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ADDRESSING NEW CHALLENGES

Article

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Family and Demographic Policy in the Vector of Ensuring National Security of Russia

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Abstract: Based on the analysis of the main normative documents defining the directions of ensuring national security and development of Russia, the authors substantiate the need to form a strategic program and target document in this area, integrating the tasks of implementing demographic security and family policy of the State. The authors provide their understanding of the content of demographic security, which the authors consider as one of the components of the national security of the Russian Federation. The authors substantiate the conclusion that the main goal of demographic security in the context of modern challenges is to improve demographic indicators through the reproduction of indigenous population of Russia, reflecting an increase in fertility and a decrease in mortality. Russia's solution to the problem of depopulation is possible only through the implementation of systemic activities aimed at solving the problems of ensuring demographic security, by developing

a unified demographic policy aimed at stabilizing the processes of natural reproduction of the population at the expense of the indigenous population, where the family is the basic subject.

Keywords: constitutional development; national security; demography; demographic security; family protection; traditional values; Russian identity

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Contents

I. Introduction

In the current century, the importance of the role of the demographic factor in the further socio-economic development of Russia is increasing. During the period of the first depopulation from 1993 to 2009, the total population of Russia decreased by more than 5 million 825 thousand people. In 2010, the trend of general depopulation was “reversed”, the population began to increase, largely due to the migration flow to Russia. Only in 2013, the birth rate exceeded the death rate, which indicates a natural population growth.

According to official data from Federal Statistics Service, since 2015 the natural decline of the population has been recorded again. The population is decreasing annually due to a decline in the total fertility rate, which suggests a significant decrease in the population after several decades. Regardless of the accuracy of forecasts, population decline has negative geopolitical and socio-economic consequences for Russia. The

negative dynamics of demographic indicators also has a negative impact on the development of certain Russian regions, some of which can be considered endangered, which allows us to talk about the demographic problem as a serious threat to Russia's national security.

In modern Russia, a search is underway for mechanisms to stabilize the population, stimulate fertility by introducing various socio-economic measures to support Russian families — families with children, young families, single parents, reducing mortality, improving public health services, including reproductive health, etc. Important achievements include the implementation of programs for the socio-economic development of the Russian Federation in the medium term in order to stabilize the demographic situation, housing construction programs, mortgage loans, maternal (family) capital, etc.

II. Demographic Security in the Vector of Constitutional Development of Russia

The constitutional development of Russia presupposes protection of constitutional values expressed in ensuring the foundations of the constitutional system and state sovereignty in a multipolar world, protection of human and civil rights and freedoms, preservation and multiplication of the Russian nation — the multinational people of Russia. The stability of the constitutional state is ensured by an effectively functioning Constitution — the foundation of Russian statehood and the entire legal system that guarantees the implementation of the constitutional and legal status of the Russian Federation as a democratic, legal, social state. The Constitution of the Russian Federation defined the values and ideals of society, outlined the social conditionality of the development of the state and its legal system to the national and cultural traditions of the people and the ideals of law that are accepted by society (Komarova, 2019, p. 63). By consolidating the fundamental ideological principles of organizing the life of society and the development of the constitutional state, the Russian Constitution pays special attention to the protection of the family, motherhood, fatherhood, and childhood. The guaranteed implementation of the protection of the family as the most important social institution for stabilizing the population is

ensured, first, by the Constitution itself due to its direct effect and the highest legal force.

The constitutional reform initiated by the President of Russia in 2020 increased the importance of the institution of the family in the public consciousness. For the first time in Russian history, the institution of fatherhood received constitutional protection, the value content of the institution of marriage as a union of a man and a woman was indicated, and the protection of which was attributed to the joint jurisdiction of the Russian Federation and its constituent entities (Part 1 Art. 72 of the Constitution of the Russian Federation). The Constitution introduced a new direction for the implementation of state social policy — to preserve traditional family values, the implementation and provision of which is attributed to the authority of the Government of the Russian Federation (Part 1 Art. 114 of the Constitution of the Russian Federation).

In fact, the updated Constitution consolidated the foundation of the Russian constitutional model of family protection, defining the role of civil society and the state in protecting the family, the vectors of law-making and law enforcement, which is especially relevant in modern conditions of the spread of anti-family ideologies by Western countries aimed at destroying the institution of the family. The fundamental foundations of protection of the institution of the family, outlined at the constitutional level, have been repeatedly outlined in the Annual Messages of the President of Russia to the Federal Assembly of the Russian Federation, instructions to the Government of the Russian Federation, as vector directions for the development of the state with the socially oriented demographic policy.

In modern Russia, the above-mentioned priorities are reflected in strategic program and target documents adopted for the long term: The National Security Strategy of the Russian Federation,[1] the Foundations of state Policy for the Preservation and Strengthening of traditional Russian spiritual and moral values (Presidential Decree No. 809 dated 9 November 2022), Measures of social support for multi-child families (Presidential Decree No. 63 dated 23 January 2024), National Development Goals of the Russian Federation for the period up to 2030

[1] Presidential Decree No. 400 dated 7 July 2021. (In Russ.).

and for the future up to 2036 (Presidential Decree No. 309 dated 7 May 2024).

The National Security Strategy of the Russian Federation, approved by the President of the Russian Federation in 2021, defines the content of the categories "national security" and "national interests". National security is understood through the state of protection of the national interests of the Russian Federation from external and internal threats, which ensures the realization of constitutional rights and freedoms of citizens, decent quality and standard of living, civil peace and harmony in the country, protection of the sovereignty of the Russian Federation, its independence and state integrity, socio-economic development of the country (Art. 5). The national interests of Russia, expressed in the objectively significant needs of the individual, society and the state for security and sustainable development, contain a list of tasks to ensure national security, the first among which is the task of saving the people of Russia and developing human potential.

We suppose Vadim M. Mamonov that national security is formed based on the national interests of the state in a specific historical period and represents "a set of internal and external conditions for the existence of an individual, society and the state, ensuring a decent life for citizens, protecting the interests of society, the sovereignty of the people, excluding the possibility of forcible change of the constitutional system" (Mamonov, 2004, p. 18). The constitutional value of ensuring national security forms the targets and priorities for the development of the legal system to ensure all levels of security: personal security, public security, and state security. In this context, demographic policy pursues the goals of ensuring demographic security, which is integrated into the national security system, as a source of all other types of security affecting constitutional and legal relations of vital importance to the individual, society, and the state (Kardashova, 2013, p. 23). In the context of declining demographic indicators for a number of years, demographic security has been a condition for ensuring national security. In this regard, we believe that the tasks of demographic policy should proceed from ensuring national security and the interests of Russia.

The similar approach to demographic security is reflected in the works by Leonid L. Rybakovsky, who considers demographic security as one of the components of a broader concept of "national security", which includes other types of security (economic, environmental, financial, resource, food, demographic, etc.) (Rybakovsky, 2003, pp. 37–46). Demographic security, according to Rybakovsky's approach, can be expressed through the state of demographic processes sufficient for the reproduction of the population without significant external influence and the provision of human resources for the geopolitical interests of the state. Developing this thesis, the scientist emphasizes that demographic security reflects "the functioning and development of the population as such in its age, gender and ethnic parameters, its correlation with the national interests of the state, consisting in ensuring its integrity, independence, sovereignty and preservation of the existing geopolitical status". As noted in the scientific literature, at present "Russia is entering a long period of unfavorable demographic changes for its economy, cessation of population growth, reduction of the working age population and its aging, increase in the demographic burden on the able-bodied population. These factors will have a hindering effect on the development of the economy and will make it difficult to solve social problems" (Vishnevsky and Scherbakova, 2018, p. 50).

The basic threats to demographic security are as follows: declining birth rate and, accordingly, population decline, demographic expansion associated with a significant transformation of the ethnic structure of a number of regions (when undeveloped and devastated territories of Russia are filled with migrants from other countries, primarily with very high population density and conflict zones), the loss of historically dominant cultural values, religious, political, etc. positions, and the loss of part of the ancestral territory (Zolotareva and Nakisbaev, 2024, p. 155).

The priorities of saving people, improving the quality of life of families with children, and preserving the Russian nation as a strategic direction of state policy have been repeatedly emphasized by the President of Russia in annual messages to the Federal Assembly of the Russian Federation due to the understanding of the role of the multinational people as a source of power and bearer of sovereignty,

keeper of cultural and historical heritage and the foundation for further development of the country. Saving the people of Russia, developing human potential, improving the quality of life and well-being of citizens, preserving and strengthening traditional spiritual and moral values of Russians, strengthening social support for a large family all the designated priorities of state policy are directly related to demographic policy. Addressing the nation in February 2024, the President of Russia outlined the leading role of the family in the development of Russian society and the state, stressing that "the main purpose of the family is the birth of children, the continuation of the human race, the upbringing of children, and, therefore, the continuation of our entire multinational people. Supporting families with children is our fundamental moral choice. A large family with many children should become the norm, the philosophy of society, the guideline of the entire state strategy".

Demographic security is aimed at ensuring Russia's national security. We agree that the demographic security can be defined as the central and unifying element of national security that ensures the interplay of all other elements of national security — military, economic, social, cultural, personal, etc. (Sidorenko, 2019, p. 10). Being the basis of national security, demographic security sets the task of ensuring a balance in the population, which is the result of effective state policy (social, economic, socio-cultural) and the mainstay of economic, military, personnel, migration, scientific and other policy directions to overcome national threats.

There are two main approaches to the definition of demographic security among scholars: instrumental and value-based. According to the first, demographic indicators directly determine the socio-economic development of the state; according to the second, demographic processes are aimed at maintaining and preserving the Russian nation, culture and traditions. We agree that in relation to the Russian Federation, the reduction in the number of permanent population, and primarily the number of the titular Russian nation, is a threat to its geopolitical position that hinders its development as a great power (Glushkova and Khoreva, 2014, p. 16). It can be noted that human capital determines the prospects for the development of a modern state, and the main demographic threat is depopulation — a real or possible reduction in the population.

III. The Problems of Implementing the Conceptual Approach to the Formation of Demographic Policy

At the level of state policy objectives, demographic tasks for stabilizing the population began to be set relatively recently, in the early 2000s despite the fact that experts noted a decrease in demographic indicators since the 1990s, after the USSR collapsed, due to the economic crisis of this period that resulted in the low standard of living of the population.

In the first Concept of National Security approved in 1997, the national security of the Russian Federation was understood as "the security of its multinational people as the bearer of sovereignty and the only source of power in the Russian Federation". Sharp decrease in the birth rate and average life expectancy in the country, deformation of the demographic and social composition of society undermining labor resources as the basis for the development of production, weakening of the fundamental unit of society, namely, families, a decrease in the spiritual, moral and creative potential of the population were named among the main threats to national security. The designated threat is stated in subsequent conceptual documents in the field of national security.

The next Concept of National Security of the Russian Federation approved in 2000 still insisted on the deformation of the demographic and social composition of Russian society, a sharp decrease in the birth rate and average life expectancy in the country as the consequences of a deep social crisis.[2]

For the first time in 2000, the President of Russia Vladimir V. Putin drew attention to demographic problems in his Annual Message to the Federal Assembly of the Russian Federation stating that "...he country's population is decreasing by an average of 750 thousand people annually [...] if the trend continues, the survival of the nation will be at risk".

The first Concept of Demographic Policy approved in 2001 in order to ensure national security until 2015, outlined priorities and tasks in the field of regulating demographic processes, which consisted of

[2] Presidential Decree No. 24 dated 10 January 2000. (In Russ.).

three directions: 1. strengthening health and increasing life expectancy; 2. stimulating fertility and strengthening the family; 3. regulating migration and resettlement of the population. The goals of the country's demographic development outlined in the document include: stabilization of the population and the formation of prerequisites for subsequent demographic growth that were achieved by strengthening health and increasing the duration of active life of the population; improving reproductive health and stimulating fertility; strengthening the creation of the family and institutions of social support for families with children; creating conditions for self-realization of the youth; regulating migration flows in order to create effective mechanisms to replace the natural loss of the population; improving the efficiency of using migration flows by achieving compliance of their volumes, directions and composition with the interests of socio-economic development of the Russian Federation; ensuring the integration of migrants into Russian society and the formation of a tolerant attitude towards them.[3]

It should be noted that the tasks were not fully solved, as stated by the subsequent Concept of Demographic Policy of the Russian Federation for the period up to 2025 (hereinafter the Concept), adopted in 2007 (Presidential Decree No. 1351 dated 9 October 2007), where the main goals were still designated stabilization of the population by 2015 at the level of 142–143 million people and the creation of conditions for its growth to 145 million people by 2025, as well as improving the quality of life and increasing life expectancy to 70 years by 2015, and to 75 years by 2025 (Part 3).

To achieve these goals, the document sets the following tasks that need to be solved during the designated period of the Concept: reducing the death rate, primarily in working age; strengthening public health (including reproductive) and increasing active life expectancy; creating conditions and motivation for a healthy lifestyle; increasing the birth rate due to birth in families of the second child and subsequent children; strengthening the institution of the family, revival and preservation of spiritual and moral traditions of family relations; attracting migrants in accordance with the needs of demographic and socio-economic

[3] Government Executive Order No. 1270-R dated 24 September 2001. (In Russ.).

development, taking into account the need for their social adaptation and integration. Obviously, in terms of its goals, the document mostly reproduces the provisions of the previous Concept, the tasks are still reduced to the three previously identified areas.

The lack of a comprehensive strategic task for their implementation seems to be a great disadvantage of both Concepts (2001, 2007). Like any conceptual document, Concepts in their legal content are not strategic planning documents; they reflect a set of views on the demographic situation in the country, a list of tasks that need to be solved in this area, goals and objectives of demographic policy, as well as prospects for their further solution. As follows from the content of the documents, the Concepts were adopted in order to consolidate the efforts of federal government authorities, state authorities of constituent entities of the Russian Federation, local governments of municipalities, organizations and citizens of the Russian Federation to ensure conditions for sustainable demographic development of the country. Thus, the Government of the Russian Federation was instructed to approve an action plan for its implementation on the coming years (with subsequent prolongation).

The lack of a list of entities responsible for the implementation of the documents forms another significant disadvantage of the Concepts. This list is contained in the plans approved by the Government of the Russian Federation for the implementation of the Concepts.

Thus, according to the version of the Plan valid until 2025,[4] federal executive authorities, executive authorities of the constituent entities of the Russian Federation, state and non-state foundations, public organizations, whose activities are reflected in the annual report to the Government of the Russian Federation, participate in the implementation of demographic policy within the framework of the Demographic Policy Concept until 2025. The degree of participation is determined by the powers and competences of these bodies, the results of their activities in this area are reflected in reports to the Government of the Russian Federation.

[4] Government Executive Order No. 2580-R dated 16 September 2021. (In Russ.).

It should be noted that, in accordance with the constitutionally established powers of the Government of the Russian Federation, ensuring demographic policy is not attributed to the powers of the Government of the Russian Federation. This gap was not filled in 2020, when the constitutional reform significantly updated the norms of the Constitution aimed at realizing the social status of the state and ensuring the sovereignty of the Russian state.

We believe that it would be logical, both from the point of view of the content of the assigned government powers, and based on their requirements for the legal formalization of constitutional provisions, to attribute them to the powers of the Government of the Russian Federation, enshrined in the provisions of Part 1 Art. 114 of the Constitution of the Russian Federation, along with ensuring a unified financial, monetary, credit policy (Para. b), and socially oriented state policy in the field of "culture, science, education, health care, social security, support, strengthening and protection of the family, preservation of traditional family values [...]" (Para. c), the authority to ensure demographic policy. This approach is justified by the fact that, in terms of its principles, content, methods and guarantees of implementation, demographic policy does not fully coincide with the social policy of the state, primarily due to the fact that it includes elements of migration policy, which directly follows from the tasks outlined in the Concept of Demographic Policy.

Demographic policy is under the jurisdiction of the Ministry of Labor and Social Protection of the Russian Federation, more precisely, one of its structural divisions — the Department of Demographic and Family Policy established in 2020. The Department, within the framework of its powers, carries out activities aimed at developing and implementing the state policy and normative regulation in the field of demography and gender equality, social protection of the family, women and children, income policy and living standards of the population.[5] We believe that such an approach to solving the demographic situation in the country is clearly insufficient, since demographic policy is complex and cannot be limited by the powers of the Ministry of Labor and Social Protection.

[5] Decree of the Ministry of Labor and Social Protection of the Russian Federation No. 583 dated 8 September 2020. (In Russ.).

IV. Family and Demographic Policy as a Condition for Ensuring Demographic Security

Russia's solution to the problem of depopulation is possible only through the implementation of systemic activities aimed at solving the problems of ensuring demographic security, through the development of a unified demographic policy aimed at stabilizing the processes of natural reproduction of the population, where the family is the fundamental element. We tend to share Sinelnikov's standing that the problem of depopulation (natural population decline) can be solved through a properly designed demographic policy of the state (Sinelnikov, 2019, p. 85). The constitutional vector of Russian Federation development presupposes a systematic approach to the formation of state policy based on understanding the importance of the institution of the family for society and the state, supporting the family in raising children, strengthening the institution of marriage, providing protection for families with children and families with many children, which is consistent with the constitutional and legal status of Russia as a social democratic rule-of-law State.

It is true that "the family is the only possible option for preserving the ecology of the nation, harmonizing the moral and ethical climate of society, it is the unconditional primary society for the education of new generations, socialization and development of an individual, as well as the basis of public consciousness of the future society and the state" (Dorodonova, 2023, p. 119). It is in the family that the value attitudes of an individual are formed. Then they are passed on from generation to generation, they form the spiritual and moral immunity of society to modern challenges, determine the all-Russian civil identity and form a single cultural sociocode of the Russian nation determined by the traditions and identity of the peoples of Russia in their historical development.

The importance of the institution of the family for the state is expressed in the fact that it is one of the historically proven forms of population reproduction, stability and development of statehood. The interaction of the family, society, and the state is realized on the basis of a historically established set of socio-cultural norms, values, ideals,

patterns of behavior, specifics of mentality, and all their immanent characteristics. The protection of the family and family values should be considered among the priorities of ensuring Russia's national security, the solution of which is aimed at preserving the all-Russian identity, sustainable development of the state, and preservation of socially significant spiritual and moral values.

In order to ensure the most complete protection of the family and family values in the vector of ensuring the national security of the Russian state, we believe it is necessary to focus on solving the problem of ensuring demographic security. Taking into account that two basic documents in this area — the Concept of State Family Policy and the Concept of Demographic Policy expire in 2025, we consider it advisable to develop and adopt a strategic program and target document by an act of the Government of the Russian Federation, which will combine the directions of demographic and family policy.

Currently, at the federal level, the Ministry of Labor of the Russian Federation, together with representatives of the scientific and expert community, has developed a draft Action Strategy for the implementation of family and demographic policy, support for large families in the Russian Federation until 2036 (hereinafter referred to as the draft Strategy). The proposed Strategy is aimed at stabilizing the population, increasing life expectancy, increasing fertility, protecting reproductive health, juvenile health, supporting and strengthening the family as the foundation of Russian society, preserving traditional family values, improving conditions and quality of life of families, preventing and overcoming family problems.

The designated draft Strategy was repeatedly discussed at meetings of the interdepartmental working group led by Olga Yu. Batalina, First Deputy Minister of Labor and Social Protection of the Russian Federation, with the participation of co-author Tamara K. Rostovskaya, a member of the interdepartmental working group.

The draft of the Strategy designates several goals for its implementation, including several areas of its implementation, namely:

— saving people based on an increase in life expectancy, saving public health, increasing fertility, active longevity, including based

on improving the quality of life of the population, active longevity, stabilization of the population;

— ensuring the sustainability of the population on the basis of strengthening the institution of the family and marriage as a union of men and women, traditional Russian spiritual, moral and family values;

— an increase in the number of large families;

— support and protection of the family as the fundamental basis of Russian society based, among other things, on improving the well-being of the family; protection, preservation, promotion and encouragement of traditional spiritual, moral and family values, family lifestyle in society.

Among the key measures of the draft Strategy aimed at supporting multi-child families for the period up to 2036, it is necessary to highlight the strengthening of the institution of the family, including extended families, protection, preservation, and promotion of traditional Russian spiritual, moral and family values and family lifestyle, improvement of social support for families with children. In this regard, the authors draw attention to a special type of family of a prosperous large family as an ideal family model. This model correlates with the "prosperous family" model, developed under the guidance of Tamara K. Rostovskaya in 2007, within the framework of the Concept of State Policy towards a young family (Rostovskaya, 2024, p. 10; 2025, pp. 16–17). It should be emphasized that the status of a large family approved by the Decree of the President of Russia in 2024 will allow for a unified socially oriented state policy at the national level in the field of support for large families.

The proposed Strategy is consistent with the objectives set out by the President of the Russian Federation in Presidential Decree No. 309 "On the National Development Goals of the Russian Federation for the period up to 2030 and in the perspective up to 2036" and other program-targeted documents. The Strategy is aimed at realizing a systematic approach to the formation and implementation of the state policy in the field of demography, protection of the family and family values of Russian society, strengthening the institution of marriage, support for families with children and large families, protection of reproductive health of the population, which is consistent with the constitutional and legal status of Russia as a social democratic rule of law state.

The goals of the Strategy implementation formulated by the authors in Section III deserve a positive assessment, including:

— preservation of the population by increasing the birth rate, strengthening maternal, child, and reproductive health of the population, and promoting the implementation of family-oriented demographic policy in the constituent entities of the Russian Federation with due regard to national and sociocultural peculiarities;

— protecting, supporting and defending the family as the foundation of Russian society by improving the well-being and quality of life of the family and improving its support in special life situations, creating conditions for the harmonious combination of work and education of parents with the birth and upbringing of children, and developing family-oriented infrastructure;

— strengthening the institution of family and marriage as a union of a man and a woman on the basis of preserving and promoting traditional family values, including countering destructive ideologies aimed at destroying the value of a strong family, marriage and large families.

The document pays great attention to the formation of the national idea of respect for the institution of the family, responsible parenthood, the value of preserving reproductive health, maintaining a family lifestyle and intergenerational communication. The formation of public consciousness in this direction involves educational and awareness-raising programs and information campaigns, including the involvement of non-profit and educational organizations in the upbringing of children and young people.

Separate areas of the Strategy elucidate the formation of a system of motivation among the population to lead a healthy lifestyle and the creation of conditions for timely prevention of diseases, protection of maternal and child health, and strengthening reproductive health.

Among the measures of the social block aimed at reproducing the population, supporting families with children, creating additional incentives for the birth and upbringing of children, the authors propose both traditional measures of material and financial support, and various forms of organizational guarantees, involving assistance in the successful combination of family and professional realization of individuals through the development of public services, as well as corporate support for employees with children.

The Strategy implementation may result in a gradual increase in demographic indicators of the indigenous population of Russia, due to an effective system of measures aimed at improving public health, increasing life expectancy, reducing mortality, increasing fertility, improving the status of families with children.

The draft Strategy proposed by the authors-developers has the main goal of consolidating the efforts of public authorities at all levels and civil society institutions (scientific, business community, non-profit organizations) in stabilizing the population, increasing life expectancy, increasing fertility, protecting reproductive, maternal and child health, supporting and strengthening the family as a foundation of the Russian society, preservation of traditional family values, improvement of conditions and quality of life of families, strengthening the prestige of a socially prosperous large family, reducing the divorce level, prevention and overcoming of family problems. Along with socio-economic measures, it is important to support the family, the formation of a public idea about the importance of the family as a value in itself, expressed in responsible support of the family lifestyle, a value attitude towards the creation of a large family, respect for the elderly, public support for extended families, public condemnation of the refusal to marry and raise children.

V. Conclusion

The study of the state of family and demographic policy in the vector of ensuring national security of Russia allows us to state the need to solve domestic demographic problems based on systemic solutions. They presuppose the implementation of a consistent multifaceted policy based on constitutional values and ideals of the importance of man and family and protection of family relations. This approach is justified by the significance of the interaction of both legal factors that determine the regulatory provision for curbing demographic crises and population growth declines, and measures of a general social nature. The latter include large-scale activities of state bodies and civil society institutions, whose activities collectively solve the tasks of social salvation from population growth declines, the need to increase

the share of young people in the total population of the country, the cultivation of spiritual values of a strong and prosperous family, which in turn involve information and educational activities focused on the formation of the consciousness of the modern youth of the values inherent in Russian society, identification of morally oriented patterns of behavior of young people. The family, strengthening of marriage, systemic care of the state and social control in the field of protection and ensuring the protection of families with children and large families remain the main social institution ensuring the solution of the tasks of modern demographic policy. It is this approach that is able to confirm the constitutionalized essence of the Russian state as a social, legal, and democratic State.

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Article

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New Legal Tradition: Paradigms of Developments in Technology

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Abstract: This paper looks at the influence of the developments in technology on the evolution of the legal map of the world and the individual elements thereof through the prism of the philosophy of law, general theory of law, and comparative law. The analysis is based on the comparative legal and comparative historical methods. The author comes to the conclusion that the maxims of the Fourth Industrial Revolution have led to the emergence of a new legal tradition, and outlines the key characteristics of this tradition. The analysis of the aforementioned tradition is preceded by a look at the legal traditions already explored in the history of legal thought, the key position among which is occupied by the Western legal tradition. The "symptoms" of the new legal tradition described in the paper represent not only a certain stage in the development of global jurisprudence (albeit being at an initial phase), but also an element of the civilizational evolution of a universal social order. Like any previously non-actualized phenomenon, the new legal tradition does not only give new attributes and characteristics to the legal world, but also generates discussions about further paths of its own development. The final section of the paper deals with the problematic areas of the evolution of the new legal tradition.

***Keywords*:** law; evolution; tradition; technologies; foreign (non-Russian); international

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Contents

I. Introduction

Continuity and renewal are two properties of human existence, which — year after year, century after century, millennium after millennium — manifest themselves in the legal space as well. The "new tradition" oxymoron pertains to more than one phenomenon in social practice. In the field of art, for example, the foundation for new traditions was laid by the movement of French impressionists in the 19th century, giving new impetuses to the links of continuity in this area of social practice. In the modern world, the Fourth Industrial Revolution has served as a powerful catalyst for the evolution of social subsystems of different qualitative orientations. It changed not only the world of objective things around us — creating new technologies and (or) accelerating certain developments in technology, giving us a new perspective of the foundations of communication between people, but also transformed the subjective component of human existence.

Undoubtedly, the developments in technology have had an impact on the legal systems of the contemporary world and the homogeneous entities thereof. The symptoms of the new legal tradition are multifaceted, interdependent to a certain extent, and manifest themselves both in legal theory and in legal practice. Their assessment requires both a synchronic and a diachronic comparative analysis of the corresponding phenomena and processes.

This paper provides an assessment of the legal tradition as a framework in the history of legal thought (I); identifies the symptoms of the new legal tradition in connection with the development of new technologies (II); and deliberates on the evolution of the new legal tradition (III).

II. Legal Traditions in History of Legal Thought

The Oxford Dictionary defines "tradition" as the transmission of beliefs, statements, customs, etc., from generation to generation; the fact of being passed on in this way, especially by tradition.[1] The French Le Petit Robert[2] points out that "tradition", on the one hand, can be interpreted as a material transfer or a fulfillment of an obligation to hand something over, and, on the other hand, as information orally transmitted from generation to generation.

The most elaborate doctrine of legal traditions is offered by the works dedicated to the Western legal tradition. The work by Harold J. Berman entitled *Law and Revolution, the Formation of the Western Legal Tradition* is highly noteworthy in this respect. It is a truly life-long book. Berman began writing it in 1938, and finished it in 1983. According to Berman, the Western legal tradition originates from the so-called Papal Revolution.[3] The Papal Revolution, which started in 1075 with the Dictates of Pope Gregory VII (in Latin *Dictatus Papae)* and culminated in 1122 with the Concordat of Worms, took place for the sake of the so-called freedom of the Church. It was a revolution against the subordination of the clergy to emperors, kings and feudal barons, a revolution for the establishment of the Roman Church as an independent corporate political and legal entity under the aegis of the papacy. The duality of the spiritual and the secular jurisdictions, as well as the plurality of secular jurisdictions, resulted in a fierce rivalry, which brought about not only the rule by law, but also the rule of law. The claims of each jurisdiction met obstacles from the other jurisdiction. This is the fundamental feature of the Western legal tradition, a feature that persisted in one form or another for eight hundred years. It was the source of the development of law and the source of freedom (Berman, 1998).

[1] For details, see: https://www.oed.com/search/dictionary/?scope=Entries&q=tradition [Accessed 01.08.2024].

[2] Le Petit Robert Dictionnaire de la langue française. Paris, 1992, p. 1994.

[3] A term coined by the German historian and philosopher Eugen Rosenstock-Huessy.

The start of formation of the Western legal tradition, according to Berman, was triggered by the idea of law as a separate subject. He points out that, for the first time in the West, law was considered separately from theology, and economics, and politics; for the first time something definite, deserving the name "law", appeared. This law had its own professional guardians, called lawyers, and its own texts (publications). Before 1050 there were no law-related compilations or legal treatises in Europe, however, there were compilations of customs or canons. There was no legislative process in its current sense, although kings issued laws from time to time (Berman, 1998, p. 11).

Berman also looks at the issues related to the crises of the Western legal tradition. He links them to an unprecedented crisis of legal values and legal thought, stating that before 1914 the West was the center of the world, one might even say that the West created the world, for the West was the first to understand that there existed such a thing as the whole world, and sent its soldiers and missionaries to conquer it. However, in his opinion, in 1993, the world undoubtedly becomes the center, and the West becomes one of the elements thereof, one of the partners in the gradual creation of the global technology, the global economy, the global culture, and the global legal order (Berman, 1998, p. 13).

Assessing Berman's point of view mentioned above, it should be noted that his conclusions with regard to the matter under consideration feature a somewhat idealized vision of the Western legal tradition. The time of emergence of the Western legal tradition is certainly significant, but the humanity existed long before the famous Papal Revolution. However, Berman was absolutely right in saying, "Because the age is ending, we are now able to discern its beginnings". And these historical beginnings of the Western legal tradition are brilliantly demonstrated in his work.

As for the analysis of the palette of various legal traditions of the past and the present, it is undoubtedly quite comprehensively covered by comparative law. The comparative vector of various legal traditions originated primarily within the framework of the Anglo-American and Canadian teachings on the State and law. *Legal Traditions of the World: Sustainable Diversity in Law* by Patrick Glenn is one of the classical

works on comparative law assessing various legal traditions of the past and present.

S.I. (Stacie) Strong remarks the following in this regard, "In 1998, the International Academy of Comparative Law named Professor Glenn's newest book, then in manuscript form, the winner of the grand prize at the XV International Congress of Comparative Law. In so doing, the Academy made no mistake, for this is an exceptional and eminently readable book. Combining a historically accurate analysis with a distinctly contemporary sensibility, Glenn invokes not only jurisprudential concepts as he explains the different legal traditions, but religious and sociological ideas as well. It is difficult to imagine an interdisciplinary team of authors taking on a project of this scope, but Glenn, working alone, successfully integrates strands of thought from these different disciplines into a single cohesive whole" (Strong, 2001, pp. 421–423).

In terms of the scale and the depth of the analyzed material, the aforementioned work by Glenn can be compared to *A Study of History* by Arnold Toynbee. The common ground for both works is the culture-and-value based approach used when studying the social practices of various peoples and communities (Bell, 2001, p. 6).[4]

Patrick Glenn, consistently pursuing the line of the culture-and-value based approach in jurisprudence, emphasized, "The principal problem with contemporary theories of the State is that they have become largely founded on positivist philosophy, or more precisely on non-critical or non-normative legal positivism, which saw positive law and state structures as facts, requiring no justification but simply description" (Glenn, 2009, p. 513).

S.I. Strong, while being quite enthusiastic in her positive assessments of Glenn's work, still criticizes it a bit, remarking that "the book's brilliance belies its slightly slow beginning". In our opinion, the "slight-

[4] The culture-and-value based approach in comparative law is used in works on legal culture as well. Among the most notable of such works are, certainly, those by Pierre Legrand and Csaba Varga. The theory of comparative law also features separate studies devoted to the distinction between the notions of legal culture and legal tradition. For instance, in the opinion of Professor Bell, these concepts represent a whole (culture) and a part (tradition). It was this methodology of distinction that he applied when analyzing the French legal culture.

ly slow beginning" (by which the general theoretical aspects of the legal tradition portrayed in the first paragraphs of the work are meant) is the very essence, the core, the centerpiece of the work, without which the entire work would be impossible. The lack of such a description in the work could be compared with the lack of the general part in civil codes structured according to the pandect system, i.e., the lack of general provisions means the lack of the basic principles for developing the provisions of the specific part.

When characterizing the theory of tradition, Glenn noted that the theory of tradition should therefore not be thought of as a present, or perhaps even a future construction, but rather as a present device or method for thinking traditions (Glenn, 2007, p. 4). According to Glenn, the key feature of tradition is the transmission, i.e., the involvement of the past in the present, the need for continuous reference to the traditional heritage of the past in a given social context.

In our opinion, Patrick Glenn described very aptly in his work entitled *Tradition in Religion and Law* (for details, see Glenn, 2009, pp. 503–519) the process of the embracing of tradition, "Transmission beyond an initial hearer is impossible without some form of memory, or recording; and what is transmitted is no longer what was heard in its original form, but what is remembered" (Glenn, 2009, p. 504). The core of the book *Legal Traditions of the World: Sustainable Diversity in Law* consists of seven chapters that discuss different traditions. Beginning with the chthonic tradition, the book continues with the Talmudic tradition, the civil law tradition, the Islamic tradition, the common law tradition, the Hindu tradition, and the Asian tradition (for details, see Strong, 2001, pp. 421–423). As we can see, Patrick Glenn's view of the legal tradition is primarily diachronic. As a consequence, the overwhelming majority of legal traditions described in his book have a close connection with religion.

In addition to Patrick Glenn's landmark work, works on the legal traditions of individual countries and legal communities (for details, see Sinitsina, 1987, pp. 44–57; McEldowney and O'Higgins, 1990, p. 249) as well as on the historical forms of various legal traditions (Duxbury, 1989, pp. 241–260) have become widespread in comparative law. However, none of the aforementioned works provides an assessment of the

new legal tradition, which is gradually "generating buzz" in connection with the intensification of advances in science and technology in various spheres. The new legal tradition is set outside of any specific environment — be it countries, unions thereof, or individual regions, — but obviously keeps in step with the time that brings this tradition about.

The extent to which it penetrates social environments is astonishing and defies the standards of classical comparative studies where the "outpacing" advanced legal systems (the so-called great contemporary legal systems) and legal systems lagging behind have always existed. For instance, in some countries of the East women are still not allowed to drive, however, at the same time cryptocurrency is actively used there, and the relevant legal regimes for such a use are established.

While the Western legal tradition was triggered by the Papal Revolution, the new legal tradition was triggered by technologies reaching a qualitatively new phase of development. The technologies which brought about the emergence of a new legal tradition can be divided into two large groups:

— the technologies that change the world around us (most vividly manifested in digitalization of processes and systems);

— the technologies that change us (such as, for instance, genetic technologies).

The new legal tradition is at the initial stage of its development. However, its symptoms are already noticeable. What are they?

III. New Legal Tradition — Answers

The new legal tradition manifests itself in several aspects of the existence of law simultaneously. First of all, we observe the emergence of new variables on the legal map of the world that have a direct impact on its evolution. Such variables include *lex genetica* (the term coined by the author. — M.Z.), i.e., the system regulating the issues of genetic tests and genetic therapy, as well as the social consequences thereof; digital law — a regulatory framework formed in the sphere of application or through application of digital technologies; and *lex sportiva*. These variables have both their own unique legal and social nature, and some common features. First, the peculiarities of the scope of legal regulation

of these variables predetermined the synthetic nature of law formation for such variables, such nature of law formation being, among other things, of a non-classical extra-state [extra-governmental] nature. Secondly, the aforementioned variables manifest the dialectics of the new (as compared with the decentralized period in the development of legal systems) particularism and universalism of law. Thirdly, at the moment these variables complement the national systems of law, which act as classical objects on the legal map of the world. However, in the future the evolution of these variables might lead the global legal space to a large-scale transformation of the legal map of the world (e.g., the development of digital law might result in the emergence of a new global legal order, where nation-and-state and culture-and-value features of the legal phenomenon as such would be completely or partially erased). The list of the new variables is not complete and exhaustive. The new social realities and challenges of the external environment might drive the emergence of other new variables on the legal map of the world (Zakharova, 2022b).

Second, the legal science is witnessing the emergence of new forms of symbolization used in the present-day world. As Professors Antoine Garapon and Jean Lassègue point out, the digital age brings about a new global writing system with only numbers, rather than letters or words, as the base. Therefore, the digital age brings about its own pure, wordless order (Garapon and Lassègue, 2018, p. 27).

Third, the list of creators of law is augmented by new actors. One of such phenomena brought about by the development of digitalization has been metaphorically named *Google Law* in international publications. Obviously, the aforementioned transnational corporation is not the only one trying to get into the good old "kitchen" of law. The first attempts of that kind can be traced back to the mid-20th century with John Horty considered to be a pioneer (Paliwala, 2010, pp. 11–20). In 1955, he used the text retrieval technology for computer-based processing of law-related texts at the University of Pennsylvania.[5] In 1963, Stuart Nagel published a paper where he put forward the idea of using

[5] Text retrieval is defined as the matching of a given user query against a set of texts.

mathematical correlations to predict the outcome of court proceedings from a scientific point of view (Nagel, 1963, p. 1006). In 2006, Lawrence Lessig proposed mechanisms for law creation using computer codes (Lessig, 2006). It should be noted that the above examples most clearly reflect the tendency of erasing boundaries between the human and the non-human as an object of the material world (Zakharova, 2022b). Fourth, we are witnessing the emergence of new forms of interaction between law and ethics. That brings to mind the words of Vladimir Solovyov who wrote at the beginning of the 20th century that law is an ethical minimum. Nowadays, these minimums are expanding. If we look at law and morality from the point of view of the circular model of the German mathematician Leonhard Euler, we can see that the intersecting zones of social regulation of law and ethical norms are expanding, and sometimes are supplemented in a truly bizarre way. Such transformations are visible, for instance, in the 1994 French Bioethics Law, as well as in the December 2017 report by the French National Commission for Information Technology and Civil Liberties (CNIL) entitled *The Ethical Matters Raised by Algorithms and Artificial Intelligence*.[6] This document, among other things, introduces the principle of reflexivity, implying that the constant development and the unpredictability of artificial intelligence (AI) require methodical, consultative and regular verification by all stakeholders, including the ethical education of all those involved in AI development and use (Zakharova, 2022b).

Fifth, we can observe new concepts of ensuring the force and effect of normative prescriptions. The classical "obligatory — optional" dichotomy contained in publications on the theory of State and law does not lose its relevance, however, at the same time, it can be supplemented with new facets and shades in connection with the emergence of new legal phenomena. A vivid example in this regard are the phenomena of "*soft law"* and *lex electronica*.

[6] For details, see: Commission Nationale De L'informatique Et Des Libertés (CNIL), Comment Permettre À L'homme De Garder La Main? [How to keep mankind in control?]. Dec. 2017. Available at: https://perma.cc/B3KD-63B5 [Accessed 07.08.2021].

In the first instance, we deal with the concept of graduated relative or diverse normativity. The proponents of this approach point out, among other things, that soft law is a penumbra of law, since, while being obviously not mandatory from the legal point of view, it gives rise to specific legal (rather than simply political or other practical) consequences. It is also important to keep in mind that soft law, due to the institution of hardening, may gradually transform into hard law (for details, see Zakharova, 2022b).

In the second instance, we see that the progress in science and technology leads to the emergence of a system of legal norms of an international nature that regulate the relations arising in connection with transnational transactions in the electronic information environment. This system of norms is established by the participants in such relations for internal use and is applied by arbitrators when resolving disputes arising from such relations, taking into account the intentions of the parties and comparative legal analysis that factors in the current situation in the sphere of electronic commerce. This process results in the creation of a system of normative prescriptions that are formed by a self-regulating sector of the economy, rather than by the government or supranational institutions, as well as in creation of jurisdictional institutions for resolving disputes in this subject area (Demin, 2017).

Sixth, justice as a segment of the functional element of legal systems of the world is acquiring new features. The most noticeable in this regard is the development of two practices: transparency and predictive justice (Zakharova, 2022b). The transparency of the contemporary justice has a diverse nature and sources. The latter, in particular, include integrational justice; various manifestations of the "legal Esperanto"; forum shopping; social solidarity of a new type leading to a horizontal control over normative prescriptions.[7] Predictive justice is only gaining ground on social platforms on the current legal maps of the world at

[7] For instance, the EU has a (regularly updated) practice of announcing "unfriendly" tax jurisdictions. In 2019, the EU Ministers of Finance updated the list of non-cooperative tax jurisdictions and included 15 countries in the "black list". Three jurisdictions were transferred to the "grey list". The list is based on the EU's concerns about tax transparency, good governance, real economic activity and the existence of a zero corporate tax rate.

the moment. While the European jurisdictional platforms are rather cautious about the introduction of this institution, the American ones are using it quite actively. The aforementioned institution is based on the LegalTech technology, and cannot be called "justice" in the exact sense, since its functionality does not include dispute resolution as such. The task of predictive justice is to create algorithms for rapidly analyzing a huge number of situations that allow predicting the outcome of a dispute or, at least, assessing the chances for success. The advantage of introducing this institution is obvious: the possibility to validate a court ruling from a scientific point of view. Its main disadvantages can be summarized in the metaphorical formula "100 judges in one ruling". In other words, a law enforcement officer is to some extent limited in the freedom of decision-making due to the use of the previous practices for legal cases that predictive justice can provide (Zakharova, 2022b).

There are also certain discussions regarding the reference points, or benchmarks, serving as a basis for analyzing previous legal practices in predictive justice. Firstly, the question as to who or what should set these reference points (a human being or a machine) remains unresolved.[8] Secondly, the problem of their qualitative and quantitative characteristics remains unresolved as well.[9] Thirdly, the following dilemma arises: is it possible to develop a universal pool of reference points for analysis and apply them in legal systems of various nature in terms of grouping, or should these reference points be divided based on the principle of the legal system's belonging to a certain homogeneous group or based on thematic blocks of certain groups of cases, etc.? (Zakharova, 2022b).

Seventh, we can talk about the emergence of a new group of subjective human rights, the so-called human rights of the "postmodern" era when, as Tamara Meshcheryakova rightly pointed out, people began to actively create themselves rather than being content with the paradigms of a predetermined existence (Meshcheryakova, 2010, p. 97).

[8] At the moment, the reference points (benchmarks) for analysis are set by human beings.

[9] The already known practices have seen the use of such reference points of previous court decisions as oral arguments of the parties, the deadline for judgements (court rulings), compliance/non-compliance with the principle of fairness in judgements (court rulings).

The most typical examples of this group of human rights are somatic rights and, in particular, the right to have a child using assisted reproductive and genetic technologies. In the opinion of some researchers, the emergence of this group of subjective rights leads to the *formation of a "new" right* (the courts single out a separate subjective right based on the interpretation of "traditional" norms with regard to fundamental rights). For instance, when considering cases on protection of the right to have a child using assisted reproductive and genetic technologies, the judicial authorities in the sphere of constitutional control prefer the approaches of progressive interpretation and the "new" right formation, since they both show the court's response to the changes in society, and allow timely constitutional protection of the right to have a child using assisted reproductive and genetic technologies (Posadkova, 2023).

A number of countries took a synthetic bio-legal stance with regard to the regulation of the aforementioned group of human rights. The most vivid example of this vector of social regulation is the 1994 French Bioethics Law. This reform essentially became the most large-scale, resonant and liberal as compared to the previous reforms of the Bioethics Law. Undoubtedly, the broadest discussion was brought about by the new provision of the Law regarding the expansion of the list of the subjects of law entitled to resort to the technological opportunities offered by in vitro fertilization (IVF). By the time when the Law was adopted, several European countries had already stepped on the path of liberalization of the IVF use. In ten European countries (Portugal, Spain, Ireland, the UK, Belgium, Holland, Luxembourg, Denmark, Sweden, and Finland), IVF has been allowed for same-sex couples and single women. In 7 countries (Estonia, Latvia, Croatia, Bulgaria, Greece, Cyprus, and Hungary), IVF is allowed for single women, but not for same-sex couples. On the other hand, in Malta and Austria, IVF is allowed for same-sex couples, but not for single women (Zakharova, 2022a).

Eighth, the active diffusion of BioLaw in the national legal systems of various countries necessitated the introduction of new reception models associated with the horizontal continuity of biolegal norms and regulations. In our opinion, we should talk about the reception based on a model that can metaphorically be called a "carrot version 2.0"

(the term by the author. — M.Z.). Such a metaphorical description and disclosure of the essence of the reception suggests that, in addition to the diffusion of normative prescriptions as such (the visible part of the carrot, i.e., its tops), various social and bioethical components of the practical real-life implementation of a particular norm (the part of the carrot invisible to the human eye, but no less important for the carrot's integrity, i.e., its taproot) should be taken into account as well.

In our view, a case in point with regard to the implementation of this reception model is the position of Switzerland in relation to the third gender recognition. Switzerland is well-known to take a fairly liberal position with regard to the recognition and protection of somatic human rights. At the same time, in December 2022, it became known that Switzerland refused to recognize a third gender. This was stated in a document issued by the Swiss Federal Council and published on the website of the country's government. It pointed out that the Swiss are not ready to abandon the traditional model of gender identity — the one which assumes the existence of only male and female genders. The document said that the principle of two genders (sexes) remains deeply rooted in Swiss society.[10] A similar reception model seems to be operational in relation to other extremely sensitive and complex institutions of BioLaw. For instance, France is facing the introduction of the institution of euthanasia at the moment (Haddadi, 2023).

Ninth, it is important to pay attention not only to the internal patterns of the legal phenomenon development, but also to its external manifestations associated with various features of the legal technique. For instance, we are witnessing the emergence of a new legal framework in the field of legal regulation of innovations — namely, *"rules from exceptions"* (RFEs; the term coined by the author. — M.Z.). A representative example of RFEs in the Russian Federation is the introduction of an *experimental legal regime* in the constituent entity of the Russian Federation, the city of federal significance Moscow, from 1 July 2020 following the amendments to Art. 6 and 10 of the Federal Law "On Personal Data" dated 24 April 2020. In foreign law, the examples of RFEs can be found in the sphere of medical law, such as: 1) Hospital Exemption; and 2) Point-of-Care Manufacture (POC).

[10] For details, see: https://lenta.ru/news/2022/12/21/switzerlandcoservative/?ysclid=lkmq1p9bow830578673 [Accessed 03.09.2024]. (In Russ.).

The *hospital exemption* scheme was introduced into the European practice with the adoption of the landmark EU Regulation No. 1394/2007 *Advanced Therapy Medicinal Products (ATMP)* [in French: *Médicaments de thérapie innovante (MTI)*]), which, in its turn, should be read and interpreted in direct connection with Directive 2001/83/EC some of the provisions of which it amended. According to Regulation No. 1394/2007, the *hospital exemption* applies exclusively to ATMPs. In fact, advanced therapy medicinal products "prepared on a non-routine basis according to specific quality standards, and used within the same Member State in a hospital under the exclusive professional responsibility of a medical practitioner, in order to comply with an individual medical prescription for a custom-made product for an individual patient" are not covered by the European pharmaceutical legislation: they are excluded from the scope of Directive 2001/83/EC.[11]

Unlike the *hospital exemption* scheme, which has been actually practiced in the EU countries for 15 years, *point-of-care* (POC) *manufacture* is an initiative only announced in the UK, but currently not implemented at the legislative level. If this initiative is established as legislation, the UK will become the first country to introduce this scheme into the national legal framework, as its official government sources state.[12] As for the further prospects for the introduction of RFEs in Russian law, in our view, it is possible with the formation of a legal model for chimeric antigen receptor T (CAR-T) cell therapy regulation.

Tenth, last but not least, the manifestations of the new legal tradition can be observed in the educational segment of the jurisprudence. The present-day higher education institutions are at the opposite point of evolutionary growth than the university model of the 19th century described by Immanuel Kant in his work *The Conflict of the Faculties* (1798): scientific (scholarly) knowledge is not differentiated, but, on the contrary, integrated in an interdisciplinary manner. In the context of the formation of a new legal tradition, interdisciplinarity becomes an important element of its cognition and assessment of its development prospects.

[11] Para. 2 Art. 28 of the Regulation amending Art. 3 of Directive 2001/83/EC.

[12] For details, see: https://www.gov.uk/government/case-studies/horizon-scanning-case-study-point-of-care-manufacture.

Professor Ludmila Mikeshina made a very good point in this respect saying that with the advent of postmodernism, the essence of cognitive practices changes (or should change), that "complementarity, harmonization, simultaneity instead of opposition or along with it", and "the legitimacy of not one, but several paradigms (multi-paradigmality)", as well as "other techniques that require analytical work not limited to identifying the opposites", are recognized (should be recognized) (Mikeshina, 2005). However, the new legal tradition poses no fewer questions than gives answers to the global legal community.

IV. New Legal Tradition — Questions

The first question that, by all means, arises in the event of a new evolving legal tradition is the question of the consequences brought about by it. Obviously, such consequences can be found in the system of our reflections of legal existence, which, in turn, inevitably lead to a certain crisis of theoretical jurisprudence. The crisis lies in the ever-increasing gap between the phenomena described by the language of theoretical knowledge and the empiricism of the real legal world.

The way out of the crisis, in our opinion, might be to include not only the individual manifestations of the new legal tradition in certain segments of law (whether these are individual branches of law, or other structural components inherent in the legal systems of the world, such as, for example, the "law of personal status" and the "law of power norms" in Islamic law, or the "common law" and the "law of equity" in English law) and in the international and regional legal standards, but also to introduce the new legal tradition as an integral entity into the general theoretical body of jurisprudence (theory of law, philosophy of law, history of legal thought).

Just as important is the second question of the timing of the establishment ("rooting") of the new legal tradition in the global legal practice and the determinants of such timing. First of all, these determinants lie in the plane of objectification of innovative technologies as such. In other words, we could hardly talk, for instance, about the legal and bioethical issues of IVF or its more advanced version (the so-called "three-parent baby") when the technology itself had not yet been implemented in global practice and in individual countries.

However, we should take into account not only the objective background for the emergence of the new legal tradition, but also the subjective perceptions thereof. On the one hand, the authors who talk about the emergence of a post-modern era human being are right (Meshcheryakova, 2010, p. 97). On the other hand, the current population of the world is over 8 billion people among which the so-called new people (the post-modern era people or *Homo economicus*) can be observed. But is every person in the 8-billion population a post-modern era person? Obviously not. On the one side of civilizational growth, Elon Musk would like, for example, to make the most of the achievements of bioinformatics (in a way authorized by law) to modify the nature of the human being. On its other side, a hypothetical Sherpa on Everest, while probably having certain elements of the new legal tradition within their legal system, wants and is able to use it minimally.

It is also obvious that the new legal tradition is not a phenomenon of one speed. In other words, we are dealing with a new legal tradition of different speeds (by analogy with the phenomenon of "Europe of different speeds"), where the impulses of this speed in different national legal orders as well as in international and regional integration formations are determined by a number of factors. First of all, these factors are associated with the peculiarities of the structure of national legal systems. In our opinion, the inductive legal systems of the Anglo-Saxon legal world can potentially respond more quickly to changing conditions of the external environment, including those connected with the development of innovative technologies, than the deductive systems of the continental legal world. In addition, the cultural, and, in some cases, religious origins of various legal orders, undoubtedly, influence the rate at which the new legal tradition is gaining ground. As for integration formations, in our view, the formations with closer integration ties (such as the European Union) have a more noticeable potential with regard to embracing the individual elements of the new legal tradition, since they are able to develop common standards of legal regulation and introduce them into the zone of the imperative, rather than advisory practice. For instance, this was the case of Regulation No. 1394/2007 *Advanced Therapy Medicinal Products (ATMP)*.

The fourth question is who should reveal the patterns of the development of the new legal tradition? This is the next question that

inevitably arises when analyzing it. In our opinion, we should definitely avoid holding on to the maxims such as "the philosophy of law is only a matter for lawyers" or "the philosophy of law is only a matter for philosophers" when dealing with the aforementioned question. The new legal tradition is a complex, multidimensional, multilayered phenomenon. Therefore, in order for the revealed patterns to be as true and accurate as possible, we need to be guided by the maxims of interdisciplinarity without engaging in excessive "privatization" of this issue in one or another separate sector of knowledge.

The fifth question that necessarily arises when analyzing the new legal tradition is whether it carries the potential of a means or of an end [a purpose]? Does it complement the existing legal realities of different countries and unions thereof, or has it already become a new reality in and of itself? This question needs to be answered taking into account the classical trichotomy that Cicero wrote about in his early work *De Inventione* when characterizing *prudentia*: memory, intelligence, and foresight.

We need to answer this question in the zone of the due [the proper], but we are experiencing serious difficulties in the zone of the existent for a number of reasons. The first of such reasons is the diverse (in qualitative terms) nature of the present-day technologies. The second reason is the fact that the new legal tradition is the legal tradition of different speeds. And, finally, the new legal tradition is only emerging, therefore, further vectors of its development and transmission in time and space are not yet clear enough.

In our view, artificial intelligence carries the biggest potential in terms of transforming the new legal tradition into a new legal reality. In this case, the world may face the so-called "Mrs. Davis" effect.[13] Its deployment in social reality is capable of potentially transforming the legal map of the world into a kind of monochromatic mass, where there will no longer be Jewish law and Muslim law, Scandinavian law and Anglo-Saxon law, Roman law and German law, etc., but only the law of "Mrs. Davis". However, at the moment, this assumption looks like a utopia.

[13] "Mrs. Davis" is a metaphorical name for artificial intelligence used in the TV series of the same title.

V. Conclusion

Innovative technologies have entered and gained ground in the social practices of the global community, individual countries and the citizens thereof. Today, things like searching for a perfect life partner based on genetic compatibility, surrogate motherhood and IVF, Mark Zuckerberg's metaverse or "life" after death in the form of avatars of deceased people are no longer seen as something unrealistically fantastic (see, e.g., the French *Digital Republic Law*).

The new legal tradition is one of the manifestations of the global world Patrick Glenn wrote about. This global world is striving to become the central point around which the identical legal traditions of the West, East, North, and South revolve. Undoubtedly, the new legal tradition is unfolding in unison with, and sometimes under the influence of the impulses of the postmodern era, the goal of which, according to Jean-François Lyotard, is the destruction of the metanarrative mechanism of legitimation, a departure from the totality of the universal and a return to the intrinsic value of the individual (Velikanov, 2007).

The reactions to the emergence of the new legal tradition are very diverse. There might be no reaction at all, or, rather, some kind of disregard. From our point of view, this is akin to having your head in the sand, and is hardly constructive. In some instances, a state of frustration is observed. As pointed out by Valery Zorkin in his publication on the future of law in the context of digitalization, the frustration experienced by people and society in this case is due to the changes in the ways of communication and the postmodern atomization of society resulting from such changes.[14] In our opinion, the most constructive reaction to the new legal tradition is awareness and recognition.

The above conclusions with regard to the new legal tradition are drawn in the framework of legal ontology, epistemology and, to some extent, legal futurology. Professor Irina Umnova-Konyukhova made a very good point in this respect saying that "in the current era, futurology has transformed the doctrine of futurism as a principle and methodology of cognition into a science that deals with forecasting and modeling

[14] For details, see: Rossiyskaya Gazeta, 15.04.2020 https://rg.ru/amp/2020/04/15/zorkin-pravo-budushchego-eto-te-zhe-vechnye-cennosti-svobody-i-spravedlivosti.html [Accessed 01.09.2024]. (In Russ.).

future evolutionary processes" (Umnova-Konyukhova, 2023). At the moment we are only at the initial phase of understanding the patterns of the new legal tradition development. However, new times may give us new answers and ask us new questions about and with regard to the new legal tradition.

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PROSECUTING INTERNATIONAL CRIMES AND WHITE COLLAR CRIMES

Article

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Examining the Legal Implications of the Reparations Regime Principles of The Impugned Decision of The International Criminal Court in Thomas Lubanga's Case

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Abstract: *The Prosecutor v. Thomas Lubanga*'s case remains a notable decision that gave rise to the first reparative justice regime of the Trial Chambers of the International Criminal Court (ICC) on war crimes of child soldiering. In line with the provisions of Art. 75(1) of Rome Statute of International Criminal Court (ICC), this work notes that ICC established several relevant principles related to reparations along with its application. It examines the implications of the evolved principles developed by ICC with respect to their implementation in International Criminal Law (ICL). The article touches on the impediments affecting the court as it relates to the enforcement of the emerged principles. The work argues amongst others that the legal consequences of the slow development of reparations principles under the ICL architecture through case-by-case analysis, unclear definition of collective reparation, large number of victims, unsettled view on causation, large beneficiary factors,

financial constraints of the convicted persons, are some challenges facing the development of reparations regime of the ICC. Significantly, the work identified the existing gaps that affect the reparations process. It concludes by making recommendations capable of enhancing the growth of reparations principles in ICL.

***Keywords**:* Reparations; Victim's Principle; Impugned Decision; Thomas Lubanga; International Criminal Court (ICC)

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Contents

I. Introduction

Thomas Lubanga born on 29 December 1960, was a brutal non-state armed group commander during the crises that embroiled the Democratic Republic of Congo (DRC) in Africa (Kurt, 2013, p. 431; Yuvaraj, 2018, p. 69). He remained a notable figure convicted by the ICC through a State party referral of war crimes.[1] Lubanga was a principal actor in the non-international armed conflict that existed in the period of 1999–2007 in the Ituri Province of the DRC. In the month of July 2001, upon the emergence of the DRC crises, Thomas Lubanga formed a separatist organization named the Union of Congolese Patriots (UPC) (Wagner, 2013, p. 180) known as one of the armed organizations that festered their agony in the region of Ituri noted as mineral rich region in DRC. In the month of September 2002, Lubanga created a separatist armed organization which is an arm of the UPC known as "Patriotic Force for the Liberation of Congo" (PFLC).[2]

In February 2003, at the upsurge of the war, the UPC engaged about 15,000 military personnel in pursuance of its military objectives and unleashed several unwanted attacks on civilian populations that resulted in rapes, abductions, mutilations, maiming as well as conscription of children under 15 years old as soldiers to augment its ailing military powers. At the end of the hostilities, the DRC referred Lubanga for trial to the ICC. Lubanga's prosecution for the war crime of recruiting and using children of under 15 years to participate actively in war commenced in 2009 (Squares, 2015, p. 567; Hynd, 2021, p. 74). He was found guilty by the Trial Chamber of the ICC on the above charges in the month of March 2012, and was sentenced to imprisonment on 10 July 2012 for a jail term of 14 years.[3] In the computation of time, the Trial Chamber of ICC ordered that the period from Lubanga's surrender to ICC in the year 2006 till sentencing should be deducted from the

[1] Prosecutor v. Thomas Lubanga Dyilo, Judgment Pursuant to Art. 74 of the Rome Statute of ICC. On 04-01/06-2842. TC on the 4 March 2012. Available at: http// www.jcc.cpi-int/icc.docs/doc/doc1379838.pdf [Accessed 23.03.2024].

[2] In early 2003, Lubanga emerged the Senior Commander of the FRPL, a Militia Group which was involved in the conflict in Ituri.

[3] RS of ICC, Art. 8(2)(e)(vii) and 25(3)(a) and Art. 74 Para. 1358.

14 years jail period of imprisonment as pronounced by the court (Stahn, 2015; Wlersing, 2012, p. 22). On 15 March 2020, Lubanga regained his freedom after a period of 14 years term of imprisonment.

Interestingly, this development emerged as the Court's first reparation regime in the history of the ICC. These reparations proceedings commenced in 2012, while in the year 2016, the Trust Fund for Victims (TFVs) endorsed the execution plans for victims (Dwertmann, 2010, pp. 1–9; Stahn, 2015, p. 10). In this regard, the Court calculated Lubanga's liabilities for collective reparations in the sum of ten million USD as an equivalent of the harm perpetrated against the children. Moreover, a total number of 427 persons were victims of Lubanga's criminal acts. The reparation process was executed by ICC's TFV at the end of the appeal session.[4] Evidently, these reparations processes took the form of physical along with mental reformation, acquisition of technical skills as well as capital management skills acquisition programs.

Though this work briefly looked at the meaning of reparation and its mechanism within the ICC, it centered on the first decision of the Court and the principles of reparation developed through cases. Such principles like the relevant laws to reparations, scope and modalities, causation and proof, roles of the judiciary were looked into. The work also addressed some gaps identified with some principles of reparations within the ICC regime. The author also examined the issues such as the slow development of the principles of reparation, no clear definition of collective reparation, unsettled view on causation, inadequate publicity, compromised fair trial procedure, difficulty in gender imbalance evaluation, likely non-cooperation of member states, financial constraint of convicts. The paper draws conclusions and recommendations relevant to the improvement of the ICC's reparation principles.

[4] Prosecutor v. Thomas Lubanga Dyilo, Reparation Order, ICC-01/06-3229; Prosecutor v. Bosco Ntaganda, Reparation Order, ICC-01/04-02/06-2568, 8 March 2021, and The Prosecutor v. Germain Katanga, Order for Reparations, ICC-01/04/07-3728 24 March 2017.

II. The Concept of Reparations

Reparations is making amends, repair, compensation, restitution, apology on the harm caused to another. Black's Law Dictionary defines "reparation" as "The act of restitution aimed at remedying a wrong through compensatory action for an act which results to an injury or wrongs during war time situations or an act which breaches a global responsibility (Wenger, 2007, p. 241). Therefore, reparations is a fundamental principle of law that enhances justice by reducing consequences of a wrongful act, preventing and stopping violations of law.

Specifically, reparations refer to the procedure and processes of remedying the loss, injury and damage inflicted by a perpetrator through unlawful means. The aim is to bring the current bad situation back to the *status quo* before the injury took place. It serves as an instrument for reconciliation or restoration of breaches in order to stop future occurrences by healing fast the wounds of war. It may take an immediate effect and may be for a long-term repair. This foretells those reparations take different forms or modalities and a victim or victims must have suffered harm, injury or harm (Blanchi, 1994, pp. 9–10).

To this end, reparations address restorative justice to the victim and it is purely victim centered. It seeks to make remedy, ignite remorse, assuage, correct, restitute, reduce differences, and stop offences, crimes and damages in the society. It replaces punishment with restitution in order to restore the offender and the victim back to the society as better persons (Roach, 2000, p. 253).

Reparations as a concept entail appropriate healing measures to prevent violations. It calls for adequate post-war investigation of violations on victims. By this, the end result is to promptly, exhaustively and impartially take action on the perpetrators in favor of the victims after conviction. It provides effective justice system delivery as it looks beyond the limited nature of criminal trial as per the number of complainants. It encompasses victims that did not participate in the trial. On this note, it supports activities that encouraged self-reliance in order to improve the conditions of the victims, family members along with common ties that may be beneficial to the victims as well as being sustainable. Though a reparations award may be done either on personal or group basis, its main essence is to restore justice to the victims.

III. Reparation Mechanism of the International Criminal Court

Unarguably, the provisions on reparations contained in the Rome Statute of the ICC reflect a salutary development on the glorious coloration of the victims' rights in ICL proceedings centering on individual responsibility. Varied provisions of the Rome Statute starting with the preamble acknowledge victims as stakeholders attest to this.[5] The wide discretion and authority of the court to exercise its reparative powers on the award of damages to aggrieved victims or to those who are entitled to it shows its importance in ICL. Thus, Art. 75 of Rome Statute of ICC provides for the application of reparations under the regime of the ICC.[6]

Aside from determining who a "victim" is, Art. 75 expressly made it clear on issues of reparations to aggrieved parties. However, it also affirms the recognition of relatives or members of the family of the aggrieved parties who may have suffered damages, injury and losses. Also, Section 85 of the Rules of Procedure and Evidence of the ICC specifically defines a victim as a person who is adversely affected by the conduct of another resulting to grievous bodily harm within a geographical location upon which a court can exercise its powers of adjudication.[7] Who actually is a victim within the reparations regime of ICC is a key contention (Wenger, 2007, p. 241). This is because a victim is one who has suffered harm and losses within the jurisdiction of ICC. This suggests that such a crime should not be one under investigation ordered by ICC, but can hang on the presumption of innocence of the victim. To this end, victims are not required to refer to a particular investigation in their reparations cause of action. The claim must relate to the charges against the perpetrators.

The reparation orders of the ICC are applied in direct and specific terms because the Court's reparative orders are made against persons

[5] The Preamble of the Rome Statute, Available at: www.icc.cpi.int [Accessed 25.03.2024].

[6] The Rome Statute of the ICC, Art. 75.

[7] The Rome Statute of ICC Rules of Procedure and Evidence, adopted by the Assembly of States Parties, New York. *Report on the Impact of Rome Statute System on Victims and Affected Communities* (The Redress Trust 2010), pp. 1–3.

who have been convicted in line with their criminal liability on behalf of a direct or indirect victim (Evans, 2012, pp. 39–43, 117–128; Gaeta, 2011, pp. 305–327).

In contrast, human rights reparation can be made against a state with the aim of remedying a proven harm, injury or loss. While the growth of reparations regime in ICC gears towards victims' rights, aligning development to measures towards state responsibility to victims is evolving (Nollkaernper, 2003, pp. 615–620; Rivas, 2006, p. 311). This does not impugn on the powers of the ICC in making reparative orders via individual along with collective means, or through Trust Fund for aggrieved parties.

Basically, TFV's responsibilities arise from the need to regulate the Trust Fund for victims of harmful practices arising from war situations, and as a regulatory framework, it was adopted in 2005. The major role of TFV is to complement or take over the award made against a convict on behalf of victims when the convict is declared indigent. It can also carry out assistance measures to victim. The role of the TFV makes it easier for the court to complement reparations order with voluntarily assessed resources not deriving from the coffers of the perpetrators, is germane especially when the convicted is declared indigent.

IV. The Reparation Principles Laid Down in Thomas Lubanga's Case

Notably, the first reparative orders of the ICC arose from the convictions made by the Court in *Prosecutor v. Thomas Lubanga*.[8] In this case, the Trial Chamber in its declarative order, and in line with Art. 75(1) of Rome Statute of the ICC, developed several guidelines relating to issues of reparations and their enforcement procedures.[9] These guidelines outline the processes, procedures and laws followed to arrive at a successful reparation order for the victim of war. The essence of reparation principles is to bring lasting reconciliation and succor to those who have suffered harm.[10] Hence, they are to be

[8] Prosecutor v. Thomas Lubanga, ICC — 01/04-04/06-2872, Para. 210.

[9] Prosecutor v. Thomas Lubanga, Para. 181.

[10] Prosecutor v. Thomas Lubanga, Para. 65.

administered in a flexible, broad and general manner that is altruistic to victims.[11] The below issues were addressed by the Court culminating in the development of reparations principles. Notwithstanding the fact that the judgment was impugned on appeal, these principles were developed by the ICC for the first time, and they had a huge impact on the restorative justice of the Court. The principles formed the basis for the growth of the Court's case law in its reparative regime. They were derived from the first reparation trial of Thomas Lubanga before the ICC. They are discussed in the next section below.

V. Laws Relating to Reparations Regime

The Trial Chamber adduced the use of legal frameworks and standards that cut across many regimes of international criminal law, human rights law, labor law, etc., in the treatment of reparation matters. In its ruling on reparations, the Court relied heavily on Art. 21(1)(a) of the Rome Statute of the ICC in addressing the concerned issues bordering on the element of crime along with the Rules of Evidence and the Regulations of the TFV.[12] Drawing from the provisions of Art. 21(3) of the Rome Statute of the ICC, reparative orders should be devoid of discrimination based on the person's age, ethnic origin, color, language, religious beliefs, political affiliation, and social status in line with the internationally recognized basic human rights principles.[13] Moreover, the Trial Chamber recognized the contribution of the regional basic rights instruments, as well as case-law and international custom that have evolved on reparation regime.[14] On this note, laws outside criminal law are requisite in taking decisions bordering on issues of reparative orders.

[11] Prosecutor v. Thomas Lubanga, Para. 180.

[12] UDHR 1948, Art. 8, ICCPR 1966, Art. 6, UNCAT, Art. 14(1), ACHPR Art. 21(2), ACHR, Article art 63(1) among others.

[13] The Rome Statute of ICC, Art. 31(3).

[14] Note that while IACtHR and ECtHR have jurisdiction towards reparation orders on States, the ICC is limited to individual persons.

V.1. Impartial Treatment of Victims

Generally speaking, the Court advised the use of the principle of impartiality to victims, which centered on fair hearing and trial in reparation trials. To this end, victims are to be treated equally in all aspects of reparations programs despite whether they were parties to the trial proceedings. They are to be part of the plan and design of the reparation process. On this note, they are to enjoy unlimited and equal access to information and assistance in the reparation regime.[15] This being said, vulnerable persons such as children, elderly, females, victims of sexual and gender assault are not to be discriminated against during trial.[16]

When making the decisions on reparation, the victims should not be maltreated as an object of humiliation, but should be humanely treated by means of implementing measures capable of ensuring their safety, social and physical needs, privacy, emotional and psychological status.[17] In the midst of limited resources for the reparation of large number of victims, the process should be handled through community-based approach due to illiteracy and poverty. However, unlike criminal trial that emphasizes fair hearing and fair trial for all the parties, the principles of reparation developed by the ICC center on the victims' rights mainly, disregarding the defendant or the convict.

V.2. Direct and Indirect Beneficiaries of Reparations

As was ruled in Lubanga's reparations decision, the palliative should be carried out as contained in Rule 85 of the Regulations of ICC to direct and indirect victims who participate in the process. To this end, direct victims who are ones that took part in the trial that led to conviction and indirect victims who did not participate are entitled to take part the reparation process of the Court.[18] Indirect victims can be family

[15] The Rome Statute of the ICC, Art. 85, UNBPs, 11, 12, 24.

[16] The Rome Statute of the ICC, Art. 68 and Rule of Evidence 86.

[17] See Rule of Evidence, 87 and 88.

[18] Prosecutor v. Thomas Lubanga Dyilo, ICC 601/04601/06, Pre-Trial Chamber I, Decision on Confirmation of Charges, 29 January 2007. Para. 32, on "indirect victims". Available at: http://www.icc-cpi.int. [Accessed 24.03.2024].

members, friends, well-wishers who have lost a beloved or have suffered harm or injury not directly.[19] Besides, reparations in some cases may be granted to legal entities under Rule 85(b) of the Regulations.[20] While identifying the beneficiaries, formal and informal means can be used. Aside the above, the court may approve a declaration attested by two known witnesses pointing to their relationship to the beneficiaries.[21] If it is an organization, any document of its incorporation suffices.[22]

The Trial Chamber recognizes as a principle that certain groups need be given priority and special treatment. These includes child victims, victims of gender or sexual assault and severely traumatized victims. The Court may adopt special procedures such as affirmative action to guarantee equal, fair and effective security. In light of the provisions of Art. 75 of the Rome Statute of ICC, organizations like schools, villages, markets, etc., where the children were recruited to serve as soldiers can benefit reparations packages.[23] To this end, direct, indirect victims are potential beneficiaries. In general, it was submitted that it will be appropriate for the Trial Chamber to maintain open list of applicants for reparations to the best interest of children that were affected by the war and their relations. This brings about long list of victims to reparation in the ICC.

V.3. Scope and Modalities of Reparations

The Trial Chamber developed numerous principles on the scope and modalities of reparation. It was decided that the regime of reparations grew from international human rights obligations,[24] and in line with Rule 97(1) of the Regulations of ICC, the Court is obliged to award reparations on an individual basis or, where necessary, on the basis of

[19] Prosecutor v. Thomas Lubanga Dyilo, ICC 601/04601/06, Pre-Trial Chamber I, Decision on Confirmation of Charges, 29 January 2007. Para. 32–34.

[20] Standard Application Form for Organizations, Part A. Available at: http://www.ICC.CPI.int/MENUS/ICC/structure+of+the+court+victims/forms.httm [Accessed 24.03.2024].

[21] See Prosecutor v. Thomas Lubanga, Para. 104–107.

[22] See Prosecutor v. Thomas Lubanga, Para. 136–142, 153–159.

[23] ICC Rule, 97 and 98.

[24] The Rules and Reparations of the TFV, Rule 98(5).

collective interest, or both. It should be noted that a combination of the provisions of Art. 21(3) of the Rome Statute of the ICC along with Rule 85 of the Regulations of ICC, give impetus to the Trial Chamber in authorizing individual or group reparations. The implications of the above is that these provisions seem not to be mutually independent as they exist simultaneously.[25] The Rome Statute's provisions clearly provide for individual reparations and impliedly provided for collective reparations.[26] The non-definition of the meaning of "collective" creates ambiguity (McCarthy, 2009, p. 250).

On the modalities, the Trial Chamber is of the view that despite the entire provisions of Art. 75 of the Rome Statute which lists the restitutions, compensation along with rehabilitation as measures of reparations, the said list remained inexhaustive as the case may be. There are other types of reparation that may have symbolic and preventive transformative values. For example, they may include the publication of the court's convictions and sentences in Radios and Newspapers.[27] Another may include the public apology of the convicts to the reparation beneficiaries and their acceptance.

V.4. Causation and Standard of Proof in Reparations

The position of the Trial Chamber is clear on issues of damages, loss or injury sustained by the victims. The form and structure of a reparative claim must be related to the crimes convicted of. In this sense, the Court can apply proximate cause in relating the loss, harm or injury to the crime convicted of.[28] Hence, in situating a balance in the relationship between harm and crime, the court must be satisfied of the nexus between both on causation.

To this end, it should be noted that at the stage of the reparation trial, the Prosecution is obliged to prove the relevant facts of their case

[25] Redress, Report on the Impact of Rome Statute System on Victims and Affected Communities (The Redress Trust 2010), pp. 1–3.

[26] RS Art. 75(1) and Rule 97 (1).

[27] ACtHR, Veldsquez Rodriguez v. Hundred and Costs, Judgment of 21 July 1989, Para. 2004.

[28] Rule 97(3) of Rules of Procedure and Evidence.

to a standard required in criminal prosecution, though a less exacting standard of application as per different nature of the reparations proceedings.[29] The standard of proof, in line with Rule 94(1) of the Regulations of the ICC along with Art. 74 of the Rome Statute, is that of a balance of probabilities.[30] That said, this implies that both the standard along with the burden of proof must be applied in a more flexible manner, relaxing the law along with the facts. In support of the above, a lower evidentiary standard to proof beyond reasonable doubt should be applied. This is because reparations proceedings differ from criminal trial and they do not lead to another conviction.

VI. Reparative Orders against Convicted Persons

Lubanga's conviction by the ICC remained a celebrated one as he was at the same time declared indigent for the purposes of reparations. The Trial Chamber was of view that he may be made to contribute non-financial reparations in the form of symbolic nature of public or private apology to the aggrieved parties. In this regard, this clearly suggests that the above may not constitute part of the decision of the Court.

The foregoing called for the concept of reparation via the TFV.[31] The Trial Chamber ruled that when convicted person is indigent, and reparations are ordered via the TFV, such restitutive measures should not be restricted to the resources or assets seized and deposited to the TFV, but can be supported by the TFV.[32] On this note, the court has the right to confiscate the present and future properties of the person whom the order for reparations is made against. Even if he is a declared indigent, his financial records should be kept under review.

[29] At the debate of the drafting of the Rome Statute, it was agreed that the standard of proof must be lower.

[30] This is in line with overriding evidence in reparations claims programs.

[31] The Rome Statute of the ICC, Art. 75(2).

[32] The Rome Statute of the ICC, Art. 75.

VII. Implementation of the Reparation Plan and the Role of Judiciary

In the reparation's regime, the Court institutes a five-step enforcement plan as suggested by the TFV through which reparations shall be received by victims.[33] The first is the identification of localities of parties or victims, while the second consists of a consultation process in the localities identified. The third step is the assessment of harm suffered by beneficiaries of reparations. Public debates in communities, education and advocacy on reparation principles modalities is the fourth stage, while the last involved collection of proposals for general reparations.[34]

The Trial Chamber deemed it necessary that applications so far made to it should be transferred to the TFV for appropriate consideration. To this end, they have independence to carry out the reparation assessment vide experts as provided by Rules 47 of the Regulation of ICC along with 48 of the Regulations of the TFV. In conclusion, the Trial Chamber issued the aforesaid guidelines on reparative orders as contained in Art. 75(1) of the Rome Statute of ICC. It is imperative to note that notwithstanding the aforesaid was appealed upon, the principles developed formed classical precedent for future decisions in the ICC reparative regime on victims' restitutions.

VIII. Challenges to the Applications of ICC's Reparations Principles

It is generally noted that the ICC's first decision on reparations in the matter of Thomas Lubanga unfolded a lot of issues bordering on the development of reparations principles in a criminal matter (Wlersing, 2012, pp. 29–38). It made a magnificent precedent in ICL within the context of regime of victims, indigency of the perpetrator and the application of the TFV as an alternative succor. However, the principles

[33] Decision establishing the principles and procedures to be applied to reparations. ICC-01/04-01/06-2904. Para. 173.

[34] Decision establishing the principles and procedures to be applied to reparations. ICC-01/04-01/06-2904. Para. 173.

brought out by the court which covered the law, practice, purpose and procedure within the court's reparations order, have a long way to go in ICL. Reparation proceedings being different from criminal trial, the Lubanga's reparations decision principles face numerous impediments in application. Some of the clogs on the enforcement principles are discussed hereunder.

VIII.1. Slow Growth of Precedents of Reparations Principles in ICL

Reparations provisions is a novel development of the ICC. The mandates and powers of *ad hoc* tribunals that predate the ICC like the International Criminal Tribunal of Yugoslavia and International Criminal Tribunal of Rwanda do not have provisions of reparation (Mumba, 2001, pp. 359–371; Cassese, 2005, p. 429). It is trite that reparations under ICL is a borrowed concept from International Humanitarian Law (IHL) and International Human Rights Law (IHL) practices. Although they are separate regimes, there are relevant interconnections between them as the criminalization of serious human rights violations bring forth criminal responsibilities and war crimes (Moffett and Sandoval, 2021, p. 750). It remained an undisputed fact that reparative principles of ICC rely on the jurisprudence of IHL and IHRL. However, in terms of application, it operates on a narrower level.[35] This is in sharp contest with the human rights regime of reparation, where it can be ordered against the State in respect to proof of victim's injury and harm.

Though, Art. 25(4) of the Rome Statute maintained that no provisions of the Statute relating to individual criminal responsibility shall affect the responsibility of States under international law, as most member States are wary of the collective or state responsibility syndrome in reparations award. Notwithstanding that the ICC limited its reparations process to individual criminal liability, the extensive nature of state responsibility as utilized in human rights regime of reparation provokes a lot of jurisprudential debates. Worst, the growth of the principles of criminal reparation is slow unlike other regimes like the IHL.

[35] Prosecutor v. Thomas Lubanga, Decision Setting the Size of the Reparations Award, Para. 118, 269.

VIII.2. Principles Limited by Case-by-Case Analysis

Article 75(1) of the Rome Statute vested the ICC with extensive powers in establishing and developing guidelines relating to aggrieved parties who may be directly or indirectly affected by the act that requires restitutions, compensations or rehabilitations.[36] Unlike trial proceedings, in which a court decides that a case forms a precedent to be followed by lower courts, principles do not follow such a sequence. Precedents per se are binding on lower courts and can be referred to or utilized in a similar matter. The established principles as ordered by Art. 75(1) of the Rome Statute do not have a binding effect on other cases. Hence, the approaches of its implementation are relevant to the present case at hand. To this end, the evolved principles developed in Lubanga's case do not bind any other case. However, the principles can be used or referred to by the Court in other cases are not binding precedents in other cases of reparations before the ICC, domestic, regional or international criminal law legal institutions[37] Suffice it to say that binding precedents do not exist within the evolved principles developed by the Court. On this note, it can be developed subjectively on a case-by-case circumstantial condition.

VIII.3. No Clear Definitions of Collective Reparations

It must be admitted that several principles have evolved from the decisions of the Court in Lubanga's case with specific emphasis on the modalities of reparation which may be specific or collective in nature.[38] While individual reparation is clear, collective reparation is wide and contentious. Although the latter is adjudged a salutary means of reaching large number of victims in the face of limited resources of the perpetrator and the ICC, the absence of its definition in law is a big snag, because it is a mechanism of reaching a large number of people other than identified specific victims.[39] The absence of a clear definition of collective reparations drowns the principle in the mud of ambiguity and uncertainty.

[36] The Rome Statute of the ICC, Art. 75(1).

[37] Prosecutor v. Thomas Lubanga, Para. 181.

[38] The Rome Statute of the ICC Art. 64(2) and 3(a).

[39] Prosecutor v. Thomas Lubanga, Para. 10, 11, 13–15, 17, 35–42.

VIII.4. Unsettled View on Causation

Damage, loss and injury suffered by victims must have a connection with the offence convicted of. Such a connection or relationship implies causation. Article 75 of the Rome Statute appears to favor the reparative regime in such a manner that it could be applicable to the victims either directly or indirectly, and does not impugn on causation proof to get the palliative remedy. Thus, causation is not defined by the Rome Statute. Hence, the specific conditions of the causal relationship in the face of the offence or the harm suffered by the victim is not precisely provided for the purposes of reparations. On this note, if the direct cause is not satisfied for the court, a proximate cause may suffice. The non-precise definition of causation leaves the process subjective.

VIII.5. Large Victims Participation

A look at recent armed hostilities around the globe suggests that mass violations of IHL through war crimes entail several casualties wherein the affected person or persons may not be part of the trial proceedings that warrants conviction under Art. 74 of the Rome Statute. However, Art. 75 of the Rome Statute made a clarification on the misconceptions on whether victims appear under direct or indirect victims. The provision "in respect of" compounds and expands the geography of beneficiaries in reparations regime of ICL. This builds up uncertainty in expectation as reparations orders are made against individuals and not States under the ICC and ICL in general. The indigency of the perpetrator and the lack of resources by the ICC through its TFV leave the massive numbers of victims with their individualized harm under the mercy of collective reparations (Balta et al., 2018; Cassese, 2005, p. 429). This goes along in dwindling the palliative justice of the ICC.

VIII.6. Inadequate Publicity of Principles

The wide publicity of reparations principles is pertinent especially in communities festered by illiteracy, ignorance and lack of communication structures like television, newspapers, radio and electricity. Reparations being a transitional period from war, the above

facilities in the communities and emotional balance of the victims may be low. Under the jurisprudence of the ICC, and in line with Rule 96 of the Regulations of the ICC entitled "Display of Reparative Guidelines", it must be emphasized that it remained the Court Registrar's responsibilities to make such publication when it becomes necessary. The Registry shall carry out necessary measures which include outreach publication with the national bodies, local authorities on the recent reparation proceedings and principles. The Registrar ensures that reparation proceedings are transparent, open and measures adopted for its altruistic effect are ensured through timely notification and accessibility of awards (Letschert et al., 2011, pp. 1–3). This may not be easy having in mind the distance barrier between the court and member states involved. Without the cooperation, publicity of the principles as ordered on the Registrar to perform fails.

VIII.7. Compromised Fair Trial Procedure

Reparation to victims under the regime of the ICC centers on fairness of proceedings in respect of the victims mainly. This obviously is a compromise as it stifles the rights of the defense in the process. Notwithstanding that the victims' rights take predominant focus in reparations proceedings, the perpetrators rights must also be guaranteed (McGonigle Leyh, 2011, pp. 2–11). On this note, the large participation of the aggrieved victims should not stop the procedural fairness to be extended to the convicts. The fairness should benefit the victims and the perpetrators. To this end, the victim-centered roles in the ICC should not affect the rights of the convict to be represented and be heard in the proceedings. The justice maxim of "fair trial and hearing" are applicable to the victim-centered reparations proceedings.

VIII.8. Difficulty in Gender Imbalance Evaluation

Gender balancing would achieve a meaningful result on an individually awarded reparations order facilitated by adequate publicity. The Court is enjoined to examine such problematic issues bordering on discriminatory practices on gender in the course of the establishment of

principles and procedures for reparation. This enhances its compliance with obligations in line with Art. 21(3) and 75(6) of the Rome Statute. The Court should avoid preferential and partial treatment in order to ensure that all gain access to the reparations in other to gain wholesome reconciliation.

VIII.9. Likely Non-Cooperation by Member States

To properly enforce reparations orders made to an individual, the Rome Statute requires the Member States to cooperate with the ICC. By Art. 75(4), 75(5) along with Art. 109 of the Rome Statute, contracting parties are instructed to cooperate as regards reparation principles. On this note, the reparation principles highlight firstly the role of contracting parties to abstain from any act capable of stifling the implementation of reparative orders along with the application of the awards made by the ICC. This complementarity principle, entails member states cooperation in identifying, locating, freezing or engaging in seizures of proceeds; properties as well as assets relating to offences committed wherein reparations orders were given by ICC.[40] The above appears to pose a great challenge in enforcement when such contracting parties are not happy with the decision taken by the ICC. This could be experienced in Africa, for example, where different States have already breached their agreement with the ICC. This stems from the fact that there is a feud between the African Union and ICC on complementarity. More so, the ICC reparative orders against individuals especially non-state armed groups leaders may not be properly enforced without state party members cooperation.

VIII.10. Financial Constraints of the Convicted Persons

On where the money for the reparation orders should come from, Art. 75(2) of the Rome Statute stipulates that the order should be made directly to the convicted individual. Alternatively, when necessary, the Court is obliged to make orders that such award be made via the TFV as stated in Art. 79 of the Rome Statute. Accordingly, by default, it is

[40] Prosecutor v. Thomas Lubanga, Para. 49, 43–44, 206.

the convicted person who pays for the reparations order. Alternatively, with regard to the Thomas Lubanga's Case, the court viewed him an indigent person, and therefore made an order that his award should be directed to the TFV.[41]

The above development suggests that the drafters of the Rome Statute may have foreseen this likely financial constraints from the convicted persons as Rule 98(5) of the TFV prescribed that TFV's other resources should be applied or utilized in such a manner to benefit the victims.[42] As a way of clarifying the above development, it must be admitted that when a convicted person is indigent and the reparative awards are made via the TFV, such an order may not be restricted to the funds and assets confiscated or put under the TFV's custody, but may be complemented with the TFV resources. Hence, the role of the TFV is first to guarantee availability of funds that may be sufficient to address emergency situations that will likely occur in the Court's reparative orders in line with the provisions of Art. 75 of the Rome Statute.[43] It should be acknowledged that TFV is an autonomous arm of ICC as its resources are pooled from the voluntary contributions of the Member States. In the wake of lack of resources from the convicted person and the TFV, the reparations orders would suffer implementation hitch.

IX. Conclusion

Our irresistible conclusion is that the reparation principles developed in the impugned decisions of the ICC in Thomas Lubanga's Case remain a reference for any discussion on the reparative regime as it prescribed for the acceptable requirements for an award. Also, the paper has brought to light the important reasoning in the Lubanga Judgment particularly as it relates to novel reparations schemes for victims. This is in the wake of shortage of literature, rules, practices and mechanisms within the domain of ICL reparations regime. Despite the slow growth of the reparation regime within the criminal jurisprudence of the ICC, it remained notable along with a fast-emerging concept that has opened

[41] Prosecutor v. Thomas Lubanga, Para. 49.

[42] Prosecutor v. Thomas Lubanga, Para. 50.

[43] The Rome Statute of the ICC, Art. 75(4), 93(1)(1c).

much debates on several conceptual and theoretical arguments on its acceptability in the international criminal law jurisprudence. Aside from certain restrictions, frailties, inadequacies or controversies, yet unresolved, overhauling of the reparative regime of ICL, particularly, as it relates to aggrieved parties and breaches of the rules of IHL, remained an innovation in the emerging bodies of international law. With the case of Thomas Lubanga as a precedent, improvements and developments on reparations for aggrieved parties in situations of military hostilities within the regime of the ICC along with ICL have been made.

A lot of principles were formulated by the ICC as expressed in Thomas Lubanga's Case on reparations. This development unfolds the following aspects. First, traditionally, the parties aggrieved by the abuse of the rules of IHL, could not ask for reparations within the international law jurisprudence and hybrid criminal courts. It seems to us that ICC became the first amongst all to incorporate rights and models of claims for reparative orders for aggrieved persons who suffers from the effects of war crimes by the convicted persons.

In addition, such reparative awards to aggrieved persons are granted by the ICC centers regarding personal criminal responsibilities for offences committed in situations of military hostilities along with similar offences perpetrated during military hostilities. Hence, the paper revealed that the ICC can only issue reparative orders on a convicted persons and not on States or Non-State Armed Groups or Corporations involved in armed conflicts. Such jurisdictional limitation on individuals alone is a lacuna to be filled. In this context, the large number of claimants, the unclear jurisprudence on nature or kind of reparations, modalities along with execution structure remained restrictively exercised in the ICC regime of reparative justice to individuals alone. However, in the experimental case of Thomas Lubanga, though impugned on appeal, the principles developed have helped the jurisprudence of the ICL.

The development of reparation principles before the ICC being novel and evolving, this work makes some recommendations that are important to the development of the subject. For instance, the ICC should be vested with the jurisdiction and power to order reparations against States, corporations existing in States, non-state armed groups and other culpable entities. This would require amendment to the

provisions of Art. 75 of the Rome Statute in line with the proposition. It cures individual responsibility and the consequential indigency that may harm the reparation program.

The procedural rights of victims due to large numbers are representatively carried out either by lawyers, NGOs, etc. Also, on matters of assessment of harm, experts are employed by the Court and the location of the Court in Hague make the reparations regime far from reality. It is recommended that the victims participate in the making of the principles guiding reparations, or at least an adequate publicity and involvement of beneficiaries help to draw the program from symbolic to reality.

At the ICC, due to large number of victims, collective reparations play a bigger representative role. Collective reparation should be provided in the Rome Statute and defined as follows: collective reparation is a restorative mechanism of providing redress to people that have suffered injury, loss and damage through group process. Moreover, due to beneficiaries and claimants of reparations, symbolic reparation should be encouraged, such as public apology, etc., especially where the loss is irreparable and lacks no equivalent means of material compensation.

To ensure reparation for a wide number of victims, the clause as provided in Art. 75(1) of the Rome Statute with regards to the aggrieved parties should be deleted. This makes the article on reparations concentrates on direct victims. In addition, for reparation awards to be effective, States should be responsible for cooperation with the ICC in line with Art. 93(1) and 109 of the Rome Statute. It is recommended that the ICC cleans up its complementarity regime with Member States.

Justice for victims does not impugn on the right to free expression as well as proceedings for defense. Notwithstanding, reparations programs are victims-centered, the Court should not overlook the rights of an individual or that of the convicted persons to defend himself. The procedure for reparative justice should be clear, consultative and accessible to the victims and to the defense. When characterized by uncertainty, it will predispose dissatisfaction.

The application of reparation principles on individual case-by-case basis makes them subjective as they cannot bind or be used or referred as binding precedent on appeals. Reparation principles as developed

by Trial Chambers of the ICC should be a precedent binding because of appeals. Aside of that, in case a convict is declared indigent and there is a disagreement between the ICC and the TFV on the mode of carrying out reparation orders, it tarnishes the effectiveness of the restorative program. There should be at all times cordial working relationship between the two institutions.

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Addressing White Collar Crime with Situational Crime Prevention Approach: What's Promising and How It Works?

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***Abstract*:** The study aims to demonstrate that white collar crimes can be prevented by limiting organizational opportunities for such crimes. By employing a situational approach to crime prevention, the research seeks to highlight practical measures businesses can adopt to reduce these opportunities. It explores the 25 techniques proposed by Cornish and Clarke, discussing their implementation within the context of organizational crime prevention. The findings reveal that while situational crime prevention measures are effective in controlling white collar crime, they cannot eradicate it entirely. These measures help to maintain white collar crime within an acceptable range, as complete elimination is unattainable due to the complexity and organized nature of these crimes. This research underscores the importance of a situational approach in white collar crime prevention, providing a systematic framework for reducing crime opportunities. It emphasizes the need for businesses to adopt comprehensive internal controls, ethical guidelines, and awareness programs to mitigate the risk of white collar crimes, contributing to both academic discourse and practical crime prevention strategies in corporate settings.

Keywords: corporate fraud; crime opportunities; financial crime; situational crime prevention approach; white collar crime

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Contents

I. Introduction

Today, financial markets face a lot of corporate fraud and accounting scandals. When the accounting scandals that took place in the last century are examined carefully, it is seen that companies deceive and mislead their employees, investors and markets with various fraudulent methods. In the process of accounting scandals that resulted in great destruction, companies present fraudulent and erroneous reports to the public, harming not only employees and investors, but also social interests (Homer, 2019). In addition, another consequence of these scandals is the deterioration of the confidence climate in the markets. Thus, the belief that companies in globalized markets are unreliable economic actors aiming only at profit maximization is formed. The goal of profit maximization, which is one of the most basic goals of companies, should be in line with the goal of providing public benefit and should be compatible (Free and Murphy, 2015).

In order to achieve the goal of providing social benefit, potential white collar crimes within the company should be prevented and

potential criminals should be deterred from committing crimes (Dodge, 2019). In order to prevent white collar crimes, there are many different perspectives based on the criminal act, the criminal, the personality characteristics of the criminal, the social, cultural, environmental and legal elements that allow crime to be committed, the concept of criminality, the genetic factors that lead to delinquency, and many other various factors in the literature. One of the most preferred crime prevention approaches in practice is the situational crime prevention theory which elaborated 25 techniques provided by Cornish and Clarke (Benson and Simpson, 2017).

It is possible to say that these 25 techniques for reducing the opportunity for crime offer a systematic framework for reducing or preventing different types of crime, which helps to make crime seem less attractive to potential criminals (Ho et al., 2022). It is seen that these 25 techniques, which aim to reduce crime opportunities, which are frequently used in criminal justice studies, are mostly used in the prevention of simple violent street crimes. Although situational crime prevention techniques can be easily applied to street crimes, their applicability to white collar crimes, which are more complex, well-organized, longer-lasting and have higher returns, are questioned. Furthermore, the number of studies revealing how and to what extent situational crime prevention techniques are applied to white collar crimes is very few. Therefore, in the following part of the study, the application area of situational crime prevention techniques in the field of white collar crime is discussed. The situational crime prevention approach is discussed in detail and within this framework, the crime prevention techniques suggested within the approach are listed. In order to determine how successful the situational crime prevention approach is in preventing white collar crimes, the application method of crime prevention techniques in white collar crimes is discussed. In this context, firstly, a conceptual framework about the concept of crime is drawn and crime theories in the literature are presented in general terms. In the following section, the concept of white collar crime is discussed and how these crimes can be kept under control within a situational crime prevention approach is explained.

II. The Theoretical and Practical Basis of Situational Crime Prevention Approach

The situational crime prevention approach takes its theoretical foundations from the classical school and neo-classical criminology teachings, it goes beyond these school teachings in the field of criminology and offers a new crime prevention approach. Although there are many theories in the literature on how to handle crime, a clear understanding of the "classical school" teachings, which is considered the starting point of all these theories, is very important for understanding the situational crime prevention approach (Ray and Diane, 2017).

Classical school argues that individuals are selfish beings that tend to reduce pain and costs by increasing their pleasure and benefits by nature, and that they always seek to maximize their individual interests due to this nature. It is emphasized that the arguments for the classical school are based on the concepts of "utilitarianism, hedonism, rationality and free will". According to the classical school perspective, criminal individuals go through a rational decision-making process before they commit their criminal acts. To put it more clearly, potential criminals decide to commit or not commit a crime before committing the crime, taking into account the benefits they will gain from the crime and the harms that the crime will cause if they are caught. Therefore, the classical school argues that the way to prevent a crime is to remove a potential criminal's motivation to commit a crime. In this respect, crime deterrent practices should be aimed at crippling the will of the guilty individual (Travis, 2017).

In addition to the classical school, positivist criminology teachings constitute the theoretical infrastructure of modern legal systems. Although the positivist criminology school follows the classical teaching, it has a very different perspective from the classical teaching. The positivist school of criminology is more concerned with the motivations that bring about crime rather than punishments. Contrary to the classical school doctrine's assumption that individuals make rational choices while committing crimes, the positivist doctrine suggests that there are genetic, environmental, psychological and other factors that affect the individuals' decision to commit crimes. According to this

point of view, it is possible to say that people do not have a free will in the full sense of the word, and that the will of individuals is crippled by various social factors. Whether individuals have criminal capacity or not, does not prevent them from being penalized for the crimes they have committed (Doak, 2015).

The neo-classical school takes its foundation from the main assumptions of the classical school, but takes these assumptions one step further and claims that crime can be prevented by preventing the formation of the minimum conditions necessary for an action to constitute a crime. According to the neo-classical school point of view, the conditions that create the crime are the primary factors that need to be addressed more than the causes of the crime. In neoclassical school teachings, the conditions that allow the formation of crime are evaluated in order to comprehensively examine the concept of crime and to prevent criminal acts (Derek, 2017).

The theory of rational choices, developed within the framework of the teachings of the neo-classical school, assumes that individuals are rational beings by nature and that they benefit from their rationality in decision-making processes. However, rational choices theory focuses only on individuals' rational decision-making processes; it does not take into account the factors that cause crime and delinquency. On the other hand, in the context of rational choices theory, although it is accepted that individuals make rational choices of their own free will in the process of deciding to commit or not commit a crime, the rationality of individuals in real life is not unlimited (Caillé and Vandenberghe, 2016).

Clarke and Cornish opposed the rational choice theory's assumption that "individuals have infinite rationality". They argue that there is a limit to the will and rationality of individuals. Clarke and Cornish who oppose the classical school's acceptance of infinite will and rationality, are based on the "bounded rationality" approach of Herbert Simon at the point of differentiation between the classical school and the neo-classical school. According to Derek Cornish and Ronald Clarke, although crime is affected by the rational decisions of individuals, this rationality is a limited one (Cornish and Clarke, 2017, p. 942). Therefore, the individual, who is considered as a potential criminal,

can never make a decision with the knowledge and equipment he should have, while deciding on committing or not committing a crime. The potential criminal always has limitations in skills, knowledge and time (Brantingham and Brantingham, 2017).

There are also studies in the literature stating that the evaluation of criminal acts and actions as a rational choice for potential criminals can be achieved through deterrent and preventive practices. However, variables such as the limited rationality of individuals, the effectiveness of deterrent and preventive practices, the deficiencies of the criminal justice system, when, where and how the crime is committed, the target to which the crime is directed directly, and the characteristics of crime and criminal cause the adequacy of the deterrent-based view to be questioned.

The situational crime prevention approach differs radically from all other remaining criminological teachings and mentions the necessity of making various managerial and environmental changes in order to minimize the possibility of the occurrence of crime. According to Felson's perspective on the subject, the situational crime prevention approach includes "methods used to prevent crime events by eliminating situations that allow criminal acts and actions" (Felson, 2008, p. 314). Clarke systematized all the measures that serve to prevent criminal acts and actions and to be taken regularly both by individuals on a micro scale and by companies on a macro scale, and included them in the literature as a "situational crime prevention approach". According to Clarke, the practices aimed at preventing crime should be carried out more effectively and efficiently and should be evaluated as a scientific discipline that includes the whole society, and therefore the situational crime prevention approach has been brought into the criminology literature (Clarke, 1995, p. 3).

Situational crime prevention approach differs from other crime theories mentioned in the literature and accepts that the individual stays away from committing crimes of his own free will, but does not deal with the arrest and penal sanction of criminals. This approach focuses on the crimes committed, rather than the individuals who are the actors of the crime, and focuses on the conditions that create the crime instead of the conditions that cause the individual to become a

criminal. In the approach, how crimes occur is more important than the motivations of individuals to commit crimes. Within the framework of the approach, an attempt is made to determine which situational factors can be used in order to prevent people from committing crimes again in the future (Newman and Clarke, 2016). In parallel with Gottfredson and Hirschi, other crime prevention theorists accept that there is a distinction between the concepts of crime and delinquency within the framework of the situational crime prevention approach, and focus on the criminal act itself by putting guilt in the background. Identifying and revealing the acts and acts constituting a crime, and getting the criminals who committed these acts and acts to receive the punishment they deserve, are not among the priority agenda items for the situational crime prevention approach. While the situational crime prevention approach is not concerned with the elimination of crime through the development/improvement of the social order or the social institutions shaped by the rules, norms and values prevailing in the society, it serves the purpose of making the criminal act less attractive to individuals with a criminal potential.

Situational crime prevention approach aims to prevent crime by reducing opportunities to cause crime and taking necessary measures such as administrative decisions and environmental regulations. At the heart of the situational crime prevention approach is the goal of reducing crime opportunities. In order to fulfill the aforementioned purpose, the approach states that the probability of the criminals being caught should be increased and the benefit to be gained from the crime should be reduced. Benson and Madensen base their situational crime prevention theory is based on the idea that crime can be minimized, if not entirely prevented, by altering the opportunity structures that potential offenders have access to (Benson and Madensen, 2007, p. 610)

In many developed countries, the situational crime prevention approach is used in the process of redesigning physical environments. It is a known fact that physical spaces play an important role in promoting or preventing criminal acts. For this reason, within the context of the situational crime prevention approach, “creation of a defensible space” and “crime prevention through environmental design” studies are carried out in physical spaces. In addition, “problem-oriented policing

activities" are carried out within the context of the situational crime prevention approach, enabling more effective and rapid measures to be taken for certain types of crime. The aforementioned measures are considered to be extremely important steps in bringing the situational crime prevention approach to its current state and in establishing its basic principles (Madensen, 2016). According to Clarke and Cornish, the situational crime prevention approach is aimed at very specific types of crime; it involves the management, design or manipulation of the immediate environment as systematically and permanently as possible; and it should include measures to reduce opportunities for crime that make crime more difficult and riskier to commit, while at the same time making it less rewarding and justifiable (Clarke and Cornish, 1985, p. 151).

According to Wortley and Cornish, and Clarke, the situational crime prevention approach, in addition to the aforementioned measures, also includes efforts to control situational crime triggers (factors that trigger the motivation to commit crime) and to eliminate situational factors that provoke crime reactions. Benson and Madensen discuss the basic principles of the situational crime prevention approach under five main headings. These principles aim to reduce the attractiveness of crime for potential criminals. First, increasing the effort required to commit the crime. Second, increasing the risk of being caught by the potential criminal in the criminal process, which includes the stages before, during, or after the completion of the criminal act. Third, reducing the rewards that can be obtained as a result of the crime. Fourth, reducing situational conditions that may trigger unplanned criminal acts. Fifth, preventing the perpetrator from making excuses that justify his or her criminal actions or relieve the perpetrator from the responsibility of the crime (Benson and Madensen, 2007, p. 623).

Although the basic principles of the situational crime prevention approach are summarized under five main headings, it should not be forgotten that these principles vary according to the potential criminal's perception of effort, risk, reward, triggering and excuse making in terms of a certain type of crime (Benson and Simpson, 2014). These perceptions, based on personal judgments, allow a general framework for crime prevention efforts to be drawn within the situational crime

prevention approach. There are 25 special techniques in the literature for the application of these 5 basic crime-reducing principles that draw the general framework (Table 1).

Table 1: Summary of 25 Techniques for Situational Crime Prevention

Increase the Effort	**Increase the Risks**	**Reduce the Rewards**	**Reduce Provocation**	**Remove Excuses**
Harden target	Extend guardianship	Conceal targets	Reduce frustrations and stress	Set rules
Control access to facilities	Assist natural surveillance	Remove targets	Avoid disputes	Post instructions
Screen exits	Reduce anonymity	Identify property	Reduce emo-tional arousal	Alert conscience
Deflect offenders	Utilize place managers	Disrupt markets	Neutralize peer pressure	Assist compliance
Control tools and weapons	Strengthen formal surveillance	Deny benefits	Discourage imitation	Control drugs and alcohol

Source: Clarke, 2016

The first of the principles determined to reduce crime opportunities is to increase the effort made during the commission of crime. In other words, by increasing the effort of the person to commit a crime, it can be ensured that the person gives up committing a crime. In this context, the person's access to the crime target should be made more difficult (Weisburd et al., 2017). For example, with the installation of steel steering wheel locks in cars in a neighborhood where theft cases are high, there has been a significant decrease in car thefts. Keeping the entrances and exits to the buildings under control will not only keep unemployed or unwanted persons away from the buildings, but also make it more difficult for the person who knows that they are controlled to commit a crime. Ensuring control in buildings can be achieved by measures such as using electronic cards at entrances and exits, showing identity cards, or establishing security points at entrances and exits. Closing the

streets to pedestrian and vehicle traffic by the law enforcement officers, determining the locations of the bars or having the men's and women's toilets in separate places have been determined as techniques to prevent crime opportunities in terms of eliminating criminals. The use of smart weapons, the shutdown of stolen phones, and the restriction of spray paint sales to young people are also measures to increase the effort to be made during the commission of crime.

According to the situational crime prevention approach, another way to reduce crime opportunities is to increase risks. The biggest risks that the potential perpetrator will face in case of committing a crime is the risk of being caught and punished (Nagin et al., 2015). Increasing these risks can be achieved by tightening routine precautions, expanding guard duties, or providing natural surveillance by providing street lighting, redesigning defensible spaces, and supporting whistleblowers. The use of official uniforms and professional identities are considered important steps in reducing crime opportunities by removing anonymity. Other actions that will reduce the risks are the installation of closed-circuit camera systems (CCTV) within the framework of space management and official surveillance, the placement of more security officers, the creation of red-light cameras and alarm systems for thieves.

Reducing the reward (return) to be obtained from crime is another principle of the situational crime prevention approach that prevents crime opportunities. In this context, hiding or eliminating the targets of the crime can be realized with techniques such as establishing women's shelters, using virtual credit cards and placing removable radios in cars. Product branding, licensing of vehicles, and application of identification numbers for auto tapes also allow reducing opportunities for crime by registering goods. Keeping usurers under control is important in terms of market abuse actions. In addition, deleting graffiti and pictures, making speed bumps on the roads and placing product alarms on the product are considered eliminating criminal motivations (Richard and Michael, 2016).

Another fundamental principle of situational crime prevention is the reduction of crime triggers. Reducing or eliminating triggers can be accomplished by eliminating boredom and stress. In addition, resolving conflicts that trigger crime, neutralizing emotional stimulation, balancing

peer pressure, and preventing imitation are other crime opportunity reduction techniques mentioned by Cornish and Clarke. The last basic principle of situational crime prevention is the prevention of crime excuses. Techniques foreseen in the literature to prevent excuses are as follows: setting rules, issuing instructions, providing moral awareness, helping people in complying with the rules and instructions, and keeping stimulants such as alcohol and drugs under control (Richard and Nick, 2017).

III. Understanding the Essentials of White Collar Crime Concept

Some of the crimes committed are homicide, injury, sexual assault, etc. As in crime cases, it includes the use of physical force by the perpetrator of the crime against the victim and refers to the physical integrity of the victim. Such crimes are classified as "violent crimes" in the literature (Fajnzylber et al., 2002). In addition to violent crimes, there are crimes against property or crimes without victims, which do not involve any threat or element of attack against any individual, such as fraud, robbery, trespassing, disrupting public order, or a property that does not result in physical loss of individuals (Deka, 2022). It is also possible to commit crimes that are described as "non-violent crimes" (Maulidi and Ansell, 2021). Although there are opinions that there are two main types of crime, mainly violent crimes and property crimes, other crimes that are not covered by these two main types of crime can also be encountered. White collar crimes are one of the most important examples of crimes that do not include property damage or violence in their structure. Unlike violent crimes, white collar crimes do not require physical force and contact, and it cannot be determined that these crimes are clearly illegal during their commission. The fact that white collar crimes are difficult to detect at first glance and they can occur in various forms makes it difficult to identify the main features of these crimes. However, it is important to understand how white collar crimes differ from other crimes in order to reveal how white collar crimes are committed and to determine effective strategies to prevent these crimes. White collar crimes differ from violent crimes

in three main points. First, the perpetrator of a white collar crime has legitimate access to the place where the crime was committed. Second, the perpetrator of a white collar crime is spatially separate from the victim of the crime. Third, the actions of the perpetrator of the white collar crime are seen as legitimate when looked at superficially at the first stage (Gottschalk, 2018b).

When the concept of crime is mentioned, although violent street crimes usually come to mind first, white collar crimes can have as devastating results as violent crimes due to the costs they cause. On the other hand, white collar crimes are committed by well-educated employees in middle or upper-level positions, often earning higher wages than the majority of society. These individuals, particularly those close to top management, are responsible for such offenses carried out in the course of their duties. The cost to communities can be much higher when compared to street crime (Cohen, 2016).

The phenomenon of white collar crime was described in the literature by Edwin H. Sutherland. The concept in question first emerged at the meeting held in 1939 by the American Sociological Society and the American Economic Association. While talking about the concept of white collar crime, Sutherland states that white collar crimes have an unlawful nature, just like other crimes, and therefore should be considered as a real crime as in street crimes, and contrary to a popular belief, the crime is not committed only by the lower classes. According to Sutherland, for an act of a criminal nature to be considered as a white collar crime, the act in question must constitute a crime, and this offense must also be committed by a respected and high social status individual during the practice of the profession. Reurink opines that Sutherland used the term “white collar” as a metaphor to distinguish employees in office buildings — especially in management and managerial positions (Reurink, 2016, p. 389).

Sutherland states that white collar crimes are frequently seen in every occupational group. White collar crimes are mostly misrepresented in the financial statements of companies, manipulation in the stock market, commercial bribery, direct or indirect bribery of public officials for the purpose of making appropriate contracts and showing them in accordance with the legislation, bribery of public tenders, false

advertising and sales, corruption, embezzlement. Less than promised or less than what was paid (short measures), tax evasion, bankruptcy and it appears in the form of misuse of funds in liquidations (Sutherland, 1940, p. 9).

Sutherland basically places these crimes under two headings. These are occupational criminal behavior, which occurs when the employee violates the rules of law for the sake of his individual benefit, during the performance of a profession, and organizational criminal behavior, which is the crimes committed by the individual(s) of the company in order to obtain benefits and/or economic benefits on behalf of the institution they work for. In the literature, there are opinions that argue that the definition of white collar crimes by Sutherland is insufficient and limited in terms of the individuals it covers. Edelhertz argues that white collar crimes should consider not only crimes committed by high-level corporate employees, but also criminal acts committed by other white collar employees regardless of a status (such as accountants, cashiers in lower social classes) (Cliff and Wall-Parker, 2017). Shapiro, on the other hand, argued that in order to make the concept of white collar crime more valid, the complementary components of the concept should be clarified. In this direction, Shapiro argues that "manipulation and violation of trust norms and impartiality constitute the behavior style of white collar crimes" and thus reconceptualizes white collar crime through the phenomenon of trust (Pontell, 2016).

Benson and Simpson consider white collar crimes from the perspective of opportunity and emphasize that individuals who have the opportunity to commit crimes at a higher rate are more inclined to white collar crimes. In this context, these people can more easily access the necessary resources to commit crimes and hold strong professional positions within the organization. Adhering to Sutherland's concept of white collar crime, there are many studies revealing that the most important factor forming the basis of white collar crime is the professional power of the individual and the opportunities provided by this power (Sutherland, 1940, p. 7).

Victims of white collar crimes actually know that the rapid damage caused by the crime has consequences far beyond the material dimension. The emotional collapse caused by white collar crimes shows that besides

the material damage expressed in numbers, different damages are endured. The most important of these damages is the loss of trust, which is also vital for organizations, and thus the destruction of the social trust climate. Trust should be considered both in terms of white collar crimes and as a precursor phenomenon of legal (legitimate) business activities. In other words, white collar crimes are crimes that should be given importance in terms of causing critical physical and mental harm to the victims of such crimes, beyond their material dimensions. Often, the consequences of white collar crimes can be larger than street crimes and can lead to a climate of insecurity in society (Dearden, 2016).

As white collar crimes intensify, their effects are wider and the situation may cause more serious consequences such as an economic trauma in the society. The consequences of white collar crimes are costly for all segments of society (Gottschalk and Gunnesdal, 2018). For this reason, white collar crimes need to be comprehensively addressed and examined. The fact that white collar crimes are inevitable and their consequences are very costly for both companies and investors and the whole society has led to the fact that these crimes have become an important research trend, especially in the fields of accounting, corporate governance, law and forensic sciences. Therefore, in many studies, researchers talk about the importance of white collar crimes and efforts to prevent these crimes. In this study, measures to prevent white collar crimes are evaluated within the framework of the situational crime prevention approach.

IV. Addressing White Collar Crime under the Situational Crime Prevention Theory

The situational crime prevention approach focuses on the effect of environmental factors on the occurrence of crime and argues that if it is kept under control, the situations that lead to the emergence of crime can be eliminated and therefore the formation of crime can be prevented. The main objective of the situational crime prevention approach is to eliminate or reduce the benefits to be obtained from crime by preventing the occurrence of situations, opportunities, risks and difficulties that are essential for the emergence of certain crimes.

In this direction, many developed countries such as England, Sweden and the Netherlands, also benefit from the situational crime prevention approach to deter crime. The approach, which was introduced to the literature by Clarke and Homel in 1997, is based on the personal preferences of criminal individuals regarding the cost of the crime and the benefit they will derive from the crime. In this respect, the potential criminal may choose to commit a crime if the benefit he gains in case of committing a crime is greater than the cost he will bear. Clarke and Homel mentioned crime prevention measures that make it difficult to commit a crime or limit the time of committing a crime within the framework of the situational crime prevention approach (Homel and Clarke, 1997, p. 21).

The situational crime prevention approach aims to prevent white collar crimes by changing the opportunity structures that cause crime. For this reason, in order to apply the situational crime prevention approach, the crime opportunities that cause white collar crimes should be well understood. Since the situational crime prevention approach can be applied for the same type of crime that has been committed with many different forms of implementation (modus operandi), it should be focused on specific types of crime in this context (Lord and Wingerde, 2019). For example, a white collar crime committed in a hospital (health sector) can be committed by a doctor, as well as by a nurse, pharmacist, psychiatrist or a hospital administrator. In this case, the opportunity for each actor to access the crime scene is different despite the committing of the same crime. The crime opportunity should be evaluated by considering the actor of the crime.

In addition, since the characteristics of white collar crimes have an important role in determining situational crime prevention techniques, these techniques should be redesigned taking into account the characteristics of white collar crimes. The peculiarities of white collar crime that should be considered within the framework of the situational crime prevention approach, which emphasizes the necessity of making certain managerial and environmental changes to reduce the possibility of crime, are as follows: potential white collar offenders often have exclusive access to victims and targets; the criminal person uses means of deception or concealment to hide the evidence of the

crime he has committed; it is often difficult to detect the intent and malice on which the offense is based, since the action taken by the guilty person does not clearly differ from legal (legitimate) activity; and the perpetrator is usually physically separated or distant from the victim of the crime at the time of committing the crime (Gottschalk, 2018a).

In order to discuss the role of the situational crime prevention approach in addressing white collar crimes, it is necessary to consider the basic situational crime prevention principles one by one and determine the techniques to be applied within the framework of these principles. In this context, when the increase in efforts to commit crime is evaluated, it is often not possible to physically restrict or prevent access to crime. White collar crimes often result from individuals having special access through their professional roles (Dearden and Gottschalk, 2021). For example, it is not possible for a senior executive who engages in insider trading to be prevented from accessing company information before it is determined that he has committed a white collar crime. Blocking the person's access to the company information may lead to the prevention of the company's routine activities.

Although preventing the physical access of the person to the target within the situational crime prevention approach is not very applicable in terms of white collar crimes (Heinonen et al., 2017). It is possible to provide the senior manager with controlled access to the company information. In this direction, a well-functioning internal audit system established within the company can control important information that an individual can access. Internal audit systems are very important in terms of revealing the true nature of seemingly legal actions and revealing that they are fundamentally unlawful, wrong or fraudulent. However, even though companies have a strong internal audit system, company employees can circumvent these internal audit systems with their confidential collaborations from time to time. Licenses or certificates, regulations requiring them in order to prevent certain types of white collar crime increase the efforts of individuals to reach the crime target. By organizing the working environment in the company to prevent crime, determining ethical rules and codes within the company, creating special support programs to help company employees financially, and trainings to be given against white collar crimes within

the company, employees can be more careful and conscious of these crimes. This situation will cause potential criminal employees to make more efforts to commit crimes. In addition, with the independent audit process, it can be difficult for the potential criminal to reach the target. The fact that the potential criminal has to make more efforts to carry out the criminal act may result in his withdrawal from the idea of committing a crime. In order to prevent white collar crimes within the framework of the situational crime prevention approach, measures such as controlling the entrances and exits to company offices (using personnel cards), presence of security guards in the company and using various control tools (providing access to the company's confidential information in special stages) also increase the efforts to access the target. It allows to prevent white collar crimes.

Increasing risks, which is another example of the situational crime prevention principles, can be achieved by tightening inspections or increasing penalties. In order to increase the risks, the duties of the structures (board of directors, audit committee, internal audit system, etc.) that undertake the task of oversight in the company can be expanded. In addition, in order to help natural surveillance, employees can be assigned to watch each other at work. In addition, assigning company-related transactions to individuals means increasing risks for potential criminals by reducing anonymity. On the other hand, increasing the severity of punishments in deterrence of white collar crimes in order to increase the risks does not give the expected effect in preventing crime. Increasing the severity of punishment alone is not a complete deterrent to committing crimes; it is necessary to know that the penalty required by the crime will be applied in a way that is proportional to the crime and that the finalized penalty should be executed in a timely manner. In addition, companies can create risk management systems and internal reporting lines within the company in order to increase the risks related to potential white collar crimes. The fact that the company prefers more honest people in personnel employment increases the existing risks for potential criminals. In addition, it is used by companies as another risk-increasing measure to ensure that employees are aware that they will be punished if they commit a crime (Andreatta and Favarin, 2020).

Unlike simple crimes such as street crimes, it is more difficult to increase the risks in white collar crimes in order to identify and eliminate opportunities that pave the way for crime (Sehgal and Koul, 2021). For example, installing security cameras against the simple theft crime, tightening surveillance, more guards on the streets, hardening door locks is enough to prevent the potential criminal from accessing the target. However, when these crime prevention efforts are applied to white collar crimes, the establishment of a physically tighter surveillance mechanism to prevent potential criminals from accessing the target may become more difficult than in street crimes. Reducing the crime opportunities that cause white collar crimes can be achieved by developing mechanisms that will monitor the compliance of business people's behavior with both legal and ethical standards within the organization rather than by physical measures to be taken.

Another way to change the opportunity structure of white collar crime is to reduce the rewards for engaging in illegal activities. They can be reduced by disrupting the functioning of illegal markets, not recognizing or denying the benefits of a criminal act (Stadler and Gottschalk, 2022). The acknowledgment that the situational crime prevention approach can be achieved through concealment or elimination of targets, registration of goods, disruption of markets or removal of incentives for crime has more validity in white collar crime than in street crime. Reducing rewards to prevent white collar crime is more difficult to achieve than street crime. Hiding or eliminating targets, registering goods are mostly ineffective in terms of white collar crimes. In deterring white collar crimes, cooperation should be made with institutions that carry out special studies and implement proactive crime prevention techniques to identify individuals, institutions and organizations involved in crime and prosecute crime cases. To summarize, the most effective way to reduce rewards in white collar crimes is to disrupt illegal markets and remove the factors that encourage crime.

Reducing the triggers of crime, in other words, the situational factors that trigger crime, serves the purpose of preventing crime opportunities that encourage people's criminal actions (Cozens and Love, 2015). However, unlike simple street crimes, white collar crimes

are not passion-based crimes, have a more complex structure and are committed as a result of a more rational decision process compared to street crimes, which shows that the perpetrator has gone through a long decision-making process. For this reason, avoiding conflicts and reducing emotional arousal, which are effective in street crimes, do not give the expected effect in white collar crimes (Craig and Piquero, 2017). However, in order to prevent emotional stimulation of bankers who are dealing with large amounts of money in the banking sector, double custody (dual custody) is imposed on funds above a certain limit. In addition, the existing system created to sue government payments in order to prevent white collar crimes in the health sector is designed in a very easy and simple way. In addition, continuous training and seminars are given in order to ensure professionalism in the sectors.

Ethical principles and guidelines created to promote professionalism can serve to neutralize peer pressure by eliminating the justification that "all employees are already doing this". Finally, it is important to prevent the methods used by those involved in white collar crime from being made public, in terms of reducing counterfeiting. While many successful white collar crime cases can be accessed on the internet or in official documents, the methods used by individuals or organizations during the commission of these crimes are generally kept confidential (Rustiarini et al., 2019).

The last of the situational crime prevention principles, namely the excuse prevention principle, is based on the rationalization of the motivations that criminals have while committing crimes. Despite the reasons on which the perpetrators base their criminal acts, the determination of the rules and instructions by the company, the creation of ethical and moral codes and ensuring that the employees comply with these regulations prevent the rationalization of criminal motivation by using possible excuses. In addition, it is extremely important that the boundaries of the rules are determined and clear in terms of reducing the opportunities for crime. Uncertainty in company rules can cause employees to abuse them whenever they have the opportunity (Engdahl, 2017).

V. Conclusion

The situational crime prevention approach focuses on understanding how potential offenders evaluate the costs and benefits of crime opportunities and adjusting these risk and reward factors to deter criminal behavior. This method is more effective in preventing white collar crimes than increasing sanctions or creating new regulations. Although it does not completely eliminate white collar crimes, it helps to maintain them at a manageable level. Traditional views of white collar crimes being purely rational decisions have evolved, recognizing the influence of various micro and macro factors on individuals' choices, which are not always driven by rational motives. Thus, despite different perceptions of effort, risk, and reward, the situational prevention approach effectively keeps white collar crimes under control by addressing these diverse factors.

To successfully implement this approach, companies must understand the specific crime opportunities within their organization and apply appropriate techniques to alter these opportunities. This involves strengthening internal audit systems, establishing whistleblower lines, creating comprehensive company constitutions, and defining and enforcing ethical rules. Additionally, companies should focus on employee training and awareness programs to prevent crimes and ensure adherence to ethical standards. Beyond the organizational level, raising community-wide awareness and fostering a commitment to ethical values and legal compliance are essential. An effective legal system that swiftly and fairly punishes offenders while protecting victims is crucial for deterring potential criminals and maintaining trust in the law.

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ESTABLISHING CIVIL LIABILITY AND EQUALITY OF CREDITORS

Article

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Theoretical Aspects of the Basic Conditions for Liability: Restorative and Punitive Approaches under Russian Law

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Abstract: The concept of liability is a key one in jurisprudence. Its universal significance in civil law lies in the ability to monetize negative property results and impose financial consequences on the party involved. In criminal law, it is used to punish the offender. This paper analyzes fault as the most important element of the said legal institution and discusses the role of cause-and-effect relationship. The aim of this publication is to draw a sectoral comparison between important conditions of liability. The developing economic turnover in the Russian Federation requires to ensure the reproduction and multiplication of monetary values. The effectiveness of legal techniques, particularly in establishing fault, constitutes an initial condition for civil liability and cause-and-effect relationship between misconduct and an offence still determines the use of the full range of opportunities provided by law. In criminal law, the fault is a necessary basis for any criminal sanction, including a fine. The paper elucidates the concepts of fault and cause-and-effect relationship as a separate, stand-alone issues important for imposing criminal punishment, and showing the significant difference between these legal categories in civil and criminal law.

***Keywords*:** civil sanctions; criminal; liability; damages; fault; cause-and-effect relationship; loss; reimbursement

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Contents

I. Introduction

At the dawn of modern civilization the primary penalty was a response to non-compliance with legal prescriptions and functioned as a fine imposed as the remuneration for loss (Dmitrieva, 1997, pp. 9–10). As society developed, reparation was divided into criminal and civil law one as a response to personal offence as a consequence of non-fulfillment of property duties, both contractual and non-contractual.

However, the use of penalty, on the one hand, always resulted in the restoration of financial standing and, on the other hand, it led to the situations of abuse. As a result, another method of protecting rights has become more prevalent, i.e., reimbursement of losses when fault is proven. It was widely accepted in legal doctrine that the concept of fault is consistent across all branches of law. We justify the increasingly different understanding of the forms of fault and cause-and-effect relationship in private and penal law as a reflection of the increasing complexity of the regulation of diverse social relations subject to legal protection.

II. Domestic Guilt Concept

The analysis of the fundamental provisions of the doctrine of *culpa* in the Soviet past helps to understand that its underlying understanding in the new economic realities should be different. At that time, *guilt*, in accordance with the popular belief, was identified with the anticipation of public danger of civil-law violation (Matveev, 1955, pp. 32–35). However, such an assertion is now considered obsolete. Accordingly, what was the cornerstone of this legal construction before, no longer exists. The hypothetical degree of awareness of the negative social impact cannot create an idea of the type of fault admitted — carelessness or intentionality. This understanding lacks the volitional moment. The attitude towards the consequences is the most important for punitive reaction as they are expressed in losses, damages, costs, expenses, expenditures, and harm. Conscientiousness or purposefulness are manifested in the behavior of a person who fails to fulfil what is prescribed, promised or established by the regulation. Therefore, the unilateral overperformance of contractual obligations still may be considered a "culpable activity". However, it does not violate the subjective civil rights of the counterparty and does not entail liability. Most importantly, such intent to act beyond the contract can be legalized by the subsequent agreement of the parties. At the same time, an outcome involving socially dangerous criminal consequences cannot be subject to adjustment. One can recall here the maxim of the Soviet civil jurisprudence school: "There is no fault without wrongfulness" (and hence no responsibility) (Agarkov and Genkin, 1944, p. 324). We believe that the opposite thesis appears to be indisputable: "There is no wrongdoing without fault" (Matveev, 1955, p. 107; Kaspar, 2017, pp. 37–39).

The general legal concept of guilt is disclosed in the doctrine as a mental attitude to wrongful behavior and its consequences (Naumov, 2004, p. 228). However, there are at least three circumstances, noted only in Soviet times, which influenced the formation of the subjectivist concept of *culpa*.

Firstly, any failure or violation of civil law resulted in social damage. Today, of course, it is impossible to make such an assessment. Only

individual provisions of law can speak of a contradiction with the public interest, public morality and notions of justice.

Secondly, Soviet law did not distinguish between public and private norms (Stuchka, 1921, p. 111; Goykhbarg, 1924, p. 52), which is a fundamental distinction in modern law. The concept of fault, defined as the intention to cause harm to the state and public interests is relevant in public law.

The third factor that strongly influenced the content of the legal categories was the task of civil law aimed at that time to produce correct and acceptable members of socialist society and economic relations (Ioffe, 1975, p. 117; Matveev, 1955, p. 241). However, this is no longer relevant to modern civil jurisprudence.

The Soviet doctrine of fault was influenced by ideologists from another unexpected side: scientific studies and major works invariably had to criticize the Western European and American concepts of the analyzed legal institution, which were based on the "objective" criterion by treating property as a "good master" or taking care of it as "one's own business" (Matveev, 1955, p. 200). The supporters of these modes of evaluation were opponents of our legal scholars during the exchange of opinions and in the discussion of problems at various events, so that the subjective theory of fault was fueled by this as well. At the same time, there were borrowings (certainly not ideological ones). In particular, we are talking about adopting the idea of foreseeable consequences as condition of recovery (Matveev, 1955, p. 59), not subsequently reflected in the Civil Code provisions.

Based on the former thesis that fault for legal regulation in all sectors has common features in the form of a desire for harmful consequences or a general expectation thereof, it had created the necessary prerequisites for collection. In the first place, the psychic concept of fault prevented the creation of a chain of sanctions and recourse claims in order to compensate for the mutual damage caused by the indiscipline of "allied contractors" whose non-performance did not enable a particular production obligation to be fulfilled.

As far as can be seen, "state tribunals" have refused to award damages in the absence of clear fault, which was presumed under the 1964 Civil Code of the RSFSR and therefore the defendant had to prove

its absence. This situation did not suit the law enforcement authorities either and their approach was changed through a more diverse perception of such a basic notion as fault. However, this did not lead to a uniform judicial practice, since the subjectivity of courts played a significant role in the judgments concerning the losses. However, for example, at the level of the RSFSR state tribunals it was established that liability should arise because the buyer, for example, "did not raise the issue of amending the terms of the supply contract in good time with the plaintiff" (Novitsky, 1952, pp. 118–125).

It was also noted in a number of cases that, despite the principle of culpable liability, penalties envisaged by the relevant contracts could also be imposed without fault. As a result, in 1971 Professor V.V. Ovsienko advocated in his dissertation the introduction of the principle of liability without fault in relations between "socialist organizations". Some academic persons also supported the objectification of *culpa*.

The relationship between wrongfulness and fault is a topic of ongoing debate in Soviet scholarship. In this case, one of the most important perspectives is the merger of these concepts. We believe that this reveals a methodological fallacy of reasoning, which is that the categories already activated today, not only in theoretical discourse but also in law, cannot be identical because they constitute fundamental legal institutions with their own specific role. Illegality, as recognized by authoritative Soviet scholars, influenced the understanding of fault in the interests of ideology. It was explicitly stated that guilt depends on the "foundations of the system" (Matveev, 1955, pp. 169–172). From this follows a simple conclusion that today, when the political foundation of society is radically different, it is wrong to assume that *culpa* in civil law is a personal mental attitude to the actions and their consequences.

Ultimate *guilt* is not only a phenomenon of the conscious, it is also subjectively manifested in the desire for non-compliance with what is proper at the moment (Safferling, 2008, pp. 212–215). By the way, two prominent Soviet civil law theorists characterized fault as a deviation from the generally accepted legal norms (Matveev, 1955, pp. 199–200) and as a failure to observe the standards of conduct (Matveev, 1955, p. 292). However, their views were not dominant.

The desire for consequences differs between criminal and civil law. In criminal law, the will to cause harm is a crucial factor, whereas in civil law it is not. The intention of knowingly causing harm is important for theology because it is sinful. However, a confession is rather necessary in this case, not a legal response. Curiously enough, this is supported by a study conducted by G.K. Matveev, Doctor of Laws and Professor at Kiev State University, the main author of the universal concept of responsibility in Soviet civil law. According to Matveev, the offender's psyche is the main determinant of fault that leads to the conclusion that an excused ignorance of the regulation consisting in normative instructions absolves him from responsibility (Matveev, 1955, p. 261). Therefore, the psychic theory of subjective fault in civil law in its natural manifestation has an insurmountable practical drawback, because it proves to be powerless in matters of establishing *culpa* when *de facto* there is no idea of legal regulation.

The appropriate qualification for conduct that does not conform to the letter of contract is negligence in varying degrees. It is important to note that civil law culpability arises only from a lack of care and diligence. The term "care" is particularly significant as it refers to the creation, preservation, transfer and enhancement of civil assets. However, it refers to a failure to use one's best endeavors in the case of slight negligence, a lack of ordinary care in the case of gross negligence and the presence of deliberate acts in violation of prohibitions, not necessarily associated, however, with a desire to cause damage to other subjects, in the case of intent. It is appropriate to mention the word "fiction" here in relation to the awareness of the regulation but not the consequences of misconduct.

The defendant's carefulness requires ascertaining the details in an ideal situation. Diligence is demonstrated by avoiding any behavior that may lead to negative consequences.

III. The Notion of Causation

In our view, the understanding of cause-and-effect relationship in civil law needs to be revised. The premise of risk liability should be adjusted. The question of reimbursement should hardly be made rigidly

dependent on proof of cause-and-effect relationship. Scholars who have studied it have repeatedly discussed the link between a wrongful act and harm or damage (Sadikov, 2009, p. 56). However, conduct is not always the cause of violation of a right. Moreover, the property burden and the consequences of danger are most often assumed on the condition of universality, i.e., without any reservations about causality and significance of special circumstances.

The cause-and-effect relationship is significant due to judicial interpretation. Article 401 of the Civil Code of the Russian Federation, which refers in detail to damages, does not mention it. Articles 15 and 393 of the Civil Code only provide a doctrinal explanation of the role of causality through the use of the participle "caused". Special rules of law explicitly refer to it only occasionally. For instance, Art. 720(5) of the Civil Code states that the contractor must bear a burden of defects and should pay for an expert examination to identify the defects if there is a "causal link" between them and "the contractor's actions". Similar provisions are not found elsewhere in the Civil Code.

In the practice of state courts, a claim for damages may be denied not only due to the lack of a cause-and-effect relationship and the defendant's explicit harmful actions or failure to perform an obligation, but also due to the failure to prove it. Cause-and-effect relationship is a common topic in books, dissertations and articles (Antimonov, 1948; Baibak, 2014; Evteev, 2005; Egorov, 1981; Novitsky, 1952, pp. 300–319; Yagelnitsky, 2016; Rümelin, 1900, p. 174). According to the apt acknowledgement of European civil law scholars, this subject had previously created a "crowded dissertation market" (Antimonov, 1948, p. 66). T.M. Yablochkov said that "the doctrine of the essence of causality is one of the most difficult questions of law, both criminal and civil" (Yablochkov, 1910, p. 60).

The presumption of culpability of debtors increases the desire to recover primarily contractual damages. But such claims in litigation still cannot overcome the barriers erected by the concept of cause-and-effect relationship. The doctrine holds that if a necessary and legitimate causal connection exists between the debtor's conduct and the result in question, the debtor foresaw or should have anticipated the situation. If

this cannot be established, the responsibility is subject to the discretion of the court (Egorov, 1981, p. 127).

Well-known authors speak in favor of limiting the natural-scientific understanding of causality and argue that this is the main function of the legal concept under discussion (Egorov, 2006, p. 75). The amount of reimbursement may be ruinous for the delinquent or for the party failing to perform the contract. Thus, some doctrines of cause-and-effect relationship are based on the idea of changing the principle of full property recovery, fundamental to the civil law of the Russian Federation.

The defendant is not bound by the duty to fully reimburse for the result of the negligence (fault) of the creditor, who takes care of his property himself. The negligence and intent of the victim is the opposite of the principle of complete satisfaction, i.e., no more compensation than is actually due.

The legal regulation is linked to the business community's insistence on maximum freedom in the allocation of risks in contractual relations. This is expressed in the extreme in the possibility of being held liable for the consequences of force majeure, which is expressed in the formula "unless otherwise provided for in the contract". Article 401(3) of the Civil Code states that, by default, the merchant — a party to the contract — shall be exempt from liability due to a failure to fulfil his obligations under circumstances which are extreme and unavoidable under the circumstances.

The exemption from consequences of an accident or a force majeure event is a dispositive general rule. Its purpose is to establish discretion with regard to the choice of imposed risk of property loss. In this way, a high level of business activity is maintained in the property environment. The entrepreneur is prepared to "proceed with the project" because significant dangers can be transferred to the counterparty whose liability will be enforced.

Whether the damages were caused by the defendant or in fact arise from other influences is for the court to decide. The jurisdictional body does not, strictly speaking, need theories of cause and piling up constructions which in certain cases obscure the case and reduce the effectiveness of the legal defense. Apart from the question of whether

there is a connection between the damage and the behavior of the debtor, it is also important to determine who and how much is at fault to quantify the amount to be reimbursed.

As already stated by some legal scholars (Novitsky, 1952, p. 366; Ioffe, 1955, p. 310; Agarkov, 1945), causality determines the extent of damage and not whether it is caused at all (Baibak, 2014; Egorov, 2006, p. 75). Meanwhile, the courts analyze causality not for the purpose of determining the amount of damages, but for the purpose of denying reimbursement. The Supreme Court of Arbitration and the Supreme Court of the Russian Federation have repeatedly used the following formula: to recover damages, it is necessary to establish their dependence on the facts of the violation of a subjective right.[1]

The court practice has for many years been focused on a causal link being proved by the plaintiff as a strict condition of liability, although in reality it is primarily a factor for reducing the amount awarded.

In the opinion of authoritative legal scholars, causality is only an objective course of event. It must be typical and regular. It must be proven by the plaintiff and it is left to the court to evaluate the arguments presented. This brings us to the theory of adequate causality (Serakov, 2014).

The fact that, according to a number of authors, causality should be deprived of the volitional component, can be explained by the Soviet legal tradition. Its representatives proceeded from a strict distinction between the concept of fault as psychic, i.e., purely subjective, attitude to their action (or inaction) and independent course of occurrences (Ioffe, 1975, p. 128).

It has been argued that the Marxist-Leninist theory of the objective connection of phenomena could not always be used to establish causality as a condition arising also from behavior and having a subjective or human nature in many episodes (Novitsky, 1950, pp. 72–74). It was also correctly assessed that, unlike the chronological connection in the commission of an evil deed in criminal law which results in felonious consequences, in a property dispute causality has to be traced by going

[1] Ruling of the Supreme Court of the Russian Federation dated 4 December 2012 No. 18-KG12-70. (In Russ.).

from the incurred loss to its cause, i.e., in reverse order, moving from a later phenomenon to an earlier one. This is a methodologically rational way of establishing the influence of extraneous circumstances on the increase in losses.

We have noted above that in contractual relations causality is obvious in most cases. M.I. Braginsky and V.P. Gribanov write about it (Braginsky, 2011, pp. 718–719; Gribanov, 2001, pp. 330–333).

The statutory provisions do not presume a lack of cause-and-effect relationship, such as in the case of presumption of fault. Proving allegations is governed by the rules of CPC and APC (Art. 56 of the CPC, Art. 65 of the APC), but sometimes assistance of the court is needed. Establishing a causal chain is not always straightforward and often requires both forensic examinations and the determination of legal consequences to prove.

A common doctrine is that cause-and-effect relationship is justified by the interdependence of facts according to general philosophical laws. This often results in a loss of defense by clearly injured parties who have had the misfortune to suffer harm from an offender but who are unable to reliably prove that the source of the harm was solely the defendant's conduct.

Meanwhile, global legal practice has been steadily redefining the relationship in question. If it remains a genuine condition of responsibility, then proving its essence or lack thereof should be handled by an entity providing specialized services of medical, educational or consultative nature or working in a special field in which the client is not competent due to lack of relevant knowledge and training (Yagelnitsky, 2016, pp. 32–33).

IV. Floating Factors of Liability

In some countries, courts award damages even in the form of costs incurred by the plaintiff prior to the occurrence of the inevitable damage. The causal chain need not be traced in cases of cumulative or alternative infliction of loss where the actual involvement of each person in the injurious act is unclear. For example, pharmaceutical companies produce a drug that causes damage to health and the victims

purchase it from one manufacturer or another at different times. The weakening or at least differentiation of the concept of causality as a condition of responsibility can be traced in the fact that more and more legal scholars nowadays talk about the need not only for a different approach to its establishment than the mere proof by the plaintiffs, but also about its rebuttable presumption (Oliphant, 2011, pp. 1609, 1615).

In the field of non-contractual damage, provided there is fault, causality has long been defined by the general philosophical criteria of necessity and sufficiency (Egorov, 1981, p. 127). But it is necessary, as a minimum, that the fact producing the effect stands out in the series of phenomena occurring simultaneously and is characterized by subjective sufficiency. Harmful behavior must be damaging. It is presumed to be the direct result of these actions and not of any other cause. An unpleasant but illustrative example of subjective sufficiency of damages would be an injury which caused irreparable harm to health or death because the victim had an infirmity or disability of which the tortfeasor was unaware. There is an analogy with the widely commented thesis about foreseeability of harm as a basis for its compensation (Baibak, 2014, p. 54). But it is only at first glance. Foreseeability of damage is applied to the average person and exists hypothetically. This understanding of causality devalues the possibility of protection.

The category *conditio sine qua non* (necessary condition) has a strong epistemological basis. In our jurisprudence, thanks to the flamboyant statement of G.F. Shershenevich, it is not historically welcomed. According to the famous lawyer, this theory is too harsh for the criminal law and too unfair for the civil law. In accordance with this methodology, parents of criminals should be subjected to reprisals for crimes committed by their sons and daughters (Shershenevich, 1995, pp. 265–266). But G.F. Shershenevich obviously said this in jest. After all, procreation is by no means a reprehensible activity and does not automatically lead to crimes. *Conditio sine qua non* for civil and criminal law is neither strict nor liberal, but simply a fair theory of the unity of cause and effect. It seems that on the basis of judicial discretion (*ad arbitrium)* it may have to be applied by examining the extent of the damage and the volitional activity of the causer separately in each individual case.

The most clear and undisputed lack of a causal link is also evident in the issue of indemnification for damage caused by a source of increased danger. A construction crane falls, a fire breaks out, and the contents of a warehouse perish because of ordinary, not extraordinary, wind gusts. All losses must be paid by the originator of the hazardous activity irrespective of whether or not the disaster could have been foreseen. He is responsible for the damage as such due to all events and actions other than force majeure.

Damage must be reimbursed in full. The degree of fault, whether there is one cause or several, whether there has been harm — these three basic questions are of course at the discretion of the judge. But it is one thing when it is not limited to anything and the jurisdictional body decides to reject the claim because the claimant "has not proved cause-and-effect relationship" and quite another when only the amount to be indemnified is determined.

The idea that the answer to the question of cause-and-effect relationship cannot be simplified to "either... or...", but rather should include requirements and identify the structure of each type of loss, is not a new one, but it has not been consistently expressed in our literature (Karapetov, 2014).

In a fast-paced and ever-changing business environment characterized by diverse and dynamic transactions, there has been a tendency to rely on easy-to-understand regulatory standards as opposed to formalism and a tendency to dismiss claims on grounds of lack of evidence, and to enforce claims rather than impose additional procedural and substantive conditions, in the face of the growing complexity of legal relationships. These developments have also reflected a change in the approach to cause-and-effect relationship. In the developed jurisdictions, the courts have increasingly started presuming its existence, as in the Federal Law No. 127-FZ "On Insolvency (Bankruptcy)" dated 26 October 2002. They leave out the rule that the plaintiff has to justify causality, which is often beyond his control, and that the court must passively observe, deciding whether his arguments are sufficiently persuasive.

Among other things, the defendant has the right to justify the lack of possibility to influence the events that led to the losses in general. The authors speak about the distinction and relaxation of the requirements

for proving causality as evidence of progressive legal development (Baibak, 2014, pp. 15–16). Causality may be potential. Moreover, the requirement of causality in some areas of activity should be replaced by "sufficiency of its substantial degree" (Koziol, 2012, pp. 134–168).

If causation cannot be seen and proven with certainty, then losses must be recovered at least in part. For instance, if a newborn baby is found to have irreparable malformations, and the doctor was found to have made a gross error in the treatment, but the mother's illness could also have caused the damage, the orthodox domestic approach requires the mother to prove a causal link between the medical staff's actions and the harm. And if she fails to do so, the claim will be dismissed. But the advanced standards of applying the rules of causality are incompatible with a decision which deprives the injured party of protection in such an important area as health in the provision of certified services. Cause-and-effect relationship in the circumstances named must be presumed.

In the resolution of other tort claims, the impact of the conduct of the tortfeasor is considered detrimental if his activities were dangerous and the damage resulted from an act sufficient to constitute a tort.[2]

The new approach has led to a special application of the rule on joint infliction of damage. Not only do those who literally caused the damage to property by acting simultaneously and/or in concert become jointly liable, but so-called cumulative tortfeasors who appeared after the formation of the damage, as well as those from whom the risk of loss was substantially anticipated, also become liable. A particular application of this method would be imposition of liability on a defective supplier who failed to fulfil his obligations, but whose damage to the buyer could only hypothetically have occurred, because of an earlier non-delivery from another entity he would not have been able to proceed with a product in demand anyway, i.e., the behavior of the defaulting party was subjectively sufficient to cause harm.

The first and second wrongdoers are jointly and severally liable. Thus, in cases of guaranteed full reimbursement, the court shifts the burden

[2] Resolution of the Plenum of the Supreme Court of the Russian Federation No. 1 dated 26 January 2010 "On the application by the courts of civil legislation governing relations under obligations resulting from injury to a citizen's life or health". (In Russ.).

of proving the efficacy and intensity of cause-and-effect relationship, as far as possible, to the relationship between the defendants. It does not make compensation strictly dependent on the existence of a causal link to the conduct of each wrongdoer. This undoubtedly indicates a weakening of the role of causality within a civil violation which gives rise to damage and allows for a more active use of this civil remedy.

There has thus been a tendency to diminish the role of causation as an important condition of liability. This is reflected in the emergence, development and increasing application of the doctrine of loss of chance in circumstances where there is absolutely no real damage. Importance is attached to any degree of probability, because it is the loss of income itself which is recovered even though it might not have occurred. Illegality, of which fault is an inherent feature and characteristic — already a sufficient ground for the recovery of damages for loss of chance — is presented as a new approach and a recent theory. It is regarded as leading to a better regulation of liability. The active discussion of this thesis, which has come down to us from the Western legal literature, reflects above all the need to rethink the nature and role of cause-and-effect relationship.

The logic of the lost chance doctrine goes back to an English precedent from 1911[3] in which unearned profits were awarded for default and calculated against the likelihood of gain. A female bidder was negligently omitted from the selection process among three others due to the negligence of the organizers. Because of this, she received compensation in the amount of 25 % of the expected profit (Baibak, 2015, pp. 64–65). Foreign literature provides another illustration of a breach of contract leading to liability despite the absence of a continuous causal link and a substantial risk of failure to achieve a result. This involves the poor performance of a lawyer's representational duties and his failure to file an agreed appeal against an unfavorable court judgement in a timely manner. If the professional duties had been performed properly, the client would have benefited, but only by exercising legal options in the course of the challenge.

Following the Anglo-Saxon line of reasoning, Russian legal scholars write that chance as an antipode of risk becomes an important

[3] Chaplin v. Hicks, [1911] 2 KB 786 (CA).

commercial value to be taken into account (Baibak, 2015, pp. 63–73). This position is reflected in the Principles of International Commercial Contracts 1994 (hereinafter referred to as the UNIDROIT Principles, PICC).[4] But this logic does not suit the continental legal scholar, because chance or risk can in no way become an object of civil rights without being a property value. The emergence of the chance theory reflects the following course of reasoning of legal scholars. Firstly, they want to extend the concept of "subjective right" to include a claim based on expectations of not explicit but probable acquisitions. Secondly, they seek to weaken the causation factor by introducing into the latter the notions of risk, danger and chance, which in this context are one and the same. Thirdly, such legal scholars would like to strengthen the role of fault coupled with subjectively sufficient causality by assuming that in several circumstances leading to losses liability should arise and that there is no need for the so-called single necessary condition test, in the absence of which there would be neither damage nor loss of profit.

It seems to us that in reasoning about causation it is necessary to distinguish between criminal, tort and contractual relationships. In constructions of property liability we cannot but observe the gradual disappearance of cause-and-effect relationship in question. Failure to understand this undermines or significantly devalues the institution of loss and damages. When an ordinary contractual monetary obligation is not fulfilled, payment is awarded without any preconditions. Another case is the cancellation of a materially breached transaction in order to be released from the buyer's contractual counterclaims. It is not logic that in that case a painstaking, reliable, documented proof of a direct, genuine, real and necessary causal link (*causa proxima, non remota spectatur*) is for some reason required for even partial recovery of damages. It is precisely because of this requirement that the claim of such nature is not widely used. However, the viability of turnover, especially commercial one, depends directly on this.

As mentioned above, we do not believe it is correct to completely equate cause-and-effect relationship in torts, in contractual obligations and in the commission of crimes. In these cases its significance is

[4] Art. 7.4.3(2) of the UNIDROIT Principles (1994).

different. In the case of harm, it forms an obligation and must be more explicit. There has not yet been a relationship between the creditor and the debtor and it is the task of the court to determine whether this should have arisen. If the harm was caused by a source of increased danger, it is not necessary to establish a breach of the law. In a contractual relationship between merchants, it is more important to determine who bears the negative consequences of the failure in performance. Moreover, in the case of transactions, it is more often inaction that is wrongful, whereas in torts, on the contrary, as a rule an active behavior of tortfeasor is necessary. Therefore, apart from questions of the extent of lost profits, the role of cause-and-effect relationship in contractual relations should be less important. If the entrepreneur has not fulfilled his obligations, the consequences of the companion's loss may fall on him without fault, and he is responsible for the case not only because of possible wrongdoing. In criminal law theory, cause-and-effect relationship is seen as creating the objective side of the crime, the configuration of consequences and, together with the fault, is considered as the degree and content of public danger.

Courts in the Russian Federation still have not realized what has long been noted in doctoral dissertations by legal scholars of the Soviet time: causality creates "not only qualitative, but also a precise quantitative dependence between the breach of obligation and the ensuing negative economic result" (Ovsienko, 1971, p. 326).

The polemics of causality in the 1950s are interesting. L.A. Luntz and I.B. Novitsky in their work said that causality should be necessary, but not accidental (Novitsky, 1950, pp. 300–319). In response, Professor O.S. Ioffe wrote "Necessity… equals regularity. Therefore, the very essence must be embodied in what is necessary as in what is regular… which is almost never the case with unlawful behavior". And further, "…recognition of only the necessary causal link as sufficient… should lead to irresponsibility…" (Ioffe, 1955, pp. 221–222).

Today there is a growing and clearer view that causality only rarely requires expert judgement to establish a fact hidden from the surface view. More often causality is seen as a concept which presupposes a legal interpretation.

The category of causation is regulated in sufficient detail in the European Uniform Acts: by three articles in the *Draft Common Frame of Reference* (*DCFR*) and by six ones in the *Principles of European Tort Law* (*PETL*) (Art. VI.-4:101-VI.-4:103 DCFR; Art. 3:101-3:106 PETL). Causality is not mentioned in the Principles *of European Contract Law* (hereinafter PECL) and this is indicative.

The standard which has become widespread nowadays in the laws of Europe, although known in theory as far back as the 19th century, seems to have restricted the role of causality to the question of determining the amount of damages. And this is close to condition of foreseeability in the objective sense (Belov, 2019). In our view, the proponents of this rule did not mean that it would serve as an optimum substitute for causality, which needs to be justified by going into calculations and evidence. It goes without saying that we are talking about different ways of determining the value of losses consisting in a factual approach, where it is the study of events, incidents, or, roughly speaking, the weighing of different opposing influences, and seeking a hypothetical definition of the economic consequences of the realized hazards after the loss has occurred.

However, foreseeability is only relevant in the case of non-observance of contracts as a condition of the liability if there is slight negligence; in all other cases of culpable conduct, it should play no role (PECL, DCFR). The same is provided for under an expansive interpretation of the relevant article of the UNIDROIT Principles. The tendency to weaken the role of cause-and-effect relationship is seen in the fact that PETL (Art. 3:101) clearly establish the pro-creditor principle of the necessity of events for which the debtor is responsible and bears the risk as a condition for damages. The DCFR, on the other hand, no longer stipulates this, but simply states that due to the conduct or influence of the accident the tortfeasor creates the protected loss and that there is a presumption of the occurrence of this loss when the responsible wrongdoers have performed various acts capable of causing the damage (Art. VI.-4:103).

The foreseeability of loss appears to rest on a different logic, depending on whether it arises from the contract or from the infliction of harm. In the case of non-performance of contractual duties, it must

not begin with the preconditions for liability, i.e., non-performance, but with the moment of contract conclusion: in this case the calculation of the debtor is not based on an assessment of the cost of his culpable behavior, but on an analysis of the global risks of entering into contractual relations. This, we believe, further weakens the role of cause-and-effect relationship, as it becomes useless if the loss or damage could not have been foreseen by the debtor.

In PETL — and this is its main feature — causality is a condition for damages (Art. 3:101). Its sufficiency is specifically stipulated in alternative, potential, indefinite, partial cases of harm, where the connection is relevant in relation to the overall property outcome of the accident. The main corrective factor, as already mentioned, is the effect of causation, by virtue of which the damage is determinable and which depends primarily on its foreseeability.

Unlike insurance, where the protection mechanism is triggered by the occurrence of approved events, in damages cases in the ordinary sense the burden of bearing the risk can be inferred from the essence of the will and any other relevant circumstances. For two reasons the foreseeable risk is more important here, because the fault itself and the risk of consequences increases, answering not only the question "who?" but also "how much and to what extent?". Having manifested itself in this capacity, it becomes a factor of cause-and-effect relationship, which, in turn, acts as a quantitative determinant of redress (Kantorovich, 1928, p. 105). It is quite correct to conclude, since none of the theories of causality has been directly legislated (except the formula of necessary condition (*conditio sine qua non*) in torts in PETL (Art. 3:101)), about the not too fundamental importance of this condition for emerging liability, save its size.

The category of cause-and-effect relationship in criminal law has its own significant features, which it is advisable to first briefly enumerate. It is primarily aimed at establishing a criminal law material result arising from a crime, a human act, and never from a natural or other event, as in civil law, where the first thing to be established is the configuration and essence of the violation of a subjective property right, such as loss of profit, loss of opportunity to sell something for higher price, damage to reputation, etc.

V. Criminal Law Aspects

The criminal sphere explores the chain of cause-and-effect relationship — injury, death, disappearance of property, embezzlement, etc. — as the ultimate chain. Several fundamental implications emerge from the major differences. Firmly adhering to the unshakable positions of materialism, although the Constitution of the Russian Federation already mentions an enduring civilizational value — belief in God, criminal theory, represented by a great number of authorities, still operates with causality as a general philosophical category of determinism, at least always factual. Questions of causality are only rarely raised for the sake of the defense, in the interests of the investigation, and are checked by the courts. The establishment of causality is the prerogative of holders of special knowledge, i.e., experts. Their task is to condition the emergence of material and physical outcomes by the act of a human being. Competent legal interpretations are exactly what is needed to make this determination of causality.

A well-known theorist said "Since the offender never acts independently of the conditions of place and time existing in a particular case, these conditions have a more or less determining influence on the particular course of the causal chain set in motion by the offender in all its individual links, and this causal chain in its outcome depends on these conditions" (Renneberg, 1957, p. 60). This statement of Joachim Renneberg back in 1957 predetermined the features of causality, investigated in the theory. First of all, it can be traced not only in the direct action or omission of the crime but also in the preparations for the crime, e.g., discussions about it. The complicity of several persons in an atrocity — which happens more often than not — requires an examination of the degree of fault of each person in order to determine different sentence for them, taking into account individual mitigating and aggravating circumstances. A causal connection in civil law, on the other hand, where there is a joint infliction of harm or default by tradesmen, entails joint and several liability so that the defendants having discharged the claim, then deal with each other by way of recourse.

Criminal law has its purpose in the protection of law and order. In comparison to Civil Code the Criminal Code contains far fewer articles, which only cover concepts and institutions, but it mainly classifies criminal offences. The most socially dangerous offences, which may not previously have been such, are gradually being separated from the field of ordinary unlawful acts. For example, hooliganism did not become a crime until the 20th century, whereas before that fights and attacks on physical integrity were punished administratively or privately. Foreign currency transactions, which could always have been treated earlier as illicit trade or participation in the black market, became a criminal offence undermining the economic foundations of the State and attracting the death penalty in the 1960s. In more recent times, imprisonment can follow for unfair competition, cartel collusion, etc.

Hence the peculiarity of criminal law regulation at the level of the special part — the general nature of the notions, giving them greater scope in order to prevent perpetrators from evading responsibility, putting the deed under a suitable legal structure and using articles that refer to different broad situations, such as fraud, misappropriation, abuse of office, etc. This sometimes involves the use of old, long-established terminology to isolate the criminal law context and refer to the relevant qualification.

This is counterweighted by the basic criminal law and criminal procedure checks and balances: the presumption of innocence, the impossibility of objective imputation, a different understanding of complicity, the special role of the causal link and the ban on its predominant objectification, as mentioned above. The differentiation in regulation is imminent. This is reflected in the tendency to separate, to distinguish the basic legal categories in civil and criminal law. This, however, is not noticed by many. In the Soviet civil doctrine the notion of fault in bringing to responsibility was finally returned to civil law only in the 1930s and consisted, as mentioned, in a psychic attitude towards the wrongful result, and also had a general legal content. However, the new formula of fault in civil law became explicit for the first time with the adoption of Part One of the Civil Code of the Russian Federation in 1994.

Proof of taking measures required "by the nature of the obligation and the conditions of the turnover" (Art. 401 of the Civil Code), means projecting the actions committed, as well as refraining from them, onto the prescribed behavior. Assumption or anticipation of a negative result is not laid down here (Braginsky, 2011, pp. 720–721). Thus, there is a clear legislative impetus in the law not only to distinguish between criminal or civil law context of an offence, but also to separate them. In this sense it is not a question of legislative development, but a return to the Russian pre-revolutionary foundations of interpretation of fault.

The famous domestic theorist E.E. Pirvits spoke of two forms of fault — gross and slight carelessness arising from a deviation from the standards of care usually displayed in one's own affairs and the behavior of a "good master" (Pirvits, 1895, pp. 6–8). These criteria have long been accepted in German legal theory, where "fault" is an evaluative abstract concept which is interpreted in an objective sense within civil law (Bley, 1963, pp. 111–112). But what is really expected for development is the transfer of provisions on fault, responsibility, presumptions to the general part of the Civil Code, without which, in the absence of a breach of obligations, the fault is not formally and logically established in accordance with the objective scale for all civil relationship.

In the Soviet period of development of civil jurisprudence the psychic nature of fault in civil law was quite understandably substantiated. However, it should be remembered that the absence of such a fundamental private law principle as freedom of contract was characteristic of that time (Schabo, 2005, pp. 93–94).

Dispositive regulation was poorly represented, and the property turnover was regulated by planning tasks (Bratus, 1985, p. 65). There was no institution of bankruptcy (Melnik, 2008, pp. 156–163), as well as an independent property liability, taking the forms of civil and administrative fines. Therefore, the terminology and the methods of regulation were unified and consisted of an incentive to respect prohibitions and injunctions.

After 1991, one could speak of a revolution in civil law, a return to its market nature, which primarily required a revision of the meanings of the underlying concepts. In Soviet criminal law, the theory of fault

steadily developed and evolved into a coherent concept of the main, necessary component of responsibility. Here there is complete continuity of the current developments of this concept up to the 1990s and its relationship with cause-and-effect relationship, criminal outcome.

Fault is a feature of the subjective aspect of the crime (Safferling, 2008, pp. 7–10). Like objective causality, it is a necessary prerequisite for criminal responsibility. At the same time, these attributes are separate and almost do not interact. This concept rooted and established by much investigative and judicial practice, cannot be shaken.

In the meantime, differences between the concept of civil and criminal fault should be highlighted.

VI. Renewed Approach to Civil Liability

The new Civil Code of RF introduced the new concept of fault in civil law. For the first time the essence and understanding of *culpa* was passed over to the level of legislator. The mostly authoritative theoreticians pointed out that the guilt as a legal notion is attributable to all branches of law and possesses qualities of generally fundamental category. As opposed to causation, assimilated to objective cause of events dominating reality, the fault was exclusively subjective notion, dependent on psyche of an actor whose illegal behavior has different mode of control, from light negligence to conscious intent. It is interesting to know that the above stated paradigm was applicable to also organizations represented simultaneously by number of human beings in position of directors, employees with power of attorneys, etc.

It was decided that in modern market economy the certain standards of behavior applicable to particular features of each person as basis for their responsibilities should be implemented. The Point 1 Art. 401 of Civil Code asserts that person is considered guiltless if he undertook all measures needed according to conditions of turnover and character of the obligation with all necessary degree of diligence and care to perform the obligation. The general formula opens the direction of development and new understanding of fault and the process of objectivization. Unlike criminal, administrative, other branches of law the affiliated notion of causation should become more susceptible to

individual impacts and effects as each human-being is a master of his reason and endowed with freedom of will.

Unlike civil law, criminal law does not recognize liability without fault. The guilt effects and defines the mode of punishment in criminal law, in civil law it happens only when specified in the law, such as in the case of infliction of moral damage, etc. The fault in criminal law is dependent on psyche and not objectified by a standard of conduct as in civil doctrine (Matveev, 1955, pp. 285–287; Kaspar, 2017, pp. 34–35). C*ulpa* consisting in negligence means real forecast of criminal results (Ugrekhelidze, 1976, p. 21) as opposed to civil law (Braginsky, 2011, pp. 720–721).

The dogma of guilt according to penal standards is premised on Marxist dialectics and philosophical determinism. In private law this concept appears to be outdated because the person has autonomy of will and he may mitigate the damage (Braginsky, 2011, pp. 720–721). When imposing punishment on accomplices of a crime, the degree of their participation in the emergence of a criminal result is determined in criminal law. In civil law, joint infliction of harm causes joint and several liability, and the degree of fault is important only at the level of recourse claims against each other (Epikhina, 2018, pp. 88–128). In criminal law there can be no more complicity after the moment of committing a crime (Malinin, 1999, pp. 270–271). In civil law, ordinary property damage to things may be of a sequential nature and would constitute joint infliction of damage, since repeated infliction of damage worsens the condition of an already damaged tangible object (Bley, 1963, p. 153). Inaction often does not need to establish a causal link in criminal law, or as the advanced theorists of criminal law science say, inaction is acausal (Malinin, 1999, pp. 219–248). In civil law, on the contrary, inaction is the main manifestation of fault, especially in contractual relations, and it is always necessary to establish its connection with the violation of subjective rights (Matveev, 1955, pp. 29–30).

A criminal offence is always accompanied with immoral behavior or a breach of morality. In civil law, fault appears apart from the latter. In criminal law there is a presumption of innocence and in civil law there is a presumption of fault (Sintsov, 2015, pp. 23–24), i.e., the

opposite assumption. The fault in criminal law is strictly separated from cause-and-effect relationship, it does not mitigate or affect it. In civil law, fault enhances or mitigates causality (Pirvits, 1895, pp. 128–132). The fault is a necessary precondition for socially dangerous behavior. There is no such concept in civil law that operates the standards of good faith, probity, care, diligence, etc. should apply. In civil law, fault is expressed in the omission of expected actions that manifest a lack of due care and diligence (Shershenevich, 1995, p. 36), whereas in criminal law — in the willingness and foreseeability of a criminal results. The carelessness in commercial law is characterized by a lack of care and diligence (Agarkov and Genkin, 1944, pp. 322–323). The fault in penal law originates in the mental area and then manifests itself externally (Naumov, 2004, p. 223). The *culpa* in punitive regulation may imply the wish for a bad outcome: murder, robbery, etc. The fault in civil law may mean a conscious ignoration of norms, prescriptions, prohibitions, contractual conditions.

VII. Conclusion

The formula of Clause 1 Art. 401 of the Civil Code of the Russian Federation on the essence of fault, in force since 1995 in the Russian Federation, was ignored by representatives of Civil Law. This concept continues to be regarded as only a psychic attitude to the offense and its consequences. Meanwhile, the second paragraph of Clause 1 Art. 401 of the Civil Code of the Russian Federation ("A person shall be presumed innocent if, with the degree of care and diligence which was required of him given the nature of the obligation and the circumstances of the turnover, he took all measures to properly perform the obligation") implies the objectification of this condition of responsibility and a radical change in its meaning.

In criminal law, fault and cause-and-effect relationship are the main objects of proof, a necessary condition for responsibility and the central issue of any criminal procedure. In this field, the concept of fault also undergoes a natural legal evolution, but in criminal law it is much better developed than in civil law.

The paper compares such fundamental notions of civil law as liability and obligations. The acting Civil Code paradigm states, as amended and supplemented in 2015, that they might be no longer confused and should be regulated separately, which reflects logical development of civil law in line with European tradition. Long before it was set forth at the international level in Principles of European Contract Law in 2002. The legislative basic thereof was created by key formulas of Civil Code in Art. 307 in 1994. In 1940, M.M. Agarkov in his conceptual book "Obligations under Soviet Civil Law" said that differentiation between "Schuld" — "Debt" and "Haftung" — "Liability" had no significance for Soviet Civil Law (Agarkov, 1940, p. 45). This publication aimed at analyzing that principle renewed and revised by fundamental Civil Code provisions pinpoints that old dogma is worth to be reconsidered exclusively on the ground of new provisions of Civil Code of RF.

In present time the renewed and more precise significance should be attached to notion of obligation as duty to make a specific action with property objective embracing also personal values in the context of any economic aspirations in society. Unlike indications of earlier laws the obligations and corresponding rights to demand performance thereof should only emerge from limited number of grounds subject to extension only by Civil Code provisions. There are deals, torts, unjust enrichments, gestions, judicial acts, law enforcement resolutions. As a response to the isolation and closed nature of civil turnover, in which each asset should be traced through its transformation, reproduction, forms of essence evolution with uninterrupted identification of its owner, the obligation should be concreate, uniformly understood by its parties and as a rule should lead to conversion with the accrued value. According to the modern statutory paradigm in CC RF obligation right as asset enjoys legal regime different from those of corporate, restitutory and other relative rights as opposed to absolute rights.

Therefore liability claims should be based on other grounds, have different nature, aim and mode of settlement in contemporary Russian civil law.

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Article

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The Risk Theory of the Principle of Equality of Creditors

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Abstract: The paper is devoted to the nature of bankruptcy law as a mechanism for implementing the principle of equality of creditors. This principle assumes that creditors should bear the risk of insolvency of the debtor. This risk is expressed in the proportion of the claim that turns out to be unsatisfied. Bankruptcy law deals with the distribution of the corresponding risk to creditors of different classes. The essence of the relations of the creditors of an insolvent debtor with each other can be understood through the definition of: 1) the subject in relation to which such relations arise; 2) claims of creditors in respect of this subject matter. The subject of relations of creditors with each other is the bankruptcy estate of the debtor, which (and only which) will be used by each of the creditors to obtain satisfaction. The claim to the insolvent debtor to receive satisfaction under the obligation coexists with the claim to other creditors to receive part of the bankruptcy estate. The right of claim arising from the obligation and addressed to the debtor, in the event of the debtor's insolvency, gives rise to the right to receive part of the bankruptcy estate, addressed to other creditors of the insolvent debtor. However, the lack of the right to claim against the debtor makes the right to a part of the estate addressed to the debtor's creditors impossible.

Keywords: bankruptcy; insolvency; *pari passu*; risk; proportionality; prioritization; segregation; claims; law of obligations

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Contents

I. The Essence and Legal Nature of the Pari Passu Principle

The main principle of bankruptcy law is the principle of equality of creditors, also called the principle of *pari passu*. The existence of the principle is expressly recognized in the doctrine (Shershenevich, 2003, p. 449; Karelina, 2008; Goode, 2011, pp. 89, 99; McBryde et al., 2003, p. 81).

Although the phrase *pari passu* is used not only in bankruptcy law, in general it refers to the idea of equal treatment (Tomsinov, 2008). It should be noted that the phrases *pro rata* and *pari passu*, sometimes used as synonyms in bankruptcy law, are not identical. *Pro rata* is translated as "in proportion" and it denotes the idea of distributing the bankruptcy estate of an insolvent debtor in proportion to the debt in the total debt, which, in turn, is the implementation of the equal approach. Under this approach, *pro rata* is a means to achieve the idea of equality, i.e., the means of implementing the principle of *pari passu*. Thus, we can conclude that *pari passu* is achieved through *pro rata*. At the same

time our thesis is somewhat different from the general approach that identifies the terms *pro rata* and *pari passu* (Bevzenko, 2022, p. 26).

Bankruptcy law owes its existence to the *pari passu* principle. In essence, bankruptcy implies a specific mode of fulfilling the obligations of an insolvent legal subject, i.e., one that, with a high degree of probability, will not be able to fulfill his obligations in full. The essence of the *pari passu* principle is that all creditors of such a debtor, who are in a similar actual situation, should have equal opportunities in terms of obtaining satisfaction from its bankruptcy estate and the implementation of managerial and informational powers accompanying the named goal. Accordingly, if one of the debtor's creditors receives full satisfaction of his claim, he finds himself in a preferential position in relation to other "creditors of the same queue" (*pari passu* creditors), and even more so in relation to unsatisfied creditors in a higher priority position.

Moreover, the creditor finds himself in such a position at the expense of other creditors, if we take into account that the difference between the full satisfaction of his claim and the satisfaction that the mostly satisfied creditor could count on in the proportional distribution of the bankruptcy estate among all creditors, he receives from the bankruptcy estate the funds due to all creditors, and not only to him.

In general, the debtor's creditors facing insolvency are in a similar situation: the very concept of a creditor implies taking the risk of the debtor's insolvency. In this regard, such an attitude towards creditors of the same queue will be equal, when they evenly distribute the risk of insolvency, i.e., assume losses in proportion to the amount of their claims (*pro rata*).

Proportional discharge of creditors' claims is possible only after identifying all the applicants for participation in the distribution of the bankruptcy estate, as well as the formation of the estate itself. Therefore, the insolvency (bankruptcy) legislation introduces an interdiction on individual satisfaction (moratorium), expects creditors to proof and set their claims in a bankruptcy case and ensures settlement with creditors at the same time, taking into account the formed bankruptcy estate. In fact, the paper describes the content of the mechanism for implementing the *pari passu* principle, namely bankruptcy law.

The condition of equal distribution is valid within the same queue, which combines the claims of creditors with similar status (a positive manifestation of the *pari passu* principle). On the contrary, with a significant difference in the status of creditors (also due to the nature of their claims), the named principle requires that these differences should be taken into account by establishing the order of satisfaction, including subordination of claims, or by providing other privileges, including the right to segregated satisfaction (a negative manifestation of the *pari passu* principle).

Regardless of whether bankruptcy will take place under the liquidation or rehabilitation scenario, the *pari passu* principle is valid in all cases, since it does not allow obtaining material, managerial or informational advantages of some creditors over others who are in a similar position to the first.

Significance of the pari passu principle. In the absence of the principle of equality of creditors, the legislation on enforcement proceedings could well cope with the fulfillment of obligations; unknown to creditors and third parties, by *ad hoc* methods.

In turn, it is the *pari passu* principle that makes it necessary to fulfill obligations collectively (immediate in relation to all creditors) and evenly, to carry out liquidation publicly according to the rules of bankruptcy legislation, to take into account the interests of all involved persons, and to retore solvency under control and with the consent of creditors. In particular, it is the need to implement this principle that caused the provisions on the introduction of a moratorium that does not allow individual satisfaction, on the need to include a claim in the register of creditors' claims in order to obtain satisfaction on a collective basis, on a collective method of settlement, on proportional satisfaction in case of insufficiency of funds, on challenging the preferential satisfaction.

The *pari passu* principle in some cases is also considered as the basis for the orderly liquidation of debtors, this is another, but not the main, role of this principle (Zautrennikov, 2019, p. 85).

I.1. Comparative Legal Analysis

Although the principle of equality of creditors in the general provisions of the Russian Bankruptcy Law is not directly enshrined as a principle,[1] it can be derived from Para. 16 Art. 2 of the Bankruptcy Law. The principle of "equality of creditors of the same queue" is also mentioned in a special rule applied in the event of bankruptcy of credit institutions (Para. 14 Art. 189.89 of the Bankruptcy Law). In addition, individual elements (implementation tools) of the principle of equality are contained in the definition of bankruptcy proceedings (Art. 2 of the Bankruptcy Law).

This principle has been repeatedly recognized by the Constitutional Court of the Russian Federation[2] and it is recognized by the Supreme Court of the Russian Federation[3] (e.g., Para. 18 of the Review of Judicial Practice of the Supreme Court of the Russian Federation No. 2 (2017) approved by the Presidium of the Supreme Court of the Russian Federation on 26 April 2017, etc.).[4]

The principle known as "*le principe d'égalité des créanciers*" is recognized in French bankruptcy law. For instance, a moratorium on payments for pre-bankruptcy claims is established from the moment the preservation procedure (*sauvegarde*) is initiated, as outlined in Art. 622-7 of the French Commercial Code.[5] In addition, the distribution of the amount of the debtor's asset among his creditors in proportion

[1] The law does not mention such a principle precisely as a principle, suggesting only a method for its implementation (priority and proportionality).

[2] *See* Ruling of the Constitutional Court of the Russian Federation dated 12 March 2001 No. 4-P "In the case of verifying the constitutionality of the second paragraph of Para. 1 Art. 134 of the Federal Law 'On Insolvency (Bankruptcy)' in connection with the complaint of the public joint-stock company 'T Plus'". (In Russ.).

[3] *See* Para. 52 of the Ruling of the Supreme Court of the Russian Federation dated 21 December 2017 No. 53 "On some issues related to holding persons controlling the debtor liable in bankruptcy". (In Russ.).

[4] *See* Ruling of the Supreme Court of the Russian Federation dated 27 February 2017 No. 301-ES16-16279; Ruling of the Supreme Court of the Russian Federation dated 5 July 2018 No. 301-ES18-114; Ruling of the Higher Court of the Russian Federation dated 16 August 2018 No. 303-ES15-10589 (2); Ruling of the Higher Court of the Russian Federation dated 5 December 2016 No. 305-ES16-10852. (In Russ.).

[5] Code de commerce. 107 ed. Dalloz, 2011, pp. 940–943. (In French).

to the debt (*en proportion de montant*) in the course of judicial liquidation (bankruptcy procedure, liquidation judiciaire) is provided for by Art. 643.8 thereof.[6]

The principle of equality that mandates proportional satisfaction of claims among creditors of the same priority is derived from § 39 of the German Insolvency Code. With regard to § 1 of the Regulation (*par conditio creditorum*), Bork notes that *pari passu* is not only equal, but also the best satisfaction of creditors (Bork, 2017, p. 160).

The principle of equality of creditors is directly enshrined in Art. 2741 of the Italian Civil Code[7] (Guglielmucci, 2017, pp. 9–10).

This principle is also upheld in U.S. bankruptcy law, as indicated by Subsection (b) of Section 726 of the U.S. Bankruptcy Code, which requires that payments for claims in each class be made on a *pro rata basis*[8] (Norton and Norton, 2008, pp. 987, 990–991). The report of the House of Representatives and the Senate notes that the provisions are applicable to cases where the available property (funds) is not enough to satisfy the requirements of one queue (Norton and Norton, 2008, p. 990).

Finch and Milman (UK) point out that the *pari passu* principle is often recognized as the principle playing a fundamental role in corporate bankruptcy law (Finch and Milman, 2017, p. 511; Zwieten, 2019, pp. 121–123, 291; Goode, 2011, p. 235). They also refer to the fact that at present the principle is enshrined in Art. 107 of the Insolvency Act 1986 in relation to voluntary winding up and § 14.12 of the Insolvency Rules 2016 in relation to compulsory winding up and administration (Finch and Milman, 2017, p. 511).

As the authors highlight, *pari passu* provides an orderly means of dealing with unsecured creditors. In their opinion, the named principle,

[6] Le montant de l'actif, distraction faite des frais et dépens de la liquidation judiciaire, des subsides accordés au chef d'entreprise ou aux dirigeants ou à leur famille et des sommes payées aux créanciers privilégiés, est réparti entre tous les créanciers au marc le franc de leurs créances admises (cit. ex Art. L.643-8 CC Code de commerce. 107 ed. P. 1257). (In French).

[7] "I creditori hanno uguale diritto di essere soddisfatti sui beni del debitore" [Creditors have an equal right to satisfaction from the debtor's property].

[8] Payments on claims of a kind specified in paragraph 1, 2... shall be made pro rata among claims of the kind specified in each such particular paragraph.

inter alia, leads to lower costs and shorter delays. It is indicated that the collective model of dealing with unsecured creditors is associated with the *pari passu* principle, which meets the problem of efficiency, since it allows avoiding the costs of individual proceedings (Finch and Milman, 2017, p. 513). The authors also note that the *pari passu* principle is fair both in a procedural and substantive senses, since it prevents individual claims from winning in strength and speed and assumes an equal (equivalent) treatment for all unsecured creditors (Finch and Milman, 2017, p. 513). Goode and Zwieten (UK) emphasize that "the most fundamental principle of bankruptcy law is the distribution of pari passu, all creditors participate in the common pool in proportion to the size of their recognized claims" (Zwieten, 2019, pp. 121–123, 291; Goode, 2011, p. 235).

I.2. Discussion regarding the Existence of the Principle of Equality of Creditors

It is also necessary to appreciate alternative points of view, according to which the principle under consideration does not exist. A prominent proponent of this approach is Mokal who provided his opinion in the paper entitled "Priority as Pathology: The Pari Passu Myth" (Mokal, 2001, p. 581).

As we mentioned above, the collective form of settlement with creditors is a means of equal distribution of risk in pursuance of the principle of equality of creditors. Mokal, on the contrary, sees in the collectivity of the procedure, as opposed to the individual penalty, not a means, but a goal (essence) of bankruptcy procedures. Queues and privileges are secondary issues as compared with the collectivity. In addition, the author argues that creditors' attempts to secure immunity against the collective procedure are suppressed by bankruptcy law. Apparently, this is an objection to the fact that the existence of the principle of equality is confirmed by the recognized possibility to challenge pre-bankruptcy transactions (Mokal, 2001). The author elucidates that *pari passu* puts together similar creditors. But further, he notes, it is the sequence, and not *pari passu*, that ensures the absence of destructive competitions between creditors.

Thus, according to Mokal, the essence of bankruptcy regimes lies in collective production, which streamlines and prevents damage to the general mass. Mokal discovers another advantage of the collective procedure over the individual one: he believes that when the debtor's property as a whole is sold as a "business on the go" (as a going concern), such property can be worth more than if it is sold in parts (Mokal, 2001, p. 592). As a consequence, Mokal believes that the priority and collective nature of the procedure is ensured not by the principle of equality of creditors, but by the key objective. Therefore, bankruptcy law and collectivity are not about equality, but about consistency in order to increase the price of the sale of the debtor's property.

Our disagreement with this position can be expressed as follows. First, the order in which creditors' claims are satisfied is in itself the principle of equality of creditors. Mokal does not take into account the negative manifestation of the principle of equality of creditors when he gives an example of impossibility of challenging on the basis of the provision of preferential satisfaction based on the principle of equality of creditors in the case of equal satisfaction received by creditors of different queues (Mokal, 2001, p. 11).

The collectivity itself, and the author draws attention to this thesis, does not yet give rise to the obligation to act together (Mokal, 2001, p. 592). Collectivity is necessary for equal distribution. Coordinated actions stem from the principle of cooperation, as the interests of one party are interconnected with the actions of others.

Mokal, while justifying the objective of bankruptcy solely by replacing the individual actions of creditors with a collective procedure, which should reduce costs and increase the price of selling the business, comes to a logical for him conclusion: the question of priority within the collective procedure does not matter; it is enough that it be collective (Mokal, 2001, p. 593). It is difficult to agree with such a statement, bearing in mind that the decision on the order is based on the requirement of equality, which, in turn, follows from justice.

Mokal sees the negation of the principle of equality of creditors in the fact that bankruptcy law itself creates exceptions in the form of privileges (Mokal, 2001, p. 582). But after all, this is a confirmation of the principle: they talk about exceptions only in the context of the

rules. The question that the basic solution is precisely equality is not discussed, we are talking about legislative exceptions. The law is needed precisely in order to legitimize such exceptions. In addition, Mokal correctly points out that among preferred creditors the division is also proportional, i.e., equal (Mokal, 2001).

Although Mokal disputes the connection with the principle of equality, it seems that this is another confirmation of this principle: equal to equal, unequal to unequal; those who are unequal can be equal to themselves, and that is where the proportion appears.

It must be admitted that the proportionality of distribution is already a consequence of the principle of equality and it acts only as an instrument within a positive manifestation. Within the negative manifestation, proportionality must be eliminated; this is also a manifestation of the principle of equality. The very "restrictions" to the principle of equality, by virtue of their multitude, blur the idea of equality — this seems to be how Mokal understands the problem when he gives negative manifestations with a reference to Roy Goode (Goode, 1997; Mokal, 2001, pp. 587–588) in the form of secured creditors, suppliers of goods under reservation of title (ROT) clauses, of creditors for whom the debtor "holds" assets by virtue of a trust (Mokal, 2001, p. 585). But looking at this issue as a negative manifestation of the principle of equality allows us to see in these situations its confirmation, not denial.

The approach is interesting: on the example of small and medium-sized businesses author uses and shows their debts statistics (secured creditors, shareholders, finance lease) — all this should, according to the author, show that there is a little place for the *pari passu* principle (Mokal, 2001, pp. 587–588). Our thesis remains unchanged: all of this demonstrates the manifestation of the principle of equality among creditors in a negative context.

Interestingly, Mokal also emphasizes the need to "reprove" exceptions to the principle of equality. It seems that this confirms the author's recognition of the negative manifestations of the principle of equality (Mokal, 2001, p. 590). The principle of equality of creditors is not a myth, just because any exception to it needs to be justified. It is the existence of this principle that serves as the basis for the introduction

of individual exceptions. Otherwise, there would be no concept of an exception, as well as the need to justify each exception.

Finally, this does not exclude, but rather confirms the existence of the principle of equality of creditors, as well as the right to segregated satisfaction of claims from secured creditors. The priority of creditors secured by the debtor's property must be justified by the principle that contrasts the principle of equal treatment, as the notion of a right to a share of the debtor's estate conflicts with the concept of general equality. In this context, all creditors whose claims are secured by various parts of the bankruptcy estate (such as pledged assets or secured items) receive satisfaction in opposition to the principle of equality.

The idea opposed to the principle of equality of creditors is the idea of property rights in that part of the bankruptcy estate that serves the interest of a secured creditor. The key point here is that the person does not bear the risk of the debtor's insolvency while designating (segregating) a portion of the constantly changing estate; in this framework, it cannot be countered by risk-taking.

Possible forms of true and fictitious segregation of assets include pledge agreements, title security, security deposits, set-offs, special accounts, etc. In cases of true segregation, the principle of equality among creditors does not apply to the satisfaction of the asset. Conversely, when segregation is fictitious (sham), we can either discuss the absence of the right to segregation (such as in offset situations) or the negative implications of the principle of equality among creditors (as happens to notary deposits in the event of a bank failure).

II. The Risk Theory of the Principle of Equality of Creditors: Basic Provisions

II.1. Basic Notions: Obligation, Person

Before delving into the theory, it is important to make a few general remarks. Obligation presupposes a claim against a person in civil law. In turn, a person in civil law is a separate property (Sukhanov, 2014; Duvernois, 2004, p. 237). Therefore, an obligation implies a claim to separate property.

At the same time, the obligation does not imply the right to things from personal estate and, moreover, does not create the authority to control debtor's property status. Consequently, the creditor may have a claim to estate that is insufficient for him, as well as to that estate that is insufficient for settlements with all the creditors.

Since each creditor has their own claim to the estate, these creditor-applicants come together, creating the necessary conditions for addressing the issue of how to resolve the competition among creditors. The creditor's claim is nothing but the right to claim. A claim is always addressed to another entity, in contrast to a right to a thing. Under these conditions, this entity may find itself in a situation where it is impossible to fulfill the requirements (requirement) due to the lack of an asset in estate. The need to fulfill an obligation presupposes an answer to the question about the source of such fulfillment. The source of execution is the property of the debtor (estate), which can vary in size at any given time. Consequently, it is fundamentally the creditor's responsibility to bear the risk of an insufficient source of enforcement, which generally does not allow the creditor to seek performance from parties other than the debtor. Thus, creditors bear the risk of their debtor's insolvency by their very status and are not entitled to claim the use of another personal estate to fulfill the obligation.

If the issue of competition is addressed by ensuring equal opportunities for all creditors (or through a combined approach), each creditor (in the same position) will share the same risk, represented by an equal portion of the obligation that remains unfulfilled. This implies an attribute of the right of claim, where all creditors of the same debtor share the same risk of losses due to non-fulfillment, particularly when establishing priority among creditors in the same queue.

From the point of view of fairness, the creditor's bearing the risk of insolvency of his debtor also stems from the fact that the loss in the debtor's business in a competitive environment in most cases is associated with the gain of individual creditors (banks in the form of an interest rate, the budget in the form of taxes, etc.).

Next, we should move on to the issue of competition of creditors as the basis for the collective form of settlements and bankruptcy law in general.

II.2. Creditors' Competition

The subject of competition among creditors is the fulfillment of an obligation to each creditor under conditions where full payment to all is not possible. Such competition can be resolved by establishing the order of discharging the debt, providing equal opportunities for performance (proportional satisfaction), in a combined manner. The order of satisfaction of claims can be established chronologically according to the occurrence of the claim, the size of the claim, the type of claim.

Some queuing methods allow a combined method, when the claims within the same queue are satisfied on the basis of proportionality (equal opportunities), and some other claims are not satisfied. For example, chronological and volumetric modes of satisfaction are not combined with the provision of equal opportunities.

In Russia, as in many other established legal systems, a combined method of claim satisfaction is utilized, where claims are organized in a queue by type, and those within the same queue are satisfied proportionately based on their size relative to the total amount of claims in that queue.

Such a method of discharge is impossible outside the collective form of settlements: proportional satisfaction presupposes the unification of all applicants.

The distribution of the risk of insolvency within one queue of satisfaction occurs on a proportional basis, which, in essence, means that all the creditors of one queue bear equal risk, namely, equal losses in the form of a share of the obligation that turns out to be unfulfilled.

Finally, we shall proceed to the description of risk theory.

The *pari passu* principle is often defined through the proportionate satisfaction of creditors' claims and the right to equal satisfaction from the debtor's estate (Zautrennikov, 2019). This, however, is not entirely true. The creditor's right to claim as a whole follows from his right in relation to the debtor: having the right to the whole, the creditor has the right to the part. First of all, the dissatisfaction of the creditor's claim violates his right in relation to the debtor, and not the principle of equality. Therefore, the principle of equality cannot be elucidated in terms of the amount of satisfaction.

The principle of equality of creditors, meanwhile, is expressed in the fact that creditors do not pretend to receive an equal share of the execution, but to an equal restriction of the right (hence, equal risk). In other words, each creditor has the right to demand that the other creditor assumes the risk of insolvency to the same extent as he does. The risk of insolvency is expressed in the loss of the share of performance due from the debtor. Thus, the violation of the principle of equality means not the smaller claim satisfaction obtained by one creditor (than the debtor owes him), but the bigger claim satisfaction obtained by another creditor who, thus, bears a lower risk of insolvency of the debtor.

Thus, each of the creditors bears the risk of insolvency of his debtor under the obligation, which follows from the essence of the obligation. To clarify the above thesis, let's start with the fact that the creditor has a claim on the person (the right to his action). Consequently, an individual (as defined in civil law) is responsible for fulfilling his obligations with their property (assets). The composition of the property of the debtor (a person in civil law) is dynamic and at each specific point in time can be of a different value, which cannot be ignored by the creditor who has a claim against such a person (but not a real right).

Consequently, the creditor, entering into a binding relationship with the debtor, assumes the risk of such a change in the property status of the debtor, in which the debtor will not have sufficient property to fulfill the obligation to the creditor. Bearing the risk of insolvency of the debtor by the creditor means that the creditor, as a general rule, will not be able to receive satisfaction of his obligation in full if his debtor is unable to fulfill the corresponding obligation. Since the creditor independently bears the corresponding risk, he will not be able to receive such satisfaction by contacting other persons (other property, estate).

The corresponding risk may be realized in the form of full or partial non-fulfillment of the obligation, depending on the solvency of the debtor. Since each creditor bears the risk of default by the debtor of an obligation, in the event of the debtor's insolvency, such a risk can potentially be realized in relation to all creditors. The volume of the obligation not fulfilled as a result to each specific creditor can be

considered the volume of realization of the risk of insolvency of the debtor. The insolvency of the debtor, therefore, may lead to one or another distribution of the risk of such insolvency among creditors: the volume of the defaulted obligation will be the distributed volume of the realized insolvency risk.

In the absence of any restriction, the distribution will be uneven: the first creditors who apply for execution may avoid the risk distribution at all, the next ones may take on a partial realization of it, the rest may take the risk in full. Since the realization of a risk means nothing more than the loss of a part of the creditor's property (estate), it is fair that creditors who are in an equal (similar) position take on the realization of such a risk equally. In turn, equal acceptance of the risk of insolvency means an equal share of the remaining unsatisfied claims of the creditor. This implies that the principle of equal treatment of creditors (principle of equality of creditors, *pari passu* principle) implies an equal distribution of the realized risk of insolvency of the debtor. This also means that each of the creditors must equally lose part of their property (estate) and incur the same share of losses. This is how the implementation of the *pari passu* principle should be understood, bearing in mind that we are talking about equal losses, but not about equal satisfaction (performance).

The latter representation is inaccurate if we take into account the preservation of the debtor's obligation to the creditor in full, regardless of its insolvency: such insolvency does not change the scope of the claim. If the volume of the claim does not change, then all creditors are entitled to full, and not to partial satisfaction. This means that the *pari passu* principle cannot be understood as involving satisfaction in the same parts. Although this distinction seems insignificant, it makes clear the essence of the principle: the losses from the realized risk of insolvency are equally distributed. Of course, an equal distribution of the realized risk of insolvency is necessary among equal creditors. If there are differences in the position of the creditor, which are important for granting him a privilege (higher priority) or for his discrimination (subordination of the claim), the risk to be distributed must take this into account.

In itself, the increase in the order of satisfaction of the claim means a decrease in the risk of insolvency distributed to creditors of the corresponding queue, subordination means an increase in such risk. Please note that in these cases we are talking about the distributed potential risk, and not about the distribution of realized risk (losses). In particular, if the debtor does not have sufficient funds to satisfy the claims of priority creditors, such creditors assume a reduced risk (probability of loss), however, this risk is realized in full or in part of the loss. Lower-ranking creditors, although they take on an increased risk, it may turn out to be realized in the same number of losses as those of higher-ranking creditors: this will take place when the debtor, in principle, does not have the any estate to partially satisfy the claims of creditors above standing queue. Thus, the *pari passu* principle implies a uniform distribution of realized risk (losses) among creditors of the same queue and may imply a different distribution of risk among creditors of different queues. It follows that the principle of equality of creditors cannot provide a different distribution of the realized risk of insolvency, but it can provide a different distribution of the risk of insolvency among creditors of different queues and an equal distribution of the realized risk among creditors of the same queue.

II.3. The Notion of Creditor and Creditors' Risks

The very concept of a creditor (it. *credere* — to believe) comes from the concept of trust. In turn, in civil circulation, everyone trusts not so much persons as their property masses (estate), since the subject in civil law is an estate around which debts (liabilities) are concentrated (Sukhanov, 2014; Duvernois, 2004, p. 237). For example, the principle of limited liability follows from the principle of independence of subjects of civil law. If so, then the creditor claims such estate. It is fair that creditors claim as much as they contributed to the mass (estate). At the same time, the contribution to the estate is the provision that the creditor made. That is why the creditor assumes the risk of non-satisfaction of the debt to the same extent as everyone else, but in absolute terms, the amount of losses will always depend on the amount of contribution to the debtors' estate.

Thus, the risk of insolvency of the debtor lies with the creditor who trusted the person. Since trust is given to a person where there are no guarantees regarding the composition and volume of the property mass (estate) of this person, the creditor bears the risk of the debtor's insolvency. The risk of insolvency of the debtor is manifested in the actual (non-legal) impossibility to satisfy the claim. The actual impossibility of satisfying the claim may be complete or partial. The distribution of the risk of insolvency means, therefore, the distribution among creditors of a certain part of the remaining unsatisfied due to the actual impossibility of claiming.

The general rules for risk distribution in private law assume that the owner of a particular good (thing, right) bears the risk of losing this good on his own. The assignment of risk to the owner of an object of civil law is based, in turn, on the ability and interest of just such an owner to take measures to reduce this risk.

In Russian Federation, the general corresponding maxim is expressed in Art. 211 of the Civil Code of the Russian Federation,[9] by virtue of which the risk of accidental loss or accidental damage to property is borne by the owner, unless otherwise provided by law or contract. It seems that such a rule expresses a general idea and can be extrapolated beyond the limits of real legal relations. In the same way, the risk must be borne by the owner of other objects of civil law: the claim, the intellectual property. Such an extension of the idea beyond the real right is motivated by the absence of fundamental differences in the legal status of the owner of the thing and the owner of the claim. Although there is certainly a specificity, the owner of the claim, just like the owner, (1) is interested in preserving the good, (2) has the greatest amount of opportunities to preserve it as compared to other persons.

Thus, the creditor, like the owner of the thing, is interested in the possibility of exercising the right of claim, as well as having more opportunities for this than others: to analyze the solvency of the debtor before entering into a relationship (for voluntary creditors), to seek security, to take timely measures of operational protection, etc. Of

[9] Civil Code of the Russian Federation (Part I) dated 30 November 1994 No. 51-FZ (as amended on 16 April 2022). *Collection of Legislation of the Russian Federation*. 1994. No. 32. Art. 3301.

course, all these possibilities do not guarantee the elimination of the risk of non-fulfillment of the claim due to the insolvency of the debtor, but this is not the main thing: it is important that there are a priori more of these possibilities than anyone else, and therefore the risk is not even potentially can be transferred to someone on the basis of his privileged (in relation to the possibility of avoiding the risk of insolvency of the debtor) position.

It should be recognized that the risk of insolvency of the debtor, like any risk, is not legal. It is precisely the transfer (distribution) of this risk that relates to matters of law. If the law is silent on the issue of risk distribution, then the general rule described above applies: the risk is borne by the owner of the corresponding good. It follows that the corresponding risk, contrary to the general rule of law, can be transferred to another person. Risk transfer is the responsibility of adverse consequences of the realization of the risk on a person other than the owner of the lost good.

In case of risk transfer, losses incurred in the property of the owner of the lost good are compensated to such owner by the person to whom the corresponding risk was transferred. With regard to the transfer of the risk of insolvency of the debtor, this will be expressed in compensation to the creditor for losses in the amount of lost satisfaction. The most well-known form of transferring the risk of insolvency of the debtor is vicarious liability for the obligations of such a debtor to third parties (currently regulated in the Russian Federation in Chapter 3.2 of the Bankruptcy Law).

II.4. Instability of the Ratio of Debtor's Obligations and Debtor's Estate as a Reason of Creditor's Risks

As already mentioned, the risk of the debtor's insolvency is associated with the principles of independence and limited liability: it is the impossibility of turning to other persons (their estates) that entails the potential impossibility of satisfying all creditors from the debtor's estate. This impossibility is associated with the absence of any correlation whatsoever between the volume of obligations (liabilities) of the debtor and the value of his property (assets). So, in relation to a

liability, the debtor is free to enter into any obligations, regardless of the fact that this may lead to an excess of the liability over the asset. In addition, the debtor may become the subject of an involuntary obligation (delict, unjust enrichment).

As for the asset, the debtor's property may be spent or destroyed (perish), damaged, and finally, the value of such property may change for the worse for the debtor.

The whole set of circumstances leads to the conclusion that, at any particular moment in time, there can be any ratio of the obligations and property of the debtor, including one in which all the property is not enough to satisfy all obligations. The principle of independent responsibility means that the debtor's obligations, however, can only be fulfilled at the expense of the debtor's property (Art. 24, Clause 1, Art. 56 of the Civil Code of the Russian Federation) and the creditor cannot turn to other persons (other property masses, estates) for discharging debtor's obligations.

II.5. The Principles of Limited Liability and of Independent Liability as a Legal Basis of Creditors' Risks. The Risks' Distribution Role of Bankruptcy Law

The principle of limited liability, arising from the principle of independent liability, means that the creditor cannot apply to persons who have combined their capital or their efforts to form the debtor as a legal person; the named persons are liable within the limits of the contributions they have already made (there is no such liability when combining persons) (Clause 2, Art. 56 of the Civil Code of the Russian Federation), i.e., owe nothing to the debtor's creditors.

In some cases, it is allowed to mix the principles of independent and limited liability, which is not justifiable: the latter is only a variation of the former in relation to legal entities, for whose obligations the founders are not liable. In other words, among all the persons who are protected by the principle of independent liability from other people's obligations, the principle of limited liability specifically singles out the founders of the corresponding debtor: they are not liable for its obligations, being other subjects of civil law. Such a specification of a

general decision is caused by the presence in the legal order of legal entities, for whose obligations the respective founders are still liable (Para. 2, Clause 1, Art. 56 of the Civil Code of the Russian Federation).

The connection of the risk of insolvency with the principles of independent and limited liability in relation to the rules for the distribution of this risk in accordance with the *pari passu* principle leads to the conclusion that the *pari passu* principle is to a certain extent dependent on the principles of independent and limited liability. This, in turn, means that where these principles do not apply, there will be no place for the *pari passu* principle: the unsatisfied part of the claim from the bankruptcy estate of the debtor will be satisfied at the expense of the estates of other persons. And only in the case when, due to a shortage of funds to satisfy the claims from the named estates, creditors will not be able to turn to other persons due to the principle of independent responsibility, the *pari passu* principle will begin to operate. True, this will take place in relation to the estate of the subsidiary responding debtor.

The option that the *pari passu* principle is a consequence of the idea that creditors accept the risk of non-payment from the debtor and distribute such risk is not an alternative to the nature of such a principle as a special case of the general principle of equality. As can be seen from the above, equal acceptance of the risk of insolvency corresponds to the general idea of equality of equals, which, in turn, is based on the concept of justice.

In view of the foregoing, it turns out that bankruptcy law is a regulator of the distribution of risk, which is fully manifested in bankruptcy: from eternal debt in the ancient period (Shershenevich, 2003, p. 102) (in case of non-exemption from debts, or even quartering of debtor for division between creditors) (Shershenevich, 2003, p. 102) to repayment of debts under proceedings in the present time.

Interestingly, we find the same thought in K. van Zwieten arguing, that “This principle is based on the notion that unsecured creditors should bear losses equally: as the Supreme Court recently stated, apportionment provisions embody ‘fundamental principle of equality’” (Zwieten, 2019, p. 292).

It turns out that equality consists not so much in distribution as in incurring losses, while the right to control (votes) is also granted for the future incurring of losses. The Report of the Institute of European Law states the same: the insolvency of an enterprise is a situation in which losses must be distributed between creditors and interested parties.[10]

Attention should also be paid to the fact that creditors in bankruptcy in absolute terms receive unequal satisfaction (at the face value of the property provided by the debtor), which may raise the question of why creditors are said to be equal. The answer to this question lies in the risk theory described above: the risk of insolvency is expressed in the share of the requirement remaining unsatisfied, such a share is the same for equals, therefore and only because of this, it is a question of the principle of equality (*pari passu*), and not of proportionality (the mechanism of equal distribution of risk is *pro rata*).

In other words, the risk of insolvency is equally distributed, not the property of the debtor. In turn, the creditor is entitled to the same share of satisfaction, which is inversely proportional to the same share of risk. Since the right to satisfaction for him does not follow from the *pari passu* principle, but from the principle of due performance, the only way the *pari passu* principle can be understood is the equal distribution of risk (such risk is an input condition that stops the action due performance principle). At the same time, equal distribution (the absolute amount of satisfaction), on the contrary, would violate such equality, since it would not take into account the degree of risk of each of the creditors. Further, it is the degree of risk (losses in absolute terms) that determines the level of control in the bankruptcy case and the level of participation in the distribution.

II.6. The Implementation of the Pari Passu Principle and its Stages

The implementation of the *pari passu* principle through the distribution of risk may have final and intermediate stages. The last stage in the distribution of the risk of insolvency is the repayment of the

[10] Rescue of Business in Insolvency Law, (2017). European Law Institute. 2017. P. 255. Para. 442. Available at: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Instrument_INSOLVENCY.pdf [Accessed 05.03.2025].

remaining unfulfilled part of the obligation. Meanwhile, in the case of forced debt reduction or forced deferral of its execution in rehabilitation procedures (debt restructuring), the imposition of a reorganization plan (cramdown) is a way of distributing the risk of insolvency. New conditions can be imposed on the creditor precisely because he is the bearer of the risk of impossibility to fulfill the previous conditions of the obligation.

In general, the risk theory proceeds from the fact that each of the creditors owns the risk of insolvency of his debtor, as the owner owns the risk of destruction of his property. Such a risk can be transferred to third parties only on special grounds for this: on a subsidiary (vicarious) debtor — when bringing to bankruptcy or misleading; on guarantor; for a subsidiary (vicarious) debtor for a special subject of civil law (state-owned unitary enterprises, public offices).

As stated above, the risk of the debtor's insolvency lies with the creditor as the owner of the subjective right (claim). The term *"owner"* of a subjective right follows from the construction of "right to right", previously substantiated in the doctrine (Vasilevskaya, 2004, p. 99), and serves to designate that characteristic for the legal subject (legal person), which allows us to consider a subjective right as a type of an object of law (property right), and its subject — having the authority to dispose of the relevant subjective right (Tretyakov, 2022). In other words, in this way the creditor's ownership of a separate object of law is justified — a subjective right, the risks of "loss" of the useful properties of which, as a general rule, are borne by the subject of the relevant right (by analogy with the position of the owner in relation to risk of accidental loss or accidental damage to things).

In turn, the bankruptcy of the debtor under the obligation changes the term and method of satisfying the subjective right (claim). Now the method becomes collective, assuming order and equality within the queue. Since equality consists in the same share of the risk of non-payment for each of the equal subjects, such a risk is realized by non-payment of that part of the debt that is equal to the level of risk for the corresponding category. It should be recognized that creditors have different queues of satisfaction there are several levels of risk, such levels can be called the degree of risk. The higher the satisfaction

queue, the lower the level (degree) of risk. For example, the first order of satisfaction corresponds to the risk of the first degree, the second order of satisfaction corresponds to the risk of the second degree, etc.

It must also be recognized that the exclusion from the definition of the proportion for the equal distribution of the risk of the amounts of penalties and financial sanctions confirms that the *pari passu* principle follows from the equal distribution of risk. Such a risk manifests itself in the losses of the creditor, which are fully represented by the principal, and not additional (without consideration) claim. Of course, an objection about the losses' nature of the penalty is possible here, but it must be recognized that, being separated from its basis, the penalty became an additional and non-loss claim. Therefore, both the right to satisfaction (proportional within the framework of the collective calculation) and the right to control are based on the amount of real damage.

It is more accurate to call the *pari passu* principle the principle of equal treatment, which emphasizes the equality of legal approaches. If we talk about the mechanism of law, then we are talking about equality of opportunities, duties and prohibitions. As follows from the above, the principle of equal treatment of creditors is incorrectly understood as equality of opportunities (rights) for satisfaction, since each creditor already has the right, the satisfaction of which he is asking for. Therefore, it is necessary to talk about equality in the restriction of rights, which consists in taking on the risk of default by the debtor. It would be correct to say that we are dealing with an equal termination of the right, since the right with the calculation according to the general rule is terminated by the inability to fulfill the obligation. An exception, however, includes cases where the right can still be exercised at the expense of other people's property masses (estates) or withdrawn property (for example, Clause 11, Art. 142 of the Bankruptcy Law).[11]

However, involuntary creditors (victims of tort and unjust enrichment claims) also have a claim to the person, therefore, they bear the risk of insolvency.

[11] The legal regime of retired things (Clause 11 Art. 142 of the Bankruptcy Law) is as follows: these are things that do not belong to the owner (illegal basis for disposal), but no longer have an owner (with liquidation the subject of law ceased to exist).

Thus, bankruptcy law aims to ensure the *pari passu* principle, i.e., distribute the risk of insolvency of the debtor equally (in negative and positive manifestations of such the principle). Reducing and increasing the corresponding risk is possible within the framework of the negative manifestation of the *pari passu* principle.

The fairness of the distribution of risk implies, however, such a distribution on the one who accepted it (the creditor trusts the person, and therefore accepts the risk of its insolvency). At the same time, the refusal to accept risk is manifested in property security when the pledgee accepts the risk of loss or damage to the thing that constitutes the security.

The risk theory of bankruptcy assumes development in the economic context: for example, an option (derivative) can be bought for such risks, such risks can be insured. Bankruptcy and satisfaction statistics seem to be the material for determining the probability of the realization of the risk of insolvency.

II.7. Creditor's Right in relation to the Equal Distribution of Risk

Next, it should be established what right each of the creditors has in relation to the equal distribution of risk and the equal distribution of realized risk (losses) in relation to creditors in a similar position. In particular, it is necessary to determine whether the requirement of equality in terms of the distribution of risk and losses constitutes the content of the subjective right of obligation in relation to the debtor or has a different essence. The requirement for equal bearing of risk and losses as a realized risk is addressed not to the debtor, but to other creditors of the debtor. There are other creditors who must be in the same position as the subject of the corresponding claim. Receipt by the creditor of fulfillment in an amount greater than the creditor of his queue will receive constitutes a violation of the principle of equal distribution of the risk of insolvency and losses from the realization of such risk. Consequently, all creditors of the debtor will be obligated persons in relation to the requirement of equality of creditors. It follows from this

that the corresponding subjective claim constitutes the content of legal relations between creditors, but not between a creditor and a debtor. One should take into account the main details of the nature of these legal relations, their subject composition, the content of the rights and obligations of creditors in them.

Thus, the creditor's right to the debtor's action (obligation) includes the following legal possibilities: the right to demand performance; the power of judicial protection, which breaks down into the right to sue and the power to initiate and participate in a collective bankruptcy procedure. In addition, the creditor has the right to dispose of the claim (assign, pledge, contribute it to capital), as well as the right to refuse the same claim.

Meanwhile, the subjective right of the creditor does not include the right to demand an equal distribution of the risk of impossibility of performance by the debtor, since the debtor himself in the majority of cases does not distribute the debtor's estate, which is done by the insolvency practitioner. In addition, the debtor is in principle indifferent to what share this or that creditor will be satisfied with, such a debtor has absolutely no interest in the amount of satisfaction of individual creditors. Such an interest is a prerequisite for determining the subjects of the relevant legal relationship: it is precisely the need to resolve clashing interests that brings to life the norm that defines the boundaries of the subjective right of everyone. In particular, here we fully agree with R. Iering, who believed that subjective right is "interests protected by law "[den rechtlich geschützte Interessen] (Ihering, 1880, p. 72).

The interest is not with the debtor, but with the same (other) creditors of this debtor. It is the volume of satisfaction of each of the creditors that depends on the extent to which such satisfaction will be received by other creditors. This feature of the conflict of interests is connected with the fact that we are talking about an insufficient object for division between all creditors: with such a lack of satisfaction, the share of satisfaction of one depends inversely on the share of satisfaction of the other.

III. Conclusion

The creditor has the right to demand equal satisfaction and, consequently, equal distribution of risk in relation to other creditors — interested subjects. It turns out that we are talking about the right that is included in the subjective right of each of the creditors in relation to each other, and not about the subjective right of the creditor in relation to the debtor. In this regard, the *pari passu* principle is not the principle of exercising the obligatory right of the creditor to the debtor.

If the right to demand equal distribution of risk is the right of the creditor in relation to other creditors, it is necessary to establish the essence of the relations of creditors with each other, determine their legal nature, identify the specifics, areas of intersection of interests and potential rules governing these conflicts.

The essence of the relations of the creditors of an insolvent debtor with each other can be understood through the definition of: 1) the subject in relation to which such relations arise; 2) claims of creditors in respect of this subject matter.

The subject of relations of creditors with each other is the bankruptcy estate of the debtor, which (and only which) will be used by each of the creditors to obtain satisfaction for their claim.

In turn, the claim of each of the creditors is to receive satisfaction from the bankruptcy estate.

As can be seen, here the claim to the insolvent debtor to receive satisfaction under the obligation coexists with the claim to other creditors to receive part of the bankruptcy estate. It turns out that the right of claim arising from the obligation and addressed to the debtor, in the event of the debtor's insolvency, gives rise to the right to receive part of the bankruptcy estate, addressed to other creditors of the insolvent debtor.

Thus, the reverse conclusion can be made. The absence of the right to claim against the debtor makes impossible the right to a part of the debtors' estate addressed to the community of the debtor's creditors. Consequently, being in the register of creditors' claims itself, if it is associated with the absence of a liability claim against the debtor, does not indicate the existence of a right to a part of the debtor's estate that is opposed to other creditors of the insolvent debtor.

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THE ART OF ARGUMENTATION

Article

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Law Against Rhetoric: Establishing the Truth in Legal Disputes when Using Argumentation Tricks

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Abstract: The desire to achieve truth is an important feature of the civilization that developed in the territories of the far and near Mediterranean in the 8th-2nd centuries BC and exists nowadays. Law, considered as a description of the essential properties of social reality, has been formed as a system of means that makes it possible to establish in a conflict situation the truth regarding the facts that are subject to assessment by the law enforcer (usually the court). Recently, however, the law's focus on truth has been questioned as its achievability has been contested in philosophy and rhetoric. The lack of demand for true knowledge, its historicity, difficult achievability, fundamental nature of lies, and the dominance of pseudo-true knowledge are pointed out. It is noted that similar processes are reflected in the legal understanding of truth, which does not negate its fundamental significance for law. At the same time, statements about the impossibility of achieving truth in a dispute are often based on seemingly true, but in fact incorrect statements (so-called argumentative tricks); those can be overcome with the use of rhetoric. A typology of such tricks is given. It is pointed out that classifying tricks as acceptable is incorrect, since they constitute deception, although not prohibited by law. Tricks that go beyond the

scope of discussion (tricks of appeal) are considered. Methods are proposed to counter them with rhetoric, which makes it possible to clearly demonstrate the fallacy of the relevant statements and maintain confidence in the possibility of establishing truth in the legal process, which, in turn, ensures the preservation of social justice.

***Keywords**:* truth; lies; rhetoric; law; dispute; tricks

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Contents

I. Introduction

The beginning of many modern civilizations is traditionally considered the period of the "Axial Time" (Jaspers, 1991, pp. 32–50), which falls on the 8th-2nd centuries BC. At this time, in the long-populated territories of the far and near Mediterranean, complex state formations were taking shape, social-class inequality with the exploitation of man by man appeared. Some people who had free time to understand reality created the first philosophical systems and demonstrative scientific knowledge; these were Thales, Pythagoras, Plato and Aristotle. Religious cults became more complex: the activities of Homer, biblical prophets, Buddha and others led to the creation of the Olympic religion, Judaism, Buddhism, and other religions.

Important features of Mediterranean civilizations in understanding the essence of the universe, the ways and directions of its development were the idea of truth and legal systems, in particular, legal proceedings

that implement social justice in an inherently unjust class society. At the same time, law considered as a description of the essential properties of social reality, was formed as a system of means that makes it possible to establish in a conflict situation the truth regarding the facts that are subject to assessment by the law enforcer (usually the court). It should also be noted that without truth it is impossible to achieve justice (Voplenko, 2013).

The presented civilization, both in general and in its specific manifestations, had a powerful impetus for development: periods of evolution were replaced by revolutions, the collapse of some civilizational formations and the emergence of others, ups and downs. Societies and States that emerged later copied these features with a certain degree of diversity. At the same time, some well-known and ancient civilizations, for example, ancient Egypt, Assyria-Babylon, were unable to survive the "Axial Age" in their former capacity as "leaders"; they became outsiders of the historical process for a long time. Accordingly, we can consider that the desire to achieve truth, including through the formation of powerful philosophical and legal systems, obviously acts as an advantage fundamentally important for the existence and development of civilization.

II. The Relationship between Truth and Non-Truth

In the classical philosophical systems of antiquity, Plato and Aristotle created the first concept of truth in history, according to which truth is the correspondence of thoughts to reality. The understanding accessible from the point of view of common sense, however, soon gave rise to paradoxes, such as the "liar paradox", which philosophy, logic and mathematics tried to understand until the middle of the twentieth century. Against the backdrop of the problems of the correspondent concept, alternative points of view have emerged — a pragmatic and coherent concept of truth, which should be perceived not as independent positions, but as complementary to the main point of view.

Why did the idea of truth seem so significant to people? Apparently because true or adequate knowledge of the world seemed to be a guarantee of a correct understanding of existence, its successful

functioning and its successful transformation in the course of human activity. However, everything turned out to be not as simple as it seems from the standpoint of the so-called common sense.

Firstly, truth in any of its incarnations turned out to be a weak fighter in the field of knowledge of reality and its functioning. Entire bodies of well-reasoned, proven, justified (all these are characteristics of truth) knowledge are not in demand by humanity and are not used in any way. For example, many are still convinced of the priority of induction over deduction, sensory knowledge over rational knowledge. Traditional logic, with its scant set of four laws of supposed thinking, still defeats modern symbolic logic with its fundamentally different set of laws and other cognitive means. Marxist-Leninist philosophy still looks like an attractive social ideal, despite the proven contradictory nature of its foundations.

Secondly, each era formed its own idea of true knowledge, and it worked well. Based on such an understanding (micro and macrocosm in antiquity, theocentrism in the Middle Ages, classical mechanics in modern times), States were built, economic transformations took place, an education system was created and goals for the future were set. Subsequently, the knowledge on which all these factors were based turned out to be either false or insufficient. The universe itself was much more complex than it was thought to be. However, practices based on false or inaccurate grounds have more often than not been successful or effective. The crusaders were sure that wealth awaited them in the Holy Land with its milk rivers and jelly banks, and they were not deceived in their expectations, although they did not find milk rivers. Christopher Columbus sailed to discover India, and discovered America because he was sure that there could be no land in the eastern hemisphere.

Thirdly, since the truth turned out to be difficult to achieve, humanity had to be content with what was easier to achieve. Moreover, this is not-truth, sub-truth, post-truth and a lie. Imagine a parabola that tries endlessly to get closer to the coordinate axes, but never touches them, or the fleet-footed Achilles who will never catches up with the slowly crawling turtle, or the limit of a convergent sequence. All these are examples of unattainable and completely incomprehensible truth.

In these conditions, the main attention should be paid to the knowledge and use of various options for pseudo-true knowledge.

Fourthly, in the process of development of modern predicate logic it turned out (this is a recent result obtained by A.M. Anisov (Anisov, 2019) that it is lies, and not truth, that are fundamentally present in our world. "It is the lie that is ontologically rooted, and the truth does not receive an adequate universal interpretation at the level of denotational meanings" (Anisov, 2019, p. 184). The meaning of falsehood as a universal object is the empty set that is present in every possible world, while truth is local and partial.

Fifthly, pseudo-true knowledge (users and creators of this knowledge) is successfully presented as true. For many centuries, alchemy and astrology were considered sciences, and with a good reason. The twentieth century gave birth to new pseudo sciences — Michurin biology, ufology, numerous parapsychologies, etc. Various technologies have emerged for presenting false and advantageous knowledge (in the form of judgments or statements) as true knowledge. In addition to pseudo-true knowledge presented as true, there also appeared incorrect reasoning that successfully imitates the correct one. Similar processes are reflected in the legal understanding of truth, although its research is not as large-scale as in philosophy.

They are limited primarily to vibrant and lengthy discussions in procedural science (Proving and decision-making in adversarial criminal proceedings, 2022). For example, researchers note, "the concept of truth as a basic requirement for the judicial consideration of criminal cases was contained in all major criminal procedural acts during the period of developed Russian criminal proceedings in the 19th–20th centuries" (Khalikov, 2014, p. 1416). However, the current Code of Criminal Procedure of the Russian Federation does not contain a direct obligation to establish the truth. The same situation applies to civil procedural law. In Para. 1 Art. 14 of the Code of Civil Procedure of the RSFSR, a provision was established according to which the court was obliged, not limited to the presented materials and explanations, to take all measures provided by law for a comprehensive, complete and objective clarification of the actual circumstances of the case, the rights and obligations of the parties. This rule was defined in science as

the principle of objective truth of Soviet civil procedural law, supported by the provisions also contained in Chapter 6 "Evidence", as well as in Chapters 14–16 of the Civil Procedure Code "Preparation of civil cases for trial", "Court proceedings", "Court decision" (Bonner, 2009, p. 55). At the same time, scholars discussed whether the truth in procedural law is absolute or relative (Soviet civil procedural law, 1965, p. 47), objective or formal, and which of them should be established by the court (Kurylev, 1966, p. 14). Some of them generally denied the possibility of using the categories of absolute and relative truth in legal proceedings (Rivlin, 1951, p. 42; Ivanov, 1964, p. 9).

Most researchers and law enforcers adhered to the approach according to which the law enshrines the establishment of objective truth in a case, i.e., truth that corresponds to the actual circumstances of the case (Shakiryanov and Shakiryanova, 2021). The justification was based on the statement that "material truth is objective, not subjective, i.e., it is such a representation of reality, the content of which depends not on the subject, but on reality itself, because otherwise this "truth" is not the truth at all" (Kurylev, 1952, p. 37).

Para. 2 Art. 12 of the current Civil Procedure Code of the Russian Federation stipulates that the court creates conditions for a comprehensive and complete examination of evidence, establishment of factual circumstances and correct application of the law when considering and resolving civil cases. Despite the similarity of the wording with the previously existing rule, modern scientists do not believe that the principle of establishing objective truth continues to apply in civil proceedings (Muradyan, 2002, pp. 93–99; Samsonov, 2019, pp. 26–29), although some works continue to advocate the existence of such a rule (Gromov and Nikolaichenko, 1997, p. 33; Zazhitsky, 1996, p. 93).

It seems that the category of truth really has a meaning too broad for law and, in particular, for legal proceedings. Not every truth can be established in the legal process, since law is applicable only to social relations. From the legal point of view, it makes no sense to evaluate, for example, the true causes of such natural disasters as a drought, a flood or a volcanic eruption. Although the court can establish the fact and causes of a particular fire, flooding or other natural disaster if it is of a relative nature, i.e., is a consequence of specific actions or

inactions of people. Therefore, the truth that is established through legal proceedings refers to a limited volume of ideas related, to one degree or another, to social relations.

In addition, the court is limited in its ability to establish the truth by those methods established by law, which also excludes the achievement of the truth of part of the representations. For example, a fact cannot be established by a court if it is confirmed only by a copy, and the original document is lost or not submitted to the court (Part 6 Art. 71 of the Arbitration Procedure Code of the Russian Federation).

From the above it follows that ideas about the facts established by the court may be the truth, but not every truth represents such ideas about the facts. That is why we think that in the above articles of procedural codes it is reasonable to use not the expression "establishment of objective truth", but "a comprehensive and complete study of evidence", which emphasizes the specificity of judicial truth. At the same time, it is obvious that neither scholars nor the legislator deny truth as the goal of legal procedural proof. In legal proceedings, "the process of learning the truth" and a "procedural proof" correlate as a part and the whole (Ponomarenko, 2021; Mezinov, 2013).

It is correctly noted by representatives of criminal procedural science that "the goal of criminal proceedings is truth, the content of which is accurate, irrefutable knowledge about each circumstance of the crime committed, subject to proof in a criminal case according to the law, reflecting the essence of a specific crime and being the basis for the correct sentencing" (Ponomarenko, 2021). In general, it can be considered that judicial truth, as comprehensively and fully examined evidence, represents the presence of such knowledge and conclusions about the circumstances of the case that correctly reflect the reality existing outside of human consciousness, which allows them to be given a correct legal assessment. Therefore, despite various doubts about the possibility of establishing the truth in the legal process, it continues to be its important element.

As researchers rightly note, "the rejection of the concept of truth, although it does not deprive us of the ability to reason, however... legal proceedings lose their meaning: the speeches of prosecutors and defenders become empty chatter, and the jury's verdict "guilty" or

"innocent" is no longer based on their conviction that the defendant actually committed or did not commit the crime charged to him, but is due only to the momentary impression that the accused makes on them" (Nikiforov, 2008, p. 11).

The study of judgments and reasoning is the sphere of rhetoric, and then logic. Unlike logic, rhetoric deals with the study and use of judgments and reasoning in a natural language and is very interested in the problems associated with the practical use of false judgments and incorrect reasoning, presented as true and correct.

III. Law, Rhetoric and Tricks in Dispute

Rhetoric is one of the most ancient sciences; it is the same age as ancient Greek mathematics represented by Pythagoras and his school. However, if ancient Greek mathematics stumbled over the problem of the incommensurability of segments and the root of two, then rhetoric found its place precisely in the field of incorrect but convincing reasoning. It should be noted that it is quite difficult to distinguish between correct and incorrect reasoning: it requires knowledge of logic, a complex and non-obvious science, as well as a good level of empirical knowledge about the arguments of reasoning; they are often false, but few people know about it. In addition, the persuasiveness of an argument depends not only on its correctness (correctness is an analogue of the truth of an argument), but also on ethos and pathos, techniques that often turn out to be more convincing than neutral correctness.

So, rhetoric can be defined as the science of the effectiveness of various types of reasoning in natural language. Moreover, incorrect reasoning turns out to be more interesting than correct reasoning in many respects. These relations can be understood as political practice, judicial practice, as well as the theory of knowledge in general. Many tricks of incorrect reasoning gave rise to new branches of logic and mathematics.

Incorrect reasoning is usually called "tricks in discussion or argumentative tricks". A trick is one of the many types of deception. In the most general form, according to D.I. Dubrovsky, the author of the corresponding study, "deception is disinformation, a false message

conveyed to a specific subject. Being deceived, the subject accepts as true, genuine, fair, correct, beautiful (and vice versa) something that is not. The concept of deception is logically opposed to the concept of truth. The truth cannot be identical to the concept of truth, nor can it be reduced to a purely epistemological content. Truth means not only what is true, but also what is right, true, genuine, due, fair, and consistent with the highest values and goals, the ideals of humanity. Untruth is an intentional lie, but at the same time it can also be an unintentional delusion, and cunning falsification, and sophisticated hypocrisy, and the hypocrisy of a cultured man in the street, and the "truth" of the previous historical stage" (Dubrovsky, 2010, p. 14).

A dispute in its various variants is the main testing ground for the use of deceptive tricks. It represents a special case of argumentation. With all the variety of types of disputes, it can be defined as a confrontation in the opinions between the proponent and the opponent. A difference of opinion or a controversy arises over a certain position or a thesis. In addition to the thesis, in a dispute there are arguments and demonstration, as well as, if there is an audience, certain methods of influencing it, i.e., ethos and pathos.

A legal dispute has all the characteristics mentioned above. It is noted that "a legal dispute requires specific means of resolution, because a true legal judgment cannot be established with the help of physical pressure and coercion; it is approved only by relying on the power of logical arguments" (Zherebin, 2001, p. 19). "A legal dispute is a special form of ideological, psychological, verbal competition between opposing parties regarding the creation of law, its interpretation, application, expressed in the categories of legal consciousness" (Zherebin, 2001, p. 47). However, in legal science the term has not received an unambiguous definition (Shakhanov, 2017), since it covers heterogeneous social relations (Kunitsyna, 2014, p. 12).

From the standpoint of substantive law, a dispute is a statement of claim by a person who believes that his interests have been infringed by the violator. In a procedural sense, it is interaction aimed at resolving a conflict of interestsstthat has arisen. In the most general sense, a dispute in law can be defined as "a trial proceeding set in the prescribed manner by an authorized body of a case about which there are disagreements and contradictions" (Theory of State and Law, 2023, p. 470).

No matter how a legal dispute is defined, when conducting it, like in any other dispute, incorrect reasoning (including argumentation tricks) is actively used. Meanwhile, the use of tricks in legal disputes can lead to serious negative consequences. Decisions made in resolving disputes by various law enforcement agencies serve as grounds for the use of legalized violence, which can lead to a violation of justice.

IV. Typology of Argumentative Tricks

The number of argumentative tricks is difficult to determine. Firstly, their number is constantly increasing. Secondly, each participant in the argumentation process tries to create his own trick, and even give it a name. A whole layer of spiritual culture is devoted to lies, deception, and various tricks of the mind. Let us give just two examples. In the middle of the 12th century, one of the first vagants, Primate Hugo of Orleans, wrote the following poem,

> "Lies and malice rule the world.
> Conscience is strangled, truth is poisoned,
> The law is dead, honor is killed,
> Indecent deeds are countless.
> Locked, doors closed
> Kindness, love and faith.
> Wisdom teaches today: steal and deceive!
> A friend in need abandons a friend,
> The spouse lies to the spouse,
> And brother trades with the brother.
> This is what debauchery reigns!
> 'Come out, little one, onto the path,
> I'll give you a leg', —
> The prude grins,
> Holding a knife in his bosom.
> What a time! No order, no peace,
> And the Lord's son is with us
> Crucified again — for the umpteenth time!"
> (Primate Hugo of Orleans).

In the twentieth century, the famous Russian writer, satirist and playwright Arkady Averchenko (he lived in 1880–1925 and was the editor of the magazines "Satyricon" and "New Satyricon") in the story "Lies" creates a comic classification of lies, which can be male and female. "A woman's lie", he wrote, "often reminds me of a Chinese ship the size of a nut — a lot of patience, cunning — and all of this is completely aimless, to no avail, everything perishes from a simple touch". A woman's lie is many dubious details, while a man's lie is to say as little as possible.

A significant number of tricks necessarily require, if not classification, then at least typology. The factor of acceptability or permissibility of tricks in a certain discourse is traditionally used as the first basis for division. Therefore, tricks can be divided into acceptable and unacceptable. Inadmissible tricks include, for example, unacceptable psychological tricks that violate the rules of correct behavior. This is boorish behavior, relying on false shame, buttering up arguments, suggestion, repetition, irony, demonstrating resentment, frank statements, etc. Unacceptable tricks also include tricks based on the violation of the logical rules of argumentation. However, the term "acceptable tricks" raises doubts, because it is a typical oxymoron, i.e., a combination of the incompatible things or phenomena synonymous with "acceptable deception". Much has been written about the admissibility of deception, about lying in the name of truth (Dubrovsky, 2010),[1] but this does not stop deception from being a deception that violates the ethical principles of communication. By the way, law prohibits truly unacceptable tricks.

For example, deceiving consumers, as well as misleading them,[2] entails administrative liability (Art. 14.7, 14.8 of the Code of the Russian Federation on Administrative Offenses of 2002).[3] In addition, a trans-

[1] The monograph contains the whole "The Problem of Virtuous Deception" chapter, pp. 51–90.

[2] A misconception is a wrong, erroneous opinion, idea about something; deception — words, deeds, actions, etc., intentionally misleading others; to deceive — to deliberately mislead someone (Big Explanatory Dictionary of the Russian Language / Ed. by S.A. Kuznetsov. St. Petersburg: Norint Publ., 2008. P. 310, 673 (In Russ.)).

[3] Code of the Russian Federation on Administrative Offenses dated 30 December 2001 No. 195-FZ. *Collection of Legislation of the Russian Federation*. 2002. No. 1 (Part 1). Art. 1. (In Russ.)

action made under the influence of deception may be declared invalid by the court at the request of the victim (Clause 2 Art. 179 of the Civil Code of the Russian Federation).

At the same time, in judicial practice, deception is considered not only the reporting of information that does not correspond to reality, but also the deliberate silence about circumstances that a person should have reported with the conscientiousness that was required of him under the terms of circulation (Clause 99 of the RF Supreme Court Resolution of the Plenum "On the application by courts of certain provisions of the Section I, Part One of the Civil Code of the Russian Federation" dated 23 June 2015 No. 25).[4] In addition, delusion is defined as "an incorrect, perverted reflection of objects, phenomena in the human mind, a false thought or a set of thoughts that the subject accepts as true. Misconception is essentially always based on the incorrectness of the premises themselves... The source of misconception is rooted in the nature of the human mind itself, capable of raising questions, but unable to resolve them due to the limitations of its nature" (Khilyuta, 2009). Thus, misleading is broader than deception, but if it is intentional, it is defined as deception.

The next basis of division for creating a typology of tricks will be demagoguery, understood as a set of methods that create a sense of truth without being so. The methods of demagoguery are between truth and lies, between correct and incorrect reasoning, between true and false statements, for a lie deserves not only condemnation, but also analysis and typology. Demagogic tricks can be divided into the following types.

1. *Tricks without violating the laws of logic.* For this purpose, you can skip some facts that change the basis of the conclusion or make it incorrect. For example, at a department meeting the issue of teachers being late to classes was discussed. It turned out that no one was late. The decision was made to actively combat delays. The first and last phrases were included in the report. You can change the modality of the statement: "The event happened", "I believe that the event happened",

[4] Resolution of the Plenum of the Supreme Court of the Russian Federation "On the application by courts of certain provisions of Section I of Part One of the Civil Code of the Russian Federation" dated 23 June 2015 No. 25. *Bulletin of the Supreme Court of the Russian Federation*. 2015. No. 8. (In Russ.)

"I am convinced that the event happened", etc. As a result, the listener has doubts or mistrust about what is happening.

2. *Tricks with non-obvious violation of the laws of logic*. This is an over-reliance on inductive methods or the use of incorrect modes of syllogism with which modern writers are not very familiar. For example, all demagogues are excellent speakers, N.N. — an excellent speaker, which means he is a demagogue.

3. *Tricks not related to logic*. Such tricks prevail in oratorical activity, which, in addition to logos, relies significantly on extra-rational arguments — ethos and pathos.

4. *Tricks that are not relevant to the essence of the matter,* i.e., *practically false*. These include various methods of disrupting the discussion, turning it into a scandal, hysteria, insults and accusing the opponent of various unprovable sins.

This typology is based on the use or non-use of logic in various types of a dispute. However, most of the tricks lie outside the boundaries of logical knowledge; linking them to logic is not the best basis for a typology, making it primitive. A more acceptable basis for division can be considered the division of tricks into those that are relevant to the essence of the matter and into tricks that go beyond the scope of discussion.

Tricks related to the essence of the matter coincide with the main elements of argumentation, i.e., with thesis, argument and demonstration.

A thesis is a state of affairs that requires justification, expressed in verbal or other materialized form, for example, a picture of a crime scene. The thesis must be unambiguous and unchanging. Tricks would include ambiguous description, incomplete description, and over-description, lost description as well as using a similar description. Often this includes the so-called "logical diversions" and "personal arguments", which can be applied outside the field of direct description.

Arguments represent various factors that support a thesis. Often they are in a cause-and-effect relationship with it or precede it. These are the motives for generating the thesis, reasons and simply accompanying factors that are similar or passed off as reasons. These factors may exist, may not exist, or may be made up. In real life, these factors can form

a complex structure in which some corresponded to what happened, and some, on the contrary, contradicted this picture. The multiplicity of factors supposedly related to the event masks the cause-and-effect relationship, because whoever proves a lot proves nothing.

The demonstration must show the connection between the arguments and the thesis, i.e., the following of what happened from some previous one. What if there is no follow-up? Then it can be represented using violated rules of inference. For example, if it rains, then the roads are wet, and if it does not rain, then the roads are dry. This is a violation of the use of conditional categorical reasoning of the modus ponens and modus tollens type. You can use the so-called "imaginary implication", few people know the strict laws of logical implication (Malyukova, 2023a), but they are perfectly replaced by the repeated and persistent use of the terms "therefore", "on this basis", "thus", etc. In addition, people tend to exaggerate the significance of inductive inferences, to do the so-called "hasty generalizations" or reasoning like "after this, therefore, a consequence of this". Once a person, who is late, is recognized as always late, and a witness to a crime or a person with a motive for a crime often becomes a suspect. This also includes "imaginary analogy". Overall, this is an incorrect use of valid inferences.

Specific tricks of this type are as follows.

— Tricks to evade the "burden of proof" of the thesis — "If you think that this is not so, convince us of this", "It is absolutely obvious that", "I am absolutely convinced that", etc.

— Incorrect presentation of the thesis — taking it out of context, simplifying, exaggerating, distorting, inventing/attributing ("fictitious opponent", "straw man").

— Irrelevant arguments and irrelevant argumentation — a trick of an unexpressed premise, i.e., argument in evidence, or the attribution of an unexpressed premise.

— Trick of presenting an argument in an implicit form (for example, as a presupposition of a question), using an argument that coincides with the thesis, an opportunistic trick (doubting already proven or generally accepted statements).

— Incorrect argumentative schemes — justifying one's own point of view by referring to the opinion of the majority ("appeal to the people" —

argumentum ad populum) — "Everyone thinks so"; substituting value judgments for factual statements ("It's not true because I don't want it to be true").

— A trick of incorrectly explicating arguments into a more precise form — errors of dividing the whole into parts and combining the whole from parts.

— A trick for ending a discussion — exaggerating one's success, "still I disagree", the error of the "argument to ignorance" when there are several possibilities (and only one was refuted).

— Tricks of ambiguity at the sentence or text level.

Persons committing offenses designated as circumvention of the law actively use the tricks of obscurity (ambiguity). Thus, in Para. 9 of the Review on certain issues of judicial practice related to the adoption by courts of measures to counter illegal financial transactions (approved by the Presidium of the Supreme Court of the Russian Federation on 8 July 2020), a number of court decisions are given, from which it follows that "a bypass by participants in civil transactions of the provisions of the law for illegal purposes related to the commission of illegal financial transactions, may be the basis for concluding that the transaction is invalid and refusing to satisfy claims brought to court for these purposes". As one example, a set of actions taken by former managers of the bank is given, formalized by them as transactions, but aimed in reality at the withdrawal of the bank's assets outside the Russian Federation in the conditions of the bank's unfavorable financial position, bypassing banking rules and control procedures. The essence of the dispute was as follows. The bank's managers, knowing about its financial instability, created two companies abroad through front men, which entered into a loan agreement with each other. The execution of this agreement was secured by a guarantee signed on behalf of the bank by one of the managers.

In accordance with the guarantee, the bank (guarantor), in the event of non-repayment of the loan amount or part thereof by the borrower (principal), was obliged to pay the lender (beneficiary) an amount of 5 million euros. At the same time, the bank refused the possibility of subsequent reimbursement of this amount from the debtor (principal).

The managers terminated their employment relationship with the bank, and "the funds received under the loan agreement from the plaintiff to the account of the foreign company — the borrower, were subsequently transferred to the personal accounts of the bank managers and related persons opened in various credit institutions". After this, a foreign organization controlled by one of them, acting as a lender (beneficiary), presented a demand to the bank (guarantor) to pay them a guarantee for 5 million euros, declaring that the debt was overdue by the borrower (principal). Having received a refusal, it filed a lawsuit in court, which did not satisfy its demands.

The court drew attention to the fact that the condition on the guarantor's refusal to reimburse the amounts paid in accordance with the guarantee does not formally contradict Clause 1 Art. 379 of the Civil Code of the Russian Federation. It states that "the principal is obliged to reimburse the guarantor for the amounts paid in accordance with the terms of the independent guarantee, unless otherwise provided by the agreement on the issuance of the guarantee". However, this provision of the law, as follows from the court decision, does not mean securing the possibility of a bank issuing a guarantee "...on obviously unfavorable conditions in order to ensure the personal financial interest of individuals who were members of the bank's management bodies, to the detriment of the interests of the bank". The legislator refers, for example, to cases of issuance of an independent guarantee by an insurance organization, when "...the inclusion of a condition on the release of the principal from reimbursement to the guarantor of the amounts paid is justified based on the essence of the insurance relationship".[5] Therefore, in accordance with Para. 4 Art. 1, Clause 3, Art. 10, Para. 2, Art. 168 of the Civil Code of the Russian Federation, the court recognized the bank guarantee as an invalid transaction and refused to satisfy the unscrupulous plaintiff's demands.

Thus, offenders formally complied with the law, using the possibilities provided by the legislator for certain cases, but formulated briefly, with the expectation that the codified text of the law would

[5] Civil Code of the Russian Federation. Article-by-article commentary to Section III "General part of compulsory law" / A.V. Barkov, A.V. Gabov, M.N. Ilyushina and others; ed. by L.V. Sannikova. Moscow: Statute Publ., 2016.

be applied systematically, in conjunction with its general provisions. However, while performing seemingly lawful actions, they pursued the goal of violating the law, since they intended to cause harm to the bank, while counting on the fact that the court would accept their obviously incorrect reasoning as true.

V. Tricks that Go Beyond the Scope of Discussion and Ways to Stop Them

Such tricks are the second type and are often called appeal ploys or appellate ploys. The terms that gave the trick its name, "appeal" and "appealing", themselves turned out to be vague and ambiguous. Firstly, they come from the French verb "appeller" — "to call" and usually have an addressee), for example, appeal to the people, appeal to common sense, etc. Secondly, an appeal in jurisprudence is a procedure for checking court decisions by a higher judicial body, but checking not on individual points, but as a whole, as a completed subject. Likewise, the tricks of appeal do not examine the essence of the matter, but turn to a third party for support, for example, an appeal to God, an appeal to the Pope, etc. Common appeal tricks include the stick argument, the argument to the policeman, reading in the hearts, insinuation, the appearance of the victim, the argument to pity, the argument to the public, the argument to consequences, the slippery slope, the argument to modesty or to authority, the denial of authority, the argument to ignorance, a sacred point of view, as well as various options for argument to a person.

It makes sense to examine some of these tricks on the merits of the matter. You can start the analysis with a "stick argument".

A "stick argument" in rhetoric (in Latin *argumentum ad baculum*) is considered the threat of reprisals against an unwanted enemy. The use of this technique is justified if they want to disrupt the discussion, if all other types of tricks have been exhausted, if you are losing in an argument and do not want to show your inconsistency in it. However, the argument (stick argument) must be strong and convincing. The argument (the threat of a stick argument) does not have to take the form of physical violence. Argumentum ad baculum occurs when someone is

promised adverse consequences if they do not agree with the wishes of the speaker.

The "stick argument" is similar to blackmail, but unlike blackmail, the threat itself is not directly named; it is usually formulated vaguely and vaguely, but quite understandably. It is difficult to write a statement to law enforcement agencies regarding such a threat.

A good way to counter a stick argument is to reveal the purpose of the ploy. Often simple questions: "Why are you telling me all this?", "What do you want to achieve with your words?", "Are you saying that there will be some serious consequences? Are you threatening me with this?", "I am a lawyer, so the consequences will be not only for me, but also for you, and more tangible and visible" instantly complete the use of the trick.

The "stick argument" trick has other names, which indicates its prevalence and effectiveness. For example, the "argument to a policeman" is aimed at putting an end to an unprofitable dispute. Imagine a situation where there is no opportunity to defend one's position, then the polemicist, using this trick, declares the opponent's thesis dangerous for the State or society. As a result, victory goes to the side that used the trick, the dispute essentially ends, the social significance of the thesis comes to the fore, and its truth fades into the shadows. Moreover, the reaction of the authorities required by the polemicist leads to "clamping of the mouth" of the opponent, another type of "stick argument". Thus, the "argument to a policeman" is the impossibility of coming to a reasonable mutual understanding and reasoned compromise.

If the "stick argument" is a weaker version of blackmail, then the next trick to be discussed, which is "insinuation", is a weaker case of defamation. Insinuation in the Russian language is false information with a negative connotation, which is presented to others with the intention of defaming someone on the sly, given by hint or secretly. Insinuation is similar in meaning to manipulation (Kara-Murza, 2005). This is a softer and more traditional form of managing the opinions of others: a person tries to influence the consciousness of the interlocutor with the help of unobtrusive formulations, which are then tightly

immersed in his consciousness. Using this method, you can harm or embellish your professional qualities by reducing the merits of others.

The purpose of insinuation is to create a negative attitude towards a specific subject, putting him in a bad light, denigrating his reputation and turning others against him. In this case, direct criticism is not used; they resort to various speech techniques, made so that the interlocutor himself draws conclusions that are beneficial for the speaker. For example, they speak with sympathy or even with ostentatious respect for the victim, (they say that the person has suffered so much, and how well he holds up). Naturally, his interlocutor is imbued with this sympathy, willingly believes everything that is said and draws the necessary conclusions.

Let us give an example of insinuation in personal life: "Look how many male acquaintances this lady has. She must be very sociable" — it sounds like a compliment, but in fact it is a hint at debauchery. Here is another example of insinuation in politics: "You are an excellent deputy; you have achieved the creation of children's playgrounds throughout the region — now young people have a place to smoke and drink beer".

Insinuations are often used in trials with the aim, for example, of removing a judge who makes a decision undesirable for a party. In one of the court hearings, a participant in the process stated the following6 "As for the points related to the fact that there is an interest in making a decision in favor of a participant in the company — this is precisely procedural behavior, the methodology of conducting the process, which Judge Belyakova took as a basis, they come to the conclusion that Judge Belyakova is interested in resolving the dispute, disputes about challenging transactions in favor of the defendants. In this case, the interest, apparently, goes back directly to the debtor's participant, to his group of companies, to his family. These people still have some money. We believe that the interest has a specific economic reason".[6]

The effectiveness of insinuations can be explained by the fact that the insinuator does not make direct accusations, but only hints; listeners draw their own conclusions, and most people rarely doubt the

[6] Resolution of the Second Arbitration Court of Appeal dated 12 February 2020 No. 02AP-1170/2020 in case No. A82-10109/2017. (In Russ.).

correctness of their conclusions. Thus, insinuation is the creation of a negative opinion about an opponent among others using invisible levers of influence. To use insinuation, the following techniques are used: "We know what you did with her", "We need to figure out where you got the funds for this", "It's clear how you did it", etc.

The term "insinuation" itself is derived from the Latin word *insinuatio*, which can be translated as "ingratiation". Insinuation refers to the category of tricks based on the violation of the communicative rules of discussion. Unfortunately, this trick is still actively used. A very common example of using innuendo in speech is the use of quotation marks. In a live conversation, you can often see people making the "quotation marks" gesture with their hands when pronouncing the desired word. Thus, the meaning of the phrase may completely contradict what was stated and it will be nothing more than an insinuation.

Usually, insinuation is possible when there is a lack of information about what is happening. Hence, the main method of combating insinuation is to check the quality of information using the questions "How do you know this?", or "Where is the source of information?", or "Who was an eyewitness to the events?" etc. Showing the invalidity of hostile rumors, spreading rumors in response, and using opinion leaders with positive reviews can stop the spread of innuendo.

On a par with insinuation (Malyukova, 2023b) and manipulation are libel and defamation, which are easier to combat at the legislative level. Criminal liability for libel is established in Art. 128.1 of the Criminal Code of the Russian Federation, for defamation understood as the dissemination of information discrediting honor, dignity or business reputation, civil liability arises in accordance with Art. 152 of the Civil Code of the Russian Federation.

The argument to consequences is a convincing method of argumentation based on the well-known conditional categorical inference (Malyukova, 2022). An argument to consequences (in Latin *argumentum ad consequentiam*) is a logical trick that uses the consequences of a statement to conclude its truth. Defending his own thesis, the disputant declares that the point of view of the opposing side will inevitably lead to catastrophic consequences, and therefore in no case can be accepted. Most often, the argument takes one of the

following forms, either positive or negative. Here is an example of the positive form: if P then Q. Q is desirable or true. Therefore, P is true. This reasoning is made according to the incorrect mode of conditional categorical inference, although it is often used in reasoning. Here is another example of the negative form: if P then Q. Q is undesirable or false. Therefore, P is false. There is no logical error in this reasoning.

However, the assessment of the consequences obtained because of declaring the truth of a certain statement is not related to the truth of the statement itself. Such thinking is, in essence, a variant of the error when a person takes wishful thinking. Most actions have both good and bad consequences, many of which are unintended and unintended. Using argumentation to consequences when making decisions can lead to incorrect conclusions. For example, small negative consequences become a compelling reason to refuse a certain action, despite significantly more important positive effects.

A lover of argument to consequence should ask the following questions:

1. What is the likelihood that these consequences will occur?

2. What is the basis for the statement that if you do A, then B will happen?

3. Are there other consequences that should also be considered?

If convincing answers are received, then you can use the following tactics: tell that the consequences are not at all inevitable, list the positive consequences of choosing this decision, and look for a compromise.

The slippery slope is a special case of the consequence argument. The point of the argument is that a relatively small first step leads to a chain of related events that culminate in some significant (usually negative) effect. The contingency factor and fear mongering make the argument quite effective. However, and this is the main argument against this approach: both in science and in law it is customary to talk about events of the past and present, but future events do not yet exist, and it is unknown whether they will exist.

In legal activity, not and only in it, the argument to ignorance (in Latin *argumentum ad ignorantiam*) is actively used, reasoning designed for the lack of knowledge/ignorance of the person being convinced of a certain issue. As a result, the conclusion is drawn that

a certain statement is true because no one has proven that it is false, or, conversely, that the statement is false because no one has proven its truth. This type of argument is compelling, but fallacious, since our ignorance cannot be the sole basis for deciding the truth or falsity of a statement. The absence of proof or refutation of something in itself is not evidence of its truth or falsity. The trick does not always work, but only in cases where the opponent is poorly informed about the issues in dispute, when facts and provisions are mentioned that are little known and poorly verified, etc.

Proof *ad ignorantiam* in its positive form states that anything that has not been refuted is true. In its negative form, it states that anything that has not been proven is false. In both versions, the speaker appeals to ignorance. It is supposed to provide support for a proposition, even though our knowledge or ignorance cannot normally influence the truth or falsity of the proposition.

It is notoriously difficult to prove the existence of anything. To do this, you need to meet the object/subject, but even then, to convince others, you will need a lot of certified evidence. Establishing the non-existence of something is even more difficult. To do this, you will have to instantly look around the entire universe to make sure that the item you are looking for is not located somewhere in particular. In reality, such searches rarely lead to success, so the products of our imagination continue to exist. Imagine the problem of finding a black cat in a dark room — most likely, the problem will be solved. What if there are two rooms, or two to the power of 80 (2^{80}), or 10^{80}? The problem becomes unsolvable, since 10^{80} is a finite number, but it is equal to the number of elementary particles in the Universe. The argument to ignorance turns out to be a powerful tool in reasoning; it is no coincidence that many presumptions are built on it, in particular, the presumption of innocence and the presumption of death (Lisanyuk and Khamidov, 2021).

The "reading in the hearts" argument is quite common in discussion practice. The essence of the argument is to shift the audience's attention from the content of the opponent's arguments to his alleged reasons and hidden motives for saying exactly what he says and defending a certain point of view, rather than agreeing with the arguments of the opposite side. It is used in two main versions — positive and negative. In the

positive, it takes the form of such examples, “You say this in defense of corporate interests” or “Your integrity does not allow you to admit the obvious and support this progressive initiative”, etc. In a negative form, it takes another form: it looks for a reason why a person does not say something or does not write, the interlocutor tries to prove that the person undoubtedly does not do this for one or another reason. Thus, a specialist in “reading hearts” can find some secret motive everywhere. This trick is not aimed at the opponent, but at observers; with its help, they try to undermine the trust of a third party in the speaker, citing some base motives behind his words or his position.

The name of the trick is due to the fact that the manipulator (lawyer or prosecutor in legal proceedings, political figure) knows how to read the secret thoughts of an opponent, plays the role of a seer or psychic, an insightful and observant connoisseur of the secret thoughts and guesses of jurors, listeners or patients. Since this is usually not the case (the possibility of reading other people’s thoughts has never been proven), then this is the basis for refuting the trick, or catching its user in slander.

If the considered rhetorical tricks mislead the court regarding facts of substantive and procedural significance and create obstacles to making a decision or delay its adoption, then the person using them may be subject to criminal liability. Responsibility for deceiving the court (deliberate misrepresentation) is provided for in the Criminal Code of the Russian Federation: Art. 303 (for falsification of evidence in a civil, administrative case by a person participating in the case, or his representative, as well as evidence in a case of an administrative offense by a participant in the proceedings on an administrative offense or his representative), Art. 307 (for knowingly false testimony, expert opinion, specialist or incorrect translation), Art. 308 (for refusal of a witness to testify). The applicant’s conscientious misconception regarding factual circumstances does not entail criminal liability (Bortnikova, 2023).

VI. Conclusion

Despite the ups and downs, the civilizations that emerged in the territories of the far and near Mediterranean in the 8th-2nd centuries BC have a powerful impetus for development. This impetus, among

other things, is due to the fact that the idea of truth is an essential tool in understanding the essence of the universe, the paths and directions of its development. The latter is unattainable without specific means, including philosophy, rhetoric and law.

The above means that doubts about the significance of truth, no matter what arguments they supported, devalue the driving force of civilization in the modern world. Accordingly, the law is also deprived of meaning.

At the same time, statements (tricks) designed to confirm doubts about the unattainability of truth, including in a legal dispute, can be refuted from the position of rhetoric. Their typology makes it possible to clearly demonstrate the fallacy of tricks, identify ways to refute them and, ultimately, maintain confidence in the possibility of establishing truth in the legal process, which, in turn, ensures movement towards social justice.

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REVIEWS

Book Review

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Book: Soviet Innovation and the Law of the Western World.[1] By Prof. John Quigley. Ohio State University School of Law, Cambridge University Press. Online publication date: July 2009, ISBN: 9780511511219, doi: https://doi.org/10.1017/CBO9780511511219

Behind the Iron Curtain: The Surprising Soviet Influence on Western Justice

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Contents

[1] The book was discussed by Prof. Tibor Tajti and Gvantsa Elgendashvili, Department of Legal Studies, Central European University (CEU), Vienna, Austria, in the monthly "Great Book Review" on the 2 October 2024.

I. Introduction

In the shadow of the Cold War, as the world watched two superpowers locked in ideological combat, an unexpected legal revolution was quietly unfolding. While politicians and generals strategized over potential battlefields, Soviet legal innovations were stealthily crossing borders, reshaping Western justice systems in ways that would have been unimaginable to many at the time (Giuliani, 2020). John Quigley's "Soviet Legal Innovation and the Law of the Western World" unveils this hidden narrative, challenging our understanding of the 20th-century legal evolution and forcing us to reconsider the complex legacy of Soviet jurisprudence in the modern Western legal landscape.

Published in 2007, "Soviet Legal Innovation and the Law of the Western World" by John Quigley offers an interesting examination of the often-underestimated influence of Soviet legal concepts on Western law. Professor Quigley, a law professor at Ohio State University, challenges the commonly held beliefs concerning the relationship between Western and Soviet legal systems throughout the 20th century. The book's central premise is that contrary to popular belief, certain Soviet legal innovations gradually infiltrated Western legal systems, effecting significant and unexpected transformations. Quigley extensively examines this influence across various legal domains, including labor law, family law, human rights, women's rights, international law, criminal justice, and economic rights. By examining the secret narrative of legal cross-fertilization, the author encourages readers to reevaluate their understanding of the 20th-century legal development and the complex legacy of Soviet jurisprudence within the modern Western legal framework. This book challenges our ideas regarding the Cold War era and provides an insightful investigation of the surprising ways in which legal systems can influence one another across ideological divides.

II. Discussion

The book is divided into 4 parts. In Part 1 of "Soviet Legal Innovation and the Law of the Western World", John Quigley explores how revolutionary ideas have historically spread and impacted Western

societies. He draws comparisons between earlier revolutions like the Protestant Reformation, the French Revolution (Merryman, 1996), and the Bolshevik Revolution of 1917. Quigley argues that these revolutions acted like contagious ideas, rapidly spreading beyond borders and leaving lasting marks on neighboring countries. The Bolshevik Revolution struck fear into Western governments because it challenged core principles of Western society, such as private property rights and capitalism (Cox, 1984). Just as Napoleon's rise had once threatened monarchies across Europe, Bolshevik principles, Karl Marx's philosophy, and Soviet ideology now posed a danger to the established order. Western leaders responded with a mix of resistance and adaptation. While their initial reaction was one of fear and rejection, Quigley points out that history shows many revolutionary ideas eventually found their way into Western institutions, albeit in more moderate forms. By drawing these parallels, Quigley sets up his argument that Soviet legal innovations, despite being initially viewed as radical and dangerous, would go on to influence Western legal systems in subtle but significant ways. This historical context helps readers to understand the complex relationship between revolutionary ideas and gradual legal evolution in the West.

The book is organized thematically, examining different areas of law where Soviet influence can be detected. Quigley begins by setting the stage with the Bolshevik Revolution and the radical legal reforms implemented by the new Soviet government. Then, he explores how these new approaches to law were received and debated in the West, with some viewing them as a threat to the existing order and others as models for progressive reform.

One of the strengths of Quigley's analysis is the breadth of legal topics he covers. He examines areas such as:

1. economic rights and social welfare,
2. family law and gender equality,
3. children's rights,
4. criminal law and punishment,
5. racial equality,
6. international law and sovereignty,
7. anti-colonialism and self-determination.

In each of these areas, Quigley traces how Soviet legal innovations and concepts gradually influenced Western legal thinking and reforms.

For example, he argues that Soviet emphasis on economic and social rights as fundamental human rights helped to shape the development of welfare state policies in the West. Similarly, he contends that Soviet approaches to family law, which emphasized gender equality and children's rights, influenced reforms in Western family law systems.

Quigley also takes us back to the roots of socialist legal thought, exploring how Karl Marx's powerful critique of capitalism during the Industrial Revolution had already begun to reshape European legal systems even before the Bolshevik Revolution. Marx's ideas, which highlighted the exploitation inherent in capitalism, struck a chord in the West, leading to laws aimed at protecting workers and addressing social inequalities. This set the stage for the more radical Soviet legal concepts that would later emerge. By emphasizing Marx's analysis of class struggle and economic inequality, Quigley shows us how these ideas formed the bedrock of socialist legal thinking. Surprisingly, despite the stark ideological differences between East and West, these concepts gradually seeped into Western legal systems. This chapter helps us to understand the unexpected journey of Soviet legal innovations — born from revolutionary fervor (Borisova and Siro, 2014) yet destined to play a role in shaping Western law over time.

In Part 2 of the book, Quigley starts Chapter 1 with a very intriguing title, "Panic in the Palace", to describe how the Soviet government's revolutionary ideas initially sent shockwaves through Western governments, especially to the monarchies, which viewed these ideas as a direct threat to their political influence and stability. However, while the primary response of the West was military intervention aimed at containing Soviet influence, Quigley emphasizes that Soviet legal innovations were already beginning to penetrate Western legal frameworks (Beirne and Hunt, 1988). However, we need to mention that the changes and revolutionary ideas did not stem exclusively from the Soviet Union's influence; in the case of voting rights, the Soviet Union's influence just accelerated the process. Despite their ideological hostility, Western governments gradually and reluctantly recognized the effectiveness of certain Soviet legal concepts — particularly in areas of social welfare, labor rights, and worker protections — that aligned with rising demands for reform within their working-class populations.

In the Soviet legal concept, society "doesn't need a law". This notion stems from a complex interplay of Marxist ideology, revolutionary fervor, and pragmatic governance challenges (Bogatyrev, 2023). At its core, this concept reflects the early Soviet leadership's belief in the transformative power of communism and its potential to create a society to create a society where traditional legal structures would become obsolete. Marx and Engels theorized that law, as a superstructure of capitalist society, would "wither away" along with the state in a classless communist utopia. This ideological foundation urged early Soviet leaders to initially reject the need for a comprehensive legal system, viewing it as a vestige of bourgeois oppression.

However, the practical realities of governing a vast and diverse nation quickly necessitated a reevaluation of this stance. The Soviet leadership found itself grappling with the need to maintain order, resolve disputes, and implement its revolutionary agenda. This led to the development of "revolutionary legality" *(Revolutsionnaya Zakonnost)* (Nikulin, 2020), a concept that allowed for a flexible interpretation of the law in service of socialist objectives. Under this principle, law became a tool for achieving political and social goals rather than immutable rules. This approach allowed the Soviet state to maintain a semblance of legal order while retaining the ability to override or reinterpret laws deemed necessary to advance communist ideals.

The evolution of the Soviet legal system throughout its history reveals the tension between ideological aspirations and practical governance (Petro, 2019). While the State did eventually develop more comprehensive legal codes and institutions, particularly during the New Economic Policy era, the underlying principle that law should serve the State and Party goals rather than act as an independent constraint on power remained constant. This approach to law had profound implications for Soviet society, shaping everything from property rights to criminal justice. Ultimately, the Soviet experiment with a flexible, ideologically driven legal system demonstrates the challenges of reconciling revolutionary ideals with the complex realities of governing a modern State. It raises important questions about the role of law in society and its relationship to political power.

The Soviet approach to law and society was complex and evolving. Initially, Marxist theory posited that law reflected the ruling class's interests and would wither away under communism (Hughes, 1967). However, Soviet practice diverged from this theory. Rather than eliminating the law, the Soviets used it as a moral vehicle to create socialist consciousness. The relationship between law and religion in the USSR was unique, with the State promoting atheism as a quasi-established religion (Boiter, 1987). As Soviet society became more pluralistic in the late 1980s, grassroots organizations began driving political transformation, reversing the typical process where legislation leads to change (Petro, 2019). Contrary to common belief, early Soviet legal philosophers did not develop a coherent theory of law's withering away. Key thinkers like Stuchka, Pashukanis, Reisner, and Razumovsky either rejected the idea or provided only vague, unsupported predictions of the law's replacement by technical norms or universal justice (Bogatyrev, 2023).

Professor John Quigley argues that, despite the ideological and political opposition to Soviet communism, Western governments were forced to accommodate certain Soviet legal and social innovations. Quigley uses the term "accommodates" to describe how Western nations gradually adopted Soviet-inspired reforms, particularly in labor rights, social welfare, and economic protections, as a response to growing pressure from their working-class populations and the fear of revolutionary uprisings.

The West was accommodating in response to the spread of Marxist and Bolshevik ideas, which gained traction among European workers and intellectuals after the 1917 Bolshevik Revolution. The accommodation of Soviet-style labor law solutions in capitalist states was viewed as a product of the struggle of the working class in the capitalist State and the desire of capitalist States to follow the more attractive features of socialism (Fayet, 2008). These Soviet ideas presented a challenge to the capitalist order, particularly with their focus on worker protections, full employment, and State intervention in the economy. Western governments, while opposing communism on the surface, realized that ignoring these growing demands for worker rights and social reform could lead to instability or even revolution in their own countries.

Quigley explains that Western accommodation was largely motivated by self-preservation. Governments like those in Britain, France, and the United States recognized that to prevent the spread of communism and contain social unrest, they had to implement reforms that mirrored Soviet legal policies (David-Fox, 2003) — such as the introduction of social insurance programs, labor laws that protected workers from unfair dismissal, and the creation of welfare states to ensure economic security for all citizens. This adaptation, while politically driven to maintain order, resulted in significant legal and social changes in Western legal systems that had lasting effects on labor rights and welfare policies.

In the case of Henry Ford's care for workers with different motives (Summers, 1987), Ford's approach was not purely philanthropic; it was designed to improve productivity and reduce worker turnover. Henry Ford introduced significant worker protection measures in 1914, revolutionizing labor practices by implementing the $ 5-a-day wage and reducing the workday from 9 hours to 8 hours. With the increased welfare of his workers, Ford wanted the workers to be able to afford to buy cars so the car price could be cheaper and sustain the company in the end (Bernstein and Segal, 2006). This move doubled the wages of his workers and set a precedent for labor reforms across industries. His policies helped usher in a new era of worker protection and labor rights in the industrial sector, influencing labor reforms in the U.S. and worldwide.

Quigley also highlights the irony that Western powers were militarily opposed to the spread of Bolshevism but were forced to accommodate many Soviet-inspired legal reforms to appease growing unrest at home (David-Fox, 2003). The Soviet model, which recognized workers' rights, labor protections, and the role of the State in ensuring economic security, became particularly influential as Western leaders sought to prevent revolutionary sentiments from taking hold in their countries. Through institutions such as the International Labor Organization (ILO) (García, 2008), created after World War I, Western governments implemented reforms that mirrored Soviet legal innovations, from social insurance to labor laws that protected workers from exploitation (Sawer et al., 1977). In this way, Quigley reveals that Soviet legal ideas indirectly shaped the evolution of Western law and motivated a legal transformation that

ensured greater social and economic protections for workers despite the West's broader resistance to Bolshevik ideology.

Part 3 of John Quigley's book explores how Soviet legal concepts significantly influenced international law and relations in the early 20th century. The author focuses on several key areas where Soviet ideas challenged and reshaped Western practices. One of the significant transformations Quigley discusses is the Soviet pursuit of transparency in international diplomacy, leading to substantial alterations in treaty management. During the World War I period, the Soviets disclosed clandestine treaties revealing how Western nations had partitioned territory through covert deals that contradicted their professed stances on justice and democracy. In countries such as the United States, where President Woodrow Wilson prioritized transparency in diplomacy in his "Fourteen Points", public outrage at clandestine negotiations fostered hostility. Article 18 of the League of Nations Covenant, which required the public recording and publication of all international treaties, was mostly ratified under Soviet duress. This practice continues today under the United Nations Treaty Series, highlighting the long-lasting legacy of the Soviet legal campaign for transparent diplomacy.

Quigley also emphasizes the Soviet Union's struggle against the system of capitulations, which let Western powers force their legal systems on foreign countries, therefore negating local laws and compromising national sovereignty. The Soviets saw this behavior as a transgression of the equality of nations concept. Through bilateral treaties with nations such as Turkey and Persia — modern-day Iran — the Soviet Union effectively eliminated extraterritorial powers that had granted Western nations legal supremacy over local governments. These Soviet legislative initiatives underlined under international law that even less developed or smaller countries needed complete sovereignty and respect. This posture questioned Western supremacy and helped to change the legal structure to acknowledge the sovereignty and equality of every country, regardless of size or strength. The Soviet denunciation of capitulations (extraterritorial rights) in countries like Turkey, China, and Persia contributed to the eventual abolition of these practices.

Quigley also explores how the Soviet Union influenced the development of international law in the years following World

War I, particularly in connection to nationalism, secret diplomacy, and colonialism. Following the emergence of a revolution founded on the principles of anti-imperialism and workers' rights, the Soviet government battled vehemently against the territorial expansion and colonial actions of Western nations like Britain and France. In this section, Quigley demonstrates how the Soviet Union evolved and became a vocal opponent of Western imperialism.

Quigley discusses the mandate system created after World War I, which placed former German and Ottoman colonies under the control of Western powers. The Soviet Union's strong critique of colonialism and calls for self-determination influenced the debates at the Versailles Conference. Although Western powers still controlled the mandates, the Soviet challenge contributed to the broader legal notion that these territories had the right to eventual independence. Quigley argues that this Soviet pressure helped to lay the foundation for the later decolonization movements of the mid-20th century. The Soviet Union's advocacy for the self-determination of nations became a central principle in international law, influencing the post-war legal framework and the recognition of national rights across the globe. This is particularly significant when considering the colonial splits that emerged because of the disintegration of Germany's overseas possessions and the Ottoman Empire. For nations that were colonized or under the rule of Western powers, this opposition contributed to the formation of the international legal system as well as the discussion regarding equality among nations. Additionally, Soviet calls for an end to colonialism (Fituni, 2020), echoed to some extent by U.S. President Woodrow Wilson's support for self-determination, influenced the creation of the League of Nations mandate system for former German and Ottoman territories (Mamlyuk, 2015).

Quigley argues that Soviet legal ideas and criticisms of Western practices significantly shaped the post-World War I international order, even as Western powers often resisted or modified these concepts to suit their interests. The author highlights how Soviet influence contributed to the gradual erosion of colonial systems and the promotion of national sovereignty and self-determination in international law (Biyushkina, 2021). While not granting immediate independence to former colonies,

the mandate system represented a significant shift in how these territories were viewed and managed. Quigley also discusses how Soviet opposition to colonialism continued to pressure Western powers in the following decades, influencing debates about decolonization and the rights of dependent peoples (Bowring, 2019). Throughout this section, the book illustrates the complex interplay between Soviet legal innovations and the evolving international legal framework of the 20th century.

Such topics as the equality of nations, colonialism, and international law covered in Part 3 of John Quigley's "Soviet Innovation and the Law of the Western World" are very relevant to modern global concerns. Particularly as nations and areas throughout the world fight continuous challenges for sovereignty and self-determination, Quigley's investigation of how the Soviet Union supported the legal and political rights of smaller nations resonates now. Today's geopolitical context tests and debates the ideas of sovereignty, territorial integrity, and equality that evolved from Soviet legal debate in the post-World War I era. These fundamental concepts are profoundly connected with contemporary concerns like global diplomacy, colonial legacy, and power disparities in international organizations.

The ongoing struggle for self-determination in areas like Catalonia (Spain) (Dzhumagulov and Muratova, 2023), Kurdistan (Hilpold, 2019), Palestine (Crivelente, 2020), and Western Sahara (Omar, 2008) makes Quigley's approach one of the most obvious analogs to modern geopolitics. As the Soviet Union argued for the self-governance of conquered countries in the early 20th century, these places are actively pursuing respect for their right to independence. These conflicts show how the notion of national sovereignty, important to Soviet legal theory, remains a vital but heated topic in international law.

Especially in the framework of contemporary international relations, the advocacy of the Soviet Union for openness in diplomacy — a major topic in Part 3— remains vitally important today. Quigley explains how the League of Nations and, subsequently, the United Nations were shaped by the Soviet drive for public registration of treaties, therefore fostering a standard of transparency in international agreements. Transparency in diplomacy is still much sought after in the modern world, where covert trade transactions, climate negotiations,

and security alliances can draw public attention. Arguments about U.S.-China trade negotiations or secret military alliances in the Middle East (Kausch, 2017) highlight the continuous contradictions between the need for transparency and the continuation of political secrecy. Reflecting the continuing relevance of open diplomacy, the worldwide need for more transparency in economic, environmental, and security accords stems from the very values the Soviets supported.

Directly related to Quigley's analysis of Soviet criticisms of Western imperialism are the legacy of colonialism and the idea of neocolonialism. Today's debates on the long-lasting consequences of colonialism echo the passionate opposition of the Soviet Union to colonialism, especially their criticism of the mandate system and extraterritorial privileges maintained by Western countries. With countries like Haiti and Congo (Booth, 2015) still suffering from poor government and exploitation, former colonies in Africa, Asia, and Latin America still struggle with the political, financial, and social fallout from colonial dominance (Mombeuil and Diunugala, 2021). Like it was when the Soviets challenged Western imperialism, neocolonialism — that is, the ongoing rule of former colonial nations via political and economic influence — remains a divisive topic. Current criticisms of international institutions such as the World Bank, including the IMF, which some claim support economic reliance, reflect the Soviet criticism of inequalities inside the world power system (Djonlagic and Kozaric, 2010).

Finally, Quigley's examination of the imbalances of power in international institutions is still relevant in the modern world, where international bodies such as the United Nations Security Council are regularly attacked for being under the control of a few strong countries. The Soviet Union's support of national equality in the face of Western imperialism reflects modern worries about the unequal control exerted by the Security Council's permanent members, such as China, Russia, and the United States. Smaller and developing countries often suffer to maintain their sovereignty and rights against military alliances supporting the interests of bigger powers, trade agreements, and economic pressures. As many countries still doubt whether actual equality in the global legal system has ever been completely accomplished, Quigley's investigation of these discrepancies in international law remains much more relevant.

Part 4 begins by discussing the initial Western reaction to the Soviet Union's demise, with figures like Francis Fukuyama and President George H.W. Bush declaring it a triumph of Western liberalism and the rule of law. However, Quigley argues that despite this rhetoric, the debate between capitalist and socialist legal concepts did not vanish. He points out that many Soviet legal innovations had already been absorbed into Western legal systems, leading to a convergence rather than a complete victory of one system over the other. The author highlights how Western law had incorporated elements of public law, social welfare, and state intervention in the economy, which were influenced by Marxist thought and Soviet practices (Butler, 2010).

The section then explored specific areas where Soviet influence reshaped Western law, including women's rights, labor protections, social welfare programs, and international law (McWhinney, 1963). Quigley discusses how these changes have altered the face of Western law, moving it beyond the model of minimal state intervention. He also examines the debates surrounding these changes, with some scholars viewing them as threats to individual liberty, while others see them as beneficial adaptations (accommodation). The author concludes by reflecting on the potential risks to traditional Western legal values because of this evolution, particularly considering increasing centralization at national and supranational levels, such as in the European Union.

Based on Professor Quigley's analysis and the current global context, democratic states face similar competition with authoritarian regimes today (Schultz and Weingast, 1996), albeit in a different form than during the Cold War era. An assessment of the nature of this competition is summarized below.

1. Rapid implementation of laws: authoritarian regimes like China can still implement large-scale policy changes or legal reforms more quickly than democratic systems (Manion, 1991). For example, China's rapid development of a comprehensive legal framework for artificial intelligence and data protection demonstrates this advantage.

2. Ideological competition: while not as stark as the capitalism vs. communism divide of the Cold War, there is still ideological competition. China's model of "socialism with Chinese characteristics" and its emphasis on economic development over individual rights present

an alternative to Western liberal democracy that some developing nations find attractive (Mcmillan and Naughton, 1992).

3. Human rights and constitutional law: authoritarian regimes can still pass progressive laws on paper. For instance, China's constitution guarantees numerous rights, but their implementation often falls short. The competition here is more about perception and international reputation than actual practice (Peerenboom, 2003).

4. International influence: authoritarian states like China actively seek to shape international norms and institutions. China's *Belt and Road* Initiative, for example, not only extends economic influence but also promotes Chinese legal and regulatory standards in participating countries (Manion, 1991).

5. Technological and legal innovation (Hassid, 2015): in emerging fields like AI regulation, digital surveillance, or cybersecurity laws, authoritarian states can implement comprehensive frameworks more quickly. China's Social Credit System and its extensive digital surveillance infrastructure are examples of rapid, large-scale implementations that democratic countries struggle to match due to privacy concerns and legislative processes (Manion, 1991).

However, this "competition" is more complex and multifaceted than during the Cold War era because of a few reasons summarized below.

1. It's not a binary opposition: many countries adopt hybrid systems that combine elements of democratic and authoritarian governance (Tanner, 1999).

2. Implementation matters: while authoritarian regimes may pass laws quickly, democratic states often have advantages in consistent implementation and rule of law (Stephan, 1999).

3. Soft power competition: This competition often concerns global influence and the attractiveness of different governance models rather than direct ideological confrontation (Walker, 2016).

4. Economic interdependence: unlike during the Cold War, there is significant economic integration between democratic and authoritarian states, complicating the nature of competition (Womack, 1984).

Professor Quigley argued that non-democratic regimes might have a competitive advantage over democratic states, as they can enact

laws more quickly due to their centralized, one-party discipline. This concept invites reflection on modern geopolitical dynamics, particularly in the context of China, which has positioned itself as a challenger to Western democratic ideals. Rather than focusing on the introduction of social rights into law, as seen in the Soviet Union, China promotes its non-democratic model of governance as more efficient, particularly in terms of economic and technological development. Chinese President Xi Jinping has emphasized that China's rapid growth offers a model for other developing countries seeking modernization without the traditional Western democratic process (Kalathil, 2018).

This idea is supported by recent reports, such as one from the Atlantic Council, which highlights how China has promoted its governance model to developing countries, often emphasizing the success of its economic development under the Chinese Communist Party (CCP) (Li, 2015). The argument is that China's rapid economic growth legitimizes its autocratic system, presenting it as a viable alternative to Western democratic systems. Proponents of the Chinese model argue that its ability to implement long-term plans without disruption from political turnover, its capacity to respond quickly to challenges, and its focus on holding public officials accountable for corruption give it certain advantages over the Western model.

In response to this, figures like U.S. President Joe Biden have acknowledged the ongoing competition between democracies and autocracies, particularly when it comes to technological advancement and economic development (Gasparini, 2022). Biden has framed this competition as a battle between the effectiveness of democratic governance and autocratic models in the 21st century (Xiang, 2024). This discourse reflects Quigley's assertion that the competition between different systems of governance remains relevant today, albeit now centered more on development and global influence rather than purely legal structures.

In conclusion, while democratic states do face competition from authoritarian regimes in certain legal and governance areas, the nature of this competition is more complex and multifaceted than during the Cold War era. It involves a mix of ideological, economic, and technological

factors playing out on a global stage where the lines between different systems are often blurred.

Quigley's analysis is also particularly strong when examining the impact of Soviet legal thought on international law. He argues that Soviet concepts of national sovereignty, self-determination, and opposition to colonialism profoundly impacted the development of international law in the post-World War II era. The book explores how Soviet legal positions on issues like the illegality of aggressive war and the rights of colonized peoples helped to reshape international legal norms.

One of the most intriguing aspects of Quigley's work is his exploration of the mechanisms by which Soviet legal ideas were transmitted to and adopted in the West. He examines the role of legal scholars, international organizations, and progressive political movements in disseminating and advocating for Soviet-inspired legal reforms. Quigley also highlights how the Cold War competition between the Soviet Union and the West sometimes led Western countries to adopt more progressive legal positions to counter Soviet propaganda and appeal to newly independent nations. The book's argument is supported by extensive research drawing on primary sources in multiple languages, including Soviet legal texts, Western legal scholarship, and government documents. Quigley's command of the material is impressive, and he presents a wealth of specific examples to illustrate his points about Soviet legal influence.

However, the book's thesis is not without controversy. Some readers may find Quigley's arguments about the extent of Soviet influence on Western law overstated. While he acknowledges that many legal reforms in the West had indigenous roots as well, at times, the book can give the impression that Soviet influence was the primary driver of legal change in the West. A more thorough exploration of the interplay between Soviet ideas and Western legal traditions might have strengthened the overall argument.

III. The Reality

Additionally, Quigley also discusses some of the negative aspects of Soviet law, such as its use for political repression. Although Soviet law brought many innovative ideas — especially in the areas of social

welfare and workers' rights — it also had major negative consequences, especially in terms of how it was utilized as a weapon for political repression. The legal system was routinely controlled under the Soviet Union to quell political opposition, stifle dissent, and uphold total Communist Party rule over the nation. Often, tools of the government were used to punish and imprison critics, activists, and anybody judged a threat to the government; courts were not impartial arbiters of justice. Common show trials and false charges were those whereby people were found guilty of crimes they did not commit merely because they presented a political threat (Lukina, 2021). Furthermore, heavily involved in implementing the state's objective were the secret police, including the KGB, who frequently skipped judicial processes entirely to capture or eradicate supposed rivals (Solomon, 1987). This misuse of the legal system undermined public confidence in the rule of law. It produced an environment of fear and persecution whereby legal rights depended on allegiance to the state rather than inherent protections.

Critics may argue that the book does not give sufficient attention to the darker side of the Soviet legal system (Berman, 1970; Boiter, 1987; Minnikes, 2022). A more thorough examination of how Western legal systems rejected or modified certain aspects of Soviet law might have provided a more balanced perspective. For example, the legal framework of the Soviet Union was, on paper, quite progressive and idealistic. Soviet law, particularly as outlined in its constitutions and legal codes, emphasized principles such as equality, workers' rights, and social justice. It promised comprehensive protections for citizens, including access to healthcare, education, employment, and housing. The laws were designed to reflect the ideals of Marxist-Leninist philosophy, which aimed to create a classless society where the State would protect the welfare of all people, ensuring economic security and social equality.

However, in practice, the reality of Soviet law was far different, often marked by corruption, abuse of power, and a repressive state apparatus (Lityński, 2022). While the written laws appeared just and protective, they were frequently ignored or selectively enforced to serve the interests of the Communist Party. The legal system became a tool for the government to maintain totalitarian control rather than a mechanism to uphold justice or protect individual rights. Political

repression, censorship, and the persecution of dissidents were common, with laws being used to suppress any form of dissent or opposition to the regime. The State's focus on maintaining power led to widespread arbitrary arrests, show trials, and forced confessions, often conducted under duress by the secret police (Gorshkov, 2023).

What made the situation especially grim was the stark contrast between the utopian promises of Soviet law and the brutal realities of its implementation. Citizens had little recourse against government abuses, as the judiciary was not independent, and the entire legal system functioned to reinforce the State's power rather than to protect the people. As a result, while Soviet laws were presented as forward-thinking and just on the surface, their actual enforcement created an atmosphere of fear, injustice, and oppression, making the Soviet legal system an instrument of authoritarianism (Huskey, 1991) rather than the progressive tool it claimed to be.

When the Berlin Wall fell in 1989, thousands of people from East Germany rushed to the West, marking one of the most powerful moments in modern history. The wall had been a symbol of the Iron Curtain — the ideological and physical divide between the Soviet-controlled Eastern Bloc and the democratic, capitalist West. For decades, Soviet law and the legal systems of the Eastern Bloc, including East Germany, were marked by repressive policies that limited individual freedoms, stifled political dissent, and severely restricted people's movement and economic opportunities (Gorshkov, 2023). The fall of the wall was a reaction to this, as people sought to escape the oppressive nature of life under Soviet-style socialism and gain access to the personal freedoms, economic opportunities, and democratic governance that Western Germany represented.

In connection with John Quigley's "Soviet Innovation and the Law of the Western World", this moment highlights the stark contrast between Soviet legal principles on paper and their implementation in reality. As Quigley explores in his book, Soviet law, in theory, included progressive ideals such as equality and workers' rights. However, in practice, these laws were often manipulated by the State for political control and repression (Solomon, 1987), creating a system where individual freedoms were sacrificed for state power. The East German

legal system, modeled after Soviet law, was notorious for suppressing dissent, controlling free movement, and limiting access to consumer goods and opportunities available in the West (Hunt, 2000). Citizens of the East lived under constant surveillance by *the Stasi* (secret police), further eroding their rights and freedoms.

The mass migration from East to West Germany after the fall of the Berlin Wall was not just a rejection of the communist system but also of the Soviet-influenced legal framework that had governed their lives (Heiland, 2003). People sought economic prosperity, the rule of law, individual rights, and freedoms that Western democratic systems offered (Hensel and Chase, 2008). This movement of people symbolized the failure of the Soviet legal model to provide a sustainable, just, or attractive system for its citizens. In this way, the fall of the Berlin Wall served as a profound real-world critique of Soviet-style law and governance, reflecting the broader themes of Quigley's book on the impact and limitations of Soviet legal innovations on the Western world. Ultimately, the fall of the wall and the migration from East to West embodied a rejection of Soviet legal and political ideology, as people sought a future where laws protected personal freedoms, human rights, and economic opportunities — values that were better represented in the Western legal framework that had developed in opposition to Soviet-style governance.

IV. Conclusion

Despite these potential criticisms, "Soviet Legal Innovation and the Law of the Western World" remains a valuable and thought-provoking contribution to legal history and comparative law. Quigley's work challenges readers to reconsider assumptions about the development of modern legal systems and the complex interactions between different legal traditions.

The book's strengths include the following:

1. original and provocative thesis that challenges conventional narratives,

2. comprehensive coverage of multiple areas of law,

3. extensive research drawing on primary sources in multiple languages,

4. clear and engaging writing style accessible to both legal scholars and general readers interested in legal history,

5. illuminating insights into the mechanisms of legal transplantation and cross-cultural influence in law.

Some potential weaknesses or areas for further exploration include:

1. possible overemphasis on Soviet influence relative to other factors shaping Western law,

2. limited discussion of ways Western systems rejected or significantly modified Soviet legal concepts,

3. the book could benefit from more comparative analysis with other non-Western legal systems.

Overall, Quigley's book makes a significant contribution to our understanding of the 20th-century legal history and the complex relationship between Soviet and Western legal systems. It challenges readers to reconsider assumptions about the development of modern law and highlights the often-overlooked influence of Soviet legal thought on Western legal reforms. The book explores how legal ideas can transcend ideological and political boundaries is particularly relevant in our increasingly interconnected world. Quigley's work reminds us that legal systems are not isolated entities but are shaped by cross-cultural exchanges and global intellectual currents.

The book offers a wealth of material for legal scholars for further research and debate. It raises important questions about the nature of legal transplants, the relationship between law and ideology, and the forces that drive legal change. The book's extensive bibliography and footnotes provide a valuable resource for researchers interested in exploring these topics further. For general readers interested in legal history or Soviet studies, "Soviet Legal Innovation and the Law of the Western World" offers an accessible and engaging overview of an often-overlooked aspect of the 20th-century history. Quigley's clear writing style and specific examples help bring the complex legal concepts to life.

John Quigley's "Soviet Legal Innovation and the Law of the Western World" is a significant work that challenges us to rethink the relationship between Soviet and Western law. While its arguments may be debated, the book makes a compelling case for the need to consider the Soviet influence on Western legal development more seriously. It is an essential read for anyone interested in comparative law, legal history, or the intellectual history of the 20th century. Quigley's work

contributes to a complex and interconnected understanding of global legal history by illuminating the hidden connections between seemingly opposed legal systems.

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ACADEMIC EVENTS

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The First Russia-China Legal Forum: Internationalization of Legal Science and Education within the Framework of Russian-Chinese Cooperation

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Abstract: On 28 November 2024, the First Russia-China Legal Forum was hosted by Kutafin Moscow State Law University (MSAL), marking a significant milestone in the collaboration between the educational and legal communities of Russia and China. The Forum was held under the auspices of 25th International Scientific and Practical Conference "Kutafin Readings" in partnership with 9 leading universities of China, Beijing Office of China Window Consulting Group, Commission on Financial Legislation of the Moscow Branch of the Association of Lawyers of Russia, bringing together prominent legal scholars, practitioners, and government officials from both countries. With the increasing geopolitical and economic interdependence between Russia and China, the need for a robust legal framework to facilitate bilateral educational efforts, trade and investment relationships, and technological advancements has become more pressing. The Forum served as a platform for discussing the legal challenges and opportunities arising from this partnership.

Keywords: China; Russia; legal education; legal framework; collaboration; harmonization; AI integration; bilateral efforts

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Contents

I. Introduction

The First Russia-China Legal Forum aimed to foster dialogue and cooperation in various areas of law, including legal education, international arbitration, alternative dispute resolution (ADR), intellectual property rights, and cross-border transactions.[1] With the increasing geopolitical and economic interdependence between Russia and China, the need for a robust legal framework to facilitate bilateral training programs, trade and investment relationships has become more pressing.

[1] The Forum program is available on the official website of Kutafin University. Available at: https://msal.ru/upload/iblock/f7c/gzwmzguhu5uowy8qa47zp6zso2cc2t3q.pdf [Accessed 16.03.2025]. (In Russ.).

The event featured a series of keynote speeches and reports, strategic panels, and networking sections. Notable speakers included **Liu Xiaohong**, President and Professor at Shanghai University of Political Science and Law, **Zheng Gaojian**, President of Gansu University of Political Science and Law, **Pavel Ustyuzhanin**, Executive Secretary of the Russian Panelof the Russian-Chinese Chamber of Commerce, Member of the International Cooperation Committee of the Russian Union of Industrialists and Entrepreneurs (RSPP), **Jiang Siyuan**, Secretary-General of the Center for Exchange and Cooperation at the Legal Services Commission for the Shanghai Cooperation Organization (SCO), **Pavel Troshchinsky**, Head of the Center for Political Research and Forecasting at the Institute of China and Contemporary Asia of the Russian Academy of Sciences (IKSA RAN), **Nikita Molchakov**, Dean of the International Law Faculty at the Moscow State Institute of International Relations (MGIMO) of the Ministry of Foreign Affairs of the Russian Federation, **Wang Zhihua**, Chairman of the Research Center for Russian Law at the China University and Secretary-General of the Comparative Law Association of China, **Igor Pozdnyakov**, Education Advisor, Representative of the Ministry of Science and Higher Education of the Russian Federation in the People's Republic of China, **Long Changhai**, Professor at Inner Mongolia University, **Elvira Radnaeva**, Director of the Institute of Law and Economics at Buryat State University named after Dorzhi Banzarov, **Wei Puzan**, LL.M., China University of Political Science and Law and postgraduate student at Saint Petersburg State University. All the keynote speakers of the panel panel provided insightful perspectives on the evolving legal landscape in both countries. The discussions highlighted the importance of harmonizing legal standards and practices to enhance mutual understanding and cooperation.[2]

Thus, in the report entitled "Challenges and Responses of Digital Technology to Legal Education" **Liu Xiaohong**, President and Professor at Shanghai University of Political Science and Law,

[2] Leading educational institutions and academic schools were represented at the Forum. Thus, review of MGIMO University scholarship participation is available at: https://clck.ru/3HhxxT [Accessed 16.03.2025]. (In Russ.).

focused on challenges that digital technology poses to legal education and options educational institutions have to respond effectively. The rapid advancement of technology necessitates urgent revisions to legal curricula that are expected to include emerging fields like data privacy, cybersecurity, the ethics of AI technologies application, etc. Traditional teaching methods are also evolving, with a shift towards online courses and interactive platforms that enhance flexibility and resource availability for students.

Educators and faculties cannot neglect the rise of artificial intelligence since AI technologies are transforming legal services, requiring legal education to integrate AI tools while fostering critical thinking about their implications. To prepare students for these changes, legal education should strengthen AI-related content and promote interdisciplinary collaboration with fields such as computer science. Enhancing students' technological skills, including data analysis and programming, is essential for addressing contemporary legal issues. Furthermore, international cooperation and exchanges among law schools can facilitate knowledge sharing and best practices application in tackling these challenges. The digital age offers both demands and opportunities for legal education, allowing us to cultivate talent suited for this new era. By continuously updating our educational approaches and embracing technological advancements, we can drive innovation within the legal field.

II. Forum Architecture

The First Russia-China Legal Forum was designed to facilitate meaningful dialogue and collaboration between legal experts, academics, and practitioners from both countries. Five key areas currently generating the greatest interest and concern among educators, students and representatives of science and law were determined in order to create an interactive and engaging environment that promoted knowledge sharing, collaboration, and the exploration of strategic legal initiatives between Russia and China.

II.1. Strategic Panel 1: Internationalization of Legal Science and Education

Participants of Strategic Panel 1 "Internationalization of Legal Science and Education" focused on the internationalization of legal education and research opportunities, exploring how legal institutions can adapt to global trends and collaborate under the auspices of research projects. The Panel emphasized the importance of transforming legal education to meet contemporary challenges and the need for innovative practices that align with international standards.

The Panel participants moderated by **Maria Mazhorina**, Vice Rector for Strategic and International Development at Kutafin University, discussed issues of contemporary models and best practices for transforming legal education, new scientific legal directions and forms of academic collaboration between Russian and Chinese universities, innovative jurisprudence, network interaction among universities in the field of legal education.

Jiang Siyuan, Secretary-General of the Exchange and Cooperation Center at the Legal Services Commission for the Shanghai Cooperation Organization (China), discussed perspectives for creation of a platform for providing legal services and the promotion of economic cooperation. Jiang Siyuan encouraged further uniting of experts and scholars both domestically and internationally, promoting exchanges and cooperation among various fields and industries, and acquiring genuine knowledge. She expressed expectations that "through in-depth discussions, veryone will not only discover new ideas but also deepen mutual understanding and strengthen friendships, thereby laying a more solid foundation for future exchanges and cooperation".

One of the brightest speakers of the Panel **Qiang Yu**, Lecturer at the Institute of Law and Development of the Higher School of Economics-Skolkovo and College of Humanities and Law of Shandong University of Science and Technology, in his report "LegalTech and Legal Education in China", argued that legal technology (LegalTech) encompassed tools enhancing the efficiency and effectiveness of the legal system. However, legal education has not sufficiently adapted to the technical advancements. Chinese universities are biased towards research-based LegalTech professionals and experience a shortage of applied

professionals, resulting in a disconnect between academic training and practical legal needs. Therefore, LegalTech programs should be offered to undergraduates in all universities that provide legal education. In China, despite the presence of established LegalTech, there are limited educational offerings in this area, highlighting the urgent need for significant reforms to integrate legal technology into undergraduate curricula and address the shortage of qualified LegalTech professionals.

Various innovative approaches to legal education that have emerged in recent years need careful consideration. Their emergence encourages discussion of successful models adopted by universities worldwide, particularly in the context of integrating practical skills with theoretical knowledge, and how these models can be implemented in different educational systems. Emerging areas of legal research and the potential for collaborative projects between Russian and Chinese institutions also contribute to discussions. They highlighted the significance of cross-border partnerships in enhancing the quality of legal scholarship and education, fostering a deeper understanding of legal systems of both countries. Innovative jurisprudence encourages participants to examine the latest trends in jurisprudence, focusing on the challenges posed by technological advancements, changing societal values, facing the impact of artificial intelligence on legal practices, the need for regulatory adaptations, and the role of legal scholars in addressing these challenges.

Meanwhile, the issues of network interaction emphasized the importance of networking and collaboration among universities to enhance legal education. It encourages dialogue on creating platforms for knowledge exchange, joint research initiatives, and shared resources that can strengthen the legal academic community on an international scale.

To sum up, the Panel on the internationalization of legal science and education was pivotal in shaping the future of legal education. By addressing contemporary models, fostering international collaboration, and exploring innovative jurisprudential trends, the Panel aimed to provide valuable insights and practical recommendations for legal educators and researchers, giving them the opportunity to share experiences, challenges, and best practices, ultimately contributing to the evolution and harmonization of legal education.

II.2. Strategic Panel 2: Legal Aspects of Consulting Based on the Experience of Russia and China

As the subject of Strategic Panel implies, it was aimed at discussing the key issues of mediation perspectives in Russia and China, cooperation between law firms in both countries, multicultural aspects of legal cooperation and integration in providing legal services.

Lana Arzumanova, moderator of the Panel and Chairman of the Commission on Financial Legislation at the Moscow Branch of the Association of Lawyers of Russia, highlighted that educational tracks are structured based on the needs of employers, allowing universities to adopt a client-centric approach in response to market demands. Some Russian consulting companies are already providing support for Chinese businesses operating in Russia. In turn, educational institutions are actively collaborating with Chinese partners.

Strategic Panel 2, focusing on the intricate legal frameworks governing consulting practices in Russia and China, explored how those frameworks evolved in light of both countries' unique cultural and legal contexts. The Panel title itself emphasized a comparative approach, suggesting that insights can be drawn from the experiences of both countries to enhance legal consulting practices.

Mediation is a vital alternative dispute resolution mechanism that is gaining traction in both Russia and China. This panel likely addresses the current state of mediation practices in these countries, identifying key characteristics that define their mediation processes. It also explores future developments, considering how cultural attitudes towards conflict resolution and legal reform could shape the evolution of mediation practices.

Legal cooperation between Russia and China is inherently multicultural, influenced by the diverse legal traditions and cultural values of each country. This panel likely examines how these multicultural dimensions impact legal consulting practices, emphasizing the need for cultural competence among legal professionals. It may also discuss the importance of understanding each other's legal systems and cultural contexts to facilitate effective collaboration.

Speaking on "Sociocultural Features of Building Trusting Relationships in China", **Ilya Buturlin**, Investment Manager at *Family Office* in Singapore, financial advisor, Associate Professor at Financial University and Member of the Commission on Financial Legislation at the Moscow Branch of the Association of Lawyers of Russia, focused on differences in the area of communication and providing feedback, attitude to hierarchy and leadership, managing time and attitude to schedule, trust and relationship building.

Gan Haosung, a first-year graduate student at the Department of Theory of Law and State, Faculty of Law, Lomonosov Moscow State University, devoted the report to the issues of collaboration between law firms in Russia and China. Consulting plays a key role in business, helping to make informed decisions and solve complex problems, but it faces a number of legal risks. The main risks of consulting are related to the leakage of confidential information, violation of intellectual rights, non-compliance with advertising and insufficient consumer protection. Minimizing these risks requires carefully drafted contracts, confidentiality, compliance with advertising requirements and regular audits.

Peri Izmaylova, Associate Professor at the Department of Public Law of GAUGN, Associate Professor at the Department of Fundamental Jurisprudence and International Law of the G.B. Mirzoev Russian Academy of National Economy and Public Administration, analyzed the role of negotiation skills with Chinese counterparts. In her opinion, the ability to negotiate with Chinese counterparties requires a deep understanding of cultural characteristics, respect for traditions and flexibility in approaches. With China's economy continuing to gain momentum, knowing and applying negotiation skills will be an important competitive advantage for international companies. Properly designed and developed negotiation skills also create the basis for long-term, stable mutually beneficial relations.

Fatima Konova, professional mediator at the Mediation Center of the Russian Union of Industrialists and Entrepreneurs (RSPP), Arbitrator at the Arbitration Center of the RSPP, compared the status and application of mediation in Russia and China. Unlike Russia, in China, mediation is included in the system of state executive power,

and the activities of mediators are voluntary-compulsory, paid and encouraged by the state. Despite the existing differences in the legal regulation of the institution of mediation in both countries, one thing remains the same — it is strategically important to regulate emerging conflicts in a peaceful way, establishing mechanisms for reconciliation, intercultural dialogue and the formation of trust between different peoples and states.

Anton Naku, legal advisor, Head of International Project Support Practice at CLS Law Firm, Associate Professor at the Department of Integrative Law and Human Rights at MGIMO University, told about experience and perspectives of collaboration between Law Firms in Russia and China.

The cooperation between Russian and Chinese law firms is pivotal for enhancing cross-border legal services. This part of the panel probably highlights successful case studies and shared experiences that illustrate the benefits of such collaborations. It may also delve into the challenges faced, such as differing legal systems and regulatory environments, and propose strategies for overcoming these obstacles to foster greater cooperation.

The integration of legal services is crucial for creating a seamless experience for clients operating in both Russia and China. This part of the panel may investigate how legal firms can align their services to meet the needs of a globalized market. It could also address the technological advancements and regulatory changes that are driving the integration of legal services, paving the way for more efficient and accessible legal consulting.

To sum up, Strategic Panel 2 offered a comprehensive examination of the legal aspects of consulting through the lens of Russia and China. By addressing key questions related to mediation, cooperation between law firms, multicultural considerations, and service integration, the Panelaimed to provide valuable insights that could enhance the effectiveness of legal consulting in both countries. This collaborative approach not only fosters a deeper understanding of each country's legal landscape but also promotes a more integrated and culturally sensitive practice of law.

II.3. Strategic Panel 3: Legal Regulation of Cross-Border Private Relations and International Business within the Framework of Russian-Chinese Cooperation

Strategic Panel 3 moderated by **Beniamin Shakhnazarov**, Professor at the Department of International Private Law and the Department of Intellectual Property, Head of the Center for Legal Support of Foreign Economic Activity, Import Substitution, and Industrial Development at Kutafin University (MSAL), addressed the complex legal landscape that governs cross-border private relationships and international business, particularly in the context of Russian-Chinese cooperation. More than a dozen of expert speakers focused on regulatory frameworks that facilitate or challenge business and legal interactions between the two countries. Discussions inevitably focused on the issues of contract law principles applicable in international contexts, the importance of clarity in contract drafting and the potential challenges posed by differing legal traditions and restricting measures. Participants also dwelled on the legal implications of cross-border non-profit relationships, such as family law and inheritance issues.

Thus, **Vera Aleinikova**, Leading Researcher at the Family Law and Inheritance Law Department of the S.S. Alekseev Research Center for Private Law under the President of the Russian Federation, spoke about the legal regulation of cross-border personal and property relations of spouses. The Family Code of the Russian Federation reflects the approach contained in the unified conflict-of-law rules of treaties and conventions to which the Russian Federation is a party. The conflict-of-law connections chosen by the Russian legislator when determining the applicable law for the personal and property relations of spouses mirror modern trends in international family law regulation.

Vsevolod Vasilyev, Senior Lawyer at the Law Firm "YuST Isakov, Afanasyev, Ivanov", analyzed the bankruptcy institution in China, emphasizing that a distinctive feature of the procedural bankruptcy legislation of the People's Republic of China, and particularly the Chinese Enterprise Bankruptcy Law, is the ability to appeal court decisions only through supervisory proceedings without judicial hearings. In this context, the application of the law in a specific provincial court (an inter-

mediate court and a provincial supreme court as a "cassation" instance) plays an important role. Therefore, the experience of representatives in the court that will hear the bankruptcy case remains a crucial factor in choosing them.

Anna Draganova (Prikhodko), Director of the International Cooperation Center at Kutafin University (MSAL), discussed the prospects of international payments in cryptocurrency and digital financial assets. The unprecedented advantages of using digital financial assets for international business and economic transactions are evident (direct payments between parties without intermediaries, absence of exchange rate risks and differences in national currency rates, reduced volatility risks, the growing speed of the digital financial market's development, and the increasing share of smart contracts). However, it is important to note that legal certainty of such transactions is still in its early stages and it will require detailed legislative development in the near future.

Elena Nakhova, Associate Professor at the Department of Arbitration Process, Advocacy, and Notarization at the Saratov State Law Academy, dedicated her presentation to the use of electronic evidence in the civil procedural legislation of the Russian Federation and the People's Republic of China. The speaker emphasized that, despite significant advancements (file recognition technologies, speech recognition technologies, evidence recognition, and other AI perceptual technologies), there is a need to enhance the digital procedural framework and its specific aspect — legislative consolidation of electronic evidence as an independent means of proof within the current procedural legislation of Russia and China.

Boris Romanov, Project Manager and Lawyer at the "S & K Vertikal" law firm, shared his experience in optimal constructions of arbitration and prorogation clauses in agreements with Chinese counterparts.

In conclusion, Strategic Panel 3 provided a comprehensive examination of the legal regulation of cross-border private relations and international business in the framework of Russian-Chinese cooperation. By addressing critical issues such as contract law, investment relationships, dispute resolution, the Panel participants aimed to enhance un-

derstanding and facilitate better legal practices in cross-border dealings. They not only highlighted the existing challenges but also sought to identify pathways for more effective legal cooperation between the two countries, fostering a more sustainable international business environment.

II.4. Strategic Panel 4: Digital Transformation in the Law of Russia and China in the Context of Scientific and Technological Development

Strategic Panel 4 delved into the intersection of law and digital transformation in Russia and China, highlighting how advancements in technology influence legal frameworks and practices. **Aleksey Minbaleev**, Doctor of Law, Head of the Department of IT Law and Digital Technologies at Kutafin University (MSAL) and moderator of the Section, set the tone for the entire discussion by analyzing the development of legislation on quantum communications in Russia and China.

Moreover, the very subject of the Panel implied a forward-looking perspective on how both counties are adapting to rapid technological changes, with a focus on legal implications. The key issues considered by the Panel participants included: legal regimes of digital spaces (platforms, metaverses, online games), cybersecurity, strategies employed by Russia and China for protecting personal data and national security, digital trade and e-commerce, opportunities and risks for Russian and Chinese businesses in the digital economy, protection of intellectual property, safeguarding innovations, digitalization of public services and e-government, legal regulation of artificial intelligence, and legal aspects of regulating neurotechnologies.

Wei Depeng, a lecturer at the Faculty of Law of Shenyang Normal University and a lawyer, dedicated his presentation to the issues of civil law regulation of artificial intelligence in China and Russia. As an innovation, artificial intelligence can have a significant impact on the legal relationships among civil law subjects and on intellectual property rights. Chinese and Russian legislators and researchers need to strengthen communication to develop the framework of theoretical

research and judicial practice in the field of legal regulation of artificial intelligence. "We learn from each other to maximize the prevention of adverse consequences of artificial intelligence for humans and collaboratively build a system for the legal regulation of artificial intelligence", stated **Wei Depeng**.

Meng Gaocheng, a doctoral student at the Law Institute of RUDN University, analyzed the question of whether a new generation of human rights will be created in the digital age. Due to the lack of any legally grounded guidance on digital human rights, fragmentation and disunity are inevitable. It is urgent to unify digital legislation at all levels based on a rethinking of fundamental constitutional rights.

To sum up, Strategic Panel 4 provided a comprehensive examination of how digital transformation is reshaping the legal landscapes in Russia and China. By addressing critical topics such as digital spaces, cybersecurity, e-commerce, intellectual property protection, e-government, AI regulation, and human rights, the speakers highlighted the importance of adapting legal frameworks to meet the challenges and opportunities of the digital era. Thus, collaborative exploration not only encourages the innovative responses of both countries but also suggests pathways for future legal cooperation in the context of scientific and technological development.

II.5. Strategic Panel 5: Strategic Vectors of Joint Russian-Chinese Legal Research

Strategic Panel 5 focused on the collaborative legal research efforts between Russia and China in the context of addressing shared challenges and opportunities, demonstrating a forward-thinking approach to legal cooperation, emphasizing the importance of strategic vectors in shaping the future of legal frameworks in both countries

Issues of primary concern suggested by the organizers and **Vyacheslav Agafonov** and **Anna Draganova (Prikhodko),** moderators of the Section, included issues of legal regulation of environmental protection and rational use of natural resources; climate security; ensuring technological sovereignty in the fields of medicine and pharmaceuticals; models of Eurasian integration and new strategic partnerships between Russia and China/

To justify relevance of the topics, we will refer to the most interesting reports made by the participants within the framework of the Section.

Vyacheslav Eliseev, Professor at the Department of Environmental and Natural Resource Law at Kutafin University (MSAL), compared the peculiarities of the legal framework for food security in the People's Republic of China with Russian doctrinal approaches. Using the example of the emergency management system related to food (Chapter VII of the PRC Law), the speaker demonstrated that similar measures are not specified in Russian legislation regarding food, which further confirms the higher effectiveness of the measures outlined in the special legislation concerning food security. The comparison of food security legislation in China and Russia highlights the advantages and disadvantages of the respective laws and allows for the adoption of best legislative practices.

Ksenia Korobko, Head of the Department of Civil Law Disciplines at Syktyvkar State University named after Pitirim Sorokin, spoke about a comparative legal study on the application of traditional Chinese medicine methods. Currently, there is virtually no legal regulation of relationships in the field of traditional medicine, including traditional Chinese medicine, in the Russian Federation. Clinics positioning themselves as traditional Chinese medicine clinics are medical organizations that have licenses for the practice of reflexology. Methods of traditional Chinese medicine are utilized in the form of cosmetic and spa services, or specialists with professional training in traditional medicine work as consultants in cooperation with Russian doctors. A potential solution to the existing situation is a possible adoption of a Federal Law "On Non-Conventional Medicine in the Russian Federation", which would include folk and traditional medicine, aimed at ensuring the quality, safety, and accessibility of paid medical services in the field of non-conventional medicine and creating a uniform approach to the legal regulation of the relationships under consideration at the federal level.

Natalia Savelieva, Junior Researcher at the Schmidt Institute of Physics of the Earth of the Russian Academy of Sciences, discussed the legal aspects of the International Scientific Lunar Station — a joint

project of Russia and China. The speaker highlighted three areas of legal research aimed at improving the legal framework of the project: 1. enhancing the international legal regime for the exploration and use of celestial bodies through the evolutionary development of the existing system of space treaties; 2. conducting a comparative legal analysis of the national legislation of the project participants to identify potential conflicts and ways for harmonization with existing norms of international space law; 3. developing regimes and mechanisms to protect megascience projects from unilateral sanctions that have been misused by countries of the so-called "Western coalition" in recent years. Such a global, human-centered project requires more detailed legal research. Over time, the project could provide a powerful impetus for the development of international space law as a whole, as well as national legislation in the field of space exploration and utilization.

Thus, Strategic Panel 5 provided a vital examination of the strategic vectors guiding joint Russian-Chinese legal research. By addressing critical issues such as environmental protection, climate security, technological sovereignty, and Eurasian integration, the panel underscores the importance of legal cooperation in navigating complex global challenges. This collaborative approach not only highlights the potential for shared learning and innovation but also sets the stage for more effective legal frameworks that can respond to the pressing needs of both nations and their regions.

III. Conclusion

Overall, the First Russia-China Legal Forum was a resounding success, laying the groundwork for future collaboration between the legal communities of the two countries. With more than 500 online- and offline-participants, it celebrated the success of mutual efforts of expert communities of China and Russia. The insights gained during the event will undoubtedly contribute to the development of a more integrated legal framework, facilitating greater economic cooperation and enhancing the rule of law in both jurisdictions.

As the relationship between Russia and China continues to evolve, initiatives like this Forum will play a crucial role in addressing

educational and legal challenges and opportunities that arise in an increasingly interconnected world. The organizers expressed their commitment to making the Forum an annual event, further solidifying the ties between educators and legal professionals of both countries.

The First Russia-China Legal Forum not only displayed the importance of legal cooperation in a globalized economy but also highlighted the potential for collaborative efforts to address common legal challenges. The discussions and connections made during this event will undoubtedly pave the way for a more robust mutually beneficial partnership between Russia and China in the years to come.

In addition to the substantive legal discussions, the forum offered ample opportunities for networking and collaboration. Forum participants were able to connect with peers, share experiences, and explore potential partnerships in research and practice.

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