and uphold the rights of other riparian states to use the system. The notion of community interest offers an alternative solution to the issue of sharing fresh water. It is rooted in the concept of limited sovereignty and recognizes the interconnected nature of freshwater systems. It treats all worldwide freshwater systems

[1] Available at: https://www.internationalwaterlaw.org/documents/intldocs/ILA/Helsinki_Rules-original_with_comments.pdf [Accessed 11.06.2024].

[2] Available at: https://www.internationalwaterlaw.org/documents/intldocs/ILA/ILA_Berlin_Rules-2004.pdf [Accessed 11.06.2024].

[3] Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf [Accessed 11.06.2024].

as a single legal entity, independent of country boundaries. Therefore, it is imperative for all riparian governments to collectively strive for the maintainable growth of the natural water resources. The riparian states must acknowledge the constraints obligated via the hydrological cycle. This means that the quantity of water taken from the freshwater system should not surpass the quantity replenished by the hydrological cycle. Additionally, the water should not be contaminated to the point where it cannot be restored by the hydrological cycle (Bremer, 2013, p. 157).

During the extensive discussion and talks on water sharing, Iraq, Syria and Turkey have each substantiated their entitlements and counterclaims using the different provisions of these international requirements. Iraq and Syria contend that Turkey has an excess of freshwater that surpasses its actual needs. Turkey disputes this claim, asserting that out of the total annual runoff of 180 billion cubic metres (BCM), only 110 BCM is usable. Furthermore, due to technological, topographical, and geological constraints, only 25.9 BCM can actually be made available for use. Consequently, these water resources are not consistently accessible at the appropriate time and location (Yuksel, 2015, p. 151; Oei and Siehlow, 2016, p. 146).

A further point of contention arises among Turkey, on one hand, and Iraq and Syria, on the other, over the assertion made by Syria and Iraq that they possess longstanding legal entitlements to the utilization of the Euphrates River waters, dating back to olden periods. Turkey denies these rights because it only considers water rights that are according to equitable utilization, as defined by the Helsinki rules. These rules, specifically Art. I and V, take into consideration some factors like hydrologic, socioeconomic, and geopolitics, as well as the need to avoid redundant waste in using the basin's waters. Turkey alleges that both Syria and Iraq are depleting their water supplies via outdated techniques and inefficient water management processes. Indeed, Turkey made progress in the technical negotiations with the other riparian governments in 1984, proposing a three-phase plan to address the fair distribution of resources. This proposal was reaffirmed in subsequent discussions. The stipulation mandates that allocations must be carried out in the subsequent phases. Firstly, an evaluation of the existing resources must be conducted. Secondly, an inventory

analysis of the available land resources should be carried out. Finally, only after the ongoing projects have been modernized and rehabilitated, and irrigation practices have been improved to assess their economic feasibility, the total demand and utilization of water can be measured. Subsequently, a fair and balanced distribution of water shares among the three states can be achieved. This action plan is designed on the basis of two fundamental assumptions. The first perspective regards the Tigris and Euphrates Rivers as a one transboundary watercourse, whereas the second perspective asserts that the specific water necessities of each nation should be determined by scientific investigations.

Iraq and Syria excluded this idea because to its lack of specificity and its potential to benefit Turkey while encroaching upon the sovereignty of the riparian nations. Furthermore, Iraq opposes the notion of a single basin that forms the basis of this proposal, arguing that the Euphrates and Tigris Rivers have distinct geographical basins. Turkey has advocated for a one basin resolution, suggesting that Iraq can address the shortage of water in the Euphrates River by moving water from the Tigris River basin via the Tharthar canals. This transfer is already taking place. Currently, subsequent the Ilisu Dam becomes operational, the foundation for this argument is weakening since the Tigris River's basin will experience water stress. The three riparian countries are in conflict over the interpretation and implementation of the "causing no harm" principle outlined in Art. X of the Helsinki Rules, Art. 16 of the Berlin Rules, and Art. 7 Part II of the Convention on the Law of the Non-navigational Uses of International Watercourses. The aforementioned principle, which encompasses the Latin principle translated as "use your own property in a way that does not result in damage to the property of others," was put out and debated during the long debates and proceedings that occurred among the all riparian governments.

In this particular situation, Iraq and Syria consistently maintained that Turkey was disregarding this regulation by extensively advancing the GAP project, which resulted in a reduction of the fair portions allocated to both countries, thereby causing significant harm to their health sectors, municipal water supplies and agricultural sectors. Consequently, this may lead to difficulties for the populations of

both nations, perhaps leading to societal turmoil. Furthermore, the construction of extensive reservoirs in both Turkey and Syria has resulted in complex circumstances and heightened tensions among the three riparian governments due to their disregard for this principle.

The "causing no harm" philosophy, as previously mentioned, applies to both the sharing of water as well as the quality of provided water. The Sub-chapter 6.6.3 has already discussed the issue of growing salt and pollution in the two rivers. Both Turkey and Syria have responsibility for the deterioration of water quality inside their borders, as outlined by the International customary laws cited above. The Iraqi government has a moral and legal obligation to ensure the well-being of its people by implementing necessary steps to mitigate some kinds of pollution in the Tigris and Euphrates Rivers (for example, salinity) inside Iraq's borders.[4]

III. Megaprojects and Spatial Strategies

This section discusses large-scale projects along the Tigris and Euphrates rivers and the nations' geographical strategies. By comparing other countries' techniques, we can identify common challenges and successful strategies for managing these essential water channels. This approach illuminates how dams and irrigation systems affect regional development, water rights, and international relations. Understanding these processes is essential for developing sustainable and equitable water management methods in the region.

III.1. Nationalism and Water Regionalization

The Tigris-Euphrates river system lacks a complete collaboration agreement among the riparian states (Kibaroglu and Scheumann, 2013, p. 190). For the purpose of governing the allocation of the Euphrates River, the Turkey-Syria Protocols of 1987[5] and the Syria-Iraq Protocol

[4] Law No. 27 (2009). Protection and Improvement of the Environment Law. Iraqi Government. (In Arabic).

[5] Protocol signed by Turkey and Syria on 17 July 1987. Available at: https://www.un-ilibrary.org/content/books/9789210596435s002-c001/read [Accessed 11.06.2024].

of 1990[6] are utilised as the exclusive legally binding instruments. However, these protocols fail to adequately consider the significant fluctuations in the river's water flow. Consequently, they prove to be inadequate in establishing a solid foundation for the effectual and impartial management of the river, particularly in the context of climate change (Kibaroglu, 2019, p. 11). The history of transnational water relations is characterised by its extensive duration and turbulent nature. The consultations conducted within the Joint Technical Committee, the sole tripartite entity recognised at the transboundary level, persisted for an extended duration without yielding any outcomes owing to a fundamental divergence concerning the underlying matter in question. Turkey's assertion that the two rivers ought to be treated as a unified hydrogeological entity was believed unsatisfactory by Iraq and Syria. These countries maintained that a fair allocation framework should be established solely for the Euphrates River. The prevailing perception is that Turkey holds a dominant position in the region due to its continuous enhancement of water schemes on the Euphrates and its reluctance to comply with relevant international legal frameworks (Zeitoun and Warner, 2006, p. 450). In actuality, notwithstanding the power disparities that have been intensified by their respective geographical positions, all of the riparian nations have pursued distinct trajectories. The current state of integrated management at the basin level is severely deficient.

The KRG aspires to substantially augment the quantity of water projects and river control initiatives in order to guarantee water security. According to Heshmati (Heshmati, 2009, p. 86), the Kurdistan Region of Iraq possessed three major dams (Dokan, Darbandikhan, and Dohuk) and an additional twelve dams of smaller and medium sizes as of 2007. The recently established Ministry of Agriculture and Water Resources has undertaken a thorough evaluation, wherein it has identified in excess of 100 prospective locations for the construction of dams. In the year 2014, the Directorate General of Dams introduced a comprehensive blueprint outlining the strategic growth and advancement of 245 reservoirs, with

[6] Law No. 14 of 1990, ratifying the Joint Minutes concerning the provisional division of the waters of the Euphrates River. Available at: https://faolex.fao.org/docs/pdf/irq15920.pdf [Accessed 11.06.2024].

35 of them being designated as high-priority projects at a later stage (Save the Tigris Campaign, 2020). In November 2019, the KRG allocated a sum of US$ 27.9 million to recommence building eleven dam projects that had been previously suspended as a result of the Islamic State in Iraq and Sham (ISIS) insurgency. This allocation is expected to enhance storing capability by approximately 59 million cubic metres. In light of numerous instances of dam failure in the surrounding area, the KRG has intensified its endeavours to mitigate susceptibility arising from upstream nations and enhance its influence over the central government.

III.2. Unifying Vision: Mesopotamia as a Shared Spatial Paradigm

The following excerpt is derived from the introductory statements of the Declaration issued in 2012[7] by Iraqi sheikhs at Hasankef, an ancient settlement in southeastern Turkey with a rich history spanning 12,000 years. This town faces the imminent risk of submersion due to the construction of the Ilisu Dam, which forms part of the extensive Gap Project. In addition to expressing solidarity, community leaders participating in Arab marches and Kurdish activists in the northern region of Turkish Kurdistan underscored the significance of safeguarding a common ecological and cultural environment against detrimental megaprojects. The neutrality of terminology within a region characterised by ethnic diversity and political divisions is inherently compromised. The utilisation of the Mesopotamian toponym serves to underscore a geographically and historically unique multicultural area, which brings together various ethno-national divisions within a politically fragmented river system. Additionally, it encompasses social and ecological challenges posed by human-induced hazards. Instead of being an isolated occurrence, the Declaration served as a catalyst for an emerging discourse of resistance against nationalist ideologies. The STC has experienced significant expansion and now functions as a civil society network that facilitates the collaboration of social and

[7] The declaration was made on 22 May 2012. Available at: https://www.iraqicivilsociety.org/wp-content/uploads/2012/05/20120-05-22-The_Mesopotamian_Tigris_Declaration.pdf [Accessed 11.06.2024].

environmental activists and movements in Iraq, Turkey, and Iran. Its primary objective is to advance environmental justice within the Mesopotamian region.

The inaugural Mesopotamia Water Forum, organised by the STC partner organisations in Iraq, took place in Sulaymaniyah in April 2019. The event was held under the theme "Water Knows No Borders." Aligned with global initiatives promoting the concept of unrestricted rivers, participants expressed their disapproval of the use of water manipulation as a means of political leverage, while advocating for the implementation of sustainable practises and fair distribution of shared water resources. The focus was shifted from climate change to the harm resulting from the negligence or pursuit of personal gain by coastal governments, which serves as a representation of their failure to adhere to international legal obligations, specifically the aforementioned 1997 UN Convention on the Law of Use of International Non-Navigable Waterways[8] and the 1971 Ramsar Convention on Wetlands.[9] The conclusive assertion made without any doubt was that the water resources in Mesopotamia are facing significant challenges due to irresponsible policies that have led to pollution and degradation of river ecosystems. In contrast to the prevailing perspective on the impact of the country, the utilisation of dams and irrigation systems to manage substantial water volumes was posited as a method of exerting social regulation and facilitating expropriation, with the aim of deliberately inducing water scarcity and manipulating the distribution of electricity. The forum emphasised the importance of recognising access to water as an inherent human right. It asked for a cessation of the construction of dam on the Tigris River and emphasised the necessity of a fundamental change in perspective to harness the potential of water as a catalyst for peace and collaboration.

[8] On 21 May 1997. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf [Accessed 11.06.2024].

[9] It is named after the city of Ramsar in Iran, where the Convention was signed on 2 February 1971. Available at: https://www.ramsar.org/sites/default/files/documents/library/scan_certified_e.pdf [Accessed 11.06.2024].

IV. Conclusions

Within the Tigris-Euphrates basin, which is a region that is marked by rising conflicts over water supplies, this study investigates the political factors that are linked with the building and operation of big dams. People have a tendency to see hydraulic facilities as instruments that may be used to manipulate political agendas and coordinate the arrangement of geographical landscapes. This research puts its emphasis on the Kurdistan Region of Iraq, where the government views dams as necessary for guaranteeing security. On the other hand, activists place a higher priority on the preservation of history and the development of collaborative water management practices. One of the obstacles that stands in the way of the effective management of the whole basin is the absence of a comprehensive cooperation agreement among the governments that receive water from the basin. The Mesopotamia Water Forum, which aims to create a unified vision that transcends boundaries, places a strong focus on the need of putting into practice water management techniques that are both sustainable and fair. The purpose of this article is to highlight the importance of collaboration between riparian countries in relation to the formation of new regulations for the purpose of avoiding conflicts, equitable water distribution, and the harmonious integration of development and preservation efforts in order to achieve sustainable management of the water resources in the basin for future generations.

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Article

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The Right to Access Information: Perspectives from Lawsuits of Refusal to Information Supply in Selected Countries and Vietnam

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Abstract: The right to access information constitutes a fundamental entitlement for citizens across numerous jurisdictions worldwide. In Vietnam, the Law on Access to Information became effective on 1 July 2018. Despite certain inherent shortcomings both objectively and subjectively encountered during its implementation, Vietnamese citizens have begun utilizing this legal framework to solicit information. In instances where requests are denied, individuals have resorted to lodging complaints or initiating administrative lawsuits. As of 15 May 2023, Vietnamese courts have overseen four administrative cases directly linked to the right to access information. This study centers on these four administrative cases, scrutinizes Vietnamese regulatory statutes concerning information access, and suggests avenues for improvement to ensure the practical realization of the right to access information, which inherently embodies the protection of rights. Employing analytical legal research methodology, this paper analyzes pertinent legal provisions governing information access. Additionally, research methodology of case study are conducted, such as analyze and compare judgments pertaining to information denial in various selected countries and Vietnam. Ultimately, an analytical approach rooted in the Vietnamese legal theory and law is employed to draw conclusions and provide recommendations.

Keywords: Vietnam; law on access to information; right to access information; lawsuit; refusal of information supply

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Contents

I. Introduction 387
II. Limit of the Right to Access Information 390
III. Specific Lawsuits about the Right to Access Information in Selected Countries .. 393
IV. Specific Lawsuits about the Right to Access Information in Vietnam 395
V. Comments 400
VI. Conclusion 405
References 409

I. Introduction

When coming up with the definitions of "the right to access information" in different parts of the world, almost all definitions mention it directly and recognize that it is a legal right, one of the legal and important rights of people. Also, these definitions mention the access to one type of information — the information held by the State, but less discuss the access to other information. In current international legal sciences as well as in the reality of enaction and implementation of the law on the right to access information, it deems that there is not much debate about this right, despite the name, it could be presented differently international and international legal documents. The right to access information is considered in the following aspects (Thai, 2014, pp. 21, 22).

The right to access information is the ability to act and the manner in which people choose to act in specific conditions specified by the law

so as to obtain the information held by the State. The people exercising the right to access information have the following rights:

(1) citizens have the right to receive information from State organizations or reserve the right to search for information to exercise their subjective rights;

(2) citizens can request the subjects who are responsible for information supply to fulfill their obligations on information supply upon request or require them to terminate any prevention behaviors such as refusal to provide information so that they can get their right of owning state information;

(3) citizens can request competent state agencies to interfere or take necessary coercive measures to protect their rights in case of complaints, lawsuits filed if the prevention of information supply harms their legal rights and interests.

Meanwhile, some scientists define the right to access information as the right to obtain information held by the State by making a request and the State has the obligation of providing this information (Mendel, 2003) (unless otherwise stipulated in other regulations on the waiver of the obligation on information supply). In the report in 1998 and 2000, United Nations Secretary-General Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression affirmed that the right to access information is an independent human right which is under the scope of freedom of speech protected by international documents on human rights. The right to access information regulates the State agencies' obligations to ensure that every person can access the information sources, first of all, are information held or managed by state agencies themselves in one form or another (United Nations, 1998[1], 2000[2]).

In Vietnam, before 2016, the right to access information was stipulated in the Constitution of 1992, and mentioned directly in the

[1] United Nations, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression No. E/CN.4/1998/40 dated 28 January 1988, para, 14–16.

[2] United Nations, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression No. E/CN.4/2000/63 dated 18 January 2000, Para. 42–43.

Law on Anti-Corruption, or indirectly in the Press Law, Land Law, and Environmental Protection Law. When the Law on Right to access Information was issued, the right to access information was proclaimed: all citizens can access the information of the State, excepting those are not allowed to be accessed and information that is accessed with conditions specified in the Law (Vietnam National Assembly, 2016).[3] In it information access is characterized as *"the activity of reading, watching, listening, recording, copying and taking photo of the information,"* (Art. 2, Clause 3) and "provision of information includes the state agency's disclosure of information and provision of information as requested by citizens" (Art. 2, Clause 4).

Therefore, according to Vietnamese Law, people can access information in two ways: firstly, they access the information disclosed by the state authorities; secondly, they seek information by requesting the tate authorities to provide it. Thus, it can be understood that people's right to access information means their right to read, watch, listen, record, copy, take photo of the information which is made public or provided by the state authorities when being requested. People's right to access information depends largely on the State's responsibility for assurance, respect, protection, on the level of socio-economic development, on the history, geography, religion of each nation. Thus, the contents of the right to access information are various, relying on the will of each nation and closely related to the protection of state confidentiality and privacy.

When the right to access information is violated — for example, by denial of information that does not comply with legal regulations, or by receiving incomplete, inaccurate, or delayed information from obligated agencies and organizations, citizens can file complaints or lawsuits to protect their rights. The court may consider the case, and if the court finds a violation, the judgment may require the state agency or organization to provide information, correct the information provided, or take other measures. The process and mechanism for filing lawsuits may vary depending on the law of each country.

[3] Vietnam National Assembly, Law No. 2014/2016/QH13 dated 6 April 2016 on Access to Information, Art. 3.

II. Limit of the Right to Access Information

The right to access information is a limited right, this limit is the scope of information that people could neither receive nor request for information supply. In common sense, this information must be accessible for the public unless there is another community interest, an individual interest that is more important and required to be kept secret. (Mendel, 2009, p. 4) The problem is that there must be sufficient legal bases to deal with the relationship between accessible and inaccessible information. In other words, the right to access information allows people to access documents, dossiers of the state authorities, but not all of them.

Each country sets out exceptions or waivers when the state authorities have the right not to disclose or to refuse to provide information. The regulation on such exceptions shows that the right to access information is only limited to the cases stipulated by the law and that the state authorities are not entitled to not disclose or refuse to supply information without a legitimate reason. Out of information under waiving scope, nations rank national security (defense, security), or a private secret, information regarding scientific policy development planning, national economic interests as the top informantion that needs protecting, namely:

(1) information regarding national security, defense and other international relationship; (2) information relating to private secret, personal safety;

(3) documents on prevention, inspection or lawsuit of criminal cases,

(4) information in relation to trade secret and economic benefits;

(5) internal information that is under preparation and has not been officially approved or adopted.[4]

In addition, nations set out some cases of waiver such as:

(1) the information to be provided will cause negative impacts on social safeguards, life, heath and environment, etc. For example, the

[4] A Model Freedom of Information Law (2001), Art. 19, Part IV. Available at: http://www.article19.org/data/files/pdfs/standards/modelfoilaw.pdf [Accessed 11.06.2024].

supply of information related to the living positions of rare animals, plants could affect their habitat as people would visit, hunt, cut and damage their habitat;

(2) the information to be provided will have adverse impacts on the economics, financial policies, monetary of a nation. Typically, the leakage of the information about the rise of petroleum price will make rush to buy petroleum for reserve, causing uneasiness of people and affecting the economics as individuals, organizations speculate petroleum and then sell it when the price rises to earn profits;

(3) the information could negatively affect the diplomatic relations between countries and among international organizations;

(4) the information, if being disclosed, will affect the inspection, prosecution, adjudication, and law enforcement.

This regulation is intended to ensure that the activities of agencies in charge of investigation, prosecution, adjudication and the process of fighting and preventing crime are not hindered, ensuring that crimes are detected, prevented and handled according to the provisions of law.

The identification of information scope to be accessed is closely related to the state secrets. Currently, many countries issue a separate law on state secrets so that the Law on access to information can be referred to. However, there are many nations that implement their management activities in secret, and even nations that are assessed to be democratic still carry out their activities out of public view when trying to categorize the information into a national secret or information to keep public order. This has created a situation of abuse of power, as state agencies can determine at their discretion what types of information are inaccessible to the public without considering the nature of the information.

Of course, every country has its own "sacred" secrets relating to security, national defense, but the "secret" of state management information will be simply the "wide opened gate" for corruption, injustice and inequality. It should be seen that corruption grows in secret places and avoids public places, thus, it can be easily observed that the non-public things will be the seed of corruption. The "instinct" of keeping secret grows in secret environment, allowing officials to be "inviolable," and free from responsibilities for explanation; this is a

difficulty that needs to be addressed. It is the secret culture that slows down the opening of the society, preventing the social development.

The determination of the limit of the right to access information is also closely linked to the private right. These two zones share a collapse zone, so conflict is unavoidable. The competent state agencies have right and responsibility for collecting a large amount of private information and sometime allows accessing information based on diversely various reasons. Information requesters include reporters who fight for transparencies, individuals who request explanation about decision making process, historians and centers studying current events and other non-current events.

Conflicts between the two laws on adjusting rights arising due to inconsistency in determining the subjects to be protected, whether or not the private information, information related to assets of officials are considered to be private. Today, the information related to individuals becomes more and more important when information is stored in e-data, so the information is disclosed more easily. However, laws on access to information and laws on data protection are still vague and inaccurate, and they fail to identify what information is private. This is applied excessively when privacy is used as a basis for preventing access to information.

In the US, the Government takes privacy as a basis to deny to make public the name of individuals who have recently been arrested in terrorism investigations (it often causes a lot of controversies). In Japan, the Code on private information protection is used to be the basis for keeping officials-related information secret. The UK keeps confidential costs and information about the trip of members of the British Parliament. In fact, in many cases, even knowing that information secret could harm the private right of citizen, the courts still lean towards the right to access information by requesting the state authorities to disclose information, but not revealing the name of the individuals involved. Therefore, if the State refuses to provide information for protecting private rights, this could be a basis for filing a complaint.

Therefore, the determination of the limit of information types that must be disclosed and provided and those types that cannot be disclosed

is always a difficulty for every nation. The advantages of a publicized government are to determine the responsibilities and the democratic participation more clearly. However, this sometimes could harm social values which have been respected by people such as as a person's private right.

III. Specific Lawsuits about the Right to Access Information in Selected Countries

1. Társaság a Szabadságjogokért v. Hungary (2009)[5]

The case is a judgment by the European Court of Human Rights (ECHR), reaffirming the fundamental right to access information held by public authorities. This case is significant as it established that access to information is an integral part of the right to freedom of expression under Art. 10 of the European Convention on Human Rights and Fundamental Freedoms. In this case, a non-governmental organization in Hungary requested access to transcripts from parliamentary sessions related to discussions on changes to drug laws. However, their request was denied on the grounds that the transcripts were considered internal documents and were not publicly available. The organization subsequently brought the matter to the ECHR, arguing that the denial of information violated their right to freedom of expression.

The ECHR ruled that the denial of access to such public information constituted an interference with the right to freedom of expression and lacked any legitimate justification. The Court emphasized that access to information plays a crucial role in promoting transparency and democracy, and public authorities have a duty to provide information upon request unless there are compelling reasons for secrecy.

The ECHR's decision in *Társaság a Szabadságjogokért v. Hungary* has far-reaching implications for the right to access information and freedom of expression in Europe. It reaffirms that access to information is a fundamental right and that public authorities must be transparent and accountable in their actions. The decision also encourages European

[5] Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-92171%22]} [Accessed 13.06.2024].

member states to review and strengthen their access to information laws.

2. Guardian Newspapers Ltd and Heather Brooke v. Information Commissioner and BBC 2007[6]

The case set a significant legal precedent in the United Kingdom, reinforcing the right to access public information and the importance of transparency in government. This case involved Heather Brooke, a citizen advocate for government transparency and accountability, who requested access to a report commissioned by the UK government on the implementation of the Freedom of Information Act. Brooke, a prominent advocate for transparency and citizen rights, filed a request under the Freedom of Information Act (FOIA) to obtain a copy of a report commissioned by the UK government on the implementation of the FOIA itself. The Information Commissioner, the independent body responsible for overseeing the FOIA, initially rejected Brooke's request, citing exemptions related to internal deliberations and the protection of commercially sensitive information. Undeterred by the initial denial, Brooke pursued her quest for access to the report through a series of appeals and legal challenges. She argued that the Information Commissioner's decision was flawed and that the public had a right to know how the government was evaluating the effectiveness of the FOIA.

The Upper Tribunal, the appellate body for FOIA appeals, overturned the Information Commissioner's decision and ruled in favor of Brooke. The Tribunal found that the public interest in understanding the government's assessment of the FOIA outweighed the claimed exemptions. This decision set a precedent for greater transparency in government self-evaluation processes.

3. Fishermen and Friends of the Sea v. Environmental Management Authority and others (2018)[7]

This case highlighted the significance of access to information in environmental decision-making and public scrutiny. In this case, the Fishermen and Friends of the Sea (FFOS), an environmental

[6] Available at: https://www.casemine.com/judgement/uk/5a938b4b60d03e5f6b82c838 [Accessed 13.06.2024].

[7] Available at: https://www.jcpc.uk/cases/jcpc-2018-0055.html [Accessed 13.06.2024].

organization, sought access to information from the Environmental Management Authority (EMA) regarding a controversial development project. The EMA initially denied their request, but the FFOS successfully challenged this decision in court.

The EMA v. FFOS case underscores the fundamental right of the public to access information related to environmental matters. It demonstrates that environmental organizations and individuals should have the ability to scrutinize government decisions and ensure that environmental considerations are adequately addressed. The case also emphasizes the importance of judicial oversight in upholding transparency and accountability in environmental governance.

4. Other Notable Cases on Access to Information in Asia

Prita Mulyasari v. RS Omni International Hospital (Indonesia, 2009).[8] This case involved a nurse who was dismissed from her job for criticizing the quality of services at a private hospital in Indonesia. The case gained significant public attention and raised awareness about the importance of freedom of speech and access to information in holding healthcare providers accountable.

Nithyananda Ashram v. Government of Tamil Nadu (Madras High Court, 2013)[9]. In this case, a religious organization challenged the government's decision to block access to its website. The court ruled in favor of the organization, recognizing that the government's action violated the organization's right to freedom of speech and the public's right to access information.

IV. Specific Lawsuits about the Right to Access Information in Vietnam

As of June 2023, there were four lawsuits in Vietnam about the right to access information that have gone on trial, including (i) two lawsuits in Da Nang city in 2019 (Supreme People Court at Da Nang City, 2019)[10]

[8] Indonesia Law Advisory. Available at: http://indonesianlawadvisory.com/Case%20Prita.aspx [Accessed 13.06.2024].

[9] Available at: https://indiankanoon.org/doc/13403449/ [Accessed 13.06.2024].

[10] The appeal judgment No. 199/2019/HC-PT dated 17 December 2019 re: "Request on cancellation of administrative decision."

and 2021 (Supreme People Court at Da Nang City, 2021)[11] on request for supplying information relating to the Report on verification results of the inspection, denunciation settlement; (ii) one lawsuit in Can Tho city in 2020 (Can Tho City People Court, 2020)[12] about the denial of providing information on land planning; (iii) the one in Khanh Hoa province (2022) (Khanh Hoa People Court, 2022)[13] about not supplying information about an enterprise's investment registration certificate which directly related to the petitioner's acquired land. These lawsuits are only individual lawsuits against state agencies, with no lawsuits from organizations, institutions, or businesses regarding the right to access information.

— The first lawsuit in Da Nang (Supreme People Court at Da Nang City, 2019): Mr. DC requested to be provided with the Report on verification results of the inspection, denunciation settlement, Report on settlement of complaints and grievances. The first instance administrative judgment No. 12/2019/HC-ST was issued on 14 August 2019 of Da Nang People's Court on refusal of Mr. DC's request as the Court assumed that the report on the verification results of Da Nang city Inspectorate were the reports after Da Nang city Inspectorate was assigned by Da Nang city People's Committee. The report's contents were the bases for the Chairman of city People's Committee to handle people's complaints, were the documents of subordinates reported to superiors. And reports on verification, denunciation results fell into the Inspection's List of confidential documents according to regulations in Clause 2, Art. 1 of the Circular No. 08/2015/TT-BCA dated 27 January 2015 of the Ministry of Public Security, thus, these reports were inaccessible to people and even when being disclosed according to the Art. 6, Law on Access to Information as well as regulations at Clause 1, Art. 9 of Law on Denunciations 2011 stipulating that the denunciator had no right to request for information on denunciation verification

[11] The appeal judgment No. 02/2021/HC-PT dated 30 July 2021 re: "Complaints on the refusal to provide information, cancellation of decision on complaint address."

[12] The judgment No. 42/2020/HC-ST dated 25 November 2020 issued by Can Tho City's People Court.

[13] The judgment No. 13/2022/HC-TC dated 20 April 2022 issued by Khanh Hoa Province's People Court.

results. The first instance judgment of Da Nang High Court applied above bases and Art. 12 Circular No. 33/2015/TT-BCA dated 20 July 2015 of the Ministry of Public Security on remaining the first instance judgment.

— The second lawsuit in Da Nang (Supreme People Court at Da Nang City, 2021) was initiated in 2020. It was similar to the above case when the plaintiff requested the Inspector of district T, Da Nang city for providing the information of the Report No. 41/BC-TTr dated 11 June 2013 of district T's Inspector on the verification results of the contents about people's denunciation contents and was denied.[14] The Inspectorate assumed that this report was the document compiled by the State for internal works, based on Clause 2, Art. 6, Law on Access to Information 2016, Art. 5.1d Decree No. 13/2015/ND-CP promulgating details and methods of enforcing the Law on Access to Information, and refused to provide information. The first instance and appeal court were also based on the regulations mentioned above to refuse Mr. C's request.

— The third case is in Can Tho (Can Tho City People Court, 2020)[15]: Mr. Pham Hong D in district B, Can Tho city, initiated a lawsuit to District B People's Committee, Can Tho city about the refusal to provide information on land planning via the response to deny providing information. For this case, Can Tho city People's Court of First Instance accepted the Mr.D's lawsuit request and ordered district B People's Committee to receive, provide the initiator with the information regarding the planning of the land plots where Mr. D is not the owner in district B, Can Tho city. This case was not on appeal.

[14] Inspector of district T issued the Notice No. 112/TB-TTr on denying providing the Report No. 41/BC-TTr dated 11 June 2023 of district T's Inspector. The Trial Penal found that the Report No. 41 above is the document compiled by the district T's Inspector, it reported the verification results according to the Chairman of district T People's Committee, Da Nang city to address the denunciation dated 17 April 2013 of Mr. DC, it is the internal job, and inaccessible to people in accordance with the Clause 2, Art. 6, the Law on Access to Information 206.

[15] The judgment No. 42/2020/HC-ST dated 25 November 2020 issued by Can Tho City's People Court.

— The fourth case (Khanh Hoa People Court, 2022)[16]: this lawsuit has been causing a lot of controversies as it has been reported in almost all top presses in Vietnam. On 13 April 2020, Mr. Nguyen Van Binh in Khanh Hoa filed a lawsuit to Khanh Hoa Provincial People's Committee to request for providing information on the project licensed in his land plot which had been acquired, including the golf course Investment Registration Certificate issued to Hoan Cau company so that he could obtain the documents and information to sent to competent agencies to address his complaint. As from 2000 to date, he and his family have been affected by the land acquisition decided by Khanh Hoa Provincial People's Committee, the land was acquired and hand over the land to Hoan Cau Construction Trading Co., Ltd (Hoan Cau JSC) for carrying out Lo River Tourism and Recreation Area (currently the Diamond Bay resort & spa Nha Trang tourism complex). He believed that the land acquisition failed to comply with regulatory laws. He has continuously sent complaints over 20 years, but no satisfactory settlement was given.

On 13 May 2020, Mr. Binh filed the case to Chairman of Provincial People's Committee (PPC) on the behavior of refusing to provide information. In June 2020, Chairman of Khanh Hoa Provincial People's Committee signed the Document No. 5898/UBND responding "the refusal to provide information to Mr. Binh is because such supply of information relating to the issue of Golf Investment Registration Certificate of Hoan Can Company infringed on the enterprise's legitimate rights." Unsatisfactorily, Mr. Binh initiated the case to Khanh Hoa Provincial People's Court to request for cancelling the document of Chairman of Khanh Hoa Provincial People's Committee, requesting the Provincial People's Committee to provide information to citizen as stipulated by the laws.

In May 2021, Khanh Hoa Provincial People's Court brought the case to trial,[17] but the Trial Panel suspended the court to collect, supplement

[16] The judgment No. 13/2022/HC-TC dated 20 April 2022 issued by Khanh Hoa Province's People Court.

[17] At the court, the PPC Chairman's Protector said that the Golf course Investment Registration Certificate of Hoan Cau Company was the information related to the enterprise's business secret. Unless being approved by the Company, the supply of information would infringe on the enterprise's rights and benefits.

documents, evidence. In December 2021, The Chairman of the People's Committee of Khanh Hoa province has decided to withdraw the sued document on the grounds of "not being suitable for the form of the document" and request the Office of the People's Committee to respond. On 14 January 2022, Khanh Hoa Provincial People's Committee issued the Notice No. 36/TB-VPUB on denial of providing information to Mr. Binh with the reason that the information he requested had been existed before the Law on Access to Information 2016 and the Decree No. 13/2018/ND-CP regulating details and method of enforcing the Law on Access to Information effectively. Still not agreeing with these results, Mr. Binh filed a lawsuit against the Provincial People's Committee office, requested the court for cancelling the Notice above, and requested the Office to provide information.

On 20 April 2022, Khanh Hoa Provincial People's Court re-opened the trial and the verdict in judgment No. 13/2022/HC-TC rejected Mr. Binh's request to cancel Document 5898 with the reason that the Chairman of the Provincial People's Committee had withdrawn and cancelled this Document in December 2021. For the request to cancel the Notice 36/TB-VPUB, the Trial Panel concluded that this notice was an independent document which would not be considered in this case, so Mr. Binh had the right to initiate another independent administrative lawsuit.

Then in May 2022, Khanh Hoa Provincial People's Procuracy partially appellated the above judgment. On 16 August 2022, the High People's Court in Da Nang opened an appeal trial, accepted part of the lawsuit filed by Mr. Binh and accepted the appeal of Khanh Hoa Provincial People's Procuracy, revised part of the first instance judgment of Khanh Hoa Provincial People's Procuracy; only rejected Mr. Binh's claim on cancellation of the Document No. 5898 as the subject of the lawsuit no longer existed. As for the content of forcing Khanh Hoa Provincial People's Committee to provide a private certificate of ownership, the court did not reject this request. Whenever requested, this request will be gone on trial in another administrative case.

V. Comments

Out of the four lawsuits above, there is a case where the petitioner won, two cases where the petitioner lost and one has been unclear about the final results of whether or not the information would be provided. Studying the contents of judgments, the key problem should be clarified that which information is inaccessible and which must be provided upon request.

According to the provisions of Art. 6 of the Law on Access to Information 2016, the information which is inaccessible by citizen includes:

(1) state secrets, including information with important contents in the fields of politics, defense, national security, foreign affairs, economics, science, technology and other fields as prescribed by law. When the information that is a state secret is declassified, citizens can access it according to the provisions of this Law.

(2) The information that, if accessed, will harm the interests of the State, adversely affect national defense, national security, international relations, social orders and safety, social morality, community health; endanger the lives or property of other people; information belonging to confidential works; information about internal meetings of state agencies; documents drafted by state agencies for internal works.

The information provided upon request specified in Art. 23 of the Law on Access to Information 2016, includes:

(1) information that must be made public and information within the disclosure period but has not yet been made public, information after the deadline for disclosure as prescribed by law expires. The information is being made public but due to force majeure reasons the requester could not be accessible.

(2) Information related to business secrets, private life, personal secrets, and family secrets which are eligible to be provided according to the provisions of Art. 7 of the Law on Access to Information.

(3) Information related to the life, daily life, production and business of the requester but not belonging to the type specified in Art. 17 and Clause 2, Art. 23 of the Law on Access to Information.

(4) Based on duties, powers, conditions and actual capabilities, state agencies may provide other information created or held by them.

Thus, according to the exclusion principles, citizens have the right to access information that is not within the scope of Art. 6 above. However, when put into practice, each type of information will have different aspects regarding the level of disclosure, supply upon request and not supply of the same type of information, specifically.

Firstly, is the "Inspection Conclusion Report" a document that can be accessed upon request. Both judgments in Da Nang were determined differently by the courts, at times the Inspection Conclusion Report was a "confidential document," at other times it was an "internal document" and they were applied differently, but both fell into the type of "inaccessible document," so agencies' refusal to provide must be based on clear legal grounds.

After the Law on Protection of State Secrets was promulgated in 2018, the Prime Minister issued decisions stipulating the list of secrets for each field. According to Decision No. 774/QD-TTg dated 5 June 2020 promulgating the List of State secrets in terms of inspection, settlement of complaints and denunciations and prevention and fight for corruption, the Report concludes inspection results of Inspection Team members and of the Inspection Team. The contents of the inspection conclusions have not been made public, report on the results of verifying the denunciation contents before concluding the denunciation content public. If the conclusion of the denunciation content has not been made public, it must be kept confidential.

As for the Inspection Conclusion, it must be made public, so if relevant entities do not receive the Inspection Conclusion, they have the right to request for supply, as Art. 79 of the Law on Inspection of 2022 stipulates that the inspection conclusion must be disclosed in full text, except for state secrets or other secrets as prescribed by law. Regarding the results of complaints and denunciations, the complainant or denouncer will receive these documents.

Secondly, there are different opinions on the question that does the information about the land for which the requester is not the land owner belong to the group of accessible information upon request. According to district B Urban Management Department, Can Tho city, based on

Art. 38 and Art. 191 of the Civil Code of 2015,[18] to ensure the legitimate right and interests of the person whose name is on the land use right certificate, if the requester refuses to provide a Letter of Authorization of the person who holds land use rights in their names, the request for information supply will not be fulfilled.

At the court's viewpoint, Art. 17.1g of the Law on Access to Information of 2016 states that the planning information and land use plans are those that must be made public and are not private information. The disclosure of the planning and land use plans aims to create transparency in land management and avoid unnecessary risks in land transactions. Therefore, when requested, the land management agency must be responsible for providing it. This regulation shows that information about planning is made public without limiting the scope or object of disclosure. This means that people other than the person whose name is on the land use rights are provided with information. Therefore, Mr. D has the right to access information, even though he is not the person holding the land use rights. Furthermore, based on Clause 13, Art. 29 of the Law on amending and supplementing a number of articles in Art. 37 of the Law related to planning, the People's Committees at all levels are responsible for organizing the reception, processing and provision of documents upon request. The information provided must be based on the approved urban planning and urban design projects and promulgated regulations on management according to urban planning and design projects. Thus, in this case, the district B People's Committee is responsible for receiving, processing and providing information upon request. Therefore, the plaintiff's request satisfies the statutory conditions. The district B People's Committee's failure to provide the planning information for the mentioned land plots upon request is illegal.

Thirdly, there are different points of view about whether or not the Investment Registration Certificate belongs to the case of not providing

[18] Vietnam National Assembly, Civil Code of 2015, Art. 38 stated that: "3. The collection, store, use and disclosure of information related to private life, personal secrets must obtain the consensus of that person.

The person who is not the owner is allowed to use assets according to the agreement with the owner or according to the regulatory laws."

information. For the case of Mr. Nguyen Van Binh, the refusal of Khanh Hoa Provincial People's Committee to provide information showed a relatively big gap between regulatory laws and the reality of excercising the law on access to information. Actually, the information requested for information supply by Mr. Binh is only the Decision of the investment project of which he is the affected person.

— The reason that "exercising citizens" right to access information must not infringe on the national or ethnic interests, the legitimate rights and interests of agencies, organizations or other people.[19] According to Clause 5, Art. 3 of the Law on Access to Information, that Mr. Nguyen Van B requested the Provincial People's Committee to provide Company H's Golf Course Investment Certificate violated the legitimate rights and interests of Company H; Therefore, the PPC refused to issue the Certificate. And the Investment Registration Certificate (the Project No. 2234135873) with the first issuance on 16 November 2016 by the Department of Planning and Investment issued to H Company Limited, the Zone VII project region — Golf Club is not the information that must be made public according to Art. 17 of the Law on Access to Information 2016. Clearly, if based only on the regulation that "it must not infringe on national interests, people's rights and legitimate interests of agencies and other organizations" without any specific explanation of what is "infringing on the legitimate rights and interests of agencies and organizations" and what level of infringement will create arbitrariness when applied.

— The use of the reason that the information is related to business secrets to refuse to provide information, this type of information is not the "business secret" which can be based to refuse to provide information.[20] According to Clause 23, Art. 4 of the Unified Intellectual

[19] The document No. 243/UBND-NC dated 11 January 2021 sent to the court, the defendant is Chairman of Khanh Hoa Provincial People's Committee, explained the reason why he issued the Document No. 5898/UBND-NC dated 16 June 2020 for denying the supply of information.

[20] At the first instance court in May 2021, Chairman of Khanh Hoa PPC and his interest's protector said that the 18-hole Golf Course Investment Registration Certificate of Hoan Cau Company under Lo River Tourism and Recreation Area Project belongs to the business secret information of Hoan Cau Company, unless obtaining the Company's agreement, the supply of information related to this Certificate will infring

Property Law, a *"business secret"* is information obtained from financial and intellectual investment activities that has not been disclosed and is likely to be used in business,[21] the "administrative" decision issued by the People's Committee on investment project approval is completely not a business secret to refuse to provide information. Therefore, based on Art. 7 and Art. 23 of the Law on Access to Information, citizens still reserve the right to access this information upon request.

— The use of the reason that information was created before the Law on Access to Information took effect in 1 July 2018 to deny providing it is not in accordance with the law. Based on Art. 14 of Decree 13/2018/ ND-CP, the access to information created before 1 July 2018 continues to comply with the provisions of law and regulations on access to information issued before 1 July 2018 and must not be against Art. 3 of the Law on Access to Information. Mr. Binh's legal rights and interests are affected by the decision made by the People's Committee on land acquisition and hand over Hoan Cau Joint Stock Company for project implementation and his wish to know how the golf course investment registration certificate is affects his land plot is completely legitimate. According to Art. 28 and Art. 35 of the Land Law 2013, Art. 5 of the Ordinance on Democracy at the grassroots, Art. 3 of Law on Access to Information, there are sufficient legal bases to provide information to Mr. Binh is legal.

— Information about investment certificates issued by State agencies is not in the list of confidential information, or confidential documents, but is just normal information documents and papers. So, there is no reason for the State agencies to deny providing it to citizen. Furthermore, the people's request to provide information of an investment project, which is directly related to them, does not only comply with the Law on Access to Information. Through it the people

legal rights and interest of Hoa Cau Company. So, requesting the Trial Panel to reject the plaintiff's lawsuit request.

[21] Vietnam National Assembly, Integrated Law on Intellectual Property Rights dated 8 July 2022, Art. 84 specifies more details about the conditions on protected business secret (1): Neither to be common knowledge nor easily obtained; (2) To be capable, when being used in the business course, to render advantages to its holder over those who do not hold or use it; (3) To be kept secret by its owner with necessary measures so that it shall neither be disclosed nor easily accessible.

exercise their right of supervision. Therefore, the refusal of Khanh Hoa PPC to provide information fails to comply with Art. 6 of the Law on Access to Information and other regulatory laws.

— This lawsuit is ongoing and has not yet ended. However, considering the complex procedure required by authorized state agency, from refusal, claim the lawsuit, withdraw of the refusal document in the first instance and at appeal stages. Consequently, the requester has not been provided with the information. This reflected that the access to information, in reality, is quite difficult when the state agencies do not want to provide as Mr. Binh's application on 13 May 2020 was only a petition but not the Request for Information Supply. The reason that Provincial People's Committee issued document No. 12644/UBND-NC dated 13 December 2021 to send to the Government Inspectorate to ask for opinion on dealing with citizen's petition related to the S Tourism and Recreation Area Project, N city, of which Mr. Binh's petition and request form for information supply had been checked, considered by the Government Inspectorate and Government Inspectorate's Inspection Team and the official inspection results related to the project above according to the Decision No. 111/QD-TTCP dated 17 August 2020 on establishment of the Inspection Team for "inspection, review request, recommendations of some households related to the S Tourism and Recreation Area Project in P commune, N city, Khanh Hoa province" for refusal is unconvincing.

VI. Conclusion

In the era of technological development, information plays an important role in the administration of a State. Making information public to every person to access is considered to be one among scales to assess the democracy of a country. The Law on Access to Information of 2016 is the first step, which shows a strong will to protect citizens' political rights. The proactive application of the right to access information by the people is not yet widespread, so there are still few lawsuits and complaints and mainly they are related to information on the inspection, complaint and denunciation process, planning-related information.

Under legal perspectives, lawsuits where domestic administrative agencies refuse to provide to citizens the above information demonstrate that people are clearly aware of the enforcement mechanism as well as the protection of constitutional rights when there is a infringement from other subjects. Dispute settlement and administrative enforcement through the judicial mechanism is a civilized way due to the advantages of legal proceedings. Initiating an administrative lawsuit is a citizen's desire to exercise their rights and have their right to access the information protected. This is a behavior that needs to be viewed positively in the context of establishing a rule of law state in our country. Therefore, some recommendations need to be formulated.

First, in cases where the type of information is not clearly specified by law as to whether it belongs to the category of refusing people's requests for information or not, the following principles should be applied. Inaccessible information must not meet three conditions as below: (1) it belongs to one of the inaccessible contents and must have a specific legal basis; (2) if the disclosure of information actually harms the national security; and (3) the classification agency is capable of identifying and describing specific damages — in this case it must make a clear estimate when they impede the access to information, the damage caused by the information leakage could be much greater than the benefits that the public enjoys when they obtain information. At the same time, a specific guideline on how to access information with conditions and inaccessible information should be provided.

Second, regulations on information classification should be completed as the current regulations contain many inadequacies, inconsistencies and fail to cover all types of information. According to current regulations, information is divided into 3 types: (1) confidential information according to the law; (2) information that must be made public; (3) information that must be provided upon request. As for the information in the third case, it is not insignificant but has not been clearly defined, impacting the exercise of the right to access information.. For instance, when conducting inspection on information related to corruption prevention, whether or not the asset declarations, confirmation of income tax payments, list of properties in the data of notary public agencies of officials, civil servants, and public employees

belongs to the type of information that must be made public. Kindly note that the handling of the information related to corruption warrants careful consideration, including determining the extent to which it should be made public. This gap is the cause leading to the interruption of the access to information of citizen, and the anti-corruption activities are also not effective.

Third, it is necessary to clarify in what cases citizens would not be provided with information, as current regulations are quite quantitative. The competent authorities have the right to deny providing information in certain cases, namely, *"the information if accessible will harm the interests of the State, adversely affect national defense, national security, international relations, social orders and safety, social morality, community health; endanger the lives or property of other people"; "the information is beyond the authority's capacity of fulfillment or could harm the ordinary activities of the agency."*[22] In this process it is hard to avoid inconsistencies on the applicable conditions as well as the possibility that the State relies on it to postpone the supply of information.

Fourth, it is necessary to set out a specific regulation for settlement of violations, responsibililites of State agencies in ensuring the right to access information. Article 15 of the Law on Access to Information stipulates that any person who violates regulatory law on access to information, upon the nature, violation extent, will be disciplined, handled of administrative violation or prosecuted for criminal liability. However, in the three cases that were considered above, the case in Can Tho caused impacts directly on legal interests of the information requester. The delay, refusal to provide information without any compensation mechanism will have many impacts on people, affect people in implementing their rights as they are in concern of costs when being denied providing information.

Fifth, in cases where state agencies refuse to provide information, there should be simple and efficient procedures for resolving these issues. The goal is to obtain "information," so the existing complaint

[22] Vietnam National Assembly, Law No. 2014/2016/QH13 dated 6 April 2016 on Access to Information, Art. 6.2 and 28.1(d).

and lawsuit regulations are overly complex and time-consuming. It discourages the plaintiff and reduces his/her expectation of exercising their right to access information. At the same time, it is necessary to abolish procedures on exercising the right to access information that cause difficulties analyzed above so that this right can be realized, such as refusing to provide information if the "requested information is beyond the capacity of fulfilment or affects the normal operations of the agency" or refusing if the names of documents, records and dossiers in the request form for information supply are incorrect or the name of request form is incorrect.

Sixth, it is necessary to set out a principle of dialogue between relevant parties (Carey and Turtle, 2006, p. 10) including the subject requesting information, the subject holding the information and third parties related to the information to find out a reasonable balance between public interests, state interests and individual interests rather than agencies determining the type of information themselves. The general trend in some countries is to establish an independent information committee to specifically perform the function of supervising the implementation of the right to access to information (Bainisar, 2006, p. 23). There's no single model for Freedom of Information (FOI) oversight commissions. Some countries, like Thailand, embed them within the Prime Minister's Office, while others make them independent bodies or integrate them with existing government structures, like parliaments. Based on the report of Bainisar, 22 countries have established such commissions. Interestingly, several nations, including the UK, Germany, Switzerland, and Slovenia, have merged their FOI commissions with national Data Protection Commissions. This approach has been mirrored at the sub-national level in Germany and Canada, although a recent Canadian government commission rejected the idea. Ireland takes a different approach, combining the Information Commissioner role with the general Ombudsman position. The power wielded by these commissions also varies. In Canada and France, they hold similar authority to Ombudsmen. Conversely, commissions in Slovenia, Serbia, Ireland, and the UK can issue binding decisions, with limited appeal options or ministerial overrides in specific cases. The Information Commissioner typically has broader responsibilities beyond handling appeals. These

often include overseeing the entire FOI system, providing training, proposing legislative changes, and raising public awareness. Notably, the Commissioner in Antigua and Barbuda even has the authority to receive information from whistleblowers (Bainisar, 2006, p. 23).

Thus, while some argue that establishing a new independent agency would be costly, the potential benefits far outweigh the initial investment, for example: it would dedicate the necessary time and resources to ensure thorough and efficient processing of FOI requests; an independent agency would safeguard the impartiality of the FOI process, fostering public trust and transparency; and most crucially, an independent agency would possess the authority to compel government agencies to disclose information, ensuring accountability and upholding the principles of open governance. Moreover, global experience overwhelmingly demonstrates that the independent agency model is the most effective approach to implementing FOI laws. In light of these compelling arguments, Vietnam should seriously consider establishing an independent FOI agency to strengthen its commitment to transparency.

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