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LAW & ETHICS

Article

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Ethical Code: Between Law, Morality, and Administrative Regulation of Human Behavior

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Abstract: The article examines the issues arising from defining the essence and specifics of an ethical code as a unique institution and regulator of human behavior. The heterogeneous nature of the ethical code as a social phenomenon existing at the intersection of law, morality, and administration in managing human behavior is subjected to detailed analysis. The author identifies and discusses evolution of the concept of law from a purely legal phenomenon to a semantically significant image present in the realm of religious and scientific experience, shaping the subject-conceptual schemes of theology, natural sciences, social sciences, and humanities. The juridification of various areas of social experience resulting from this fact, including moral regulation, is considered. Additionally, the article analyses the specific situation created by the ambiguity of ethics and law as different forms of public consciousness, as well as the classification of international ethical codes under soft law, and national and professional ones under self-regulation.

Keywords: morality; law; administration; ethics committee; interdisciplinarity; action; human behavior; regulation

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Contents

I. Introduction

Can a code be called ethical? Certainly, yes. This is evidenced by the facts — there are numerous currently active, outdated, and still under discussion documents with such a designation. This does not contradict the legal theory, according to which ethical codes belong to the category of normative acts, differing from legal laws only in that they do not belong to the sphere of law, i.e., they are not legal acts. According to Malinovsky, the latter does not prevent the recognition of the social significance of ethical codes, which have not become normative legal acts simply because their development and approval are carried out not by state legislative bodies, but by various professional communities (Malinovsky, 2008, p. 41).

However, the etymology of the word can seem confusing, as the use of the word *code* to denote the concept inevitably leads us to the sphere of law. Indeed, if we turn to ancient times, we can find the original Latin meanings of the word *codex*. In all similar cases, there are many of the meanings: from a tree trunk to a block attached to the feet of a criminal or from logs used to make a river ferry to wooden tablets specially coated with wax for writing words. A codex was distinguished from a scroll, but then this word was extended to all text carriers, e.g., papyrus and parchment scrolls. Emperor Gregorian was the first to call a set of imperial constitutions a codex, followed by legal codes bearing the names of other emperors, which gave rise to one more meaning of

this word, turning it into the main one, and then the only one. Thus, throughout late Antiquity and the Middle Ages, Roman law conveyed to us the basic meaning of the word *code*, "a systematic collection of laws on one of the major sections of law, issued by the legislative power" (Small Encyclopedic Dictionary, 1907–1909, p. 119).

May this institution be outside the legal sphere, but in some or even all essential elements similar to legal institutions? How can we understand what is genetically and essentially connected with law, and what is only symbolically or metaphorically? The question is not simple, because in the process of historical development of European and then the world civilization, too many concepts, notions and even institutions have emerged, in the name, structure and content of which the influence of law is clearly evident. With all the diversity of assessments of this, only one thing is clear: the influence of law enforcement practices on all spheres of social life, on systems of thought and action is unprecedented. Now we can speak about the juridification of theology and morality, natural science, social and humanitarian studies, as well as about the emergence of non-legal social regulators, literally adjusted to the law and built in such a way as to complement the law or enhance its meaning and sense (Joyner, 1981).

II. Methodology

In our research, it is appropriate to recall the entire methodological arsenal of historical and scientific reconstruction, which highlights the genetic method, structural functionalism, phenomenological method, and comparative analysis. The genetic method will help us understand how the first legal codes were formed and why this term was used beyond the legal realm, for example, in the realm of morality, as well as in the area of self-governance and corporate self-regulation. The structural-functional method is applied to identify the social and legal functions of the regulator in question (Frederic and Kirgis, 1987). The methods of phenomenology and legal comparativism allow us to determine the meaning and legitimacy of the presence of a non-legal institution within the legal space.

III. Juridification of Theology and Morality

The ethical code is not a law, but a set of regulatory principles that can guide actions beyond the legal regulation while problems and conflicting grounds for social action remain. This is generally how the ethical code is understood, as expressed, in particular, by Malinovski in the study mentioned above. One could fundamentally agree with this position, as outlined in textbooks and dictionaries. However, it is unclear why the term *code* is applied to a document that does not pertain to the legal sphere but clearly seeks to appear analogous to a legal code. Why should we liken something that is not law in essence to law in form? The answer can be found in the philosophy of Immanuel Kant, who introduced the concept of the categorical imperative, interpreting it as a moral law. Unlike legal law, which is established by a legislative authority, namely the state, in the case of morality, a person is subject to a law that they establish themselves. Thus, alongside external commands, Kant introduces the concept of internal commands, i.e., imperatives. "But freedom", Kant writes, "among all the ideas of speculative reason, is also the only one whose possibility we know a priori — though without having insight into it — because it is the condition of the moral law, which we do know. The ideas of God and immortality, on the other hand, are not conditions of the moral law, but conditions only of the necessary object of a will determined by this law, i.e., conditions of the merely practical use of our reason" (Kant, 2002, pp. 5–6).

We can see that in the Kant's philosophy, the discussion is not about the document being addressed in this article. The moral law presented in the *Critique of Practical Reason* cannot be formulated once and for all, as written laws and the norms contained within them are. Each time prior before a free and autonomous subject wishes to follow the moral law, they must find an appropriate formulation, and such a formulation arises only through the process of reasoning, the standards and guidelines of which are contained in Kant's ethical teachings and practical reason.

One could discuss the individualism of the founder of critical philosophy, the appeal to internal motivation, the autonomy of the subject, and so on. Meanwhile, social practice shows us that discussions

about morality lead to the formulation of moral norms, which are then used for external coercion — that is, to judge and condemn the actions of others — yet to do this without any "bureaucratic" formalities and tedious judicial procedures (Chodosh, 1991).

One should remember that before this, in the Middle Ages, theologians introduced the concept of Divine Law in order to attach something external to the ordinary legal law. But even here, the discussion is not about legal law. "Since good as perceived by intellect is the object of the will, it is impossible for God to will anything but what His wisdom approves. This is, as it were, His law of justice, in accordance with which His will is right and just. Hence, what He does according to His will He does justly: as we do justly what we do according to law. But whereas law comes to us from some higher power, God is a law unto Himself" (St. Thomas Aquinas, p. 21).

As with Immanuel Kant, the theological interpretation of the concept of law has a worldview or metaphysical character. The medieval theologian, like the Enlightenment philosopher, views the world as something akin to society, specifically a developed society with a state and written law. However, such constructions are not particularly suitable for external institutional regulation of collective action. Despite the centuries-old authority of Saint Thomas in Catholic circles and the popularity of Kant's philosophical ideas among philosophers, their reasoning is too abstract to move from the category of "dogmas" to the category of "guides for action".

Thus, Thomas Aquinas used the experience of legal regulation to explain Sacred Scripture, thereby "juridifying" theology. Immanuel Kant applied the concept of law to "juridify" the inner world of man, which he described using a Cartesian interpretation of the concept of the subject. In Kant's texts, we clearly see the influence of theology, which he managed to combine with psychology and anthropology, thereby forming a psychological-theological ethics that effectively aligns with law. It is this understanding of the moral law that can be found in his *Metaphysics of Morals*, where the metaphysical principles of the doctrine of right precede the metaphysical principles of the doctrine of virtue, which in turn precede the ethical teachings on principles and the ethical teachings on method.

IV. The Influence of Law Enforcement Practices on Experimental Natural Sciences and Socio-Humanitarian Studies

It is worth mentioning separately the modern European "juridification" of natural science when Galileo, Newton, and other creators of mathematical natural sciences easily proposed various mathematical formulas and called them laws of nature. Dmitriev finds numerous instances of applying the concept of law to describe natural phenomena in the works of Aristotle, Cicero, Roger Bacon, and other ancient and medieval scholars, theologians, and philosophers. However, this phenomenon fully applies to the Modern era, where the works of Francis Bacon, who made significant contributions to philosophy, natural science, and law, became particularly important. Dmitriev writes, "Indeed, in the works of both Bacon and several natural philosophers influenced by Baconian ideas (such as Boyle), frequent use of legal terminology (trials, witnesses, testimony, etc.) is noticeable. For instance, in *Novum Organum*, while describing the procedure for verifying initial generalizations (lower axioms or axiomata infima) for their universality, Bacon employed the legal term fide-jussione (surety)" (Dmitriev, 2021, p. 187). Moreover, due to the efforts of Bacon, Newton, and British science of the seventeenth century during the formation of ideals of experimental methodology, the juridification of physics increasingly aligned with the British tradition of Common Law, distancing itself from *ius latinum* (Dmitriev, 2021, p. 189).

The search for laws and norms in the social and humanitarian studies can be considered as the last act of juridification. Thus, in the first half of the 19th century, the laws of historical development were formulated: the law of three stages of development of society by Auguste Comte and the law of change of socio-historical formations by Karl Marx. These laws gave historical knowledge compliance with new criteria of scientificity — they allowed to explain past events and predict future ones. Then the attention of sociologists switched to microsociology aimed at explanation of individual and collective actions of people, as well as their interactions. They came to understanding that society is able to influence the activity of its members through assimilation of

certain norms and rules by people and instilling a willingness to follow them.

This is how social control works, consisting not only of a set of social norms, but also of a system of social sanctions that ensure their observance. Social control allows us to operate with the concept of law, which in sociology acts as one of the social regulators, usually acting without the help of the state. "It is time to return to the concept of legitimate order, or as it has been put above, legitimacy norms, in relation to action. The way in which Weber deals with this is of central interest. In the first place he makes two classifications, the distinction between which is not at first sight evident. The first is of modes in which the legitimacy of an order may be guaranteed. The second is of reasons why binding legitimacy is attributed to the order by the actors" (Parsons, 1949, pp. 658–659).

Social control in the concept of structural functionalism is interpreted as prevention of deviations from the norm and as a means of responding to deviations that have already occurred. An important part of social control is reliance on sanctions, because without sanctions, all attempts to control something inevitably turn control into simple observation, recording, and registration. But in order to really control something, society's actions to monitor compliance with social norms and, in particular, to impose sanctions on the violator are to be ordered and categorical. Thus, step by step, the rules for describing the interaction of man with society in legal terms were formed. Folk customs, government laws, religious canons, moral standards — all turned out to be forms of social control, for the theoretical description of which the categories of law and the corresponding experience of using a legal vocabulary were needed (Higgins, 1987, p. 21).

Sociologists have expanded the legal vocabulary in order to add terms of encouragement to the terms of punishment — so medals and titles, certificates and placing a photo on the "wall of honour" were added to stigmatization, dismissal, administrative arrest, imprisonment and placing a photo on the "wall of shame". Some of this set has a clearly expressed legal character and is associated with the activities of an ordinary court, something pertains to the non-legal sphere, although

it imitates it — the court of the public, public condemnation, "comradely court", "court of officer's honor", etc.

It is clearly visible how the concept of the normative, coming to us from the sphere of law, captures ever larger spaces of theoretical thought, called upon to describe everything connected with people and their activities. "Every social group invariably couples its scale of desired ends with moral or institutional regulation of permissible and required procedures for attaining these ends. These regulatory norms and moral imperatives do not necessarily coincide with technical or efficiency norms. Many procedures which from the standpoint of particular individuals would be most efficient in securing desired values, e.g., illicit oil-stock schemes, theft, fraud, are ruled out of the institutional area of permitted conduct. The choice of expedients is limited by the institutional norms" (Merton, 1938, p. 673).

V. Ethical Codes in the Context of Law

Today, ethical codes belong to the normative, however not legal sphere. By non-legal, but normative I do not mean the phenomenon that Hegel, and then some Russian authors, called wrong (non-right) or para-right. Rather, I discuss moral norms accepted and assimilated by society and thus ceasing to be purely moral, but turning into social ones (Shelton, 2000). Why cannot moral norms be social, and social ones moral? Because they are removed from the sphere of internal conviction and become a collective assessment based on morals, not on ethics. Socrates discussed this, pointing out that morals and customs do not need explanation, not to mention their critical assessment. Immanuel Kant also wrote about this, asserting the autonomy of the subject and denying the possibility of society's interference in this activity. Therefore, social norms are much closer to customs and mores than to moral norms, and ethical codes can only be attributed to the sphere of social regulation of activities that do not fit into the framework of legal regulation (Bleicher, 1969).

It is absolutely clear that the ethical code does not directly relate to the sphere of law, but it is also clear that it has some legal content that is not limited to the fact that it is one of the social regulators. Courts take

into account the decisions of ethical committees and corporate boards as if they were the opinions or assessments of experts. At the same time, it is obvious to everyone that ethical committees or other bodies interpreting the ethical code are not expert organizations (Zakharova, 2019).

VI. Ethical Codes and the Principle of Complementarity

A widespread and almost universally accepted opinion today is that ethical codes act as additional regulators in the general system of social regulators, where law, custom and tradition are traditionally considered the main ones. All these regulators were formed quite a long time ago, a little later morality was added to them, and that resulted in creation of this special product, adding philosophy, theory and practice of managing individuals to ethics and law.

Different philosophical concepts and competing paradigms of social and humanitarian knowledge have been used to designate something that equally combines the features of law and something that is not law. But the question of how consistent the values of these quasi-legal and legal imperatives are has always remained open. Thus, David Damler in his article *The Synesthesia of Values: How the Ideals of Modernist Design Predisposed and Shaped Fascist Legal and Political Thought* directly writes that the aesthetic, epistemological and moral (legal, political) are always connected with each other and their connection is not mechanical, but organic. This is exactly what Spengler wrote about, proclaiming the existence of a certain primordial symbol, embodied in the spheres of aesthetics and ethics, ontology and the theory of knowledge (Spengler, 1926).

Damler calls Spengler's primordial symbol a common underlying mechanism, but this does not change anything — it could be easily called an archetype or even a paradigm. "Value judgments are regulated via chronologically antecedent emotions. Their attribution to a certain normative category is an analytical achievement that only occurs in a second step. 'Analogical' interferences are inevitable due to the processes involved being partly identical. Jurisprudence, too, continually operates with terms that have an underlying sensuous, aesthetic component

and depend on concrete experiential knowledge. This lifeworld horizon and the attendant aesthetic preferences differ from society to society, sometimes considerably from state to state, despite otherwise very similar economic and social conditions" (Damler, 2018, p. 811).

But it is not just a conflict of values. It is important to understand the ontology of this phenomenon, which is not law, but is functionally and essentially connected with it. A mere reference to the fact that this is just another regulator coexisting alongside law is clearly not enough. There are many terms to denote phenomena that, while not being law in their pure form, can be attributed to the sphere of law either by their nature or by their functions. It seems appropriate to recall the interpretation of this phenomenon proposed by Biryukov. This author combines all of the above connotations in the concept of "doubling of law". This author discusses different options for the terminological explication of this phenomenon of legal reality: para-right, shadow right, semi-right, and finally, non-right. (Biryukov, 2010). In Russian legal studies, the term para-right was first used by Samigullin, who believed that para-right is social relations that are regulated by law, however bypassing the law in real life (Samigullin, 2002).

An example of existence of para-right as a complementary element to law, replacing, but not cancelling it, is the concept of voluntary obligation, widespread in international law, which is the building material for the formation of a new legal space. "In the discussion of new governance in the European Union, the concept of 'soft law' is often used to describe governance arrangements that operate in place of, or along with, the 'hard law' that arises from treaties, regulations, and the Community Method. These new governance methods may bear some similarity to hard law. But because they lack features such as obligation, uniformity, justiciability, sanctions, and/or an enforcement staff, they are classified as 'soft law' and contrasted, sometimes positively, sometimes negatively, with hard law as instruments for European integration" (Trubek et al., 2005, p. 5).

The term *wrong* was introduced by Georg Hegel in his *Philosophy of Right*. By *wrong*, Hegel means deception, crime, denial or violation of right. "Wrong is the mere outer appearance of essence, giving itself forth as independent. If this semblance has a merely implicit and not an

explicit existence, that is to say, if the wrong is in my eyes a right, the wrong is unpremeditated. The mere semblance is such for right but not for me. The second form of wrong is fraud. Here the wrong is not such for general right, but by it I delude another person; for me the right is a mere semblance. In the first case wrong was for right only a semblance or seeming wrong; in the second case right is for me, the wrongdoer, only a semblance or pretense. The third kind of wrong is crime" (Hegel, 2001, p. 84). Hegel understands the third type of wrong — crime — as wrong in itself and for itself, because in this case even the appearance of a desire to preserve the legal framework is absent. The individual committing crimes wants wrong and asserts their desire as their own will.

Not all theorists agree with such an uncompromisingly negative understanding of the term *wrong*. The concept of *wrong* can be interpreted in accordance with legal anthropology or in the context of the doctrine of soft law, which has become widespread in international law. Today, it can be said that the rapid spread of this term has contributed to its inclusion in the doctrine of law, but its theoretical comprehension is not keeping up with the needs of practice. The concept of soft law is intended to designate phenomena that universally perform the functions of law by compensating for the absence of law and replacing it.

VII. Specifics of Ethical Codes in Genetic Research

Since the ethics code in genetic research is not a type of formal law, it should be recommendatory. Adherence to the principles, prescriptions, and prohibitions contained in the Code must be carried out on a voluntary basis and apply only to civilian developments (Demin, 2016).

According to Olkhovikov, "the special character and weakness of international medical law lies in the fact that the regulation of medical activity (including healthcare services) is closely linked to the norms of medical ethics developed by international medical organizations, which are not yet legal norms, but acquire legal significance in certain cases (being given the force of a source of law by national state bodies, being taken into account by courts when determining standards of professional prudence, etc.)" (Olkhovikov, 2014, pp. 56–57).

Like any ethical code, the Ethics Code in the field of genetic research should answer the following questions:

1. Why is it needed and whom does it serve?

2. What values and principles is it based on?

3. What norms and standards of behavior should be observed by all participants or subjects of the code?

4. What procedures should be used for resolving disputes and conflicts related to violations of the ethical code?

5. What measures of responsibility should be applied for violating the ethical code?

6. What mechanisms can be used for tracking and monitoring compliance with the code?

The Ethics Code in the field of genetic research should be a document that lists the principles that doctors and researchers should follow in their practical activities. This set of principles should be systematic, and the principles should be formulated in such a way to be specified in the form of prescriptions, recommendations, and prohibitions. These principles should be clearly interpretable in complex situations to resolve contradictory and controversial situations.

The specificity of genetic research is, on the one hand, the fact that it involves therapeutic activities, and on the other hand, research, and on the third hand, technical-design work. Thus, there are three areas of applied ethics-medical, scientific, and engineering. When traditionally listing the addressees of the Code, in addition to the state, it is necessary to include scientists conducting genetic research, physicians using genetic technologies, biotechnologists and bioengineers, pharmacologists, university teachers, and legal staff of health insurance companies.

VIII. Conclusion

Currently, many ethical codes could seem chaotic, but their conditional structuring can be done based on the semi-chaotic structure of professional and guild unions. As a result, different levels of coverage emerge — global, national, regional, and corporate-guild regulations related to the sphere of professional ethics. They arise from the self-organization process of various professional communities — educators and lawyers, scientists and artists, businessmen and doctors build upon

the system of legal norms and principles, creating systems of additional norms that also act as effective regulators organizing human actions and interactions.

Meanwhile, ethical codes not only resemble laws in their titles but they are written in language understandable to lawyers, because lawyers actively participate in their creation. Moreover, they are based on deontological logic and modalities. Furthermore, these codes' functions are greatly similar to legal ones — unlike genuine ethics, which appeals to the individual's conscience and moral autonomy, this ethics is mandatory and its implementation is monitored by society. That's why these so-called guild codes more closely resemble disciplinary statutes, where a legal narrative prevails, along with legal techniques for regulating socially significant actions of individuals or groups (Zakharova, 2022).

In view of the above-mentioned, without negating the differences between ethical and legal codes, it seems reasonable to view the former as a particular kind of law. This rationale stems from the necessity to study the possibilities and challenges of interaction and mutual alignment between these two types of regulation. There are a number of academic discussions about the compatibility of ethical and legal regulatory frameworks, as well as mechanisms for distinguishing corresponding jurisdictions. It is also interesting to consider the distinction between respective ethics, i.e., the ethical values and principles underlying both legal and ethical codes. This is particularly justified since not all principles and values coincide in the ethical codes of advocates and prosecutors. Moreover, not all principles in prosecutorial and advocacy ethics are compatible with each other, even though both operate within the framework of unified legal ethics and include principles like legality, adversariality, and others, which undoubtedly belong to both ethical and legal categories.

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HUMAN RIGHTS PROTECTION

Article

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Prospects for Increasing the Effectiveness of the Regional System of Human Rights Protection in the Commonwealth of Independent States

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Abstract: Based on the analysis of the regional legal acts on the human rights protection in the Commonwealth of Independent States (CIS) the article characterizes the current situation in this field in the context of the reset of the CIS Human Rights Commission activities in October 2022. The authors conduct a comparative legal analysis trying to determine what procedures and mechanisms that proved most effective in the practice of the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court of Human and Peoples' Rights can lay a solid foundation for establishing a CIS Court of Human Rights, and they outline the potential competence of a new court in the future. Key priorities and areas of cooperation between the CIS Member States in light of the task of increasing the effectiveness of a regional human rights protection system are highlighted in the concluding part, namely elaborating the CIS Model Law to enforce the implementation of the CIS Court of Human Rights decisions at the national level including

the creation of compliance monitoring bodies, the appointment criteria and the tenure guarantees for the prospective judges; adopting a new regional treaty on the establishment of the CIS Court of Human Rights to define its competence, jurisdiction, institutional structure, procedural rules, and relationship with the national judicial systems of the CIS Member States; updating regulatory documents that already exists at the CIS level; optimizing the institutional framework to increase the efficiency of the functioning CIS Commission on Human Rights.

Keywords: regional system; human rights; Commonwealth of Independent States (CIS); CIS Convention on Human Rights and Fundamental Freedoms of 1995; CIS Human Rights Commission; CIS Court of Human Rights; European Court of Human Rights (ECtHR); Inter-American Court of Human Rights; African Court of Human and Peoples' Rights

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Contents

I. Introduction

The modern international human rights protection system encompasses the activities of States, regional organizations, and the entire international community to ensure the respect, protection, and fulfillment of fundamental human rights and freedoms. This classification

of state obligations in the field of human rights — obligations to respect, protect and fulfill human rights — was first proposed by the British scholar Henry Shue back in 1980 (Shue, 1980), and the human rights bodies of the United Nations (UN) and regional organizations are guided by it to this day.

Changes in the world order caused by increased geopolitical tensions in the international arena, including the pronounced politicization of human rights issues, are accompanied by serious and systematic violations of human rights enshrined in the Universal Declaration of Human Rights of 1948,[1] the UN Charter of 1945,[2] the International Covenant on Civil and Political Rights of 1966,[3] the International Covenant on Economic, Social and Cultural Rights,[4] the CIS Convention on Human Rights and Fundamental Freedoms of 1995 as amended on 14 October 2022 (the CIS Convention)[5] and other international documents.

Researchers have repeatedly noted that the success of human rights efforts at the regional level is more likely than success at the universal level, "A group of States united by a common historical past, the same level of economic development, and common cultural traditions will prefer to compromise sovereignty to a certain extent in favor of an international body set up to identify possible human rights violations" (Elmons, 1989, p. 129). Russia is a Member State of the Eurasian Economic Union (EEU). This is a regional integration association that

[1] Universal Declaration of Human Rights. United Nations General Assembly Resolution 217 A (III) adopted on 10 December 1948. Available at: https://docs.un.org/en/A/RES/217(III) [Accessed 01.04.2025].

[2] United Nations Charter adopted on 26 June 1945. Available at: https://www.un.org/en/about-us/un-charter/full-text [Accessed 02.04.2025].

[3] The International Covenant on Civil and Political Rights adopted on 16 December 1966. Available at: https://www.un.org/ru/documents/decl_conv/conventions/pactpol.shtml [Accessed 02.04.2025].

[4] The International Covenant on Economic, Social and Cultural Rights adopted on 16 December 1966. Available at: https://www.un.org/ru/documents/decl_conv/conventions/pactecon.shtml [Accessed 02.04.2025].

[5] The CIS Convention on Human Rights and Fundamental Freedoms of 1995 (as amended on 14 October 2022). Unified Register of Legal Acts and Other Documents of the Commonwealth of Independent States. Available at: https://cis.minsk.by/reestrv2/doc/451#text [Accessed 02.04.2025].

includes five states located in Europe and Asia: Armenia, Belarus, Kazakhstan, Kyrgyzstan, and the Russian Federation. The EEU was established in accordance with the Treaty on the Eurasian Economic Union adopted on 29 May 2014.[6]

The idea of the theoretical development and practical implementation of the concept of the Eurasian space in the field of human rights deserves attention. The EAEU has not yet created a program document in the field of human rights and human rights bodies in its structure, although there are expectations of this kind.[7] In the future, the Eurasian Declaration of Human Rights may become a program document in the human rights sphere in the Eurasian space, capable of reflecting the peculiarities of regional understanding of legal processes, which is desirable, in the opinion of many legal scholars from the Eurasian states (for instance, Bainiyazov, 2013), and the Eurasian Court of Human Rights may become the main judicial body in this system (for instance, Busurmanov, 2015). The Eurasian Declaration of Human Rights, even if it was a non-binding document, could become a Eurasian catalog of human rights, which would establish all the main categories of rights reflected in the Universal Bill of Human Rights — civil, political, economic, social, and cultural rights. It will present an opportunity to consolidate the norms that are not yet available in the national legislation of the EEU Member States, so that the Declaration would serve as a guideline, a beacon to achieve.

However, this is a prospect for the distant future. Currently, it seems more likely that the Commonwealth of Independent States will assume the functions of the regional coordinator of human rights efforts. The CIS Member States share a common Soviet past and profess

[6] The Treaty on the Eurasian Economic Union. Signed in Astana on 29 May 2014. Available at: https://www.consultant.ru/document/cons_doc_LAW_163855/?ysclid=m903gwmmvi53245021 [Accessed 02.04.2025].

[7] Speech by the Commissioner for Human Rights in the Russian Federation Tatiana N. Moskalkova at the III International conference "Problems of human rights protection in the Eurasian space: exchange of best practices between ombudsmen." 17 December 2019 Commissioner for Human Rights in the Russian Federation. Available at: https://ombudsmanrf.org/news/novosti_upolnomochennogo/view/vystuplenie_upolnomochennogo_na_mezhdunarodnoj_konferencii_po_zashhite_prav_cheloveka_na_evrazijskom_prost [Accessed 16.08.2024].

traditional moral and political values; in addition, they are located in the same geographical region and have largely similar legal systems (Mkhitaryan and Mkhitaryan, 2017, p. 42). All these factors contribute to a common understanding of the principles of law and are able to form a solid foundation for the functioning of an effective regional human rights protection system within the Commonwealth.

II. The Regional Human Rights Protection System in the CIS: the State of Affairs in the Period from 1993 to 2022

The problems of respecting human rights in the post-Soviet space became particularly acute in connection with Russia's withdrawal from the Council of Europe[8] on 15 March 2022. The Secretary General of the Council of Europe, Marija Pejčinović Burić, was notified of it by a letter from the Minister of Foreign Affairs Sergey V. Lavrov in accordance with Art. 7 of the Statute of the Council of Europe on the right of any Member to withdraw by formally notifying the Secretary General of its intention to do so (such withdrawal should have taken effect at the end of the financial year in which it was notified, i.e., on 1 January 2023).[9] In this letter, Russia also announced its intention to denounce the European Convention on Human Rights (ECHR) in accordance with Art. 58 of the ECHR,[10] which was not possible earlier than on 15 September 2022 (a High Contracting Party may denounce the Convention after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe).

The authors of the present article consider it necessary to explore the possibilities of enhancing the effectiveness of the regional human

[8] The Statement of the Foreign Ministry of the Russian Federation on the launch of the procedure for its withdrawal from the Council of Europe dated of 15 March 2022. Ministry of Foreign Affairs of the Russian Federation. Available at: https://www.mid.ru/ru/foreign_policy/news/1804379/ [Accessed 01.04.2025].

[9] Statute of the Council of Europe 5 May 1949. Council of Europe. Available at: https://rm.coe.int/1680306052, https://www.mid.ru/ru/foreign_policy/news/1804379/ [Accessed 01.04.2025].

[10] European Convention on Human Rights of 4 November 1950. Council of Europe. Available at: https://www.coe.int/en/web/compass/the-european-convention-on-human-rights-and-its-protocols [Accessed 01.04.2025].

rights protection system in the CIS, including issues of improving international legal acts and control mechanisms existing in the Commonwealth.

The structure of the regional model of human rights protection in the CIS at the present stage includes the following elements:

— the normative foundations of the human rights protection system that contain the basic principles and establish the legal framework for its functioning, namely the 1995 Convention of the Commonwealth of Independent States (CIS) on Human Rights and Fundamental Freedoms and its Protocol of 14 October 2022;

— the institutional foundations of the system including the CIS Human Rights Commission, operating on the basis of the new Regulations adopted on 14 October 2022 that "resuscitated" the CIS Human Rights Commission, in the figurative words of the President of the Republic of Tajikistan E. Rahmon.[11]

Today the Russian Federation is actively involved in international cooperation in the field of human rights within the CIS (Kryuchkov, 2024, pp. 101–107). At the same time, it should be noted that the CIS Convention on Human Rights and Fundamental Freedoms of 1995 applies only to four Member States of the Commonwealth: on 11 August 1998, it entered into force for the Republic of Belarus, the Russian Federation, and the Republic of Tajikistan, and on 21 August 2003 for the Kyrgyz Republic.[12]

The CIS Convention on Human Rights and Fundamental Freedoms of 1995 codified civil, political, economic, and social rights listed in the 1948 Universal Declaration of Human Rights and in the 1966 International Covenants on Human Rights. Unlike the European Convention for the Protection of Human Rights and Fundamental Freedoms, the CIS Convention explicitly enshrines the right to work and protection from unemployment (Para. 1 Art. 14), contains a very

[11] The Decision of the CIS Council of Heads of State on the new version of the Regulations on the Human Rights Commission of the Commonwealth of Independent States of 14 December, 2022. Available at: https://cis.minsk.by/reestrv2/doc/6636#text [Accessed 01.04.2025].

[12] The Executive Committee of the Commonwealth of Independent States. Available at: https://cis.minsk.by/ [Accessed 01.04.2025].

detailed list of guarantees for the effective exercise of the rights of working women (Para. 2 Art. 14): States undertake to provide working women with a paid leave, sufficient allowances for social security before and after childbirth; consider it illegal to dismiss a woman during her absence due to a maternity leave; provide free time for mothers who breastfeed their infants; regulate at the national level the admission of women to those types of work that are not suitable for them because of the danger, harmfulness to health or severity. The 1995 Convention regulates in detail the right to health protection (Art. 15), the rights to social security and medical care (Art. 16).

The Commonwealth of Independent States Charter of 1993 provided for the establishment of a Human Rights Commission with headquarters in Minsk as an advisory body to the CIS. It was established to monitor the implementation by the Member States of the Commonwealth of their obligations in the field of human rights, to consider applications from States parties to the CIS Convention, as well as individual and collective complaints from any individuals and non-governmental organizations on issues related to human rights violations by any of the participating States. The members of the Commission are appointed by the Member States; currently there are seven of them — representatives of Armenia, Belarus, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, and Uzbekistan.[13]

III. Adoption of the New Regulations on the CIS Human Rights Commission in 2022

The new Regulations on the CIS Human Rights Commission establish the procedure for its formation (two representatives from each State), define the requirements for its members ("high moral qualities and recognized competence in the field of human rights and freedoms, as well as experience in their protection", four years as the term of office (Para. 1–2)), and also the powers of the Commission (preparation of thematic reports on topical issues of the promotion and protection of human rights and freedoms in the CIS (Para. 12), consideration of national reports on the promotion and protection of

[13] The CIS Internet portal. Available at: https://e-cis.info/cooperation/3850/105640/?ysclid=m8zvgtgw8973014274 [Accessed 01.04.2025].

human rights and freedoms and issuing an advisory opinion and, if necessary, recommendations to the State based on its results (Para. 13), interaction with interested national authorities and human rights institutions on the organization of forums, academic and practical conferences, seminars on the exchange of experience in the field of promotion and protection of human rights and freedoms (Para. 14), as well as consideration of interstate and/or individual complaints from individuals on possible human rights violations, if the State has recognized the expanded competence of the Commission in accordance with its national legislation and sent a notification to the CIS Executive Committee (Para. 15)). The issue of other regional bodies that can assist the CIS Human Rights Commission in ensuring respect for human rights in the CIS area is also of interest.

In 2001, the Parliamentary Assembly of the Council of Europe adopted Resolution 1249 "On the compatibility of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights".[14] The Parliamentary Assembly recommended in the resolution that the Member States of the Council of Europe should not enter into the 1995 Convention pointing out that the CIS Convention could jeopardize the effective exercise of the right to file individual complaints with the European Court of Human Rights (ECtHR) (Para. 3).

Recommendation 1249 questioned the impartiality and competence of the CIS Commission on Human Rights pointing out that its recommendations do not have the same coercive nature as the judgments of the ECtHR (Para. 4). At the same time, States that had ratified the CIS Convention on Human Rights were invited to make a statement confirming that the procedure provided for by the European Convention on Human Rights would not be replaced by resorting to the procedure provided for by the CIS Convention on Human Rights (Para. 6.2).

[14] Rec. 1249 "Co-existence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights", Parliamentary Assembly, May 2001, Standing Committee. Available at: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16916&lang=en [Accessed 02.04.2025].

To what extent does the criticism of the Parliamentary Assembly of the Council of Europe correspond to reality? On 14 October 2022, new Regulations on the CIS Commission on Human Rights were approved, amendments were made to the CIS Convention on Human Rights and Fundamental Freedoms of 1995 and on 29 November 2023, the first meeting of the CIS Commission on Human Rights was held on the basis of the updated document.

The CIS Human Rights Commission was given the following powers:[15]

— in the field of monitoring the fulfillment of human rights obligations, the Commission acts as an advisory body;

— the Commission develops thematic reports — analytical documents on topical issues of human rights protection that are advisory in nature and may contain proposals for improving the legislation of the CIS countries in the established field. Thus, the Commission has developed a report on the analysis of normative legal acts in the field of migrants' rights in the Member States of the CIS and prepared an overview of the experience of the Member States of the CIS Commission on Human Rights in legally ensuring the safety of the physical, psychological and moral development of the younger generation when using information posted in the Internet;

— the CIS Member States submit their national reports on the implementation of their convention obligations in the field of human rights, and the Commission issues advisory opinions and recommendations on them;

— the Commission cooperates with international and national bodies, in particular, it cooperates with human rights institutions of the CIS countries, organizes forums, conferences and seminars on the exchange of experience;

— the Commission may receive applications from States and individuals regarding possible human rights violations if the relevant States have recognized its competence in this matter in accordance

[15] On the new version of the Regulations on the Human Rights Commission of the Commonwealth of Independent States: decision of the CIS Heads of State of 14 October 2022. Official website of the Commonwealth of Independent States. Available at: http://cis.minsk.by/reestrv2/doc/6636#text [Accessed 02.04.2025].

with Para. 15 of the Commission's Regulations.[16] In other words, if its expanded competence is voluntarily recognized by the Member States, the Commission acquires the right to consider interstate complaints from States parties to the 1995 Convention and individual complaints (from any individuals and non-governmental organizations) on issues related to human rights violations by any of the participating States (Art. 15 of the Regulations on the CIS Human Rights Commission).

The Commission's decisions are advisory in nature (Art. 7 of the Regulations on the CIS Human Rights Commission). The updated Regulations also stipulate that the Commission submits an annual report on its activities to the Council of CIS Heads of State. To date, three reports on the activities of the Commission in 2023–2025 have been published (an annual report for the 2023–2024 period and two thematic reports, namely on the rights of migrants in the CIS countries and on the safety of the physical, psychological and moral development of the younger generation when using information posted in the Internet) as well as a number of documents describing the topics of the meetings held by the Commission.[17]

The Commission can play an increasingly active role in developing cooperation in the field of human rights protection at the CIS level. It would be useful to consider possible changes in its terms of reference. The following five key areas are crucial for strengthening the Commission's powers.

1. Making the Commission's decisions binding

Currently, the Commission's decisions are non-binding, which reduces their importance for the Member States. Strengthening the Commission's powers could include a mechanism for a mandatory study of its conclusions by state bodies of the CIS Member States, as well as the introduction of a monitoring system for their implementation.

2. Expanding the competence to review complaints

The Commission can consider complaints from individuals only if this aspect of its competence is recognized by specific States. To ensure

[16] The Decision of the Council of CIS Heads of State "On the new version of the Regulations on the Human Rights Commission of the Commonwealth of Independent States" (Adopted in Astana on 14 October 2022). Unified Register of Legal Acts and other Documents of the CIS. Available at: http://cis.minsk.by / [Accessed 02.04.2025].

[17] The CIS Internet portal. Available at: https://e-cis.info/cooperation/3905/ [Accessed 01.06.2025].

a generally recognized mechanism for the protection of human rights in the CIS, it is necessary to empower the Commission to consider individual complaints regardless of the position of individual States,[18] as well as to introduce clear procedural rules for their consideration. Currently, Armenia and Tajikistan have made reservations indicating that they do not recognize the competence of the CIS Human Rights Commission in terms of its right to consider interstate and individual complaints.

Despite the proclaimed commitment to the ideals of human rights protection, it should be noted that the reservations expressed by Armenia and Tajikistan regarding the powers of the CIS Commission on Human Rights attest to the systemic limitations inherent in the human rights protection mechanism within the CIS framework. This stance reflects the traditional, sovereignty-centric approach characteristic of post-Soviet states, prioritizing the inviolability of state sovereignty in matters pertaining to human rights.

3. Creating a mechanism to impose restrictive measures for human rights violations

One of the factors limiting the Commission's influence is the lack of legal measures to influence States that violate human rights. A possible solution could be the development of a sanction mechanism within the CIS, providing, for example, a temporary suspension of the membership of the offending State in the Commission.

4. Strengthening the independence and transparency of the Commission's work

Now, the Commission is formed exclusively from official representatives of the Member States; however, it is advisable to provide for the possibility for representatives of national parliaments and civil society to participate in its work.

5. Expanding international cooperation

Effective protection of human rights is impossible without cooperation with international institutions. It is necessary to strengthen

[18] Reservations by individual Member States (for example, Armenia and Tajikistan) regarding the competence of the Commission in considering interstate and individual complaints emphasize that not all CIS States are ready to give it a broad mandate to protect human rights in this area.

the Commission's ties, based on the importance of avoiding politicization of human rights. In this regard, it is possible to create advisory councils and/or working groups jointly with the United Nations, as well as cooperation with national human rights commissioners (ombudsmen).

According to the assessment of the Parliamentary Assembly of the Council of Europe (PACE), the level of protection provided by the CIS Convention for the Protection of the Rights and Fundamental Freedoms was lower than the standards of the European Convention on Human Rights (ECHR).[19] It concerned both the substantive aspects of the CIS Convention and the institutional mechanisms for monitoring its implementation.

The experts noted that the body responsible for ensuring the compliance with the provisions of the Convention within the CIS did not have the necessary degree of impartiality and objectivity typical of the European Court of Human Rights. In addition, according to the PACE, the decisions on human rights issues adopted within the framework of the Commonwealth did not have the same legal force as the judgments of the ECtHR, since their enforcement was not ensured by similar enforcement mechanisms.

However, one cannot help but notice that there was a clear trend towards the politicization of processing Russian complaints in the ECtHR, which was repeatedly pointed out by the President of the Russian Federation Vladimir Putin.[20] For instance, out of 840 complaints filed with the ECtHR by residents of Donbass, the Court did not consider a single one. Such an approach raised questions. Subsequently, the Decision on the cessation of the membership of the Russian Federation to the Council of Europe on 16 March 2022[21] did not comply with the

[19] Rec. 1249 "Co-existence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights," Parliamentary Assembly, Standing Committee, May 2001. Available at: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16916&lang=en [Accessed 02.04.2025].

[20] TASS News Agency. Available at: https://tass.ru/obschestvo/17046505 [Accessed 02.04.2025].

[21] Council of Europe CM/Res(2022)2, 16 March 2022. Available at: https://search.coe.int/cm#{%22CoEIdentifier%22:[%220900001680a5d7d9%22],%22sort%22:[%22CoEValidationDate%20Descending%22]} [Accessed 02.04.2025].

timeframe stipulated by the European Convention on Human Rights. The Decision relied on Art. 8 of the Statute of the Council of Europe, which permits the expulsion of a Member for serious violations. However, the European Convention on Human Rights does not provide for a procedure of expulsion, only voluntary withdrawal after six months' notice contained in the notification addressed to the Secretary General is possible under Art. 58(1) of the ECHR. This situation testifies to the fact that procedural guarantees enshrined in the European Convention were sacrificed in favor of a political decision.

Current situation with ensuring the observance of human rights in the CIS creates prerequisites for the search for alternative legal mechanisms. In this context, a judicial body within the Commonwealth, based on common legal principles, cultural and historical proximity of the Member States and similar socio-cultural guidelines, has the potential to build the trust of citizens. Such an institutional body, unlike the ECtHR, can become a more organic instrument for the protection of rights, corresponding to the regional peculiarities of cooperation between the Commonwealth countries.

According to Armen K. Antonyan (2024, pp. 15–21), Alla A. Chechulina (2023, pp. 39–45), Aygul S. Khisamova and Irina A. Akhmadullina (2020, pp. 376–378), the establishment of the CIS Court of Human Rights should become a guarantor of strengthening the existing system of protection of human rights and freedoms in the CIS countries, and contribute to ensuring their respect at the state level.

According to the current discussions, the projects for establishing the CIS Court of Human Rights are not focused on replacing the European system, but rather on creating a parallel protection mechanism. The proposed concepts emphasize that the future institution will complement the existing administrative and judicial bodies functioning to protect human rights at the national level. Thus, citizens of States participating in both the European system and the human rights protection system at the CIS level will have the opportunity to choose which international judicial institution to apply to in order to restore violated rights. According to some researchers, in the future the CIS Court of Human Rights will be able to take into account the legal positions of other

regional human rights courts in its judgments, including the ECtHR, in order to implement the principle of humanism (Solovyov, 2019, p. 267).

It should be noted that the acceleration of the process of creating a regional court as a structure parallel to the ECtHR is fraught with significant risks. To minimize negative consequences, it is necessary to clearly define the competence and jurisdiction of such an institution, as well as to determine the place of its future judgments in the system of sources of national law of the States parties to the 1995 Convention.

IV. The CIS Court of Human Rights and Its Possible Competence in the Future

The idea of establishing the CIS Court of Human Rights has not yet been realized, but it seems to be a more realistic and less ambitious idea than creating the Eurasian Court of Human Rights at the current stage of regional integration.

For CIS States that emerged from the USSR and view their national sovereignty as a value of paramount importance, this project may raise significant concerns. Any regional court decision contradicting the interests of national leadership may be perceived as a threat to domestic stability or an interference in state affairs. Moreover, establishing an effective regional court requires a developed administrative infrastructure, qualified judges capable of adjudicating complex interstate disputes, and sustained funding. Currently, such investments are not a priority for most CIS countries.

Nevertheless, despite these political and legal challenges, the creation of a human rights judicial body within the CIS framework offers several long-term advantages. First, a regional court could ensure uniform interpretation and application of norms adopted under the CIS human rights treaties, which is crucial given the diversity of legal systems among Member States and the inconsistency of their domestic judicial practices in the realm of human rights protection.

Second, a regional dispute-resolution mechanism enhances predictability and transparency in the legal environment. In contexts where national courts often exhibit dependence on the executive branch, limited competence in international law, or low public trust, a regional

court could serve as a neutral arbiter, guaranteeing fair adjudication of interstate disputes and individual human rights complaints.

Third, the establishment of a new Commonwealth court will help to institutionalize the rule of law at the level of regional cooperation. It will promote the unification of human rights standards and encourage Member States to bring their national legislation and judicial practices in line with the unified norms in the human rights sphere. Thus, rather than replacing the need for domestic reforms, a regional court will act as a catalyst, providing an external normative framework and monitoring compliance.

Finally, a regional court could serve as an additional safeguard for the rights and legitimate interests of private individuals, particularly when domestic judicial mechanisms prove ineffective or politically compromised. Provided its jurisdiction extends to considering interstate cases and individual applications, such a court could fulfill human rights functions analogous to that of the European Court of Human Rights, but within the post-Soviet regional context.

Academic publications of recent years (Gligich-Zolotareva, 2023, pp. 126–139; Kleandrov, 2023, pp. 12–22; Klimovskaya, 2024, pp. 123–128) emphasize that such a judicial institution should be guided by the principles of political independence, efficiency, objectivity, and impartiality. In this regard, the possible competence of the CIS Court of Human Rughts should be outlined as follows.

1. Resolving interstate disputes in the field of human rights

The competence of the CIS Court of Human Rights in resolving interstate disputes may be limited to issues related to the interpretation and application of the provisions of the Convention for the Protection of Human Rights in the CIS (interstate cases by analogy with Art. 33 of the European Convention on Human Rights).[22] At the same time, the jurisdiction of the CIS Court of Human Rights regarding the

[22] Convention for the Protection of Human Rights and Fundamental Freedoms (Concluded in Rome on 04.11.1950), together with "Protocol No. 1 (Signed in Paris on 20.03.1952), Protocol No. 4 on ensuring certain rights and freedoms in addition to those already included in the Convention and the First Protocol thereto (Signed in Strasbourg on 16.09.1963), Protocol No. 7 (Signed in Strasbourg on 22.11.1984)). Collection of Legislation of the Russian Federation, 08.01.2001, No. 2, Art. 163, Bulletin of International Treaties, No. 3, 2001.

consideration of interstate complaints could be optional and would depend on the recognition of the States participating in the CIS Convention on Human Rights and the availability of a corresponding statement on the recognition of such jurisdiction (by analogy with Art. 62 of the Inter-American Convention on Human Rights).[23]

It is also possible to define a pre-trial procedure for considering interstate disputes. Any State party that believes that another State party violated the provisions of the CIS Convention on Human Rights may have the opportunity to draw its attention to such a violation in writing and request explanations (by analogy with Art. 47 of the African Charter on Human and Peoples' Rights).[24]

2. Considering individual complaints

In our opinion, when filing an individual complaint, by analogy with the procedure of applying to the ECtHR established in Art. 35 of the European Convention,[25] the applicant must comply with the necessary conditions of admissibility, namely he/ she should exhaust domestic remedies, comply with the established deadline (currently in the European system a deadline of four months is set from the date of the last decision at the national level), demonstrate the existence of a significant disadvantage (a similar requirement of a "significant disadvantage" exists in the practice of the Inter-American Court on Human Rights).[26] In addition, an individual complaint should not

[23] Inter-American Convention on Human Rights (Pact of San José de Costa Rica, 22 November 1969). Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf [Accessed 07.04.2025].

[24] African (Banjul) Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Available at: https://www.african-court.org/wpafc/wp-content/uploads/2020/04/AFRICAN-BANJUL-CHARTER-ON-HUMAN-AND-PEOPLES-RIGHTS.pdf [Accessed 07.04.2025].

[25] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 04.11.1950). Available at: https://www.echr.coe.int/documents/d/echr/convention_ENG [Accessed 07.04.2025].

[26] For example, in Gonzales Lluy v. Ecuador (2015) the Inter-American Court recognized the violation of the applicant's rights due to the HIV infection in the hospital, pointing out to a "significant disadvantage". Corte Interamericana de Derechos Humanos. Gonzales Lluy y otros v. Ecuador. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 1 de septiembre de 2015. Serie C No. 298. Available at: https://jurisprudencia.corteidh.or.cr/es/vid/883975808 [Accessed 01.06.2025].

be anonymous, similar to one that has already been considered by a Court, as well as it should not be the subject of parallel proceedings before another international body, incompatible with the provisions of the CIS Convention, manifestly ill-founded, an abuse of the right to file an individual complaint. To prevent an avalanche of cases, it is proposed to introduce preliminary filters, for example, a requirement for a minimum degree of violation.

It should be noted that in the case of *Gonzales Lluy v. Ecuador*,[27] despite the existence of pending domestic proceedings, the Court declared the complaint admissible by applying the principle of effectiveness of legal remedies. The Court emphasized that although the applicant had not formally exhausted all available domestic remedies, such remedies could not be considered effective or accessible within a reasonable timeframe, particularly given the protracted nature of the proceedings and the applicant's vulnerable status due to her serious medical condition (HIV). This decision established an important precedent for flexible interpretation of the exhaustion of domestic remedies requirement, prioritizing substantive access to justice over formal procedural compliance. By contrast, the CIS countries lack the concept of an "effective remedy" within their domestic legal cultures. Unlike the precedent-based system of the ECtHR which has developed this doctrine through its jurisprudence, post-Soviet States typically maintain a rigid formalistic approach to the exhaustion rule without considering the practical availability or effectiveness of domestic legal mechanisms.

Initially, the European human rights protection system included three bodies such as the European Commission on Human Rights, the European Court of Human Rights (ECtHR) and the Committee of Ministers of the Council of Europe with the powers to oversee the implementation of ECtHR judgments by participating States. The European Commission on Human Rights acted as a filter, deciding on the admissibility of individual complaints, and it was abolished by Protocol No. 11 to the ECHR that entered into force in 1998. Most probably, at a first stage, the CIS Human Rights Commission could also

[27] Gonzales Lluy y otros v. Ecuador. Para. 25.

act as a body capable of rejecting those individual complaints that it deems inadmissible for consideration on the merits by the Court.

Since 2006, the ECtHR has been using the pilot judgment procedure. It serves the interests of the Court, States parties to the ECHR and the applicants. With the use of this procedure States gain "a serious incentive to begin to take effective measures aimed at eliminating at the national level the systemic problem that leads to an increase in the number of clone complaints filed with the ECtHR" (Abashidze, 2012, p. 87). This experience of the ECtHR may be taken into account in the future in the activities of the CIS Court of Human Rights, too, when it faces a similar issue, namely the need to eliminate structural problems in the national legislation of the Member States, leading to an emergence of individual complaints of one and the same type.

3. Issuing advisory opinions

This power of the CIS Court of Human Rights will ensure the strengthening of the dialogue between the CIS Court and the supreme courts of the States parties to the 1995 Convention. The latter will be able to turn to the CIS Court of Human Rights and request advisory opinions on the interpretation of the CIS Convention norms in order to eliminate contradictions in the application of regional law of human rights. This power was granted to the ECtHR as a result of the adoption of Protocol No. 16 to the ECHR in 2013 (Art. 1 of the Protocol 16).[28] The experience of the African Court of Human and Peoples' Rights should also be taken into consideration. It combines the functions of resolving interstate disputes, considering individual complaints and giving advisory opinions.[29]

The practice of issuing advisory opinions will help to resolve legal conflicts between the CIS Convention on Human Rights and various

[28] Council of Europe. Available at: https://www.echr.coe.int/documents/d/echr/protocol_16_eng [Accessed 07.04.2025].

[29] Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and People's Rights (OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) of 9 June 1998). Available at: https://www.african-court.org/wpafc/wp-content/uploads/2020/10/2-PROTOCOL-TO-THE-AFRICAN-CHARTER-ON-HUMAN-AND-PEOPLES-RIGHTS-ON-THE-ESTABLISHMENT-OF-AN-AFRICAN-COURT-ON-HUMAN-AND-PEOPLES-RIGHTS.pdf [Accessed 07.04.2025].

interpretations of human rights in the Commonwealth States. It can be expected that the Court exercising this power will have the right to recommend changes in domestic law in case it contradicts the CIS Convention of 1995.[30]

The establishment of a Human Rights Court in the CIS requires taking into account the unique socio-legal, cultural and political features of the post-Soviet space. These features differ from those that exist in other regional systems of human rights protection represented by such courts as the ECtHR, the Inter-American Court or the African Court of Human and Peoples' Rights. The CIS countries face common socio-economic challenges, such as labor migration, for instance. In our opinion, the jurisdiction of the CIS Court of Human Rights may include the resolution of such cases as a specialized procedure.

The Commissioner for Human Rights in the Russian Federation Tatiana N. Moskalkova who was elected the Head of the CIS Human Rights Commission in November 2023, believes that the new Human Rights Court authorized to operate in the Eurasian space could be based on a regional document that would be integrated into the CIS system.[31]

The structural distinctions of the proposed CIS Human Rights Court will lie in its expanded jurisdiction, institutional independence, and its interaction with the supreme courts of the CIS Member States. The institutional foundations of the CIS Court of Human Rights could be defined in a specific regional treaty. Such a document should clearly describe the competence (adjudication of both interstate disputes and individual complaints, issuance of pilot judgments to address systemic human rights violations, legally binding interpretation of the CIS Human Rights Convention provisions) as well as its jurisdiction of the Court (examination of alleged human rights violations occurring within Member States of the Commonwealth of Independent States,

[30] For example, in 2009, the Ugandan Supreme Court ruled that laws on the death penalty contradict the African Charter on Human and Peoples' Rights. Attorney-General v. Susan Kigula & 417 Others. Constitutional Appeal 03 of 2006 (judgment of 21 January 2009, unreported). Available at: https://www.globalhealthrights.org/wp-content/uploads/2013/02/SC-2009-Attorney-General-v.-Susan-Kigula-and-417-Ors.-.pdf [Accessed 07.04.2025].

[31] TASS News Agency. Available at: https://tass.ru/obschestvo/10915583 [Accessed 07.04.2025].

and authoritative determination regarding the conformity of domestic legal provisions with the fundamental standards established under the CIS Human Rights Convention), establish procedures for interaction with supreme national courts (requests for authoritative interpretation of the CIS Human Rights Convention), determine the enforcement mechanisms (establishing a binding legal force to the Court's rulings through the explicit amendments to the CIS Human Rights Convention, creating specialized compliance control bodies, publishing regular state compliance reports) for implementing its judgments and advisory opinions at the national level, reflecting best practices developed overtime in the work of the ECtHR, Inter-American Court of Human Rights and the African Court of Human and Peoples' Rights.

V. Conclusion

The analysis carried out in the present article suggests that the human rights protection mechanism operating within the CIS is at the stage of its formation. The reform of the regional human rights protection system within the CIS should take into account the specifics of the political and legal development of the participating States and should be carried out step-by-step the way it was done in the European, Inter-American, and African systems.

Among the key priorities for its further development, the following areas of cooperation between the CIS Member States should be mentioned:

— elaborating the CIS Model Law to cover the following core issues: the institutional foundations of the CIS Human Rights Court, its jurisdictional parameters, procedures and mechanisms to enforce the implementation of judicial decisions at the national level including the creation of compliance monitoring bodies, and the appointment criteria and the tenure guarantees for the prospective judges;

— adopting a new regional treaty on the establishment of the CIS Court of Human Rights to establish clearly its competence, jurisdictional parameters, institutional structure, procedural rules, and relationship with national judicial systems and bringing the national legislation of

the Member States in line with it to address issues of implementing its decisions at the national level;

— updating regulatory documents, i.e., improving both domestic legal acts and model legislation in the field of human rights that exists at the CIS level (in particular, introducing amendments to the Model Law "On the Status of the Commissioner for Human Rights in the CIS countries";

— optimizing the institutional framework to increase the efficiency of the functioning bodies in the realm of human rights protection (namely, the CIS Commission on Human Rights).

The gradual strengthening of the role of the CIS Human Rights Commission can include reviewing both interstate and individual complaints on a voluntary basis by means of the special recognition of this power by the Member States. The success of the reform depends on the effectiveness, impartiality, and professionalism of the Commission.

Expanding the competence of the CIS Commission on Human Rights will eventually set the basis for establishing the CIS Court of Human Rights, the next pivotal milestone in creating the necessary institutional foundations for the CIS system of human rights protection. The launch of the CIS Human Rights Court will, in its turn, involve the need to resolve an array of legal and organizational challenges that require a detailed study by the Commonwealth States. They will have to implement a multifaceted program of measures aimed at building the effective interaction with the judicial institution soon to be created within the CIS.

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ECONOMIC CHALLENGES FOR MODERN LEGAL REGULATION

Article

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Legal Framework for the Development of Bioeconomy: Experience of International Integration Associations

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Abstract: The author examines the basics of legal regulation of the development of the newest direction of economic knowledge — bioeconomy, which is understood by modern science as economy based on the application of biotechnologies using renewable biological raw materials. Bioeconomy is closely related to environmental issues, including the implementation of the concept of sustainable development that provides for the functioning of the national economic complex of the State, when simultaneously ensuring: satisfaction of the growing material and spiritual needs of the population; rational and environmentally friendly management and highly efficient use of natural resources; maintaining favorable natural and environmental conditions for human health, preserving, reproducing and enhancing the quality of the environment and the natural resource potential of social production. The purpose of this research is to study the key regulatory documents adopted at the global and regional levels to ensure the progressive development of the bioeconomy, and the features of the implementation of the fundamental provisions of these documents into national law. In conclusion, approaches that can be borrowed into the legal system of the Russian Federation are considered.

***Keywords*:** bioeconomy; sustainable development; legal regulation; global regulation; regional regulation; law of international integration associations; genetic research; biotechnology; legislation; judicial practice

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Contents

1. Introduction

Modernity is characterized by maintaining close attention of society and states to the development of biotechnological, microbiological, molecular genetics and other research, which has become priority of economic progress (Mateescu et al., 2011, p. 451). The rapid advancement of these types of research, their integration into global and national economic systems, has given rise to a new term — *bioeconomy*, which currently means an economy based on the application of biotechnologies using renewable biological raw materials.[1] Bioeconomy is closely related to environmental issues, including the implementation of the concept of sustainable development, which provides for the functioning

[1] Bioeconomics and economics of biotechnology. Available at: https://www.econ.msu.ru/science/bioeco/about/bioeco/ [Accessed 22.04.2024].

of the national economic complex of the state, when simultaneously ensuring satisfaction of the growing material and spiritual needs of the population; rational and environmentally friendly management and highly efficient use of natural resources; maintaining natural and ecological living conditions favorable to human health, preserving, reproducing and enhancing the quality of the environment and the natural resource potential of social production (Makedon and Talavyrya, 2017, p. 31). The concept of "bioeconomics" is being actively elaborated in foreign law, including in European research on this issue (Borgström and Mauerhofer, 2016, p. 373).

In Europe and the USA significant funds and subsidies are allocated for the development of the bioeconomy. Thus, in the member states of the European Union in 2010, the volume of innovative bioeconomy exceeded 2 trillion euros, and the forecast level of its development by 2030 will be about 3 % of GDP in developed countries and somewhat more in developing countries (Rassokhina et al., 2019, p. 152). In the Russian Federation there is also a tendency to apply biological knowledge in various spheres of public life (Zhavoronkova and Agafonov, 2019, p. 100).

A key feature of the development of modern world science and production is the "biologization" of knowledge and processes (Bobyleva et al., 2019, p. 120). Nevertheless, this characteristic attributes to the global science at the turn of the 20th–21st centuries. It was at this time that a number of new interdisciplinary directions emerged, to which "bioeconomy" belongs. With a broad approach to the definition of the concept of "bioeconomy", it is considered as "a discipline that integrates economic and biological knowledge in the field of widespread application of biotechnologies to create a qualitatively new economy and achieve sustainable development of the region" (Makarchuk, 2013, p. 196). At the same time, the terms "green economy", "low-carbon economy" and "bioeconomy" are close in meaning, but not synonymous.[2]

The concept of "bioeconomy", despite its popularity, is practically not used in Russian legislation (Boyarov et al., 2021, p. 36). An exception is the Decree of the Government of the Russian Federation of 15 April 2014 No. 328 "On the approval of the state program of

[2] Bioeconomics and economics of biotechnology.

the Russian Federation 'Development of industry and increasing its competitiveness'" [3] (hereinafter referred to as the Program), where Part I of the Program states that the Russian Federation requires the elaboration of a globally competitive sector of bioeconomy, which along with nanoindustry and information technology should become the basis for modernization and building a post-industrial economy. The Program also notes that in order to solve problems in the field of modernization and innovative development, it is planned to implement measures to advance the national innovation system, including the creation of a full-fledged bioeconomy structure in the Russian Federation. Bioeconomy is also mentioned in the Comprehensive Program for the Development of Biotechnology in the Russian Federation for the period until 2020,[4] approved by the Chairman of the Government of the Russian Federation on 24 April 2012 No. 18653p-P8. However, there is no legally defined concept of "bioeconomy" in the Russian Federation. Taking into account the definitions elaborated in the doctrine, this term is given a broad interpretation (Titova et al., 2023, p. 56).

Despite the fragmentary mention of bioeconomy in legal acts, specialized educational programs are being implemented in the Russian Federation. In particular, St. Petersburg Polytechnic University is recruiting for the Master program "Bioeconomy", the purpose of which is to train highly qualified personnel with comprehensive economic, technological, and managerial competencies for the introduction of innovative biotechnologies in various spheres of production and life.[5]

[3] Collection of legislation of the Russian Federation, 05.05.2014, No. 18 (Part IV), Art. 2173.

[4] Kompleksnaya Programma razvitiya biotekhnologiy v Rossiyskoy Federatsii na period do 2020 goda [Comprehensive Program for the Development of Biotechnology in the Russian Federation for the period until 2020] (2012). Available at: https://fbras.ru/wp-content/uploads/2015/03/bio_2020_programme.pdf [Accessed 12.04.2024]. It should be noted that after 2020, the term "bioeconomics" appears in the Decree of the President of the Russian Federation dated 07.05.2024 No. 309 "On the national development goals of the Russian Federation for the period up to 2030 and for the future up to 2036" as a direction for the formation of a new market and ensuring technological leadership.

[5] What to become: a bioeconomy specialist (2020). Available at: https://www.spbstu.ru/media/news/education/who-become-specialist-bioeconomics/ [Accessed 12.04.2024].

The program of the same name is also being implemented on the basis of the Russian State Agrarian University — Moscow Agricultural Academy named after K.A. Timiryazev.[6] A number of specialized universities and biology departments include the discipline "Bioeconomy" in their curricula, the mastery of which will help future specialists acquire the necessary competencies in the field of industrial biotechnology and biotechnological production.

The emergence of relevant educational programs and training courses eloquently demonstrates the shortage of qualified specialists in this area, which is currently rapidly developing and requires the advancement of appropriate legal regulation. To improve national legal regulation in the field of bioeconomy, it is necessary to focus on approaches formulated at the global and regional levels.

II. International Legal Regulation of Bioeconomy at the Global and Regional Level

II.1. International Legal Framework for the Development of Bioeconomy

The formation of the international legal framework for the development of the bioeconomy occurs in two directions: the greening of agricultural production and industry, as well as the development of medical technologies. The first area is covered by the activities of the Food and Agriculture Organization of the United Nations (FAO). FAO is the first UN agency to formulate a bioeconomy program as one of the priority areas for the implementation of the Strategic Framework, which concentrates the efforts of all states to elaborate conditions for the implementation of innovative solutions to improve the efficiency, equity, resilience and sustainability of agricultural systems. FAO is currently involved in approximately 150 projects related to the bioeconomy, totaling over US $ 330 million, representing about 15 percent of the value of its entire portfolio.[7]

[6] Preparation of the Master program "Bioeconomics." Available at: http://inter.timacad.ru/article/?ELEMENT_ID=2243 [Accessed 12.04.2024].

[7] Bioeconomy as a catalyst for transforming agri-food systems and increasing their sustainability. Available at: https://www.fao.org/newsroom/detail/FAO-bioeconomy-agrifood-systems-science-innovation-forum-2023/ru [Accessed 12.04.2024].

In 2020, FAO hosted the Global Bioeconomy Summit. As a result of this event, a Communiqué was prepared.[8] In it for the first time at the international level a definition of the concept of "bioeconomy" was presented as "the production, use, conservation and restoration of biological resources, including relevant knowledge, scientific disciplines, technologies and innovations that provide sustainable solutions (information, products, processes and services) both within all sectors of the economy and at the level of their interaction, and contributing to the transition to a sustainable economy".[9] Also during the Summit, it was emphasized that in the future the bioeconomy will become a tool, the use of which will help rid the growing population of the planet of poor-quality food products, replacing them with nutritious and environmentally friendly ones; it will ensure sustainable development, reduce environmental damage and significantly reduce waste. At the same time, the FAO emphasizes that the bioeconomy is not limited to the introduction of innovative, "green" solutions in agricultural and industrial production, but involves scaling the experience of "green" development to other areas (for example, medicine).

Sustainable development is becoming the fundamental concept for the functioning of global human society. However, FAO recognizes that not everything related to the bioeconomy is sustainable. Thus, obtaining bioenergy, the most important component of the bioeconomy, can negatively affect the progress of national economies, traditionally focused on the extraction and export of non-renewable energy sources, and pose a threat to food security. It is assumed that at the national level, states must ensure a balance between the "environmental friendliness" of the bioeconomy and the potential threats associated with the reorientation of the domestic energy market towards a "green" course.[10]

[8] Expanding the Sustainable Bioeconomy — Vision and Way Forward. Communiqué of the Global Bioeconomy Summit 2020 (2020). Available at: https://gbs2020.net/wp-content/uploads/2020/11/GBS2020_IACGB-Communique.pdf [Accessed 12.04.2024].

[9] Expanding the Sustainable Bioeconomy — Vision and Way Forward.

[10] Bioeconomy as a catalyst for transforming agri-food systems and increasing their sustainability.

In 2023, under the auspices of FAO, the World Food Forum was held, within which the meeting "Bioeconomy: a catalyst for the transformation of agri-food systems" was held.[11] This event served as a platform for the exchange of views between ministers of national states on the issues of reorienting investments in the bioeconomy and preserving biodiversity as a priority. It is noteworthy that state representatives noted the expansion of the concept of "bioeconomy" beyond agricultural production to include building materials, pharmaceuticals and even vaccines.[12] The continuation of the discussion of the problems of bioeconomy advancement, which started at the 2020 Global Summit, finds its logical continuation in the designated event, as well as the formation of national strategies for promoting the "bioeconomic agenda".

Documents adopted as part of FAO events cannot be considered as legally binding. These documents are the so-called acts of "soft law" and are advisory in nature. The obvious benefit of adopting such documents is to help elaborate unified conceptual approaches to the development of relevant national legislation. However, it is not entirely fair to say that there are no legally binding mechanisms in place for the bioeconomy at the global level. Within the framework of the United Nations, the Convention on Biological Diversity of 1992 was adopted. It formulates the principles of bioeconomy arising from Art. 1 of the Convention: conservation of biological diversity, sustainable use of its components and fair and equitable sharing of benefits associated with the use of genetic resources.[13] Also the foundations of the bioeconomy

[11] Science, Technology and Innovation. Available at: https://www.fao.org/science-technology-and-innovation/science-innovation-forum-2023/programme/bioeconomy--the-catalyst-for-agrifood-systems-transformation/en#:~:text=Carina%20Pimenta%20was%20nominated%20National,from%20the%20University%20of%20Sussex [Accessed 13.04.2024].

[12] Science, Technology and Innovation.

[13] Convention on Biological Diversity, 1992. Available at: https://treaties.un.org/doc/treaties/1992/06/19920605%2008-44%20pm/ch_xxvii_08p.pdf [Accessed 14.04.2024].

are complemented by the provisions of the Cartagena[14] and Nagoya Protocols[15] to the Convention on Biological Diversity.

The concept of "bioeconomy" covers the field of medical research, including research in the field of genetics and human genomics. From the point of view of the formation of a global legal framework in this area, the experience of the United Nations Educational, Scientific, Cultural, Communication and Information Organization (UNESCO) is significant, within the framework of which a number of acts of a recommendatory nature were also adopted: the Universal Declaration on the Human Genome and Human Rights of 1997,[16] International Declaration on Human Genetic Data of 2003,[17] Universal Declaration on Bioethics and Human Rights of 2007.[18] These documents are intended to ensure a balance between the principle of protecting human rights and the principle of freedom of scientific research in the field of genomics and genetics. In the context of the development of the "bioeconomy". balancing these principles at the global (as well as national) level becomes particularly relevant.

Currently, within the framework of international law, the legal regulation of relations in the field of bioeconomy is fragmented and sporadic. Conceptual legal framework is formed at the level of recommendatory acts of "soft law"; legally binding mechanisms affect the issues of bioeconomy indirectly. At the same time, large-scale events

[14] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000. Available at: https://www.cbd.int/doc/legal/cartagena-protocol-en.pdf [Accessed 14.04.2024].

[15] Nagoya Protocol on Regulating Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 2010. Available at: https://www.cbd.int/abs/doc/protocol/nagoya-protocol-ru.pdf [Accessed 14.04.2024].

[16] Universal Declaration on the Human Genome and Human Rights, 1997. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/universal-declaration-human-genome-and-human-rights [Accessed 14.04.2024].

[17] International Declaration on Human Genetic Data, 2003. Available at: https://www.unesco.org/en/ethics-science-technology/human-genetic-data [Accessed 14.04.2024].

[18] Universal Declaration on Bioethics and Human Rights, 2005. Available at: https://www.unesco.org/en/ethics-science-technology/bioethics-and-human-rights [Accessed 14.04.2024].

carried out within the framework of FAO over the past 5 years indicate the intention of the global community to form a regulatory framework for the bioeconomy. This intention is reflected in numerous initiatives implemented at the level of international integration associations.

II.2. Bioeconomy and European Union Law

Currently, the European Union is a leader in the global bioeconomy sector (Staffas et al., 2013, p. 2751). The adoption of policy documents in the field of bioeconomy at the EU level was anticipated in the document of the Organization for Economic Cooperation and Development (OECD), adopted in 2009 — "Bioeconomy until 2030: developing a political agenda".[19] This document emphasized the importance of the advancement of biological sciences in the period 1990–2010, since such progress made it possible to apply new knowledge and biotechnologies to ensure sustainable economic development. The growth of biotechnological knowledge and the integration of biotechnologies into industrial production are becoming a condition for the development of the bioeconomy as a special economic system. The program names the following key factors for the development of the bioeconomy: an increase in energy demand combined with the need to reduce greenhouse gas emissions, the creation of platform biotechnologies, the development of research in the field of genetic modification and DNA sequencing, the presence of relevant government programs and macroeconomic incentive mechanisms. These factors and conditions should be taken into account by the OECD member states when elaborating national and supranational approaches to the development of biotechnologies. Since the majority of the EU member states are members of the OECD, the approaches of this organization could not but be accepted at the Union level (Kiryushkin et al., 2019, p. 60).

In 2012, the EU adopted a bioeconomy development strategy called "Innovation for sustainable growth: a bioeconomy for Europe"

[19] The Bioeconomy to 2030: Designing a Policy Agenda. Available at: https://www.oecd.org/sti/futures/longtermtechnologicalsocietalchallenges/thebioeconomyto2030designingapolicyagenda.htm [Accessed 13.04.2024].

(updated in 2018).[20] This document presents the main characteristics of the bioeconomy, namely

A) focusing on the future by attracting additional investments and creating new markets, including by launching investment platforms;

B) attracting public attention to environmental issues, since it is the bioeconomy that is an effective tool for solving environmental problems through following the paradigm of low-carbon and sustainable development;

C) contributing significantly to ensuring energy security and self-sufficiency in resources, including agricultural resources (a positive example in this context is the reduction in the dependence of the EU member states on hydrocarbon energy, its replacement with "green" energy, including through increased collection of biomass and its utilization) ;

D) being an effective tool for European integration and the implementation of pan-European tasks by each member state of the Union (EU institutions and bodies are working on the formation of an appropriate regulatory framework in the field of bioeconomy, including the preparation of recommendations that form the basis of national strategies and road maps).

These characteristics of the bioeconomy for the EU reflect the policy approaches formulated at the OECD level. The fundamental provisions of the OECD documents are set out in the EU program documents, including strategic planning documents. The role of these documents is to equip member states with approaches that they can use to develop a relevant regulatory framework (McCormick and Kautto, 2013, p. 2589). Program documents are quite often revised and supplemented, which is largely dictated by the rapid development of scientific knowledge and industrial production in the field of biotechnology. Thus, the updated 2018 Bioeconomy Strategy provides for 14 specific measures for the development of the bioeconomy, including strengthening and expanding the biotechnology sectors; development of national bioeconomies through the implementation of supranational program

[20] Innovating for Sustainable Growth: A Bioeconomy for Europe. Available at: https://op.europa.eu/en/publication-detail/-/publication/1f0d8515-8dc0-4435-ba53-9570e47dbd51 [Accessed 13.04.2024].

provisions into the legislation of each member state; awareness of the ecological boundaries of the bioeconomy.

In 2022, the European Commission presented a report on the implementation of the provisions of this Strategy.[21] It singled out a number of important trends in it, namely promotion at the national level of the concept of intersectoral cooperation and principles of sustainability for the development of the bioeconomy; progress in the development of the bioeconomy in the EU member states located in Central and Eastern Europe, which is associated with the formation of a favorable investment climate and financial assistance from the EU; attraction of private investment in startups in the field of biotechnology. The report demonstrated that in the decade since the adoption of the first "bioeconomy" strategy, much has been done to ensure that pan-European approaches to creating a sustainable "green" economy are reflected in the policies and programs of individual states. At the same time, at present there are still gaps in the implementation of the Action Plan in the field of bioeconomy, because not all states take a comprehensive approach to solving the problem of developing this economic system. Also, national jurisdictions have not fully resolved the issue of how to manage biomass needs to meet the best way the environmental and economic needs of a climate-neutral Europe. In addition, the problem of developing more sustainable consumption patterns needs to be addressed.

Despite the abundance of program documents, including strategic planning documents, specialized legislation in the field of bioeconomy has not yet been formed in the EU. However, a number of legally binding documents that form the sources of secondary law of the Union address the issue of bioeconomy. Among such documents it is worth mentioning acts in the field of environmental protection and acts in the field of energy policy:

a) Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving

[21] Report COM/2022/283: EU Bioeconomy Strategy Progress Report — European Bioeconomy policy: stocktaking and future developments, 2022. Available at: https://knowledge4policy.ec.europa.eu/publication/report-com2022283-eu-bioeconomy-strategy-progress-report-european-bioeconomy-policy_en [Accessed 13.04.2024].

climate neutrality and amending Regulations (EC) No. 401/2009 and (EU) 2018/1999 ("European Climate Law");[22]

b) Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No. 663/2009 and (EC) No. 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No. 525/2013 of the European Parliament and of the Council;[23]

c) Regulation (EU) No. 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species;[24]

d) Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast);[25]

[22] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No. 401/2009 and (EU) 2018/1999 (European Climate Law). Available at: https://eur-lex.europa.eu/eli/reg/2021/1119/oj/eng [Accessed 13.04.2024].

[23] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No. 663/2009 and (EC) No. 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No. 525/2013 of the European Parliament and of the Council (Text with EEA relevance.). Available at: https://eur-lex.europa.eu/eli/reg/2018/1999/oj/eng [Accessed 13.04.2024].

[24] Regulation (EU) No. 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species. Available at: https://eur-lex.europa.eu/eli/reg/2014/1143/oj/eng [Accessed 13.04.2024].

[25] Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) (Text with EEA relevance.). Available at: https://eur-lex.europa.eu/eli/dir/2019/944/oj/eng [Accessed 13.04.2024].

e) Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652.[26]

Among the documents directly related to the problems of bioeconomy development, there are also acts in the field of scientific research and innovation, in particular:

a) Regulation (EC) No. 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed;[27]

b) Regulation (EC) No. 1830/2003 of the European Parliament and of the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC;[28]

c) Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions;[29]

[26] Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652. Available at: https://eur-lex.europa.eu/eli/dir/2023/2413/oj/eng [Accessed 13.04.2024].

[27] Regulation (EC) No. 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (Text with EEA relevance). Available at: https://eur-lex.europa.eu/eli/reg/2003/1829/oj/eng [Accessed 13.04.2024].

[28] Regulation (EC) No. 1830/2003 of the European Parliament and of the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC. Available at: https://eur-lex.europa.eu/eli/reg/2003/1830/oj/eng [Accessed 13.04.2024].

[29] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions. Available at: https://eur-lex.europa.eu/eli/dir/1998/44/oj/eng [Accessed 13.04.2024].

d) Directive 2009/41/EC of the European Parliament and of the Council of 6 May 2009 on the contained use of genetically modified microorganisms (recast).[30]

The presented list of acts is not exhaustive. The years of adoption of documents indicate that "bioeconomy issues" have worried European legislators since the late 90s of the twentieth century. At the same time, the term "bioeconomy" has not yet become a full-fledged legal category in European law. Since the process of systematization of supranational legislation in the field of biotechnology at the level of the European Union is currently ongoing,[31] the possibility of this term gaining regulatory recognition, as well as the formation of basic principles of legal regulation in this area, is increasing.

II.3. Bioeconomy and International Integration Associations of South America and Africa

The "bioeconomy" agenda is also reflected in the documents of international integration associations in South America and Africa. Taking into account the large number of integration associations, we will focus on two organizations that carry out active rule-making work in areas directly or indirectly related to the bioeconomy.

The experience of the South American Common Market (MERCOSUR), within which a strategy is also elaborated to promote the bioeconomy as a key component of competitive development is quite notable. At the same time, MERCOSUR regulation in the field of bioeconomy is advancing under the influence of the EU, which is dictated by the successful bilateral interaction of these international

[30] Directive 2009/41/EC of the European Parliament and of the Council of 6 May 2009 on the contained use of genetically modified micro-organisms (Recast) (Text with EEA relevance). Available at: https://eur-lex.europa.eu/eli/dir/2009/41/oj/eng [Accessed 13.04.2024].

[31] In particular, in 2023, the European Commission presented a draft Proposal to simplify the research and commercialization of gene-edited plants. The goal of this document is to create an enabling environment for scaling up research that improves the resilience of crops to climate change, pests and diseases, and to create plants that require less fertilizer. This proposal is consistent with the targets of the supranational Bioeconomy Strategy.

organizations. The legal form of such interaction was the conclusion of the EU-MERCOSUR Trade Agreement,[32] which stipulates that the parties undertake to share such goals and values as sustainable development, environmental protection, combating climate change, encouraging companies of the parties to act responsibly and maintaining high food safety standards. These targets are consistent with the key provisions of the EU strategic documents in the field of bioeconomy. At the same time, MERCOSUR pursues an independent policy in the field of biotechnology, focusing on the universal and regional agenda. The MERCOSUR member states (Brazil, Argentina, Uruguay, Paraguay) adopted the terminology of the UN Convention on Biodiversity, including the provisions of the Nagoya and Cartagena Protocols, implementing it into program documents for the development of biotechnologies, nanotechnologies and the bioeconomy.[33]

At the MERCOSUR level, Resolution Mercosur/GMC/RES No. 13/04[34] was adopted. It emphasizes the importance of the use of biotechnology in agricultural production. This Resolution established the Special Group on Agricultural Biotechnology that later transformed into the Commission on Agricultural Biotechnology. The Commission's tasks include harmonizing the regulatory framework in the field of biosafety and coordinating the actions of member states in relation to genetically modified organisms. The document provides an important rule according to which, if a MERCOSUR member state authorizes the use of a genetically modified organism for the production of food for humans or animals at the national level, such state must notify the Commission on Agricultural Biotechnology. Thus, the Commission exercises control over the circulation of genetically modified organisms

[32] EU-Mercosur trade agreement: the agreement in principle, 2019. Available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement/text-agreement_en [Accessed 13.04.2024].

[33] In particular, in Argentina the Federal Program for the Promotion of Biotechnologies and Nanotechnologies is being implemented, in Paraguay — the National Policy and Program in the Field of Agriculture and Forestry.

[34] Resolution Mercosur/GMC/RES No. 13/04. Available at: https://servicios.infoleg.gob.ar/infolegInternet/anexos/105000-109999/108789/norma.htm [Accessed 13.04.2024].

within the framework of the above-mentioned international integration association.

To finance activities in the field of biotechnology at the MERCOSUR level, the Structural Convergence Fund operates, implementing the project "Research, education and biotechnologies applied in health care". This project provides funding for effective solutions to combat chronic and infectious diseases.[35] Another financial instrument for supporting programs in the field of bioeconomy and biotechnology is joint financing of projects with the involvement of the state or an integration association. Thus, GMC resolutions No. 58 of 2005 and No. 01/14 of 2014 approved the signing of the Biotechnological Project Financing Agreement between MERCOSUR and the European Union, BIOTECH I and II. The agreements, also known as BIOTECSUR,[36] aim to promote the development and application of biotechnology in MERCOSUR. At the same time, the coverage of the areas of use of biotechnologies is expected to be as wide as possible: agriculture, healthcare, scientific research, etc.

As for the experience of international integration associations in Africa, in this case, unlike South America, it is not representative in terms of the formation of specialized strategies for the development of the bioeconomy. African integration associations demonstrate an example of fragmented regulation in this area. At the same time, some integration associations have adopted program documents covering certain aspects of "bioeconomy" issues (Poku et al., 2018, p. 134). Thus, the African Union has had a Policy and Guidelines for Bioenergy Development in Africa since 2013,[37] which aims to improve energy security and access, as well as rural development in Africa. As goals for the advancement of the bioenergy sector, the document enumerates: integration of bioenergy into energy balance strategies and national

[35] The MERCOSUR Fund for Structural Convergence (FOCEM).

[36] BIOTECSUR, 2023. Available at: https://www.recyt.mercosur.int/biotecsur/po/biotecsur.php [Accessed 13.04.2024].

[37] Africa Bioenergy Policy Framework and Guidelines Towards Harmonizing Sustainable Bioenergy Development in Africa, 2013. Available at: https://au.int/sites/default/files/documents/32183-doc-africa_bioenergy_policy-e.pdf [Accessed 13.04.2024].

development strategies that improve access to energy; integration of policies, measures and actions (e.g standards) with regional initiatives; developing cooperation with industrialized countries to benefit from knowledge and technology transfer; adaptation of sustainability criteria adopted in other states and (or) integration associations or proposed at the international level. At the same time, it must be stated that bioenergy is only a part of the bioeconomy, and a significant number of areas of development of the bioeconomy have not been covered by specialists in the field of African integration. Currently, even at the level of such a large-scale integration organization as the African Union, an integrated approach to promoting the bioeconomy on the African continent is not being implemented.

II.4. Bioeconomy in the Post-Soviet Jurisdictions: theCommonwealth of Independent States and the Eurasian Economic Union

Among international organizations, including international integration associations operating in the post-Soviet space, let us turn to the relevant experience of the Commonwealth of Independent States (CIS) and the Eurasian Economic Union (EAEU). It should be noted that neither in the first nor in the second case is it possible to talk about the presence of program documents, including strategic planning documents, in the field of bioeconomy. At the same time, it would also be unfair to say that the documents of the CIS and the EAEU do not at all cover the issues of promoting the bioeconomy in their member states. We are talking here about the initial stage of the formation of legal regulation, when the key term "bioeconomy" is not reflected in official documents, but individual aspects and characteristics of the bioeconomy penetrate into supranational regulation (Titova et al., 2023, pp. 56–79).

Within the CIS there are a number of documents that can be meaningfully attributed to "bioeconomy" issues. In particular, in 2013, by decision of the Council of Heads of Government of the CIS, the Concept of cooperation of the CIS member states in the field of use of renewable energy sources and the Plan of priority measures for its

implementation were approved.[38] This Concept is aimed at expanding interstate cooperation in the field of use of renewable energy sources (RES) and further development of their application. It is based on the priority of the economic interests of the CIS member states and is aimed at creating conditions conducive to ensuring their energy security and sustainable development, which also characterizes the bioeconomy.

In addition to the "energy" component, CIS documents also cover the environmental agenda. Thus, the Model Law "On environmental responsibility in relation to the prevention and elimination of harm to the environment" (adopted at the thirty-third plenary meeting of the Interparliamentary Assembly of the CIS Member States by Resolution No. 33-10 of 3 December 2009)[39] provides for a system of environmental responsibility for the prevention and elimination of harm environment by shifting the burden of compensation for environmental damage from society as a whole to economic entities whose activities caused harm, including a definition of the concept of "sustainable state of the environment" and enshrining the principle of international environmental law "the polluter pays".

In addition, another document contributes to the formation of a "bioeconomy" paradigm in the CIS — the Model Law on the Protection of Human Rights and Dignity in Biomedical Research in the CIS Member States (adopted in St. Petersburg on 18 November 2005 by Resolution 26-10 on 26th plenary meeting of the Interparliamentary Assembly of the CIS Member States).[40] This document proposes unified approaches to the formulation of state guarantees for the protection of human

[38] Concept of cooperation of the CIS member states in the field of use of renewable energy sources and the Plan of priority measures for its implementation, 2013. Available at: https://mpei.ru/Structure/Universe/IHRE/structure/reee/Documents/consept-plan-2013.pdf [Accessed 13.04.2024].

[39] Model Law "On environmental responsibility in relation to the prevention and elimination of harm to the environment" (adopted at the thirty-third plenary meeting of the Interparliamentary Assembly of the CIS Member States by Resolution No. 33-10 of 3 December 2009). Available at: https://base.spinform.ru/show_doc.fwx?rgn=29907 [Accessed 13.04.2024].

[40] News Bulletin. Interparliamentary Assembly of States Parties of the Commonwealth of Independent States (2006). Vol. 37. P. 312–326.

rights, dignity, autonomy and integrity when conducting biomedical research, based on the provisions of the state constitution, and taking into account the need to implement the principles proclaimed in key international documents.[41] However, model legislation is not legally binding; in fact, it only helps to harmonize national legal regulation within the framework of an international organization. In this area, this helps the participating states to develop common approaches and level out emerging legislative contradictions.

Unlike the CIS, in the acts of the Eurasian Economic Union one can find mention of the term "bioeconomy". In particular, Order of the Council of the Eurasian Economic Commission dated 18 October 2016 No. 32 "On the formation of priority Eurasian technological platforms"[42] mentions development in the field of biotechnology and bioeconomy as the goal of creating the Eurasian technological platform "EURASIABIO" (Yakovets and Rastvortsev, 2016, pp. 6–21). Also, certain aspects of the bioeconomy (including innovative pharmaceuticals in terms of the production of high-tech medicines) are reflected in such EAEU documents as Decision of the Council of the Eurasian Economic Commission dated 3 November 2016 No. 78 "On the rules for registration and examination of medicines for medical use",[43] Decision of the Council of the Eurasian Economic Commission dated 3 November 2016 No. 76 "On the approval of the requirements for labeling of medicinal products for medical use

[41] Such documents include the Nuremberg Code, the International Code of Medical Ethics of the World Medical Association (WMA), the WMA Declaration of Helsinki, the Council of Europe Convention on Human Rights in Biomedicine, the International Guidelines for Biomedical Research Involving Human Subjects (CIOMS), the Qualitative Guidelines clinical practice of the World Health Organization and recommendations of the WHO ethics committee conducting the examination of biomedical research.

[42] Order of the Council of the Eurasian Economic Commission dated 18 October 2016 No. 32 "On the formation of priority Eurasian technological platforms". Available at: https://docs.cntd.ru/document/456047406 [Accessed 13.04.2024].

[43] Decision of the Council of the Eurasian Economic Commission dated 3 November 2016 No. 78 "On the Rules for registration and examination of medicines for medical use". Available at: https://docs.cntd.ru/document/456026097 [Accessed 13.04.2024].

and veterinary medicinal products".[44] At the same time, within the framework of this integration association, a unified concept for the development of the bioeconomy has not yet been formed.

III. Conclusion

To summarize this research, it should be noted that at the global and regional levels an attempt has been made to create unified approaches to the development of the bioeconomy, which need to be adapted to national legal orders. Such approaches include transition to a sustainable economy; introduction of "ecologically friendly" food production using high-tech innovative technologies (biotechnologies); environmental protection and reduction of production waste; scaling the experience of "green" production to the field of medicine and pharmaceuticals and other environmental issues and will significantly reduce waste. Moreover, such approaches are formulated mainly in program documents and strategic planning documents, which at the global level are advisory in nature, so their implementation depends entirely on the political will of states. Legally binding international treaties and agreements also reflect the "bioeconomy" agenda, but such reflection is fragmented and sporadic. A positive example of consolidating the principles of legal regulation of relations in the field of bioeconomy is the European Union, within which not only relevant policy documents are in force, but also legally binding acts (regulations, directives and decisions) have been adopted that take into account trends in legal regulation at the global level. As for integration associations with the participation of the Russian Federation, at present neither the CIS nor the EAEU have adopted regulatory documents that would formulate the legal framework for the development of the bioeconomy. At the same time, taking into account the formation of a common market of the EAEU, including in the field of agricultural

[44] Decision of the Council of the Eurasian Economic Commission dated 3 November 2016 No. 76 "On approval of the Requirements for labeling of medicinal products for medical use and veterinary medicinal products". Available at: https://docs.cntd.ru/document/456026094 [Accessed 13.04.2024].

products, industrial products, as well as medicines, it seems necessary to develop a framework for regulating the bioeconomy on the part of the institutional structures of the Eurasian Economic Union.

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Compliance Control, Economic Expertise and Foresight in Business Legal Risk Management

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Abstract: The authors of this study analyze problematic aspects of the interrelation of economic processes in entrepreneurial activity with certain issues of legal regulation and law enforcement. Taking into account the current problems of law enforcement, this work pays special attention to the need to apply timely practical analysis of the main legal risks of business. The problematic aspects of legal awareness on the use of expert assistance in bankruptcy, tax and economic disputes, in the investigation of economic crimes, in "shareholder" conflicts, as well as in the processes of countering corporate fraud and corruption are touched upon. The methodological basis consists of general scientific and private scientific methods of cognition of socio-legal phenomena, normative, logical, systemic, functional, retrospective analysis. A separate place is given to the study of the ability of business entities to effectively defend themselves against unjustified claims from the State, counterparties, creditors and former partners, as well as issues of effective use of tools of prevention and combating corporate fraud. According to the results of the study, the authors reveal from a scientific and law enforcement point of view the positive trend of attracting experts to prevent risks in the process of entrepreneurial activity.

Keywords: business conflict; compliance control; crime investigation; legal awareness; forensic; legal risk; anti-fraud

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Contents

I. Introduction

The concentration of legal risks in domestic business is such that entrepreneurs can be in different legal statuses on the same day — as a plaintiff and a defendant, receive a billion dollar fine, act as victims, become suspects or defendants in criminal cases. This applies fully not only to business owners, but also to the management and staff of Russian companies.

The increase in the so-called "dangerous concentration of law" in the economy is influenced by corporate conflicts and wars, economic and tax disputes, and the work of regulatory and law enforcement agencies.

"Own" and "foreign" dubious and technical counterparties, a toxic business environment where shadow settlements occupy a stable significant share, high demand for cash, corrupt entry into many markets, the possibility of appropriating other people's assets and labor results by forcing transactions in court — these factors dilute standard financial and economic transactions related to the creation of added value in the Russian economy, profit extraction.

On the one hand, companies and their owners are harmed by unscrupulous counterparties and their employees in fraudulent actions; on the other hand, the schemes and peculiarities of financial and economic activities implemented by the beneficiary and managers themselves are often in the zone of a whole range of legal risks: from violation of tax or antimonopoly legislation, restrictions in the sphere of public procurement to bankruptcy and prosecution for economic crimes.

As a rule, the realization of the real danger of such schemes comes too late — at the moment of realization of adverse consequences, when there is a statement, lawsuit, act from a disgruntled participant, counterparty, bank, tax or a law enforcement agency, from the moment when the transactions performed begin to be considered from a different angle.

The problem lies in legal awareness and legal nihilism, where a person may guess that wherever there is a questionable movement of finances, transformation of cash flow into cash with a questionable commodity equivalent, restriction of competition, substitution of a market asset for "pacifiers" and similar transactions, significant legal risks appear.

II. Methodology

When writing this work were used general scientific and private-scientific methods of cognition of socio-legal phenomena, logical, systemic, analysis, comparative-legal, normative-logical methods of

interpretation of legal norms and empirical material, expert assessment method.

Was also used in the Sections III (1, 2, 3), IV (1, 2), used method risk identification, in Section V used methods analysis of the possibility of bringing to subsidiary liability, analysis of bankruptcy causes and statistical method.

The Section VI (1, 2, 3, 4) used methods of systematization and illustration when examining the elements of corporate fraud.

III. The Current State of the Processes Taking Place

According to the theory of risk management, legal risks are risks of violation of law and contract. First of all, legal risk is associated with legal problems and restrictions, administrative fines, loss of permits, licenses. Often, for a business, legal consequences translate into losses, loss of assets, deterioration of business reputation. Moreover, the realization of the most significant legal risks can easily lead to the bankruptcy of the company with subsidiary liability of management and owners.

The most relevant and problematic branches of "compliance" in Russia now are such spheres of legal regulation as anti-fraud and corruption, tax, bankruptcy, anti-money laundering and countering the financing of terrorism (hereinafter AML/CFT), antimonopoly, budget and sanctions law.

The most dangerous violations are at the intersection of sectoral and criminal law, because when proving the intent and a large amount of damage from transactions and operations, criminal liability appears, where law enforcement agencies are involved in the orbit of social relations. In such situations it is not always useful for business.

Depending on the size of the company and the availability of resources, entrepreneurs manage legal risk in different ways. Large businesses have special units and employees: compliance officers and compliance services that are either located in legal departments or are represented as independent structures. The word "compliance", like many other foreign words in Russian, has quite easily taken root in the domestic business lexicon and become popular. Large companies

always have the opportunity to invite external consultants. Compliance services are actively provided by former big four companies (Deloitte, PricewaterhouseCoopers, Ernst & Young и KPMG) and second-tier consultants. In small and medium-sized businesses, lawyers and CEOs are in charge of "compliance", dealing with legal risks.

However, the problem of compliance with legislation is equally relevant for any enterprise, regardless of its scale, legal, legal form. Unfortunately, the effectiveness of domestic compliance often leaves much to be desired. In a large business, compliance control may be too focused on its area of expertise, leaving related risks of adverse consequences unattended.

The classic conflict of interest story is as follows: anti-fraud — taxes, where identifying and recognizing fraudulent histories in accounting leads to new underpayment situations. Moreover, risk management constructs in the form of "tracing from foreign solutions" are more difficult to understand. These circumstances lead to the fact that the conclusions of the compliance service are not always taken into account when making management decisions.

In most cases, general lawyers and entrepreneurs themselves do not always have enough time and specialized knowledge to understand the significance of this or that legal risk, to work on it in order to exclude the occurrence of unfavorable consequences of the fiasco.

Not in all cases it is possible to promptly calculate the legal risk to the end, and in some situations it is not possible at all. Moreover, within the implementation of new institutions, administrative subjects complicate the task and follow the path of introducing more and more new norms and restrictions in the studied sphere of public relations. The ongoing processes are dynamic and do not guarantee the stability of legal norms.

As everyone knows, in the recent past, interaction with a "one-day firm", as well as bankers' cashing out of funds, was considered a norm of behavior. Nowadays, such entities have had their licenses revoked, individuals are hiding from subsidiary liability, and their clients, consumers of services, having lost tax disputes in all instances, are at the stage of bankruptcy and are involved in criminal law relations. At the same time, the so-called "one-day companies" to a certain

extent have remained in the market, having transformed into dubious counterparties.

From a practical point of view, such operations are best categorized into key business processes: purchasing, storage, logistics, production, construction, finance, and fulfillment.

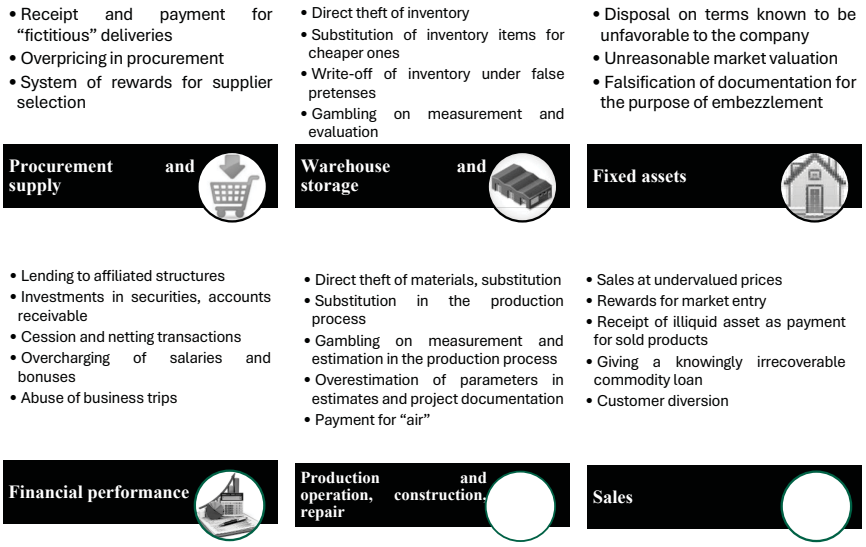

Figure 1. Anomalies in key business processes

The interconnectedness of legal risks causes a "domino effect", when one unfavorable event starts to cause a whole chain of negative legal consequences. For example, field tax audits often lead to criminal proceedings and bankruptcy of companies, as the revealed amounts of arrears are high, as they are calculated rather one-sidedly (Ryazantseva, 2019, p. 91), without taking into account real business transactions. In turn, in bankruptcy the entrepreneur has the risk of losing not only the business, but also his own property through bringing to subsidiary liability, taking into account the accusatory bias of the administrative entity. In the framework of criminal investigations, some law enforcement officers, without objectively clarifying the circumstances,

see only criminal intent in the activities of a business entity. This aspect should address the issue of specialized knowledge, which in most cases is overlooked.

Unfortunately, against the background of risk management according to translated textbooks, the role of specialized knowledge in the management of legal business risks is still in the shade. Risks in the highlighted business processes (procurement-storage-production-financing — realization) manifest themselves in three main planes:

1. economic sense of transactions and operations, their real impact on the balance sheet and financial results;

2. compliance of the transaction and operation with the law/ contract/regulations/market conditions/common business practices;

3. status of counterparties, further chain of financial and economic transactions, directions and ultimate goals of asset movement, transformation and substitution.

When examining transactions and operations in the above three dimensions, the following "traffic light" can be identified.

III.1. Definitely "Red" Zone

1) Interaction with technical organizations that do not have normal operations (mass purchases of goods and services, loans, and other money transfer operations are typical for managers and founders) (Efimov et al., 2021).

At one of the seminars with judges, when analyzing such a scheme, the question was asked — why a business steals money from itself. The reasons for transferring money from a current account to a cash or cryptocurrency case are really quite numerous. The main leitmotifs are:

— personal use (avoiding dividend distribution);

— tax avoidance (contributions to funds when partially undeclared salary, VAT, profit tax on purchases, tax on dividends);

— making various kinds of corrupt payments (it is difficult to pay a bribe from a current account).

When it becomes clear that these transactions are not a corporate fraud of hired employees, but a cash-in-transit, about which the management and owners of the company were aware, and there are any

other persons interested in the financial results (minority participants, creditors, investors), the entrepreneur runs the risk of being held criminally liable for embezzlement at his own enterprise.

2) Carrying out transactions with any counterparty. In this case, its status does not matter when market assets are replaced by technical assets on the company's balance sheet or a fictitious debt is recognized on the balance sheet.

Practice shows that, even with the most leisurely actions of law enforcement agencies, there are not many grounds for defensive counterarguments in the red zone. Withdrawal of money to technical companies and substitution of a market asset for the assets of a so-called "pacifier" through a series of transactions and firms can be easily identified and documented by bank statements, accounting documents and counterparty processing.

In such situations, it may help to prove the reality of the transactions for which the money is transferred, or to prove the market conditions of the transactions. If with the help of economic expertise it is possible to prove that the money left the company for real reasons (for example, the technical firm actually delivered goods, which were sold), then there are grounds to enter into disputable relations with the law enforcement agency regarding the qualification of the specified action or inaction as a crime.

III.2. Operations from the "Orange" Zone

1. Interaction with individual entrepreneurs (hereinafter IE) and self-employed persons who carry out financial and economic activities only with a separate company, especially if they have previously been in an employment legal relationship.

2. Relationships with organizations that have signs of doubtful activities (they have real financial and economic activities, but the share of expenses for taxes, salaries, rent is small in the payment turnover, there is a small headcount with obvious transit or other schematic operations).

3. Implementation of cessions, offsets, whereby a marketable asset is removed from the company's balance sheet and a non-technical asset

of lower value, of the value difficult to measure and of questionable utility is put on the company's balance sheet.

In the orange zone, where purchases from sole proprietorships and dubious firms, relationships with offshore firms, as well as substitution of assets with less liquid ones, the chances of protection increase. Here, economic expertise and research, if conducted in time, can play a decisive role in the realization of risk (Efimov et al., 2021).

In the majority of high-profile cases, it was the experts who managed to decide the fate of the dispute or criminal case. Among the problematic aspects in this segment it is necessary to state the circumstances of reality. In criminal cases economic expertise is formed by state experts of law enforcement agencies. In this situation, one of the main risks is the fact that experts and investigators are often located in neighboring offices. When it comes to complex data, experts often take the investigative accusatory version as a basis for the conclusion. In the ruling on the appointment of the expert examination and in the expert's report, a corresponding reservation is made about this.

At the same time, the validity of this approach raises objective doubts — too close interaction between experts and the investigator contradicts the basic principles of expert activity. When an expert takes a disputable investigative version as his/her initial data, it obviously limits his/her independence and objectivity.

III.3. Operations from the "Yellow" and Conditionally "Green" Zone

The transactions enumerated below are less dangerous:

1. "risking" improvements in accounting and reporting without withdrawing assets,

2. interaction with offshore firms,

3. any unprofitable operations where the transparency of the cash flow is lost and its real beneficiary is hidden.

They do not lead to real damage, at most the dispute around them may be in the area of lost profits or additional tax and customs charges. However, the opponents of such operations can be represented by both "red" and "orange" with the ensuing consequences (Shakhov, 2024).

Moreover, a significant volume of operations and transactions with various degrees of dubiousness, the spread of fraudulent schemes and lack of trust between market participants make other quite normal economic facts ("green zone") to be considered "under the microscope" and to find something in them.

IV. Economic Expertise in Criminal and Arbitration Cases

Economic expertise in many criminal and arbitration cases is almost as mandatory as forensic expertise. This type of expertise is appointed in those situations when accounting documents and economic information are closely related to the circumstances to be proved. If a criminal or arbitration case in one way or another affects the analysis of facts of financial and economic activities of organizations and citizens, and the knowledge of the court and investigator is insufficient for such analysis, an expert study of accounting documents is required.

Information, which is established by an expert, is used primarily to prove the objective side of a crime or a civil tort. By means of conclusions of the expert about facts of financial and economic activity it is the investigator and the court, and not the expert, that establish such important circumstances as ways of committing a crime (violations), its traces, the size of the damage caused, the causal link between the act and the consequences.

Economic expertise in arbitration and civil cases is extremely multi-tasking, the following groups of issues can be distinguished (Wewel et al., 2024, pp. 10–14):

— the conformity of the reflection of the performed operations with the rules of accounting;

— compliance of synthetic and analytical accounting data with primary accounting documents;

— availability of the necessary amount of funds on the settlement accounts of organizations for repayment/payment/payment of accounts payable, wages and other liabilities;

— on the grounds on which there was a movement of funds on settlement accounts (cash) of organizations;

— on the amount of taxes and fees not assessed and not paid by the taxpayer;

— about the borrower's creditworthiness;

— the completeness and timeliness of repayment of borrowed funds;

— changes in the debtor's financial condition, the impact of transactions and operations and other economic factors on such changes;

— on establishing the share of the company's founders in the division of profits, assets to be distributed;

— the existence of misstatements in the financial statements, their impact on the company's fulfillment of its obligations, and the correct calculation of certain financial indicators.

— on recreating distorted records;

— on the amount of received losses and lost profits on transactions, etc.

IV.1. Tax Risks and Compliance of the Company's Activities with the Requirements of the Tax Legislation

Tax control over the past 10 years has made a powerful leap forward. Tax authorities have become high-tech, learned to collect and analyze a significant amount of data on the taxpayer, its financial and economic activities, other data in state databases.

With full information about the taxes calculated and paid by taxpayers at their disposal, inspectors compare them with commodity chains from their database AIS "Tax-3" (including from the connection of electronic purchase and sales books for value added tax), with data on the movement of money on settlement accounts (received in real time from banks), information on property, owners, connections from such databases as "Unified State Register of Legal Entities", "Fedresource", "Rosreestr". Also, the tax authority easily and gladly uses data from "FCS", "Civil Registry", "Ministry of Internal Affairs". If, based on the results of such a comparison, the tax authority finds gaps in the real volume of transactions that create tax bases (revenue, property) and declared, then claims on the chains are made to the real business.

The tax authority can quite easily separate a taxpayer "with the potential to pay" from disputable and technical counterparties. In the course of the desk work and "pre-verification" analysis, inspectors find inconsistencies in the comparison of data on tax bases, and at first demands and questions are sent to the company with the task to "clarify". In answering these questions, as well as monitoring the situation with tax planning, there is a benefit of engaging specialists, as inspectors quite often come to questionable and unsubstantiated conclusions, which should be double-checked with the help of independent experts.

As a rule, the claims of the tax authority are built around 6 main issues (Freedman et al., 2019, pp. 74–116):

1. shifting the tax burden to technical counterparties,

2. artificial fragmentation of business in order to leave the general taxation system,

3. other issues of the "abuse of a right": an attempt to offer another qualification for transactions "agent/commissioner — supplier", "loans/investments — realization", etc.,

4. gray salary and half-gray payments to staff to avoid paying insurance premiums and "PIT" (Personal Income Tax),

5. disputes around evaluation of assets to reduce property tax: the cadastral value, qualification as movable or immovable property,

6. concealment of the tax base: an income, a part of activity, a volume of property.

The general attitude in the country is formulated, "taxes must be paid". If the taxpayer did not want to voluntarily induce and clarify, then the heavy artillery — "tax audit" enters the fray. Tax authorities are developing, including in the framework of digitalization — the use of electronic resources, the development of evidence. However, these resources are often used to "scare to pay", rather than to delve into the facts, which may turn out to be very controversial. Tax authorities do not accept primary documents for formal reasons and without special knowledge in various spheres of social relations, make unilateral conclusions.

Facts that require the application of specialized knowledge are often not deeply elaborated in a tax dispute, because neither the tax authority nor the taxpayer does not involve experts. There are whole blocks of

issues that in a tax dispute, in fact, cannot be established without the help of experts, but the tax authority becomes such an expert itself or invites its own experts.

At the same time, the tax authority may come to unfounded conclusions that require additional verification by independent experts on the following issues:

— the volume of supplies of goods, works, services, their cost and quality;

— the taxpayer's own labor;

— the ability to produce a volume of output without resources;

— creating all the documents on one computer;

— forged documents and stuff.

All the above-mentioned sets of questions are disclosed through setting appropriate tasks for the experts. Through their solving the experts can determine the following answers to the questions:

1. the true market value of goods, works, services, other tasks of appraisal expertise;

2. the actual volume of construction and installation works, other types of works, other tasks of construction-technical and technological expertise;

3. technological parameters necessary for the production of goods, the performance of work;

4. the presence/absence of forgeries in documents, other tasks of forensic examinations;

5. changes in electronic documents, other e-discovery and computer forensics challenges.

Appraisers, commodity experts, builders, criminalists, and IT specialists are actively involved in the establishment of such circumstances.

However, there is also an economic, analytical set of questions:[1]

— determination of actual tax liabilities using the calculation method, the tax reconstruction method, and mixed methodology;

— calculation of the tax consequences of adding and removing operations when modeling business processes within a group of companies;

[1] Tax Reconstruction, (2022). Available at: https://www.nalog.gov.ru/rn12/news/activities_fts/12395197/ [Accessed 15.04.2025].

— establishing the source of the value-added tax on a "tree of relationships" (where graphically shows the relationship between the company, its suppliers, contractors of the second and subsequent links);

— confirmation/proof of economic feasibility of transactions and operations;

— establishing the cash flow and the real beneficiary of the tax savings.

It is advisable to engage experts within the framework of challenging the results of tax control, when it is necessary to verify the conclusion of an expert examination conducted at the initiative of the tax authority, since it is not excluded that the tax authority may have missed important circumstances that require special knowledge to be established.

Among the topical tax disputes there are procurement relationships with "technical or dubious counterparties", which are at the top of the list. After an audit, the tax authorities completely exclude VAT deductions and do not include the costs in corporate income tax expenses. This approach leads to significant additional tax charges, which for many companies become unaffordable and lead to bankruptcy.

And if the taxpayer has really technical operations and paper expenses, such an approach of the tax authorities is reasonable, then in the case of real operations and the use of dubious counterparties only to increase the trade markup, the complete zeroing of such operations deprives the taxpayer of all actual expenses incurred in the purchase of goods (works, services) from a real supplier.

Not always links between companies indicate a desire to obtain tax savings. A good economic analysis can show that signs of splitting in borderline situations are artificial and do not correspond to the real financial and economic activity of the taxpayer.

IV.2. Tax Reconstruction

Tax reconstruction is the determination of tax consequences of a transaction (transactions) based on their real economic sense, when the actual tax liabilities are calculated taking into account the expenses actually incurred by the taxpayer and the VAT deductions (from the

calculation if the taxpayer has not permitted any violations) (Bykova, 2020, pp. 24–31).

Not always within the framework of tax control real expenses of the taxpayer are taken into account in full, which violates the established procedure for calculation of a profit tax and a VAT, when the amount of tax payable is determined on the basis of revenue from the sale of goods (works, services) without taking into account real expenses, while the fact of the transaction and its expenses is not questioned. This approach violates the fundamental principle of taxation stipulated in Art. 3, Para. 3 of the Tax Code of the Russian Federation: "Taxes and fees must have an economic basis and may not be arbitrary".

In order to challenge the tax authority's calculation of tax liabilities, a taxpayer must submit a counter-calculation based on proper evidence. Where a taxpayer in the course of an on-site tax audit and consideration of a case in court fails to provide proper evidence and a counter-calculation based on it, indicating that the Inspectorate's calculation of tax liabilities does not correspond to the actual conditions of its economic activity, as well as other documents and/or information that could refute the legality of the Inspectorate's position, the court shall decide in favor of the tax authority.

Thus, in the course of tax audits and tax litigation it is important to take an active position and defend your right to apply tax reconstruction, and it is possible to engage specialists to calculate actual tax liabilities. The application of tax reconstruction allows to exclude only that part of expenses, which is taken into account in the calculation of corporate income tax and the application of tax deductions for a VAT, which falls on "technical" companies. As a result, the amount of additional charges for a VAT and a corporate income tax and, accordingly, the amount of fines and penalties is significantly reduced.

V. Economic Expertise in Pre-bankruptcy and Crisis Situations

Bankruptcy in the post-Soviet space has long been associated with a means of avoiding debts. Transferring assets to a new circuit, imitating work with creditors, allowed many entrepreneurs to restart their

business, shifting their debts to the shoulders of suppliers, employees and the State, causing damage to them (Makhorkina, 2022, pp. 32–38).

However, at present we see the opposite trend, which is characterized by an excessive fascination with subsidiary liability, which owners, management, employees and even their family members are trying to be brought. With the current instability of the economy, jumps in external economic conditions and currency exchange rates, sanctions and counter-sanctions imposed on entire sectors of the Russian economy, gaps in the state regulation, and the consequences of the pandemic, the number of objective market bankruptcies is growing.

Establishing the date and causes of bankruptcy are fundamental questions that must be answered by arbitration and criminal court judges in bankruptcy proceedings. Without resolving these questions, it is impossible to establish who and what led the debtor to bankruptcy and to hold these persons criminally and vicariously liable or liable for losses caused or embezzlement committed.

Before turning to the arbitration court there is a process of confrontation between the beneficiary and the debtor's managers and the real creditors, which is attempted to be administered by a bankruptcy trustee, often affiliated with one of these two groups. In the process of investigating criminal cases under Art. 195, 196, 197 of the Criminal Code of the Russian Federation, as well as Art. 159 and 160 of the Criminal Code of the Russian Federation, for companies associated with bankruptcy, there is a need to establish the circumstances of insolvency, analyze unprofitable operations and asset withdrawal transactions.

Judges face objective problems in establishing the key circumstances of bankruptcy: it is necessary to obtain and study a significant amount of materials characterizing the financial and economic activities of the debtor and its interrelated counterparties. Over 95 percent of such materials are contracts, bank statements, primary accounting documents, purchase and sales books, and accounting registers, including those submitted in electronic form — in these matters judges do not always have enough specialized knowledge and resources to assess correctly.

Thus, it seems appropriate to involve specialists in the case and appoint a financial and economic expertise.

The tasks of financial and economic expertise largely correlate with the key bankruptcy circumstances that need to be established by the law enforcer when determining the grounds for liability:

1. the date of objective bankruptcy (experts determine the dynamics of the financial condition, clearing financial statements from suspicious transactions, establish the date of the insufficiency of property to satisfy creditors' claims);

2. the cause of bankruptcy (experts study and rank the factors that negatively affected the financial condition, determine by a factor analysis the degree of influence of each transaction, operation or other fact of economic activity);

3. the presence of suspicious transactions (experts examine and identify economic materials of information on unprofitable and economically inexpedient operations by means of the automated accounting system);

4. the presence of external negative factors and the degree of their influence on the financial condition (the task of the court and experts coincides) (Timchenko, 2024);

5. the role of the beneficiary, management and other controlling persons in the crisis situation, whether the bankruptcy filing date has been missed (experts determine the date of insufficiency of assets to meet obligations);

6. grounds for bringing controlling persons to subsidiary liability for losses (experts determine the date of the insufficiency of property to satisfy creditors' claims and the cause of bankruptcy, carry out an analysis of transactions and external factors).

In fact, it is impossible to establish the cause of bankruptcy in a company where there was at least some scale of real financial and economic activity without conducting a factor analysis. It is also impossible to establish the date of objective bankruptcy without a market evaluation of assets, clearing the financial statements from the suspicious transactions established by the court and the expert.

Attempts of judges to solve these issues independently are possible in obvious situations where there were actually no real assets, and financial and economic activity is characterized by two-three operations, but in most cases of bankruptcy of real medium and large businesses

establishing the key circumstances of bankruptcy without involving experts and specialists is impossible, there is a high risk of coming to wrong conclusions.

In this case, the analogy with the pathological examination and the conclusion about the cause of death is quite appropriate. Even if the head was severed, the death could have occurred first from a drug overdose, which the court cannot establish without an expert.

In the "bankruptcy" set of questions, the role of preventive actions and research is extremely important. It is specialists who can promptly suggest that bankruptcy cannot be avoided and it is necessary to prepare for it. Then the next important issues become the tasks of effective "pre-bankruptcy" preparation of the debtor and its managers and beneficiaries, an analysis of risks of bringing to subsidiary liability and recovery of losses.

In fact, the flip side of a compliance audit is a forensic audit.

VI. Forensic

The classic "anti-fraud" formula "the more a business spends on defense, the fewer problems it has" does not work in Russia. Economic crimes as real parasites "live and multiply" in a company, regardless of its size, margins, or industry. It is clear that if the owner of a small family firm is maximally involved in all business processes, perfectly understands where and how the added value is created and how costs are formed, it is difficult but possible to deceive him, because even here there are brave and enterprising employees ready to surprise even the most experienced owner and director. This issue is of particular relevance in corporate relations of medium and large businesses, where owners, management and control are dispersed and remote from real business processes.

Many consultants selling fraud protection (especially foreign-made ones) will strongly disagree with our opinion. It would seem that everything necessary for effective counteraction has been created and is functioning perfectly: several lines of defense have been built, employees have undergone "anti-fraud" training, the security service, the internal audit and even a hotline are working, control automation

has been completed and a system of competence and responsibility sharing has been implemented.

However, fraudsters overcome this defense: software is put "for a tick", does not see the whole picture of financial and economic activity, internal, information security service and auditors cannot control each operation, documents are destroyed, internal regulations written on the basis of foreign practice do not take into account domestic specifics, fraud penetrates into the gray areas of tax optimization, stimulating the formation of unions in organized groups and much more.

Fraudulent schemes are becoming more and more complex. Thanks to the elimination of bad banks, the growth of culture and financial literacy of business in general, now only in the most extreme and uncontrolled cases buy "air" from a one-day firm, but such schemes continue to occur.

Forensics consulting can be divided into two areas:

1) debugging the business fraud prevention system;

2) properly responding to and documenting business abuses, followed by litigation or other intelligible prospect.

There are three main elements of corporate fraud: embezzlement of assets, corruption and false reporting (Skipin et al., 2017, pp. 13–21). Asset theft can include fraud, embezzlement, misappropriation, embezzlement, and even regular theft, if committed in the company. This includes all schemes to withdraw assets from the company, when cash and other assets leave the company without equivalent counter-performance of obligations: either they are simply taken away, or some empty, non-equivalent or technical assets are supplied.

When an asset is withdrawn, a shortage is created in the accounting, but if the criminals are more skilled and realize that the shortage will be revealed during the inventory, when the asset is used, they will take actions to hide the shortage or balance it out.

For example, the money is out, but there appeared a bill of exchange of LLC "Three Horses", it is unclear when we will sort out how liquid it is and how much it is actually worth. If something was stolen in the process of production, it can be written off, so that the shortage is not hidden, that under some spoilage, the norms of the increased write-off in the process of machine operation — the main thing is that the book

balance with the actual on such stock came together. Moreover, in such a case the theft of assets will not be discovered so easily.

Falsification of reporting is all schemes of data distortion, committed to conceal the real financial state in order to deceive the investor, creditor, owner, controller. There are plenty of reasons to falsify reports — to postpone the collapse of the business, to get a bonus, benefits, to deceive the inspection from the parent organization about the real state of affairs in the subsidiary company, etc.

Corruption can be "price" or "non-price". "Price" — is associated with embezzlement and leads to the withdrawal of an asset from the business to an unscrupulous counterparty who, by corrupting our employees and managers, obtains non-market terms of cooperation.

"Non-price corruption" does not directly affect assets, they do not decrease, and they do not go out, but at the same time corporate employees, using their official position, do some useful things for counterparties and get money for it: for example, they moved products to some more prominent shelf, and so on. "Non-price corruption" does not lead to embezzlement and direct losses, but it is also very dangerous in terms of reputation.

In corporate fraud in general, harm is done to the company and its beneficiaries, and traces are reflected in accounting and other economic information. Falsification of accounting and reporting are very common ways of concealing traces of embezzlement or certain preparations for its commission.

"Constructor" abuse consists of the following operations (Skipin et al., 2017, pp. 13–21):

1. deceit and (or) a use of an official position;

2. a "physical" withdrawal (and sometimes removal) of stolen (received) funds from the company;

3. hiding traces of fraud, creating an allowance for embezzlement.

These operations may proceed sequentially, in parallel, or even ahead of each other.

Thus, the creation of a provision for theft precedes the fact of theft itself. Documents concealing the shortage and write-off entries for a natural loss may be made simultaneously with the removal of assets from the enterprise.

Corporate frauds are committed (individually or jointly) by:
— personnel;
— management, top management;
— counterparties;
— third parties.

We also have stories of business beneficiaries themselves pulling margins out of the company by rather crude means, evading tax payments and dividends to minority owners. These schemes are no longer classic forms of corporate fraud, since the harm is primarily caused to the State and minority shareholders, but they carry extremely high criminal risks for such beneficiaries.

As a rule, personnel fraud should be detected by primary documents and analytical registers reflecting transactions in the area of responsibility of employees. Anomalies here are tied to specific transactions and assets to which a particular employee has access. Analytical accounting registers and primary documents reflect incomprehensible interrelationships, procedures and events, such as new addresses of other firms, additional registers, deviations both downward and upward in the volume of product deliveries, assortment structures, prices, etc.

In order to detect employee fraud, it is necessary to go beyond simply fixing the right document, checking it for compliance with the law and internal regulations, it is necessary to understand the authenticity of the document and the reality of the transactions it reflects (writing off inventory for a natural loss in the amount of 50 million rubles seems to fit all regulations, but in reality it reflects the concealment of embezzlement). Management fraud is more pronounced in reporting and synthetic registers, as the impact of their misconduct on the enterprise's operations is large.

Anomalies in the business processes and activities of an enterprise can be identified by identifying alarming trends and events. For example, substitution of some assets for others, unusual transactions at the end of the reporting period, high debts or a large share of overheads, faster growth of expenses compared to revenues, etc.

In addition to anomalies in financial reporting, they can also be observed in the organizational structure of the enterprise: an overly

complex organizational structure, the use of services of banks and financial institutions with dubious reputation, frequent changes of third-party consultants, lawyers, auditors and others.

A typical corporate fraudster who causes maximum damage is a man, 35–50 years old and in the prime of life. He is a family man, married, has children, an active lifestyle, sports, tourism, smart, well — educated, and knows how to do maximum damage. Gives the impression of a self-confident and honest person. He works with confidential information, does not want to go on vacation, will not let anyone into his area of responsibility. And let us just say that it is often a shock to the company that it is this seemingly good employee who causes harm.

On average, the damage caused by fraud amounts to at least 5 % of companies' revenue, which is quite significant. The longer the scheme drags on, the more losses fraud causes. "Anti-fraud systems"[2] are complicate, but do not hinder. Earlier it was said that "anti-fraud systems" are quite effective in fighting fraud, and that indeed the hotline, the division of responsibilities, competencies, the introduction of anti-fraud regulations have a good effect and significantly reduce fraud risks. However, now all these innovations and systems have been introduced and fraudsters have gradually adapted to them. At present, the "anti-fraud system" makes it difficult, but not so much hindering, because the fraudsters have adapted to the "anti-fraud control".

Misreporting is increasingly contributing to theft; it is now seen as a related process. In this case, computer programs aimed at identifying signs and symptoms of fraud are essential.

Only a few percent of counterparties remain technical companies with no activity at all. Today, this process involves so-called "hybrids" — companies that actually have real financial and economic activities. Therefore, the problem of analysis is now shifting from analyzing counterparties to identifying anomalies in the business processes and operations themselves. And this task has an increased level of complexity, incomparable to loading a query into Spark or Contour Focus.

[2] What is Antifraud: what is it and how does it work? (2024). Available at: https://ria.ru/20240930/antifrod-1975059835.html?ysclid=m36c9gnj2q541182216 [Accessed 17.04.2025].

Being aware of the patterns of fraudulent schemes reflected in accounting information, it is possible to build a fairly effective system of their timely detection, using the work with the company's databases. Understanding how the realization of a scheme is reflected in accounting and other economic information allows you to create protocols for responding to primary information. Prompt detection of a suspicious anomaly will contribute to the timely establishment or prevention of the fact of fraud, improving the effectiveness of the anti-fraud system as a whole.

All stories of long-term unpunished large-scale fraud are primarily based on the lack of quick response to such anomalies. The human brain is structured in such a way that, given the abundance of information, no clear details and figures remain in the memory even for a month, let alone for longer periods of time.

VI.1. The First Set of Anomalies — Traces of How Fraudsters Overcome Internal Controls

So, our firm has already implemented some internal procedures, separation of competencies, various kinds of physical controls, observations, perimeter, there is accounting, an auditor who makes sure that everything is correctly reflected, there is an internal auditor who is responsible for the effectiveness of internal control in general.

In such a case, the fraudsters realize that the company is really struggling with fraud. In such a case, these individuals do not give up, they try to overcome these internal control procedures. And by doing so, they are framed, because their steps and actions related to overcoming internal control procedures also leave the necessary trace.

Fraudsters attempt to partially or completely remove some transaction, operation, and possibly even an asset, from control. For example, they realize that there is a procurement procedure in progress, and if the purchase is over 500 thousand rubles, such persons will fall under all the specified controls. What should be done? Split the lot into 10 purchases of 499 thousand rubles each and get away from tender procedures.

It can also be simulated that we do not have authorization or approval for a transaction. Fraudsters simulate a force majeure for urgent actions. If we do not make a purchase of office equipment now, and before that it burned down because of a short circuit in the bank, customers will come in and the bank branch will simply not be able to perform its main function — we will lose much more than a small deviation in the purchase. Often in procurement, internal control tools are overcome through so-called "bookmarks" in technical documentation. By introducing such bookmarks, fraudsters evade external competition, leaving only their own "in the competition", who dictate their own terms and conditions, which are far from market conditions.

A number of employees have not taken vacation for many years. Why? Workaholics do not want to give up a job they love or, in fact, they realize that no one should be allowed to approach their computer.

Connecting functions that do not connect can be another tool. It is a socially useful topic when people try to substitute each other. Especially such "socialization" and friendship are dangerous when these functions are deliberately divorced, e.g., a buyer, a warehouse worker, an accounting or a treasury employee who pays the money and who later also checks it. Such deviations from the protective functions of internal control are quite easily algorithmized and introduced into the operation of a special program.

VI.2. The Second Set of Anomalies

The Second Set of Anomalies is how accounting and management accounting reacts to the fact that fraud is probably being committed. We will see obvious formal mechanical things in accounting: something is wrong with a primary document, something is wrong with a register, some information noise gets to the reporting. We can see that accounting fails, and collecting such information noise is a separate topic, and it is perfectly programmable in special products.

Possible deviations exist in the design of primary accounting documents. Why is a primary accounting document drawn up? To show that a financial or business transaction has been made and there was a reason for its entry into the accounting system.

Indicators for deficiencies in "primary accounting records" are easily automated if the accounting system supports scanned copies of primary documents. The most elementary deviation is the absence of a primary document. Various reasons can be given as an explanation: drowned, burned, lost.

There are no required details in the documents, such as a seal or signature.

There is no correspondence in different copies of the same document. One delivery note in the warehouse and another in the workshop: all details are the same, but there are discrepancies in quantities in the nomenclature.

In the primary documents, there is a lack of matches for end-to-end data transfer, etc.

Formal anomalies can be traced in the accounting and management records. What can fraudsters do with registers? They try to hide the fact of committing fraudulent actions.

There is a significant variety of authorized and unauthorized accounting adjustments. There is already a great control system sewn inside the accounting, which is very much underestimated when countering fraud. If the "primary accounting documents" reflect specific operations, then in the accounting in the aggregate form a set of operations, their results can be harmful to the company. How the expense side is formed, how it turns into income, what is the movement in assets and liabilities.

If such a system begins to fail to comply with accounting rules, it is necessary to move to the main "super element" of the fraud prevention system that provides the maximum opportunity for analytics.

VI.3. The Third Set of Anomalies

The third set of anomalies is analytical anomalies. Within the framework of this analysis, we see that it was unambiguously different before, according to historical internal company data. And moreover, if we look at our colleagues nearby, at our industry colleagues, we will see that they do not have anything close to this, either — our economic information reflects a clearly incomprehensible process.

If with accounting we looked at how correctly the system works, then here we look not at accounting standards, but at the business process itself, we understand all its specifics, we compare ourselves with ourselves two years ago, three months ago, we trace historical data on the same business processes. We compare ourselves to industry peers, compare ourselves to the industry average. We use basic red flags on key fraudulent schemes.

Issuance and payment of invoices for non-existent goods, works and services

Non-deliverable supply refers to the fact that goods are not delivered, but cash or other assets leave the company and air, non-existent tangible goods or work/services are "bought".

How and what indicators might work?

First of all, if we talk about the red flag system, it is the analysis of historical data, from which we can see the appearance of anomalies. For a long time, in order to produce a certain volume of finished products, the company purchased a specific volume of nomenclature, materials, semi-finished products and at some point some anomaly occurs — the volume of 2–3 nomenclatures increases, but at the same time the volume of finished products does not change.

How does the abnormality usually manifest itself?

This may be a change in the technological map, the recipe of production or a non-commodity supply. Especially this red flag is triggered when the company has changed counterparties, and more dubious counterparties have appeared after verified large market counterparties.

Playing on the price in procurement

This story is related to the situation when a company buys some real materials, goods or services and at the same time overpays — the purchase price differs from the market price. Here the anomaly is identified by analyzing intra-group and intra-company prices from verified suppliers — they are compared with the price of specific current purchases. There can be different explanations, for example, at a certain point in time it was necessary to buy a given volume of goods/services/materials, current suppliers could not supply such volume and had to buy from a new supplier at an expensive price.

In our practice we have a case where one of the bank's branches urgently purchased office equipment because they had a serious power surge and their internal system could not withstand it, which resulted in some of the computers failing. It made it necessary to make a purchase outside of all the rules, as the branch had to continue working. The procurement was done at a higher price due to the urgency. In this case, the defense was able to prove the necessity of the purchase by arguing that the situation was out of the ordinary. After a detailed investigation the situation was resolved.

Such anomalies provide a comparison with the intra-company price for a certain historical period that the supplier should be analyzing, what will explain this or that purchase, how the purchased goods/services/materials were used.

Subsequently, if the material is collected for the initiation of criminal proceedings, it is good to support not only the internal company facts (the price is different), but also external analysis of the market, to show that if the purchase was made from third parties, the price could be significantly lower (for the judicial perspective the desirable range of overstatement can be of at least 25–30 %).

Just as in the first scheme, here it is tracked where the money went, and if in the case of a commodity-free supply it will be the entire cost, then in the "price game" it is not the entire cost of non-existent goods that is tracked, but the revenue part (markup), which will either be distributed between the supplier and dishonest employees of the company, or, if the game is fully controlled by the supplier, will be fully taken by dishonest employees of the company. It should not be forgotten that the supplier in such a scheme may be affiliated.

Remuneration for selecting a supplier, granting him favorable conditions

These are examples of both price and non-price corruption, when there are no "special" non-market conditions in terms of the price or quality when purchasing goods, services, materials. In this case, the "procurement department" does not directly harm the company, but all other things being equal, a particular supplier is selected and given priority. This priority will be repaid by transferring cash or other assets to a specific person in the "procurement department".

Here an anomaly can be expressed in the fact that the share of a particular supplier is clearly increasing, while it does not stand out much from the rest. For example, for 3 years it had 10 % for some nomenclature, and then its volume of supplies to the company began to grow sharply. Here it is necessary to pay attention to the relationship between the "purchasing department" and a particular counterparty, perhaps it will be possible to identify their connectedness. Such an anomaly will be expressed in the fact that the supplier does not give special discounts, but for some reason they choose him more often. But at the same time, the defense may have its own justification — the delivered goods are of the right quality, delivery is made without violation of terms, and that is why they are chosen more often, so this "red flag" should be actively checked.

Direct theft of inventory without concealment

Moving into the storage unit, we continue to see our purchases now turning into our inventory

— what has been purchased is inventoried and goes into the warehouse. It should be noted that if there is direct theft without concealment, a shortage is naturally formed, which will eventually be detected and reflected in the accounting system. Naturally, the theft itself does not occur at the moment of detection of the shortage, but when the inventory was taken directly from the warehouse, workshop, office, surveillance perimeter.

In accounting, the shortage is recognized after the inventory, or a particular material, semi-finished product needed in production has not been found. Also, by the way, a video surveillance system can work, but the key thing is that such situations were not noticed in time. In such a case, it is impossible to understand and analyze who did it and when it was done, since dozens, hundreds of people may have access to the warehouse.

In this case, "red flags" work well, which, depending on how storage is going, what volumes are purchased, what volumes are released, show a rough cut of historical data — how much there should be, if something changes. If there is a sharp increase or a sharp decrease, it is possible to analyze in which shifts, when exactly these anomalies occurred. To

deal with such situations, it is crucial to notice them in time with the help of video surveillance, or with the help of physical control.

Due to the inventory manipulations, such employees, who understand the control and security systems, try as much as possible to delay the moment of exposure, the discovery of shortages and try to fictitiously write off the missing materials, or replace with a cheaper analog.

For example, a particular team with a foreman and warehouse workers of a construction company exchanged Italian materials for similar Belarusian materials. Italian materials were sold, and Belarusian materials from the warehouse were installed on various objects. In this situation it is clearly seen that in the future, due to the unscrupulous actions of employees, there may be serious consequences for the company in its relations with customers.

There are situations when economic crimes lead to more serious consequences, not related to material damage, but to consequences such as harm to health. Theft in warehouses of large companies that work in the system of additional drug provision or situations when medicines are substituted for counterfeit drugs can be good examples. Consumers take the necessary medicines for their benefits, which were financed by the State, and later, instead of the expected positive effect, the health of a person, on the contrary, may worsen due to counterfeiting. First of all, it is pharmacies that fall under suspicion, but when we find out the situation deeper, it turns out that it is the fault of employees working in large warehouses with medicines.

Writing-off under a fictitious pretext

Fictitious pretexts can be simulated theft, fire, flood, shrinkage within the norms or the use of raw materials above the norms. In such a situation “red flags” work well. Write-offs under a fictitious pretext without replacement are detected quite quickly, because on historical data we can observe that within the normative limits shrinkage, shrinkage of 0.5 % is written off, and then this data changes by 1 % and continues to remain on the upper part of the limit of the allowable standard. This is definitely a red flag that needs to be monitored, as any increase in shrinkage is definitely a violation in the storage process and must be dealt with. It is also an indicator that this anomaly may

not be negligence and violation of the technological process, but theft. In such situations, measurement and estimation of the inventory takes place, especially when bulk solids, products with a watery consistency or certain irreducible balances in petroleum products are used as raw materials in production.

If you put red flags in the receiving, transfer area — at this stage, all raw materials are poured and then sent to storage and production — then such anomalies are detected. At many large production facilities that work with this kind of materials, this process is already automated. In our practice, there have been several expert examinations when it was obvious that red flags had been triggered, otherwise shrinkage would not have been detected, as the employees acted very carefully — everything was carefully poured and measured.

Production Unit

Manufacturing processes can be diverse, but as in a warehouse, the first mechanical action may be to steal products and take them out of the control perimeter. Of course, if there are many such situations, it will cause serious damage to the business. But, of course, such theft will be detected much faster than in a warehouse, because in a warehouse stored goods are not always immediately written off, while in the same production, anyway, all equipment, materials and semi-finished products are used and have their function.

In this situation, where the theft has already occurred, the most important thing is to counter the theft in a timely manner with a physical perimeter and hot spot detection. Even in this situation, red flags will be appropriate because it is obvious how much product should have been written off and why there are more inputs left in the finished product than indicated on the technical card. In addition, just like in the warehouse, a mirror method is also possible, i.e., substitution of materials exactly during the production process. It is roughly the same here.

Playing on the measurement of assets in the production process is already a more complex mechanism, which manifests itself in the theft of scraps that can be used to make unrecorded products, or in general, taking away those raw materials that are used in the production of more complex products, and where a large amount of different nomenclature

is indeed wasted. Usually workers, various technical engineers and technologists are in collusion, and such "friendship" can entail changes in the technical chart to hide traces of theft. It is worth considering the different technological processes, the description of material quantities, the use of specific equipment and realizing that many equipment can deteriorate over time. With technical expertise, it will be possible to prove that standards were overestimated and this allowed semi-finished products to be stolen.

Sales Block

In the set of questions devoted to sales the schemes are mirror opposite to purchases. In this case, the opposite situation is observed, the sale is carried out at an undervalued price or there is a sale without a payment and for long product credits. This is where the "red flags" of automation control, which work exactly the opposite way and are very often interconnected with purchases for a particular nomenclature, with their subsequent sale or sale of finished goods. However, there are also more complex anomalies that show how many products were purchased, how many are stored, what was done with these products in the production process, when the finished goods reached the warehouse and when they turned into receivables and money.

The financial investigator is a unique expert specialty that uses specific techniques to investigate economic information. Financial investigations are aimed at documenting embezzlement, corruption, illegal financial transactions and other misconduct by managers, employees and third parties and are conducted by the following team of specialists:

1. analysts (economists with specialized knowledge in accounting and tax accounting, financial analysis, anti-fraud);

2. IT specialists (computer scientists, with specialization in digital forensics);

3. lawyers (dealing with economic crimes punishable under the Criminal Code of the Russian Federation);

4. builders, appraisers, commodity specialists, technologists — if their participation is required;

5. information providers (detectives, paid databases of general and specialized information).

VI.4. Algorithm of Comprehensive Financial Investigation

A comprehensive financial investigation is generally conducted according to the following algorithm:

1. clarifying the initial data of the terms of reference, understanding of the operation of anti-fraud systems in the company (availability of a hotline, counterparty files, DLP (Data Loss Prevention) systems, automation of controls, red flags system);

2. extracting and sorting out client information (automated accounting system, mail, computer data, video surveillance, DLP system reports, other computer information);

3. interviewing;

4. analyzing an array of electronic data;

5. analyzing the information from automated accounting systems, including the use of software packages to identify accounting anomalies;

6. analyzing paper documents — primary documents, registers, contracts;

7. reinforcement by external sources (databases, social networks);

8. forming a judgment on the presence of signs of abuse, preparing a conclusion.

As a result of the "forensic audit" a specialist's conclusion is formed, which can be used for filing a criminal complaint, litigation, labor relations, formation of a negotiating position.

VII. Conclusion

The current situation in the issues of interaction between the business community and representatives of the expert sphere indicates the presence of a number of problems on organizational, legal and financial issues, which require comprehensive resolution. The importance, value and competitive advantage of an advanced business-lawyer-expert nexus, where everyone understands each other's capabilities is beyond doubt.

This system is most optimal if measures to prevent negative legal consequences are taken through the restructuring of business processes and refusal of risky operations (risk avoidance). If a dangerous situation

cannot be avoided and the operation must be carried out, the company prepares in advance for possible negative consequences through the system of compensation and risk distribution (a response strategy is discussed and formed with lawyers and explanations and justifying documents are provided). Such a preventive system saves material and time resources significantly. Involvement of experts at a later stage, when the stage of realization of legal risks has come, in general reduces the effectiveness of the strategy, because it is necessary to act early, it leaves chances for victory in case of involvement of qualified specialists.

The strength of "compliance expertise" lies in the fact that it is a comprehensive approach to all possible risks, which are interrelated not only with the branches of law, but also with the highlighted business processes.

This study has highlighted the danger of focusing on only one risk while neglecting others. Often entrepreneurs see only the option of risk avoidance and believe that structural consulting and business process redesign will destroy their profits, not realizing the existence of other countermeasures, such as compensation, distribution or localization of risk.

Thus, highlighting the positive aspects of the compliance audit, which provides an opportunity to record and search for relationships on the main vulnerabilities, it should be noted its functionality to perform the following operations:

1. automation and detection of anomalies and dubious transactions in "anti-fraud" and corruption, creation of an efficient system for countering corporate fraud;

2. establishment of effective online verification not only of the status of counterparties, but also of the transactions and operations performed with them, and effective protection against their claims;

3. prevention and mitigation of tax risks, protection against claims of the tax authority, increasing the probability of winning in court proceedings;

4. timely detection of a crisis in financial condition and avoidance of major risks in bankruptcy;

5. automation of the process of identifying doubtful transactions in terms of AML/CFT (Anti-Money Laundering and Countering the Financing of Terrorism), sanctions and currency regulation;

6. establishing a system of "red flags" in dealing with criminal risks and action protocols, including when interacting with law enforcement agencies;

7. establishment of interconnections in the work of all the allocated subsystems and a single expert structure for identifying and managing risk in financial and economic activities.

The neglect of the above-mentioned processes and the specialized knowledge of experts in the protection of the rights of entrepreneurs seems unacceptable and discrediting of their activities.

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The Third-Party Pressure for Dismissal at the Time of the Pandemic

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Abstract: The paper explores employment contract termination under third-party pressure, a topic that gained prominence during the pandemic. It categorises pressure termination into partial and complete pressure termination and highlights their differences. The authors also examine the conditions for pressure termination and its legal consequences. This issue is particularly examined within the context of terminating a contract of an employee whose spouse/partner is a healthcare worker as a result of colleagues' pressure at the time of the pandemic. The paper shows that terminating the contract of such an employee can exemplify complete pressure termination if conditions are met and it is prohibited to terminate the contract without notice. It also explains that such employees can claim compensation under general provisions. Though focused on the pandemic, the findings can apply to analogous situations, such as a professor pressuring a university to dismiss an assistant without valid cause.

***Keywords*:** employment contract; pressure; termination; dismissal; third party; pandemic; Covid-19

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Contents

I. Introduction

Employees, clients, customers or other institutions may demand the dismissal of a specific employee from the employer and may threaten them with serious economic consequences for the business if this demand is not met. This issue is labelled as "the third-party pressure for dismissal" or "pressure termination" (Settekorn, 2015, p. 66). The issue of termination under the pressure of third parties has not been extensively researched and this phenomenon needs to be discussed within the scope of the Covid-19 pandemic because the pandemic that quickly spread around the world affected the legal order and influenced working life in every aspect. Several measures such as curfews, quarantine practices, and the closure of some workplaces were introduced and implemented. This situation also devastated working life economically. Therefore, businesses had to make decisions concerning workplaces and Covid-related issues.

The relationship between Covid-19 and a third-party pressure-inducing dismissal might emerge in several ways. For example, some employees might not believe the coronavirus existence and might refuse to take necessary precautions. Additionally, the healthcare workers, who are on the front lines in the fight against the Covid-19 pandemic, might be seen as potential danger for their friends and even the friend's parents. Therefore, some people might adopt a negative attitude towards healthcare workers and their families due to the risk of transmission of the virus. Similarly, the same attitude may be displayed in workplaces towards an employee whose spouse/partner is a healthcare worker. Within this scope, the employer may have to consider the dismissal of a specific employee whose spouse/partner is a healthcare worker because of the pressure of colleagues.

In this regard, the World Health Organization is considering the advantages of global preparedness for future pandemics. This includes international collaboration on research and development, as well as launching national initiatives to create "response plans" for new disease outbreaks.[1] In the realm of legal dispute resolution, our responsibility is to be ready for individual employment disputes arising from the pandemic. On this basis, this study will examine the issue of third-party pressure for dismissal in the context of the Covid-19 pandemic. The arguments considering the concept of third-party pressure for dismissal heavily rely on German-based sources but it shows how the arguments would be comparatively applicable in Turkey.

II. Methodology

This research primarily utilizes the doctrinal research method, often referred to as *black-letter research* (McConville and Chui, 2017, p. 4). This approach involves identifying and critically examining primary sources, such as rules, principles, and judicial practices in German Law and Turkish Law to determine the key aspects, nature and scope of the relevant employment law. In addition to the primary sources, the

[1] What is Disease X and How will Pandemic Preparations Help the World? Available at: https://www.aljazeera.com/news/2024/1/18/what-is-disease-x-and-how-will-pandemic-preparations-help-the-world [Accessed 20.08.2024].

research aims to critically consider secondary sources such as academic materials regarding support, interpretation and criticism of primary sources to clarify and organize the legal issues at hand (McConville and Chui, 2017, p. 4). Ultimately, our goal is to provide an accurate and comprehensive statement of the law about the elements of third-party pressure for dismissal in employment contracts in the countries in question.

The second approach used in the research is comparative law methodology. This method helps improve the understanding of the law and enhances critical standards that may lead to advancements in domestic and/or international law (Zweigert and Kötz, 1998, p. 21). It provides insights into foreign legal systems by considering "law as rules", allowing stakeholders to view their legal system from a fresh perspective (Bogdan, 1994, p. 29). As a result, comparative law would serve not only to overcome national biases by appreciating different perspectives within various societies but also to comparatively analyse the legal consequences of pressure termination in German law and their potential application in Turkish Law without simply listing differences and similarities (Reitz, 1998, p. 630).

III. The Third-Party Pressure for Dismissal

Third-party pressure for dismissal refers to a threat of significant economic repercussions by colleagues, clients, customers, or other governmental/non-governmental institutions and applying pressure on an employer to fire a specific employee. This pressure to terminate is named *Druckkündigung* in German Law (Mues et al., 2010, p. 760; Plum, 2020, § 626 en. 43; Sandmann, 2020, § 626–629 en. 295; Kerwer, 2016, KSchG § 1 en. 583; Reinartz, 2017, § 44 Außerordentliche Kündigung, en. 141; Meyer, 2016, BGB § 626 en. 83; Rinck and Kunz, 2021, p. 1549; Vossen, 2017, BGB § 626 en. 336; Hergenröder, 2020, KSchG § 1 en. 293; Krause, 2019, KSchG § 1 en. 313; Oetker, 2020, KSchG § 1 en. 182).[2] A pressure for termination of an employment contract fundamentally involves the fact that an employer is pressured

[2] BAG., 19.06.1986 — 2 AZR 563/85; BAG., 04.10.1990 — 2 AZR 201/90; BAG., 31.01.1996 — 2 AZR 158/95; LAG Hamm, 04.05.1999 — 4 Sa 1298/98. It is important

from outside or by his employees to dismiss a specific employee in several ways such as collective resignations of employees, strikes, and withdrawal of orders (Günther, 2019, BGB § 626 en. 194; Hergenröder, 2020, KSchG § 1 en. 293). This explicitly demonstrates that the pressure for termination may contain significant risks that can create substantial challenges for even large companies, which will be discussed in detail below (Settekorn, 2015, p. 66).

It is clear that if a part of the workforce or third parties, e.g., the employer's customers, demand the dismissal of an employee, and if rejecting this demand poses a risk of resignation, refusal to cooperate, or termination of the business relationship along with serious disadvantages, then it is referred to as a pressure for the termination. For a dismissal to be considered a pressure dismissal (termination), the following elements must be present: (i) the employer must be requested to dismiss a specific employee; (ii) this pressure must be severe and must include the threat of irreparable damage to the employer; (iii) the employer must make all reasonable efforts to eliminate the pressure. (iv) dismissal must be the means of last resort.

When the pressure comes from other employees, the pressure of dismissal should be compared to the impact of a mobbing situation. Employees might refuse to work with the concerned employee within the same environment, ultimately leading to the employee's exclusion.[3] However, unlike a typical mobbing scenario, in pressure dismissal, when the employer does not succumb to the pressure, the pressuring employees themselves may leave the company (Kerwer, 2016, KSchG § 1 en. 583). Additionally, in mobbing, the intention of pressuring co-workers is to force the employee, who is under pressure, to resign, not to be fired by the employer. From this aspect, it may differ from a classic mobbing scenario.

However, when there is a demand for dismissal, the employer is not allowed to simply comply with this demand (Henssler, 2020, BGB § 626 en. 284). If the employer is under pressure, the reasons for the pressure should primarily be examined (Settekorn, 2015, p. 66). There might

to highlight that "en." will, hereafter, be referring to paragraph numbers in German sources and BGB is an acronym of Bürgerliches Gesetzbuch [German Civil Code].

[3] LAG. Schleswig-Holstein, 20.03.2012 — 2 Sa 331/11.

be different types of pressure according to the reasons for pressure. Following this, dismissal can be divided into two types: partial pressure to dismissal and complete pressure to dismissal. The next section will examine these different types of pressure for dismissal.[4]

III.1. Partial Pressure for Dismissal

The employer always has the right to terminate an employment contract if there is a reason to do so (Sandmann, 2020, § 626–629 en. 296; Henssler, 2020, BGB § 626 en. 283; Kerwer, 2016, KSchG § 1 en. 585; Meyer, 2016, BGB § 626 en. 83; Krause, 2019, KSchG § 1 en. 314).[5] In this regard, partial pressure termination occurs in cases where the pressure for dismissal is objectively justified by the provisions of the law (Mues et al., 2010, pp. 76–77). The characteristic of partial pressure termination is that it is not primarily because there is pressure created by a third party but because there is already an existing reason for termination of the contracts that are related to employees' behaviours in the regulatory provisions. When the third party's demand is justified based on a valid reason related to the employee's behaviour, it cannot principally be considered a complete pressure termination (Niemann, 2020, BGB § 626 en. 185). Here, the pressure itself only triggers the employer's decision to terminate but does not constitute a fundamental underlying reason for termination of the employment contract (Kerwer, 2016, KSchG § 1 en. 585).

For example, where employees' behaviour is against occupational health and safety regulations, the reason for dismissal objectively justifies dismissal. A case where an employee denies the presence of coronavirus and continues violating relevant regulations by insistently refusing to put on a mask despite the warning of termination that might constitute partial pressure for termination (Kleinebrink, 2021, p. 116).[6] Similarly, a coronavirus denier who is in close contact with other employees cannot only disrupt workplace harmony but also jeopardise

[4] BAG., 15.12.2016 — 2 AZR 431/15; BAG. 19.07.2016 — 2 AZR 637/15.

[5] BAG., 19.06.1986 — 2 AZR 563/85; BAG., 10.12.1992 — 2 AZR 271/92; BAG., 04.10.1990 — 2 AZR 201/90.

[6] BAG., 18.07.2013 — 6 AZR 420/12; BAG., 31.01.1996 — 2 AZR 158/95.

the health of other employees. If they stubbornly refuse to comply with necessary protection measures and encourage other employees to do the same and if other employees express that they will not perform their duties until an infringing employee is dismissed, a legitimate reason for dismissal arises and the dismissal is legally justified (Kleinebrink, 2021, p. 119). The termination of a contract due to the behaviour of the employee is at the discretion of the employer. In other words, whether to succumb to pressure and use the right to terminate the contract is at the employer's discretion (Mues et al., 2010, p. 760; Kerwer, 2016, KSchG § 1 en. 585; Reinartz, 2017, § 44 Außerordentliche Kündigung, en. 141; Rinck and Kunz, 2021, p. 1550; Hergenröder, 2020, KSchG § 1 en. 293; Krause, 2019, KSchG § 1 en. 314; Mues et al., 2010, p. 77).[7] However, in exceptional cases such as collective resignation, the employer may not truly have discretion if a violation is so serious that it would result in the termination of the contract (Kleinebrink, 2021, p. 116).

III.2. Complete Pressure for Dismissal

In a complete pressure dismissal, there are no other reasons or legal reasons for termination of the employee's contract than external pressure (Mues et al., 2010, p. 77; Weinmann and Götz, 2017, III. Arbeitgeberkündigung en. 219). The request to terminate the employee's contract is linked to an economic threat and it is the only reason for the termination. Thus, in cases where there are no reasons related to employees' conduct or behaviours, the pressure put on the employer is a decisive factor for the dismissal (Settekorn, 2015, p. 67). That is, the characteristic of a complete pressure termination is essentially a situation of pressure beyond the employer's control. Accordingly, the employer's termination process is expressed solely based on the pressure applied by third parties and is not based on an objectively accepted reason in legislative frameworks for termination, unlike the partial pressure for termination (Mues et al., 2010, p. 760; Kleinebrink, 2021, p. 116).

[7] BAG., 31.01.1996 — 2 AZR 158/95; LAG. Hamm, 04.05.1999 — 4 Sa 1298/98.

In cases where an employee with an HIV infection (it does not transfer to other employees due to just sharing the same working environment) continues to work without interruption, there might be pressure against the infected worker (Kerwer, 2016, KSchG § 1 en. 541; Watt, 1992, p. 280). Other employees express a suspicion about a potential violation of occupational health and safety regulations (Kleinebrink, 2021, p. 116). In the context of the coronavirus pandemic, there might be the following assumptions: a particular employee having transmitted a highly contagious virus, a particular employee having contacted with infected close relatives, or an employee intending to spend a vacation in a risky area (Kleinebrink, 2021, p. 116). In these cases, it is necessary to discuss whether the employer can be forced to dismiss the employee based on suspicion though the concerned employee has not violated the health and safety regulations in the workplace. On the other hand, if the employer continues to employ these employees, it is also necessary to examine if employers violate their duty of care for their employees (Kleinebrink, 2021, p. 116).

As a result, in a complete third-party pressure for termination, there is no other reason for the termination of the employee's contract than the threat of complete pressure for dismissal (Settekorn, 2015, p. 67; Krause, 2019, KSchG § 1 en. 315). Third parties must demand the dismissal of a specific employee from the employer, but this demand must be serious to constitute complete pressure to settle. Additionally, there should be significant disadvantages if the demand is complied with. Merely succumbing to this threat is not considered sufficient. The employer must also take action to counteract the pressure. If alternative actions are not possible and serious economic losses are imminent, then complete pressure termination would arise. Therefore, third party pressure for termination includes several elements that need to be fulfilled and the following section will analyse these elements.

III.2.1. A Demand by the Third Party to Dismiss an Employee

One of the most important characteristics of pressure termination is the influence of third parties on the decision to terminate an employment contract. This influence arises as a result of the pressure exerted by

third parties. Pressure can be applied by third parties who are outside the workplace, such as customers or suppliers, worker representation, unions, creditors, or even public agencies and citizens (Vossen, 2017, BGB § 626 en. 337; Kerwer, 2016, KSchG § 1 en. 583; Rinck and Kunz, 2021, p. 1549; Weinmann and Götz, 2017, III. Arbeitgeberkündigung en. 218; Griebeling and Herget, 2017, BGB § 626 en. 99). Potential tools of pressure include work stoppages, strikes, avoidance of continuing to work with the concerned employee, threats of resignation by employees, withdrawal of orders, and other operational pressures (commercial pressures); embargoes (stopping deliveries); severance of business relations; and the stopping of orders or deliveries (Sandmann, 2020, § 626–629 en. 297–298; Vossen, 2017, BGB § 626 en. 337; Henssler, 2020, BGB § 626 en. 285; Kerwer, 2016, KSchG § 1 en. 583; Meyer, 2016, BGB § 626 en. 83; Rinck and Kunz, 2021, p. 1549).[8]

III.2.2. A Demand must be Severe and must Include Significant Economic Loss

A simple request by a third party for an employer to terminate a specific employee's contract will not meet the strict requirements of a pressure termination (Mues et al., 2010, p. 760; Henssler, 2020, BGB § 626 en. 343). That is, the mere presence of pressure does not constitute a fundamental reason for termination and does not lead to complete pressure termination (Sandmann, 2020, § 626 en. 296). In addition to the pressure being directed towards termination, the pressure must also be serious. For example, a collective complaint — without insisting on dismissal — or requesting the employee be relocated or warned (telling someone what to do; reprimanding someone for a wrongdoing) would not be sufficient to create pressure for dismissal (Kerwer, 2016, KSchG § 1 en. 593).[9] Moreover, only the refusal of employees to work may not be sufficient since it would depend on the number of employees and their proportion in the workforce (Günther, 2019, BGB § 626 en. 555). If the employer has waited a considerable amount of time after the

[8] BAG., 08.05.1996 — 5 AZR 315/95.

[9] BAG., 10.10.1957 — 2 AZR 32/56; BAG., 18.09.1975 — 2 AZR 311/74.

pressure situation has arisen before resorting to termination, this could be taken as an indication that the pressure was not very serious (Kerwer, 2016, KSchG § 1 en. 593).[10]

This condition must be linked to the threat of serious disadvantages for the employer if they do not comply with the termination request (Settekorn, 2015, p. 67; Rinck and Kunz, 2021, p. 1549). The threatened disadvantages must relate to the most severe economic damage and the pressure on the employer must be strong enough (Günther, 2019, BGB § 626 en. 553). In other words, if the employer does not succumb to the pressure, the threatened outcomes must seriously affect the employer (Settekorn, 2015, p. 68). To illustrate, a strike or collective resignation, termination of business relations by a large number of customers, or a bank refusing to provide critical documents for the business or rejecting credit application (Settekorn, 2015, p. 67). In addition, the threat must also be communicated to the employer in a very serious way (Settekorn, 2015, p. 67). Given the severity of the threatened disadvantages and the likelihood of their occurrence, it would not be reasonable for the employer to resist the demand for the employee's dismissal (Settekorn, 2015, p. 67).

III.2.3. The Pressure must not be Eliminated by other Means

In eliminating the pressure, there is a significant role for employers. The employer must primarily adopt a protective approach and try all reasonable means to continue working with both the threatening employees and the complained employees to avoid termination (Mues et al., 2010, pp. 76–77; Settekorn, 2015, p. 67; Kerwer, 2016, KSchG § 1 en. 588; Rinck and Kunz, 2021, p. 1550; Griebeling and Herget, 2017, BGB § 626 en. 102; Henssler, 2020, BGB § 626 en. 284; Vossen, 2017, BGB § 626 en. 339; Weinmann and Götz, 2017, III. Arbeitgeberkündigung en. 219).[11] In other words, avoiding dismissal should be prioritised by the employers. For this purpose, the employer is obliged to try alternative

[10] LAG Schleswig-Holstein, 20.03.2012 — 2 Sa 331/11.

[11] BAG., 31.01.1996 — 2 AZR 158/95; LAG Düsseldorf, 21.08.2008 — 5 Sa 240/08; BAG., 27.01.2011 — 2 AZR 825/09; ArbG. Hamburg, 23.02.2005 — 18 Ca 131/04; BAG., 15.12.2016 — 2 AZR 431/17; LAG. Hamm, 16.10.2015 — 17 Sa 696/15.

reasonable ways by protecting the interest of employees as required by the duty of care in the employment contract (Mues et al., 2010, p. 760; Reinartz, 2017, § 44 Außerordentliche Kündigung en. 142; Rinck and Kunz, 2021, p. 1550; Hergenröder, 2020, KSchG § 1 en. 293). It is claimed that even if the relevant employee has committed a crime outside of work, the employer's protective approach should continue (Vossen, 2017, BGB § 626 en. 339).

The termination of an employment contract must be the only possible way as a last resort to prevent damage to the business (Mues et al., 2010, p. 760; Kerwer, 2016, KSchG § 1 en. 588).[12] If serious and significant disadvantages cannot be remedied in any other alternative and reasonable way and if the request is serious, the employer may have to accept the pressure of a third party (Günther, 2019, BGB § 626 en. 553; Sandmann, 2020, § 626–629 en. 299).[13] Alternative means can depend on several factors such as who is applying the pressure, the position of the threatening employee, and what disadvantages are being threatened (Plum, 2020, § 626 en. 43). In these cases, the employer is obliged to clarify the essence of the incident (Sandmann, 2020, § 626–629 en. 300).

If termination requests arise from irrelevant (unrelated) reasons — especially in cases involving a protected characteristic (gender, race, etc.) regulated under the anti-discrimination law — more effort must be exerted by the employer to correctly recognise the type of termination since it is likely that it does not constitute a complete pressure for termination, but is likely to constitute a partial pressure termination (Kerwer, 2016, KSchG § 1 en. 541).

The employer is obliged to actively behave in a way that aims to eliminate the threat (Rachor, 2018, § 626 Abs. 1 BGB, en. 90; Hergenröder, 2020, KSchG § 1 en. 293).[14] The employer must take necessary measures in individual cases to prevent future violations and prevent the health risks to other employees and must act in accordance with the principle of proportionality when choosing a sanction.

[12] BAG., 19.06.1986 — 2 AZR 563/85; BAG., 11.02.1960 — 5 AZR 210/58; BAG., 26.01.1962 — 2 AZR 244/61; BAG., 10.02.1977 — 2 ABR 80/76.

[13] BAG., 10.12.1992 — 2 AZR 271/92.

[14] BAG., 15.12.2016 — 2 AZR 431/15; BAG., 19.07.2016 — 2 AZR 637/15.

Nevertheless, the employer is not required to take any measures that are unreasonable for him.[15]

The severity of the allegations would have an impact on the employer's efforts to avoid termination. That is, the more clearly the employer sees the request as unjust, the greater the effort expected of him to eliminate the threat (Kerwer, 2016, KSchG § 1 en. 593).[16] For example, in the case of coronavirus, the employer should inform other employees that there is no risk of infection in the workplace since necessary precautions have already been taken and check whether the pressure can be eliminated by transferring him/her to another part of the workplace position to decrease the tension and establishing regular testing mechanism might be considered at the workplace to ensure peace of mind.[17] Moreover, for instance, the employee whose spouse/partner is a healthcare worker might be, if possible, allowed to work from home.

Additionally, the court, as a rule, requires the employer to demonstrate a reasonable cause for the termination, protecting the employee against arbitrary dismissal (dismissal without a just cause).[18] Therefore, it is also expected that the allegations against the employee must be clearly notified to the employees.[19] This means that the employer cannot dismiss an employee due to baseless or insufficient information about the situation as grounds for termination (Kerwer, 2016, KSchG § 1 en. 587).

While taking measures to deter the threatening employee, the employer must make a serious effort (Settekorn, 2015, p. 68). For this purpose, the employer should demonstrate arguments when there is an unjust request for dismissal, the employer must point out the illegality of the employee stopping work (Henssler, 2020, BGB § 626 en. 285; Plum, 2020, BGB § 626 en. 43). Therefore, the employer should try to be calm against the situation and conduct discussions with the employees requesting the dismissal (Settekorn, 2015, p. 67; Günther, 2019, BGB

[15] BAG., 09.06.2011 — 2 AZR 323/10.
[16] ArbG. Köln, 13.02.2015 — 1 Ca 5854/14.
[17] ArbG Berlin, 16.06.1987 — 24 Ca 319/86.
[18] BAG., 28.08.2003 — 2 AZR 333/02.
[19] BAG., 10.02.1977 — 2 ABR 80/76.

§ 626 en. 556). If work is refused by threatening employees due to non-compliance with the termination request by other employees, it should be stated that this behaviour is a serious violation of the employment contract and that they have no right to demand wages for the periods they did not work, and even this situation could give employers the right to terminate their contract by following notification periods requirements (Günther, 2019, BGB § 626 en. 556; Kleinebrink, 2021, p. 116).

By contrast, the employee should also be willing to cooperate, for instance, by accepting a workplace transfer to help reduce the pressure (Plum, 2020, BGB § 626 en. 43; Sandmann, 2020, § 626–629 en. 301; Meyer, 2016, BGB § 626 en. 86; Rinck and Kunz, 2021, p. 1550; Vossen, 2017, BGB § 626 en. 340).[20] Because the endangerment of the employer's interests is caused by the employee, the employee might be obligated to facilitate a compromise to resolve the pressure situation.[21] If dismissal is the last resort to eliminate potential significant losses for the employer, then the dismissal due to pressure could be considered and justified according to the principle of proportionality that will illustrate how it works in third-party pressure dismissal[22] (Günther, 2019, BGB § 626 en. 556; Krause, 2019, KSchG § 1 en. 315). On this basis, mediation as an alternative dispute resolution mechanism can also be used as a way to prevent third-party pressure (Settekorn, 2015, p. 67; Kerwer, 2016, KSchG § 1 en. 593; Hergenröder, 2020, KSchG § 1 en. 294). In the Federal Court decision, it is stated that mediation is reasonable for the employer only if the dispute is justified and no obstacle could prevent such a procedure (Hergenröder, 2020, KSchG § 1 en. 294). Nonetheless, it should be highlighted that if the reasons for the termination request stem from personal and vulnerable issues and if the conflicting issue is not at the discretion of conflicting parties, the parties should be forced to participate in mediation (Günther, 2019, BGB § 626 en. 556; Henssler, 2020, BGB § 626 en. 284).

[20] BAG., 11.02.1960 — 5 AZR 210/5.

[21] BAG., 11.02.1960 — 5 AZR 210/58; BAG., 26.01.1962 — 2 AZR 244/61.

[22] LAG. Rheinland-Pfalz, 20.10.2009 — 3 Sa 430/09.

III.2.4. The Employer should not Cause the Pressure

When assessing the third-party pressure for termination, it is also necessary to consider whether the employer caused the pressure and to what extent the employer contributed (Vossen, 2017, BGB § 626 en. 339; Rück/Kuntz, p. 1551).[23] If the employer is at fault for causing the pressure, then they cannot justify termination by referencing to the pressure applied to him (Kerwer, 2016, KSchG § 1 en. 593).[24] In other words, if the employer is responsible for the pressure resulting in the request for termination by third parties, and if the employer contributes to the creation of the threat situation by generating or provocatively inciting, the termination of the contract cannot be justified (Henssler, 2020, BGB § 626 en. 285; Sandmann, 2020, § 626–629 en. 300; Krause, 2019, KSchG § 1 en. 316; Günther, 2019, BGB § 626 en. 555). For example, if the employer contributed to the situation by spreading baseless fears regarding Covid-19 among employees, he cannot rely on third-party pressure to justify the termination (Kerwer, 2016, KSchG § 1 en. 541).[25] This condition is based on the Roman law principles, namely; ex *suo delicto meliorem suam conditionem facere potest,* meaning that no one can benefit from their faults (Kreindler, 2010, p. 7).

IV. An Example from the Covid-19 Pandemic

The pandemic was troubling many employees in companies because individuals fear the transmission of the coronavirus in their work environments. As stated above, there might be employees who deny the risk of transmission and refuse to wear or properly wear a mask. Furthermore, an employee whose spouse/partner is a healthcare worker may not be wanted in the workplace because of the potential high risk of transmission. The possibility of such pressure being applied by other employees because his/her spouse/partner is a health worker, and whether it could lead to pressure termination should be considered based on the principles from comparative law.

[23] BAG., 26.01.1962 — 2 AZR 244/61.

[24] BAG., 18.07.2013 — 6 AZR 420/12; BAG., 04.10.1990 — 2 AZR 201/90; BAG., 26.01.1962 — 2 AZR 244/61.

[25] ArbG. Berlin, 16.06.1987 — 24 Ca 319/86.

How an employer should act against such pressure should be answered by considering the *sui generis* structure of employment law. In this case, what an employer should do must be considered according to the conditions of pressure termination mentioned above. According to the second condition, a demand must be severe and must include significant economic loss. While examining this condition, the principle of proportionality would be helpful. It is necessary to keep a balance between the disruption of internal peace and the interest of the concerned employee. While applying the proportionality principle, establishing peace within the enterprise should be taken into account. For this purpose, it is necessary to examine the meaning of the disruption of internal peace. The disruption of internal peace can be defined by satisfying several conditions: (i) interruption and deterioration of peaceful cooperation between employees and the employer (ii) persistence of such a disruption over a certain period (iii) negative impacts on a large number of employees (Kleinebrink, 2021, p. 118).

In scrutinising these conditions, jeopardizing internal peace by the behaviours of employees is not sufficient to constitute a disruption of internal peace. In this regard, the disruption of enterprise peace must be so severe and there should be considerable concern among the workforce.[26] Additionally, the disruption of business peace must have occurred repeatedly.[27] In the case of the dismissal of a specific employee solely because his/her spouse is a healthcare worker, these conditions might be satisfied and there might be a risk of disruption of internal peace.

Accordingly, if the pressure is serious and failing to terminate would result in significant harm to the employer, and if the employer, despite all efforts, cannot dissuade the employees from their demands, the termination should be deemed complete pressure termination. However, as previously stated, this situation must be subject to strict requirements. Legal consequences of pressure termination will be discussed in the next section.

[26] LAG Hamm, 23.10.2009 — 10 TaBV 39/09; LAG Köln, 15.10.1993 — 13 TaBV 36/93.

[27] BAG., 16.11.2004 — 1 ABR 48/03.

V. The Consequences of the Termination of the Contract due to Third-Party Pressure in German Law

When termination of an employment contract is demanded by a union, administrative authorities, regulatory authorities, a sponsor, or one of the employer's clients by threatening employees with serious harm to business, the threat can emerge as an underlying reason for termination (Niemann, 2020, BGB § 626 en. 185).[28] Continuing employment relationships in a peaceful environment in a cooperative manner is essential for successful business activities. If there is a failure in this, the achievement of operational objectives might be prevented. Therefore, it can be said that dismissal can only be justified if there is a risk of serious economic damage to the employer.

Pressure termination can manifest as either ordinary or extraordinary termination (Mues et al., 2010, p. 77; Settekorn, 2015, p. 67).[29] Whether the pressure can be categorised as ordinary or extraordinary can be determined according to the features of each case (Henssler, 2020, BGB § 626 en. 283; Sandmann, 2020, § 626–629 en. 298). On this issue, the severity of the actual pressure involved in the termination, the weight of the threatened disadvantage, and the length of the notice period are decisive in determining whether the termination is ordinary or extraordinary (Weinmann and Götz, 2017, III. Arbeitgeberkündigung en. 218; Henssler, 2020, BGB § 626 en. 283; Kerwer, 2016, KSchG § 1 en. 594). This issue will be discussed further in the next sections of the paper.

Firstly, the third-party pressure for dismissal might be linked to operational reasons and it only allows for ordinary termination, meaning that the employee must be given a termination notice (Meyer, 2016, BGB § 626 en. 85; Rinck and Kunz, 2021, p. 1550). As stated above, the employer must attempt to resist the pressure before issuing the termination notice. Therefore, where there are no less severe alternatives available, it would be possible to resort to an ordinary termination

[28] BAG., 11.02.1960 — 5 AZR 210/58; BAG., 26.01.1962 — 2 AZR 244/61; BAG., 18.09.1975 — 2 AZR 311/74; BAG., 19.06.1986 — 2 AZR 563/85; BAG., 04.10.1990 — 2 AZR 201/90; BAG., 31.01.1996 — 2 AZR 158/95; BAG., 18.07.2013 — 6 AZR 420/12.

[29] BAG., 18.09.1975 — 2 AZR 311/74.

(Henssler, 2020, BGB § 626 en. 283; Hergenröder, 2020, KSchG § 1 en. 295). The timing of the third party's demand does not have any significance for the commencement of the notification (Günther, 2019, BGB § 626 en. 561). That is, the termination notice period only begins when the employer realises that they cannot resist this pressure in any other way than by issuing a termination notice (Günther, 2019, BGB § 626 en. 194).

The Bremen Employment Court ruled that pressure related to a strike could constitute a basis for a pressure termination.[30] In this case, which is not about the pandemic but applicable to it, other employees avoided working with an employee who was convicted of sexual offences, leading them to quit their jobs and halt operations at the workplace (Settekorn, 2015, p. 66). Therefore, the court ruled that the termination of the employment contract, which allowed activities to continue at the workplace, was based on operational reasons. Consequently, it can be said that if — as in this case — there is no personal or behaviour-related reason for termination against the concerned employees, this is seen as a third-party pressure termination based on operational reasons (Vossen, 2017, BGB § 626 en. 336; Rachor, 2018, § 626 Abs. 1 BGB, en. 90).

Operational reasons may include all facts attributable to the operation that led to the termination of the employment contract (Günther, 2019, BGB § 626 en. 552). Accordingly, even if there is no legitimate objective for the threat, the dismissal of a specific employee because of the threat of disadvantages to the employer can still constitute a reason for the termination based on operational reasons (Rachor, 2018, § 626 Abs. 1 BGB, en. 90). In a pressure termination tied to operational needs, the employer should be threatened with the severest economic damage, and termination should be the only means to mitigate the loss.[31] If an employer is going to lose an order, or if the employer must adjust the workforce according to the remaining order situation, this creates a pressure situation for the employer in terms of ensuring the

[30] BAG., 21.10.2014 — 11 Ca 11185/13.

[31] BAG., 26.01.1962 — 2 AZR 244/61; BAG., 18.09.1975 — 2 AZR 311/74; BAG., 04.10.1990 — 2 AZR 201/90; BAG., 10.12.1992 — 2 AZR 271/92; BAG., 31.01.1996 — 2 AZR 158/95; BAG., 19.06.1986 — 2 AZR 563/85; BAG., 31.01.1996 — 2 AZR 158/95.

continuation of the business as an entrepreneur (Kerwer, 2016, KSchG § 1 en. 590). If the employer faces severe economic disadvantages because of the pressure, it is stated that he would be compelled to act for economic reasons (Kerwer, 2016, KSchG § 1 en. 590).

The pressure caused by the loss of orders may not be directly cited as a justification for an operational-based termination. However, if the employer makes an entrepreneurial (operational) decision in reaction to the loss of an order to decrease the number of employees in the workplace (employment redundancy), this situation can justify the termination of the contract under an operational-based termination (Oetker, 2020, KSchG § 1 en. 182). This is applicable when the employer, if the complained employee continues to work, accepts significant or even serious economic loss due to the absence of customers or restricted or terminated business relations with partners, leading to a decline in business volume. These damages should be presented in the notification forms and should be expected with a high level of possibility (Meyer, 2016, BGB § 626 en. 86).

Secondly, extraordinary third-party pressure termination depends on the characteristics of a specific case. When termination is demanded under the threat of disadvantages by employees, workplace representation, one of the regulatory authorities, or clients, the pressure situation the employer faces can constitute a legitimate reason for extraordinary (without notice) termination (Henssler, 2020, BGB § 626 en. 283; Kerwer, 2016, KSchG § 1 en. 594; Vossen, 2017, BGB § 626 en. 338). Compared to ordinary situations, extraordinary can be categorised as more severe threats against the employer. For example, if a business is largely dependent on producing arms and it is no longer permissible to tolerate an employee in a managerial position because the responsible ministry suspects him/her of attempting bribery and putting pressure on the employer to terminate the contract of the suspected employee with the threat of the withdrawal of orders. It should be emphasised that the employee, in this case, is suspected of attempting bribery and there is no crime proved. For extraordinary termination without notice, the conditions of third-party pressure must be satisfied. On this basis, there should be a significant reason due to potential prospective danger for the business (Vossen, 2017, BGB § 626

en. 340). The extraordinary termination must be inevitable; hence, there should be no softer way possible to prevent the threatened damage (Meyer, 2016, BGB § 626 en. 86). That is, if the employer can already mitigate the pressure with ordinary (with notice) termination or can reduce it, then there would be no right to extraordinary (without notice) termination (Sandmann, 2020, § 626–629 en. 298).[32]

When we come back to the case about pressure against the employee whose spouse/partner is a healthcare worker, if the operational activities of the business would end due to substantial economic damage, the termination should be accepted based on the termination with a valid operational reason (Süzek, 2021, p. 623). Consequently, due to the termination being based on a valid reason under ordinary termination, notice periods should be recognised and the employee should be entitled to severance pay if its conditions are satisfied. It is also possible that there would be a right to compensation for pecuniary and non-pecuniary damages, which will be examined in the next section.

VI. The Right to Compensation for Employees Dismissed Due to the Third Party Pressure

If the pressure overrides the right not to be unfairly dismissed, it might be problematic in terms of ensuring social justice in societies (Kerwer, 2016, KSchG § 1 en. 588). Hence, it is necessary to assess whether an employee whose employment contract has been terminated due to pressure can claim compensation. According to the prevailing view, the employee affected by the pressure termination has the right to claim compensation not only against the employer but also against the third party (Henssler, 2020, BGB § 626 en. 286; Weinmann and Götz, 2017, III. Arbeitgeberkündigung en. 221; Oetker, 2020, KSchG § 1 en. 183).

If an employee loses his job due to the pressure of the third party, an employee whose contract was terminated, would have the right to claim compensation from the third party. This argument relies on the *Bürgerliches Gesetzbuch* (BGB) — the General Civil Code of Germany,

[32] BAG., 10.03.1977 — 4 AZR 675/75.

Section 823 (1).[33] According to this provision, a person who intentionally or negligently violates another person's life, body, health, freedom, property, or any other right is liable to compensate the other person for this damage. Therefore, if the termination request also constitutes a violation of personal rights, it is possible to seek damages. The "right in the workplace" or "right in the employment relationship" can be considered as absolute legal interests related to the most violated personal right in the sense of BGB § 823 (1) (Rinck and Kunz, 2021, p. 1551).

Each specific case must be discussed in more details (Sandmann, 2020, § 626–629 en. 302). In cases of pressure from employees, disputes arise because of unlawful actions of colleagues. These unlawful actions might be related to the employment relationship (Günther, 2019, BGB § 626 en. 565). In this case, the compensation is based not on the unfair dismissal, but on the behaviour of the colleagues that are not objectively justified (Sandmann, 2020, § 626–629 en. 302).[34] The damage is particularly seen in the loss of salary caused by the termination of the employment relationship (Günther, 2019, BGB § 626 en. 562). In the assessment of the compensation, the means used and how seriously the employee's work life and private life have been affected should be taken into consideration.

By contrast, whether an employee, whose contract has been terminated due to third-party pressure, has the right to claim compensation against the employer and its legal basis is a controversial issue (Günther, 2019, BGB § 626 en. 563). In this case, it is asserted that a compensation claim will be successful if the employer violates the duty of care in finding an alternative instead of pressure termination (Vossen, 2017, BGB § 626 en. 344a; Günther, 2019, BGB § 626 en. 563; Oetker, 2020, KSchG § 1 en. 187). Moreover, some scholars claim that there should be a fixed compensation for the right to sacrifice (Vossen, 2017, BGB § 626 en. 344a; Günther, 2019, BGB § 626 en. 563; Oetker, 2020, KSchG § 1 en. 187). This can be seen as a sacrifice for the

[33] Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18. 1896, § 823. Available at: https://www.gesetze-im-internet.de/englisch_bgb/ [Accessed 20.08.2024].

[34] BAG. 04.06.1998 — 8 AZR 786/96.

employer's loss to protect the business against serious economic harm, since the contract is terminated without a just reason (Kerwer, 2016, KSchG § 1 en. 596). The idea is based on the fact that the employer mitigates economic disadvantages by terminating the contract, partially compensates the employee's losses by transferring a portion of the advantage gained because of the dismissal of the employee (Kerwer, 2016, KSchG § 1 en. 596). Furthermore, if the employer is held liable for paying compensation, the employer should have the right of recourse against a threatening third party in the internal relationship (Sandmann, 2020, § 626–629 en. 303) because the third-party employees have a fundamental impact on the cause of the damage (Kerwer, 2016, KSchG § 1 en. 596).

Ultimately, the employees can defend themselves against termination by bringing a claim to courts for protection against dismissal and seeking re-employment (Günther, 2019, BGB § 626 en. 564). In these cases, the burden of proof for pressure and the threat of specific disadvantages from third parties lies with the employer. In addition to proving the existence of pressure, the employer must also explain and prove the extent to which they fulfilled their duty of care and whether the employer has exhausted all alternative means to eliminate the pressure applied.

VII. Third-party Pressure for Dismissal and its Legal Consequences in Turkish Law

In Turkish Law, the term "pressure termination" is understood as the situation when an employer terminates an employment contract due to pressure applied by third parties who are generally represented by employees (Süzek, 2021, p. 590).[35] However, pressure termination or third party pressure leading to termination are not included in legislative frameworks or judicial materials. Furthermore, there might be confusion about the concept of pressure termination. For example, the employer may want to immediately terminate the employee's contract. For this purpose, in order not to pay compensation in lieu of

[35] Y9HD., 28.11.2017, E. 2016/798, K. 2017/19292.

notice, the employer may not pay the employee's wages to compel the employee to terminate the contract with a just cause. The contract is indeed terminated by pressure but this does not satisfy the conditions of pressure termination due to the lack of a third party and thus, this is a wrong classification of a legal issue. Therefore, the rules in German should comparatively be applicable to Turkish Law.

If the pressure situation threatens serious economic harm to the employer and cannot be mitigated in any other way, it should be possible to terminate the employment contract based on the necessities of the workplace and business. Situations that have a direct impact on the functioning of the workplace and negatively affect its normal operation should be considered within the scope of pressure termination (Centel, 2020, p. 334; Çelik et al., 2021, p. 553; Ekmekçi and Yiğit, 2020, p. 555; Süzek, 2021, p. 605). Since pressure termination, as mentioned above, should be accepted as termination based on operational reasons like in German law, we believe that a termination request made by third parties should be accepted within the scope of termination of the employment contract with a valid reason.

Art. 18 of the Turkish Employment Law requires valid reasons for the termination of a contract that negatively affects the normal operation of the work. The valid reasons for the termination can be exemplified as circumstances that seriously and negatively affect the employee's ability to perform their duties due to reasons attributable to the employee or the workplace and that prevent them from fulfilling their duties properly.[36] Article 25 of the Turkish Employment Law regulates more severe reasons for dismissal without notification such as theft by the employee or sexual harassment in the workplace.[37] While Art. 18 is a reflection of ordinary termination in German Law, Article 25 is that of extraordinary termination. Whereas Aricle 18 requires notification to terminate the contract, Article 25 gives the employer the right to terminate the contract without notification.

Ultimately, if maintaining the employment relationship cannot be reasonably expected from the employer, in other words, if there

[36] Employment Law No. 4857, Art. 18. Official Gazette: 10.06.2003. Available at: https://www.mevzuat.gov.tr/mevzuatmetin/1.5.4857.pdf [Accessed 20.08.2024].

[37] Employment Law No. 4857, Art. 25.

is no possibility to avoid termination, it should be accepted that the termination is based on a valid reason. In the case of the dismissal of an employee whose spouse/partner is a healthcare worker, due to complete pressure termination, the employer can terminate the contract with a notice. However, the employee will be entitled to claim both pecuniary and non-pecuniary compensation under general provisions. Moreover, the employee will be entitled to severance pay if the conditions are satisfied. If the employer fails to notify about the dismissal, the employee can also claim compensation in lieu of notice.

VIII. Conclusion

The paper proposes to introduce the concept of pressure termination by considering German Law. On this basis, it determines the difference between complete pressure termination and partial pressure termination. Then, it examines the conditions of third-party pressure for dismissal. Towards the end, the researchers analysed the legal consequences of pressure termination in German Law and their potential application in Turkish Law.

If employees violate health and safety regulations, the employer is entitled to terminate the employment relationship under pressure from the workforce. However, there must be a serious disruption of business peace. At least, there should be a significant concern among the employees. In German Law, if an employee's contract is requested to be terminated due to non-compliance with occupational health and safety measures, a case of partial third-party pressure termination arises and the termination is based on a just cause.

When it comes to a case where an employee is unwanted at the workplace solely because his/her spouse/partner is a healthcare worker, the reason for termination is based on pressure from other employees, not a regulation. The criteria for pressure termination present in German law must be carefully considered. There must be significant pressure, and this pressure must direct the employer to terminate the contract. The employer must face severe economic damage unless the termination happens. However, the employer should still do everything possible to dissuade the pressure-applying side. If, despite everything,

termination is the last resort, termination should be pursued for valid reasons under Section 17 of the Employment Law (ordinary termination). Consequently, if the employee was not notified, the employee would be entitled to compensation in lieu of notice and severance pay. Besides, the employee can seek compensation under the general law provisions. When it comes to the difference between partial and complete pressure termination, since partial pressure termination relies on legislative or regulatory provisions, there is a possibility to terminate the contract without notification as extraordinary termination. Conversely, in complete pressure termination, the termination is only based on the third-party pressure; it is not possible to terminate the employment contract without a notification.

The study aims to explain the concept of third-party pressure termination in the context of the pandemic. However, the pressure termination is not confined to the time of the pandemic. For example, a professor attempting to get an assistant fired for personal reasons or a famous football player refusing to play in the same team with another player for personal reasons might be another example of third-party pressure termination. However, it should be noted that the conditions of pressure termination and potential rights that are illustrated in this paper would also apply to other types of pressure terminations.

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Aspects of Restitution in the Context of Injurious Act

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Abstract: The study examines the principles of restitution under Jordanian law from various aspects, with a primary focus on restitution within the context of tortious liability. Restitution is an underlying commitment under contractual liability where the debtor is obliged to perform what he committed to perform under the law, which will achieve the creditor's satisfaction. Restitution under tortious liability is no less critical than other compensation, as it results in restoring the position of the injured party to what it was before the damage was caused, and achieves the satisfaction of the injured party, who will be compensated with the same type of thing that was damaged. This study purports to clarify the perspective of Jordanian law that does not address restitution in the context of tortious liability. It provides a critical analysis of the relevant provisions regarding restitution outlined in the Jordanian Civil Code (JCC) and other applicable legislation that addresses restitution in the context of tortious liability. The paper concludes with findings accompanied by a series of recommendations designed to address the identified gaps in Jordanian regulations.

Keywords: specific performance; injurious acts; Jordanian law

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Contents

I. Introduction

Previously, the prevailing view was that restitution is usually conceived in the context of contractual liability, while it was considered exceptional and rarely occurred in the context of tort liability. This is based on the *travaux préparatoires* of Art. 171 of the Egyptian Civil Code (ECC) (Egyptian Government, Ministry of Justice, 1948). However, this kind of compensation can apply in both contractual and tortious liability, bearing in mind that damages within the framework of liability in tort may have other types of compensations that differ in nature from those that are common in the context of contractual liability, especially at present, when we are witnessing scientific, digital and technical progress and an increasing interest in environmental issues and availability of social media. This, in turn, will increase the scope of restitution in many areas.

This study addresses aspects of restitution related to material damage, provided that the nature of the material objects can be restored to their previous state. As for bodily harm, this is also to be thoroughly discussed, as many types of damage to humans cannot be restituted. At

the same time, it may be possible to apply this type of compensation in other cases, particularly in light of technological advancements and the availability of advanced medical devices and equipment.

The importance of restitution is more prominent in the context of moral damage that affects the reputation and dignity of human beings, as well as their financial, social, and employment status, which the media and social media may contribute to infringing such rights. It may also contribute to stopping such prejudice and compensating for damage by means of specific performance.

Furthermore, restitution can also be applied in the context of preserving the environment and ensuring its safety. This type of compensation also plays a crucial role in the framework of commercial transactions, particularly in cases involving infringements of trademarks, trade names, and commercial addresses, as well as in addressing unfair competition.

II. Methodology

To present findings on the topic under study, this paper employs the qualitative research method. The study employs a review design, where the existing body of literature on the underlying aspects of restitution has been reviewed to familiarize the researchers with comprehensive findings in this context. The selected research studies all contained relevant findings concerning the topic. The current literature on the subject provides an inclusive understanding of its potential limitations, enabling researchers to consider ways to overcome them and conduct their research efficiently. Multiple open-access online databases were utilized to compile relevant information, including the major platforms used for data extraction (*ScienceDirect*, *Google Scholar*, *PubMed*) and other online resources that provide access to articles, books, laws, and research papers. The resources cited in the selected publication were further examined to get a broader understanding of the topic. Lastly, the data was also collected by using conjunctions of relevant keywords to the research theme.

III. Literature Review

Numerous research scholars examined the aspects of restitution for injurious acts and how it is implemented and utilized across various domains. One of the early examples of studying restitution is the study carried out by Barnett. The scholar deliberated the idea of restitution as a new paradigm of criminal justice (Barnett, 1977, p. 300). The author believed that, since the criminal justice system had been broken down in terms of what Thomas Kuhn described as a "crisis of an old paradigm — punishment", restitution is an optimal way to overcome such a crisis. The author concluded that experimenting with restitutionary justice would vary from the trial-and-error of the former setting. In Barnett's words, "[w]e will be guided by the principle that the purpose of our legal system is not to harm the guilty but to help the innocent — a principle which will, above all, restore our belief that our overriding commitment is to do justice" (Barnett, 1977, p. 301).

Another author who thoroughly studied this concept was Bentwich (Bentwich, 1955). He scrutinized the aspects of restitution on an international stance from the standpoint of compensation for the victims of the Nazis. The researcher discussed the issue from the time of Germany's unconditional surrender in the war of 1945 and how the law and regulations regarding restitution and compensation of Nazis' victims were handed over to the four Allied Powers. Similarly, research was conducted within the realm of a post-war scenario and assessed the standing of property restitution considering the case of Mozambique (Unruh, 2005). The author presented an in-depth analysis of Mozambique's experience throughout the land creation process, as well as the property restitution regime within the post-war context.

For studying a few of the prominent aspects of damage and specific performance, Dockar-Drysdale conducted a study that identified the idea within a school setting and yielded noteworthy outcomes in this regard (Dockar-Drysdale, 1953). Aside from this, numerous research scholars have dedicated detailed notes, research, and books to studying the laws and principles of restitution in an all-encompassing and inclusive manner, allowing for the exploration of various underlying aspects of specific performance (Virgo, 2015; Birks, 1985; Burrows, 2011; Hanoch,

2004; Palmer, 1978; Birks, 1992; Kull, 1995; Levmore, 1985; McInnes, 2002; Crowder, 1994; Rendleman, 2011).

In their study concerning the province of the law of specific performance, Smith argued that "unjust enrichment" and "specific performance" are not identical (Smith, 1992). Since most people consider these terms interchangeable and create a vague image of the concept, the author decided to discuss the issue in detail. The researcher emphasized that restitution is a legal remedy for establishing the cause of action in the context of unjust enrichment. It was further declared that erroneous restitutionary remedies are independent of the cause of action in unjust enrichment and should not be determined even close to any form of actual legal specific performance. The researcher also proposed a tripartite scheme for classifying the private law responses.

Blacksell and Born reviewed the enactment of the Restitution process across Central and Eastern Europe (Blacksell and Born, 2002). Their primary objective was to assess the impact on both the economic and social landscapes.

Rajnović, Cico, and Brljak studied restitution in the spectrum of agricultural lands and reviewed the comparative legal aspects of restitution in Serbia (Rajnović et al., 2020). The researchers evaluated the likelihood of returning agricultural property by gaining insight into the relevant legal regulations and then analyzed the implemented solutions currently in practice to mitigate the issue. The outcomes of their research reported that in Serbia, implementing restitution and compensation requires more than just passing a law. It was noted that taking necessary measures is essential for acquiring the required political and social consensus for returning the seized assets, particularly when it comes to returning agricultural land, as the results have not been satisfactory enough in this regard.

The studies presented in this section demonstrate that researchers have examined restitution from diverse paradigms. However, minimal attention has been paid to conjointly assimilating the aspects of restitution from distinct facets under one roof to comprehensively overview them in the given context under the Jordanian law. Therefore, the current study aims to bridge this gap by examining them inclusively. The study will address the aspects of Restitution concerning material

damage provided that the nature of material objects can be restored to their previous state. As for bodily injuries, this will also be thoroughly discussed, as there are many types of damage that cannot be fully compensated. At the same time, it may be possible to apply this type of compensation in other cases, particularly in light of technological advancements and the availability of advanced medical devices and equipment. The primary focus is restitution within the realm of tortious liability.

IV. Results and Discussion

IV.1. Restitution for Material Damages

Restitution for material damage is one of the most common types of compensation addressed by laws and researchers. Islamic Jurisprudence has known restitution as *Dhaman* or civil indemnification. *Dhaman* in Islamic Jurisprudence has two types: the first is the *Dhaman* of the contract (contractual liability), and the second is the *Dhaman* of the act (tort liability), which is the subject of our analysis in this paper.

Under general rules in Islamic Jurisprudence, neither every tortious act that does not cause property damage requires compensation, nor does such damage constitute a source of obligation. However, Muslim Jurists have provided various cases in which restitution is essential when an object is damaged (Al-Sanhouri, 1954). This type of compensation shall apply to the damaged object when its nature and surrounding circumstances allow restoration of such an object to its previous state. At the same time, restitution may not be possible for some material objects due to the impossibility of restoring the object to its previous condition.

IV.1.1. Material Objects Subject to Restitution

Laws and jurisprudence address restitution for material objects damaged by tortious acts that can be restored to their previous condition. This has been enshrined in Section 269(2) of the Jordanian Civil Code (JCC) that states: “Damages shall be estimated in money, but the Court may, subject to the circumstances and on the application of the injured

person, order restoration to the former position of a decree by way of damages, the execution of a certain matter attached to the injurious act".[1]

Section 275 of the JCC addresses Damage to Property, also adopts the same approach (Sultan, 2015): "Whoever damages or spoils the property of another shall, without prejudice to the general provisions related to liability for damages, be liable for its like if it is replaceable and for its value if it is a property of value"[2] (Jordanian Bar Association, 1985).

In addition, Section 279 of the JCC also enshrined 4 conditions for *Restitution under Usurpation* (Jordanian Bar Association, 1993):[3]

1. A person shall be liable for what they have taken until they return it.

2. Whoever extorts the property of another shall return it to its condition at the time of its extortion and in the place where it was extorted.

3. If they have consumed or damaged it or if they have lost it or damaged it with or without its trespass, they shall replace it with a similar item or pay its value on the day of extortion and in the place where it was extorted.

4. They shall also be liable for its benefits and any increase.

[1] Similar to Art. 171(2) of Egyptian Civil Code (ECC) and Art. 209(2) of Iraqi Civil Code (ICC).

[2] Damage to property is the total loss of a property that render it with no value, such as the burning of clothes, or partial destruction of something in a way that takes away all or most of its benefits, as in tearing the cloth to become not suitable for the purpose for which it was intended to be, or changing the thing by destroying all or some of its benefits, as in grinding grains or baking flour, or the absence of object in an unknown or unreachable place.

[3] Article 881 of Ottoman Journal of Equity defined Usurpation as "Taking someone's property and seizing them without taking its permission, the person who has taking property is called Usurper, and the seized money is usurped, and its owner is the usurped from them." However, Article 890 of the same journal addressed Restitution within the scope of usurpation. This Article states that "The usurped property must be restituted and handed over to the owner at the place of usurpation if the owner is this place, but if the owner of the usurped property come across the usurper in another town, and the property is with the usurper, the owner of the usurped property can return it back, or they can ask the usurper to handed the property over at the place of usurpation and at the expense of usurper." Restitution has also been addressed under Art. 891, 892, 797, 899 and 912 of Ottoman Journal of Equity.

This Article also indicates that Restitution entails that the extorted object must be returned to its owner as long as it exists. Namely, the alternative or value of this object would not be accepted unless the owner of this object has already agreed to accept such an alternative or value (Sultan, 2015).

Accordingly, the best material objects that allow for specific performance that can be restored to their previous condition are fungible objects, as they can be replaced with similar objects that can be assessed by number, measure, and weight. Therefore, it has been said that fungibles do not perish, and they shall be replaced with an object similar to it and not by its value. In contrast, if a similar object is not available, financial compensation shall be applied.

Restitution is not merely confined to fungible objects; instead, it might be applied to cases when the damaged object can be restored to its previous status, e.g., when a person restores the vehicle that he damaged by using advanced techniques to paint and repair the vehicle, or when the wall that has been built on a tortfeasor's land is demolished, or big trees that have been planted to block the air or light for neighboring plots are eliminated.[4] Likewise, the case in which the owner of the lower part is forced to rebuild the lower part that they have unjustifiably destroyed and caused harm to the owner of the higher part follows a similar pattern (AL-Fatlawi, 2020; Sewar, 2001).[5]

According to Section 269(2) of the JCC, restoring the object to its previous condition shall be performed at the request of the injured party, not at the request of the tortfeasor. Nonetheless, the court is not obliged to apply the request of the injured party if it cannot be carried out due to the condition of such an object. Likewise, the aggrieved party cannot assert such a way of compensation, and therefore, the court may rule that the tortfeasor should perform a specific order related to

[4] According to Section 1025 of the JCC: "Obstruction of light to the neighbour shall be considered as serious damage so no person shall construct a building which obstructs the windows of the neighbour's house in a manner which obstructs light to it and otherwise the neighbour may apply for the demolition of the building in order to abate the damage".

[5] Another application of Restitution can be seen when a person builds a chimney in arbitrary and harmful manner to its neighbour, as the demolition of that chimney is an aspect of Restitution.

the tortious act as a way of compensation (AL-Fatlawi, 2020; Sewar, 2001).[6]

The Jordanian Court of Cassation ruled that "If it is established from the information that the plaintiff's building is adjacent to the defendant's property and that the defendant's behaviour on its property has caused severe damage to the plaintiff's building. It can be inferred that the damage must be eliminated in accordance with Sections 1199–1200 of the Ottoman Journal of Equity, as the law did not stipulate a specific way to remove the damage but rather provides that the damage must be removed either through Restitution or compensation, or it can be achieved through a combination of both".[7]

This Court also held that "The principle is that the damage shall be rectified through Specific Performance; however, if this is impossible, alternative forms of compensation will be applied. Accordingly, the court decides to reject and dismiss the appealed judgment, which obliges the defendant to pay the costs of the damage".[8]

French courts also emphasized restitution in the context of the tortious act, which obliged the tortfeasor to return the goods they seized or provide a similar object if the goods are fungible. This is to protect the injured party from the constant fluctuation in prices or from the difficulty of obtaining these goods in the market (Al-Hasnawi, 2015).

It can be inferred from this discussion that the JCC provides specific scenarios and examples for restoring material objects through the action of specific performance. Still, the authors believe that the JCC's approach in this regard would be more straightforward if the law included general rules that could apply to any material object, rather than specifying particular cases, as indicated by the JCC. The necessity of developing such rules lies in their suitability for Jordanian law, which adopts a civil law system that primarily relies on relevant legal texts,

[6] However, part of the jurisprudence goes that the injured party may not refuse Restitution — if the debtor has request it — in order to obtain monetary compensation, as the debtor will have fully fulfilled its obligation to restore the situation to the status prior damage, unless the debtor is unable to remove the damage before returning the situation to the previous state.

[7] Decision No. 86/1973 of Jordanian Cassation Court.

[8] Decision No. (2009/2000) of Jordanian Cassation Court.

in contrast to the common law system, which offers more flexibility in producing legal rules through case law.

IV.1.2. Material Objects not subject to Specific Performance

Non-fungible objects are not subject to specific performance, as they differ in their qualities and value from each other, which is rarely found in negotiation.[9] Namely, a non-fungible object is one that cannot be represented by a quantity, weight, or number, even if such representation is possible; its individual instances will vary to a degree, influencing their value.

The concept of similarity between objects for which fungibility can be determined is influenced by time, circumstances, industrial development, and technical methods. For example, fabrics and rugs were once considered non-fungible goods, as they were manually woven, resulting in variations in the weaving method, threads, and colors, which in turn led to different values for these items. Nowadays, weaving is done through electronically programmed machines, with designs, drawings, and dimensions that cannot tolerate error, resulting in symmetry in all the characteristics of the products produced. This is what makes them fungible, rather than non-fungible. Gold, silver, copper, and bronze coins, as well as food and drink utensils, paper, and printed books, are considered among the fungible objects, because of their symmetry and absence of difference in their value and size, provided the condition of their availability in the market.[10]

Fungible property also includes new electrical, mechanical, and electronic devices, since they are entirely identical, as well as cars, machines, and equipment that are identical in every way. Additionally, modern real estate units that are entirely identical in every respect are now considered fungible due to advancements in science and technology.

[9] Section 56(2) of JCC. Art. 85 of the Egyptian Civil Code did not regulate negotiability of non-fungible goods, while Art. 64 of Iraqi Civil Code stipulated the following: "1. The fungible objects which substitute for each other upon performing of obligation. It is usually estimated by numbers, measures or weight. 2. Any other object is deemed to be non-fungible".

[10] Jordanian Bar Association, (1985). Explanatory Notes of Jordanian Civil Code. *Supra note* 4, pp. 73, 74.

It can be assumed that items of a similar nature can compensate for the damage caused to fungible items, as a replacement of a similar kind is available on the market. Namely, restitution is envisaged in the context of fungible property. However, restitution has no applicability in the context of non-fungible items.[11]

Section 275 of the JCC regulates compensation when non-fungible property sustains damage. This Section stipulates that compensation shall be paid for the value of the object if the object is damaged. Still, if the object was partially damaged, compensation shall correspond to the damage that the object has sustained, i.e., compensation is estimated by the difference between the value of the object before and after the damage occurred.[12]

This approach is also emphasized in Section 276 of the JCC, which addresses the issue of partial damage resulting in a decrease in the value of the object, whereby the tortfeasor shall compensate for the loss of value. Still, in the case of a gross reduction in value, the owner of the object either takes the value of the deficiency or chooses to leave the object to the tortfeasor in return for taking the entire value of the object, whereas, in the case of a minor damage, the tortfeasor shall be liable merely for the value of the decrease.[13]

There may be situations when it is impossible to apply restitution for material objects, such as in cases of damage caused to a new device. It is impossible to use the kind of compensation claimed by the aggrieved party, because the device is the last on the market. Its equivalent cannot be imported shortly, which means there is no opportunity to obtain a substitute. Hence, the injured party will only be entitled to financial compensation, even though they insist on claiming specific performance.

Sometimes it is difficult to restore the condition to the state that the object was in before the damage was caused, even if the nature of the object allows such restoration, e.g., if the smoke of the chimney resulted in darkening the neighbor's wall, restoring cannot be achieved through the chimney destruction is destructed because the damage

[11] Explanatory Notes of Jordanian Civil Code, p. 74.

[12] Explanatory Notes of Jordanian Civil Code, p. 306.

[13] Explanatory Notes of Jordanian Civil Code, p. 307.

has not been eliminated (Sewar, 2001). Therefore, JCC should explain the main features of the distinction between fungible and nonfungible goods, in particular, under new developments. This is to clarify whether the object is subject to Restitution or not.

V. Restitution for Bodily Injuries

Restitution generates considerable debate concerning its applicability within the realm of tort liability, as some scholars and practitioners restrict this form of compensation solely to matters of contractual liability. In contrast, some others assumed that such compensation is conceivable in specific cases that might be encountered in the context of a tortious act affecting a human being. However, the contemporary trend involves exploring the possibility of applying restitution for bodily injuries that afflict humans due to scientific advancements in the medical field, particularly in the field of plastic surgery.

V.1. Possibility of Restitution in the Context of Tort Liability

Many of those who addressed restitution do not consider the applicability of such compensation outside the framework of contractual liability. Namely, when a surgeon makes a mistake during the surgery and his mistake results in a distortion of the patient that can be eliminated and treated, the court will be able to oblige the surgeon to repair the distortion and eliminate it through a new surgery, when the physician's negligence results in a physical defect or distortion in the face of a girl that affects her beauty and reduces her chance of marriage, when the mistake leads to the inability of the body organ to move, or when the mistake may result in a disruption of one of the senses (Al-Hiyari, 2005, p. 162; Al-Sa'di et al., 2015, p. 94). Thus, some tend to say that the absolute application of restitution is impossible for such a kind of damage, when someone's leg was amputated or the eye was poked. Neither of these organs can be restored because the body of a human being is not reparable as in material objects. Thus, the injured party

is constantly exposed to the risk of not healing or it may be subject to partial recovery, both of which require high financial costs (Al-Hasnawi, 2015).

However, there is another opinion that assumes restitution is applicable in all cases, provided that this kind of compensation is also appropriate, as well as creditors' claims for specific performance. This tendency confirms limited implementation of restitution in some instances, which is almost impossible to achieve (Saad, 1998, pp. 440–441).

As for the third opinion, it acknowledges the existence of restitution within the tort liability framework, in particular when the tortious act is considered to be not connected with a contractual relationship between a physician and a patient, and since the existence of an express or implied contract cannot be noted between the physician and the patient, the liability of the physician would not be based on contractual liability (Al-Husaini, 1987, p. 89). Cases of contract nullity can support this view due to the illegality of its subject matter or a lack of consent. Then, responsibility will undoubtedly be based on tort, like a case involving a physician who made typographical mistakes regarding the dosages of medicine, which led to pathological consequences for a patient. Alternatively, it could involve a physician who issues a medical certificate as a courtesy to admit an insane patient to the hospital for confinement measures, or a physician treats a patient without being asked by the patient or by someone authorized to make such a request.

One can argue that physicians, like others, are subject to the general provisions of tort liability. Therefore, once the court becomes satisfied with the expert's opinion and medical reports that the physician is at fault, whether the fault is technical or substantive, minor or severe, a physician shall be responsible for compensating the injured, including restitution if it is applicable (Al-Husaini, 1987, p. 89).

It can be concluded that, although physicians need to be confident in their work, they must also keep pace with new technologies and scientific advancements in the field of medicine. This does not give them the right to abuse such confidence and harm the human body illegally, because they are like other practitioners whose performances

are not absolute; instead, they shall be bound by the legal, scientific, and technical framework (AL-Fatlawi, 1997, pp. 54, 155).

V.2. Nature of Bodily Injuries and Restitution in the Context of Tort Liability

The type and extent of damage, as well as the strength and immunity of a person, are all factors that determine the extent to which restitution can be performed, as some injuries will not entitle a person to such a sort of compensation, as compared with the case that results in loss of human life. However, there is another type of injury when a mere Restitution will not be sufficient to achieve justice and satisfaction for the injured party; instead, restitution must be combined with monetary compensation as well. This scenario is observed when a person donates an organ to someone else, where the transplantation of artificial organs may not be sufficient for compensation, because artificial organs cannot be considered a substitute for real human organs.

A contemporary view goes to the need to consider all modern scientific developments in the world of medicine, especially concerning transfer and transplantation of human organs and plastic surgery operations, which may provide room for the application of restitution in that context, as was opined in Decision No. 224/1995 of Jordanian Cassation Court (Al-Hasnawi, 2015). Organ transplantation is a medical procedure that aims to replace a damaged organ in the human body with a healthy organ extracted from another person, provided all the necessary legal conditions are met and the donation is made per the guidelines to preserve human life and alleviate pain.[14] This shall not be considered restitution because it falls within charitable deeds that a person cannot be obliged to perform. However, scratches, bruises, minor wounds, and superficial burns can be subject to specific performance, in which case the court may uphold a claim of restitution, as this form of indemnification may be applicable in such cases.

[14] Decision No. 257 (10/2018) of Jordanian Fatwa Council provided conditions for donating human organs: 1. Donor must be fully competent for such donation. 2. Donor's valid consent. 3. Donor must not be exploited. 4. Donor must be subject to medical verification for the purpose of its safety.

Restitution can also be applied when a court obliges a dentist, or when the latter agrees with the injured patient, to provide a new denture instead of the one that fell out and was broken due to poor installation. This form of compensation is further noted when a tortfeasor is obliged to restore the teeth lost due to their physical assault, whereby they are required to implant teeth that are very similar to the natural teeth and achieve the same benefits.

It is worth mentioning that the JCC does not regulate restitution in the context of bodily injuries, because the general rules of Restitution provided in this law may not be entirely suitable or accurate for regulating restitution in the framework of physical injuries, as specific performance has only been regulated within the ambit of contractual performance.

VI. Restitution for Moral Damage

Restitution might be applied within the scope of moral damage, which is directly attributable to the tortious act, such as the damage that affects the reputation and dignity of humans or their rights. The moral damage could be considered collateral damage, similar to the effects on health, psychological stability, and tranquility, as well as environmental damage or damage arising in the context of human rights or intellectual production.

Restitution can also be conceived in the context of the moral damage arising in the realm of trade law, such as violations committed against trademarks, commercial addresses, and trade names, as well as cases related to unfair competition.

VI.1. Restitution for Moral Damage Affecting Human Beings

The protection of personal rights is the focus of various legislations, which are deemed to be among the moral rights closely attached to the human being, as they entitle the party whose personal rights were violated to request cessation of the violation and claim indemnification for the damage suffered.[15]

[15] This has been provided in Section 48 of JCC: "Whoever shall be subject to unlawful assault in respect of any right which attaches to its person shall be entitled to apply for the abatement of that assault together with compensation for any damage they may have suffered". This Section also corresponds to Art. 50 of ECC.

One of the personal rights is the right of a person to choose a name that distinguishes them from others, as a name typically consists of two elements: the first name and the surname. The name is the expression that is usually used to identify and distinguish a person, and hence, every person, whether a natural person or a legal entity, must bear a name that distinguishes them from other people. The word "*name*" has a narrow meaning and refers to the person's name alone, while a broad meaning includes both personal name and surname. The surname is the expression given to the family to which a person belongs, and all family members share it. A personal name, however, is the expression given to a person to distinguish him from other members of their family. Hence, one can say that both the name and surname contribute to identifying and determining the person and their family simultaneously.

In addition to the name and surname, there is the expression of a nickname, which means a name that people used to call a person. A nickname is different from the original name, the holder of which is known to the public by such a name. As for a pseudonym, it is a name that a person chooses for themselves, other than their real name, and shares it with others. This name is typically used in literary and artistic contexts to conceal their real identities; members of national resistance movements against occupation also adopted pseudonyms (AL-Fatlawi, 2011, pp. 480–481).

Although the person has suffered no damage, under the circumstances of misusing their name, they would be entitled to stop this violation, as a person's name is one of the personal rights that must be protected under the law. Therefore, they enjoy the right to claim compensation for the damage they have suffered in accordance with the rules of tort liability. This was regulated by Section 48 of the JCC (see earlier in this study). Section 49 also provided for an application of this type of compensation, as it stipulated: "Whoever is disputed by others in the use of their name or surname or both without justification, and whoever suffers usurpation of their name or surname or both without legal ground, shall be entitled to apply for the abatement of that assault, together with compensation for any damage they may have suffered".

We can infer that a violation of the right to the name can be noted when somebody challenges the right of a person to be named by

a specific name and claims the immediate cessation of such a name. Moreover, this right shall also entitle the person to compensation if such a misuse resulted in damage to the claimant. An infringement may occur through misappropriation of another's name, i.e., someone illegally uses the name of a particular person, and the holder of the name claims to stop such misappropriation, even if it does not result in damage. The aggrieved party is entitled to claim indemnification if the damage occurred. The legal protection provided for the name can also be enjoyed in the context of misusing the nickname and pseudonym (Al-Saddah, 1994, p. 426).

The damage resulting from the harm caused to an individual's reputation and dignity is considered one of the forms of moral damage that may be carried out through comments or the dissemination of advertisements on walls, newspapers, or through programs on television, websites, or social media. In these cases, the court may order, based on specific performance, the defendant to destroy, erase, or eliminate these advertisements or publish statements condemning the defendant in newspapers, television, or social media through which the violation has been committed. Thus, one can assume that this is deemed to be restitution for the moral damage incurred by the claimant (Al-Budairi, 2017, pp. 93–112).

Restitution is further conceivable in the context of environmental pollution, as such damage can be recovered by eliminating the effects that have affected the environment. For instance, pollution may result from the act of disposing of garbage or waste in agricultural land or a forest. Restoring the environment to its pre-pollution state can be achieved by removing garbage and trash and then repairing damaged soil and plants using scientific methods.

It can be concluded from this discussion that the act of returning the environment to its pre-pollution state is the most appropriate solution to protecting the environment, as Restitution contributes to restoring what has been spoiled and reforming the environment. This solution is also considered as a proper solution, as it deters the polluter, who would realize the enormity of their mistake while attempting to

rectify it and restore the environmental situation to its previous state (Arhouma, 2000, p. 322).

Most human activities result in damage to the environment and its elements. Therefore, it is necessary to stop the activities that harm the environment, even if this leads to the closure of factories, the sources of environmental pollution, or, at least, obliging the owners of such factories to take necessary measures to mitigate the effect of environmental pollution (Al-Dhaher, 1999, p. 70; Thannoun, 2006, p. 371).

Environmental protection laws in Jordan also adopt the same approach. This can be derived from the provisions of Art. 9(b) of Jordanian Environmental Protection Law No. 52(2006) that states that "A master of a vessel, ship, tanker, or boat is obliged within the period specified by the court to remove the polluted materials that have been thrown, poured, discharged, or dumped in the territorial waters of the Kingdom or in the beach area. In the case they fail to do so, the Ministry of Environment or its delegate shall remove it at the expense of the violator".

The same approach is enshrined in Art. 11 of this law. The Article provides a general rule prohibiting the disposal or collection of any substances that could be harmful to the environment's safety, whether solid, liquid, gaseous, radioactive, or thermal, in water sources. The violator is obligated to remove the reasons for the violation within the period specified by the court, as stated in a technical report. However, if they fail to do so, the Ministry of Environment or its delegate shall eliminate them at the violator's expense.

Article 19 of the same law obliges the owners of factories, vehicles, workshops, or any entity that carries out an activity negatively affecting the environment and emits environmental pollutants to install devices that prevent or reduce the spread of such pollutants, and to remove such violation within the timeline specified by the Minister of Environment or its delegates. Otherwise, the matter shall be referred to in the court that is entitled to issue a decision to close the factory. New Environmental Protection Law No. 6(2017) also stipulates that the hazardous materials

and waste brought into the Kingdom must be returned to their sources at the expense of the violating party, in addition to prohibiting the use of machinery, engines, vehicles, or any other source that exceeds the permissible limits for noise and vibration.[16]

The other form of restitution for moral damage can be found in the context of intellectual property, particularly in cases involving copyright infringement. This kind of compensation is much better for the author than monetary compensation because recovery under restitution leads to eliminating the damage that befalls the author, rather than merely compensating the author with a sum of money. Moreover, in this regard, restitution is consistent with the rules of tort liability (Injurious Act).

Thus, restitution can take several forms, depending on the nature of the subject matter of the violation. It might be found in the form of removing the distortion from the subject matter and returning it to its origin, as if a person deforms a statue by placing material on it or removing material from it. Therefore, one can assume that restitution is the form of obliging the defendant to remove what they have placed or returning what they have taken, both of which will result in returning the subject matter to the form created by the author.

Restitution may also be seen in the form of erasing the additions made to the recordings due to the infringement and returning them to the original form and manner. Restitution may be in the form of re-dissemination of the subject matter among the public or, if the infringement is focused on copyright, the work can be withdrawn from circulation (Al-Nawafleh, 2021). Restitution could also be made by publishing the work that holds the name of the plaintiff if the attribution of work to its author is infringed. It might be observed in the form of obliging the defendant to publish the work immediately if they have been reluctant to show it to miss the opportunity to display the infringed work at the appropriate time chosen by the author (Al-Nawafleh, 2021; Kana'an, 1992).

[16] This is provided in Art. 6(a), 7 and 10 of Environmental Protection Law No. 6 (2017).

VI.2. Restitution for Moral Damage within the Scope of Commercial Law

As explained earlier, restitution for moral damage is also conceivable in the context of business. This may be noted through illegal infringement of the right of patent, trademark, commercial address, and trade name. Regarding a patent, its holder can claim a halt to the infringement of their invention and claim compensation for the damage they sustained due to this infringement through a civil lawsuit (Zeineddin, 2015; Hamdallah, 1997).[17]

According to Art. 32 of the Jordanian Patent Law (JPL), an illegal infringement of a patent may take the form of imitation of the subject matter of the patent, or an infringement through selling or exporting counterfeit products, or offering such products for sale and negotiation, or having them in possession for selling. Patent infringement can also be carried out by placing data to deceive others into believing that the defendant has obtained a patent or the right to exploit it.

For the patentee to claim protection of a right under the patent, Jordanian Law stipulates that the infringed patent must be registered in the name of the claimant. This was explicitly indicated in Art. 13(b) of the JPL, which states that "After granting the patent, the applicant shall be entitled to take legal measures to prevent infringement of their invention and to claim compensation if the infringement continues".

The Jordanian Court of Appeal, in its case No. 5188/2023, relied on this article to reject the plaintiff's request to stop the infringement of its invention, because the application for registration of the invention was not proven to have been accepted by the competent authority.

It is worth mentioning that the application of restitution is also possible in the context of trademark infringement.[18] Jordanian Law grants the trademark owner the right to claim the cessation of the

[17] See Art. 32(c) of Jordanian Patent Law No. 22 (1999). A patent is the certificate issued by designated authorities to the inventor, through which it recognises its right in terms of what they have invented and enables them to monopolize the exploitation of its invention for a certain period and with specific restrictions.

[18] Art. 2 of Jordanian Trademark Law defines a trademark as: "Any visible sign that the person uses or wants to use to distinguish its goods, product or services from the goods, product or services of others".

trademark infringement and to claim compensation for the incurred damage because of an unlawful breach of trademark rights. However, Jordanian Law stipulates that to exercise this right, the trademark must already be registered with an authorized official entity.[19] However, this condition shall not apply if the trademark has misled the public; in such cases, the claimant can claim cessation of an illegitimate infringement of the trademark, as well as compensation, even if the trademark has not yet been registered with the authorized official entity.[20]

Restitution can also be identified in the context of trademark protection. This has been enshrined in Art. 37 of the Jordanian Trademark Law that grants the trademark owner the right to claim cessation of trademark infringement, as well as a preventive attachment on the goods subject to trademark infringement.

An illegal breach of the trade name may also be a reason for Restitution, as the owner of the trade name has the right to protect their trade name through the court. They will be entitled to claim a cessation of this infringement, restitution, or compensation for the damage incurred. However, the Jordanian Supreme Court of Justice, in case No. 75/1994, held that such liability shall be based on general rules of civil liability.

It is worth noting that the requirement to file a lawsuit to stop the breach of the trade name or to compensate for the damage resulting from this breach does not necessitate prior registration of the trade name. Instead, the injured party shall be entitled to file such a lawsuit, even though the trade name has not yet been registered with the designated authorities.[21]

As is the case with the trade name, it can also be applied against the violation of a commercial address (Al-Oqaili, 1995).[22] Therefore, a person whose commercial address has been infringed shall be entitled

[19] See Art. 37 and 33(1) of Jordanian Trademark Law.

[20] As provided in Art. 2(b) of Jordanian Law of Unfair Competition and Commercial Secrets No. 15 (2000).

[21] As provided in Art. 8 of Paris Convention for the Protection of Industrial Property.

[22] The commercial address is the name used by the merchant to distinguish themselves from other merchants by mentioning its real name and title, which may be associated with an innovative designation.

to sue a violator for such an infringement, because this infringement is considered to be an aspect of unfair competition, through which the defendant is illegitimately benefiting from the fame of that address, as they have misled customers about the truthfulness of the address (Sami, 1993). Accordingly, Art. 49 of Jordanian Commercial Law granted the holder of the commercial address the right of restitution by claiming a cessation of the continuation of this infringement, in addition to the right that entitles the holder to claim compensation for the damages imputable to that infringement (Al-Nawafleh, 2021).

It can be inferred from the foregoing analysis that the lawsuit filed to protect a patent, trademark, trade name, and commercial address is mainly based on the claim of unfair competition.[23] through which the holder of such a right can claim the cessation of any of the aforementioned forms of infringement, in addition to the right they may enjoy in terms of claiming compensation if such an infringement resulted in damage to the claimant. Namely, such a lawsuit shall be grounded on the provisions of liability in tort that is based on a tortious act that has a causal relationship with the damage sustained by the injured party. However, the study suggests that regulations related to a patent, trademark, trade name, and commercial address should expressly indicate that the aggrieved party would be entitled to enjoy privileges of restitution in the same way as the rights enjoyed under specific performance claimed in the context of contractual liability, and particular rules have to be developed to regulate restitution under tort liability that has its characteristics and legal elements that distinct from those attached to contractual liability.

VII. Conclusion

Restitution in the context of tort liability is considered one of the most controversial issues among jurists and commentators, with some views denying the applicability of restitution within the scope of tort liability. In contrast, such compensation is conceived in the context of tort liability merely in limited and specific cases. Therefore, this

[23] The right to file an unfair competition lawsuit was granted to the aggrieved party in accordance with Art. 3(a) of Unfair Competition and Trade Secrets Law.

paper is dedicated to addressing restitution within the scope of tort liability, particularly in light of the emergence of new technologies and developments that have widely encouraged the adoption of this form of compensation.

It has been concluded that restitution in tort liability is one of the best solutions, not because of the room that it may provide to compensate for material damage, but because it also allows moral compensation that may affect humans directly or indirectly, particularly the damage related to human dignity and personal rights that are naturally attached to humans.

This study also found that the transfer and transplantation of human organs, such as hair transplantation and dental implantation, are topics in the context of which restitution can be applied in addition to plastic surgery, which demonstrates significant progress. Moreover, it has been explained that this type of compensation is also noted within the area of environmental protection and the commercial realm, such as intellectual property, trade names, commercial addresses, patents, trademarks, and unfair competition.

The outcomes also suggested that a distinction should be drawn between specific performance and restoration, as specific performance obliges the debtor to carry out what they have committed to do, if feasible, and this is envisaged solely under contractual liability. However, restoration stipulates that the aggrieved party return to the situation they were in before sustaining damage, which can be achieved by eliminating the damage, if feasible. This applies to both tort and contractual liability.

The study also noted a difference between the phrase "returning the situation to what it was before damage" that represents the essence of restitution and the phrase "carrying out a specific act connected to the tortious act" as has been explained earlier under the relevant provisions of Environmental Protection Law that have obliged the tortfeasor to eliminate the violation that caused environmental damage, which is deemed to be an application to the Second Part of Section 269 of the JCC that has been addressed before.

Additionally, a scarcity of Jordanian judgments regarding restitution applied in the context of tort liability is also noted, as the

courts have resorted to monetary compensation as a means of resolving such disputes. The present paper further notes that Section 269(2) of the JCC stipulates that priority must be given to monetary compensation, contrary to civil law jurisprudence, which prioritizes restitution among other forms of compensation. The importance of prioritizing restitution as a form of compensation has been elaborated through the examples provided in this paper, in the context of physical, moral, and environmental damages, as well as the damage observed within the intellectual property field. Hence, the study suggests that the JCC should prioritize restitution, and if this is not applicable, recourse can be made to the rules of monetary compensation.

Accordingly, the authors found that Jordanian Law does not regulate restitution in the context of tort, where the rules for such compensation can be impliedly derived from several legal texts scattered throughout different legal sets, such as the Civil Code, the Commercial Code, the Patent Code, and the Trademarks Code. Namely, the legal framework of restitution is not clear under Jordanian Law, because some rules can be impliedly derived from the general rules in the JCC. In contrast, the remaining rules can be derived from specific examples provided in several texts across different codes. As such, the study suggests that the Jordanian Legislator may review all relevant Jordanian legal sets to highlight and identify the legal issues impeding the satisfaction of restitution under liability in tort.

It has further been recommended that Section 269 of the JCC must be amended to deprive the discretionary authorities of the court in terms of restitution and suggest that restitution must be considered an obligatory route, provided that circumstances of the case allow the application of such a compensation and in turn, the aggrieved party can avail more privileges due the compensation attained through the right to restitution. Moreover, the section mentioned above has to be rectified. This can be achieved by not confining a claim of restitution to the injured party, as this restriction would deprive the defendant of the opportunity to claim restitution, forcing the court to refrain from responding to this claim. Such an amendment will undoubtedly be in favor of justice and consistent with the requirements of development in various fields.

It can further be recommended that though Art. 48 of Jordanian Copyrights Protection Law adopted Restitution as a mean compensation, Jordanian law should further pay more attention to restitution as a form of compensation that should be given priority over other types of compensation or penalties, especially in the context of the Environmental Protection Law, as international and national efforts seek to recover the environmental situation by removing violations or closing the factories that affect the environment instead of imposing fines or penal sanctions. Such a solution will be consistent with an international approach of environmental sustainability. Moreover, restitution should also be consolidated in Jordanian commercial laws including laws related to matters of infringement of moral rights like patents, trademarks, trade names, and commercial address rights, whereby the situation will be returned to the state that existed before the damage was sustained. For all of these recommendations to be effective, there is a need to develop a comprehensive legal framework.

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AI through the Prism of Its Legal Personality: Basic Characteristics

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Abstract: The issue of extending legal liability to artificial intelligence — that is broader than its legal capacity — has been within law and technology. The main array of questions in this area is focused on understanding the specific characteristics of artificial intelligence in the context of its regulation, which inevitably leads to a number of fundamental and applied questions. The integration of artificial intelligence into the legal framework requires a clear understanding of its functional capabilities and limitations. Its autonomy and ability to self-learn provide a basis for discussions about legal personality and the potential for accountability. Such considerations inevitably raise questions about how exactly artificial intelligence can participate in legal relationships, as well as what rights and obligations may be associated with its functioning. In this regard, one of the cornerstones remains the question of introducing artificial intelligence into the circle of entities subject to legal liability, which necessitates the exploration of existing approaches to defining this category and the subsequent step of developing acceptable conceptual approaches concerning the legal capacity of modern technologically complex systems. The main task of

the research is to present the existing conceptual constructs, based on a detailed analysis of the existing concepts regarding artificial intelligence and its legal capacity.

Keywords: artificial intelligence (AI); legal capacity; systemness; autonomy; self-learning; adaptability

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Contents

I. Introduction

One of the fundamental challenges in recognizing the legal personality of artificial intelligence (AI) is the absence of a unified theoretical and doctrinal approach within contemporary legal discourse. While AI systems demonstrate certain characteristics traditionally associated with legal subjects — such as autonomy, self-learning, and decision-making capacity — there remains a considerable gap between these technical attributes and the foundational legal criteria for personhood. According to Solum (Solum, 1992), legal personhood requires not merely the ability to act but also the recognition of these actions within a legal framework, implying a degree of responsibility and accountability. Therefore, bridging the conceptual divide between

the functional capabilities of AI and its potential legal status requires a more nuanced understanding of both the normative basis for legal subjectivity and the practical implications of assigning rights and duties to non-human entities.

Considering the issue of forming a conceptual construct that most accurately reflects the existing development of artificial intelligence systems, it is necessary to note that the foundation for further strengthening the regulatory framework for artificial intelligence consists of two aspects: a certain degree of autonomy in solving assigned tasks, and the inability to directly perceive and adhere to moral, ethical, and legal norms during their activities.

Regarding the matter of forming conceptual constructs of artificial intelligence, it is essential to define the criteria that are inherent in it and that can serve as a basis for determining its possible legal capacity. In this regard, it is proposed to proceed from the assumption that artificial intelligence

1) represents a complex system made up of numerous interrelated components that function together to perform tasks;

2) learns via provided data and experience without directly programming each task (including the use of machine learning, deep learning, and *ad hoc* learning techniques that allow the system to adapt and improve its solutions over time);

3) able to process information logically, draw conclusions, solve problems, make decisions based on available data, and self-learn;

4) meets the adaptability criterion, that is, it is able to adjust its functioning in response to changes in the circumambiency or on the basis of new information.

Considering the specified criteria, artificial intelligence can be regarded as a complex autonomous system capable of self-learning, independent analytical thinking, adapting to new conditions, performing multitasking operations, and making decisions based on embedded algorithms and data analysis, without direct human intervention, embodied in digital form and/or in a physical shell, capable of carrying out actions that go beyond pre-programmed tasks.

This approach allows us to talk about the existence of at least two groups of criteria, the presence of which raises the question of the legal

subjectivity of artificial intelligence: volitional and functional criteria, the examination of which serves as the main focus of this research.

It is important to note that the functional characteristics themselves are not limited to the ability to process data and make decisions. Modern artificial intelligence systems demonstrate a high degree of adaptability and learnability. For example, neural networks based on transformer architecture, such as GPT (Generative Pre-trained Transformer), are capable not only of generating text but also of solving complex analytical tasks, adapting to new types of input data without the need to retrain the entire model. This property, known as "few-shot learning", allows for rapid mastery of new operational areas, significantly expanding its potential sphere of influence in various fields of human activity.

Moreover, modern artificial intelligence systems possess a high degree of autonomy in decision-making. For example, the algorithms used in autonomous vehicles are capable of independently analyzing traffic situations and making maneuvering decisions without direct human involvement. This raises important questions about the boundaries of responsibility and legal subjectivity of such artificial intelligence systems in cases where their autonomous actions lead to legally significant consequences.

Another important characteristic is the ability of modern artificial intelligence systems to perform multimodal data analysis. Systems like DALL-E or Midjourney are capable of not only understanding and generating text but also working with visual information, creating images based on textual descriptions. This expands the understanding of "intellectual activity" in terms of how artificial intelligence functions and potentially impacts legal regulation in the fields of copyright and intellectual property.

Considering the fact that this definition and classification of criteria are not universal and are subject to criticism in the scientific community, as well as the fact that in the international legal context there are also various approaches to the definition and regulation of artificial intelligence, the research of the designated volitional and functional criteria acquires additional significance and complexity, which predetermines the need for their analysis, as well as consideration of various positions regarding their essence and impact on the integration of artificial intelligence into legal reality.

II. Methodology

The methodology of this research is based on an interdisciplinary approach that combines tools from the fields of law, philosophy, and information technology. For this purpose, the work utilized methods of analysis and synthesis, deduction and induction, correlation of definitions and concepts, as well as comparative conceptual analysis of a wide range of sources, including monographs, articles, and scientific papers that examine artificial intelligence from various perspectives.

The methodology of the research is based on a dialectical approach using a combination of general scientific and specific scientific methods of cognition and understanding including

1) the method of explication, which allowed considering approaches to understanding the characteristics/features of artificial intelligence (autonomy, self-learning, systemic nature, etc.) from the perspective of legal science (in particular, from the theoretical component of legal responsibility) as forming a set of factual circumstances indicating the presence or absence of legal capacity;

2) formal legal (dogmatic) method, through which the legal characteristics of artificial intelligence are studied on the condition of its legal capacity;

3) comparative legal method, by means of which existing theoretical and practical approaches to the understanding of artificial intelligence in foreign legal orders are examined;

4) legal modeling method, by means of which possible approaches to addressing the issue of understanding artificial intelligence in the light of its legal capacity are developed and substantiated.

III. Volitional Elements in the Characteristics of Artificial Intelligence

The first group of characteristics that serve as an essential component in understanding artificial intelligence is related to the manifestation of volitional elements in its functioning.[1] It seems that such characteristics should be classified as follows:

[1] In this study, the category of "volitional" is used as the most relevant in terms of content to the categories that will be described later when examining approaches

— systematicity;
— autonomy;
— independence.

A sequential analysis of these indicators will allow to answer the question, firstly, what substantive components are embedded in the doctrinal and regulatory framework of these categories, and secondly, how appropriate and justified it is to use them when addressing the issue of the legal capacity of artificial intelligence.

Systematicity of artificial intelligence

One of the most important characteristics used to reveal the essence of artificial intelligence is systematicity, which refers to the integration of various components into a single functional structure.

From the perspective of revealing the substantive component of this characteristic, it seems reasonable to assume that the systematicity of artificial intelligence implies a mode of operation in which a complex of components are interconnected and work together to achieve specific goals.

The systemic nature of artificial intelligence implies the inclusion of various elements in its structure: software, hardware, as well as cybernetic components. In particular, considering artificial intelligence as a cybernetic system suggests that it integrates a set of elements, among which:

— controls;
— data processing elements;
— automation elements.

As an effective functional structure, this system can be viewed exclusively in its entirety, serving as a means of processing information and analyzing complex interconnections (Bratko, 2024, pp. 273–275).

In this sense, including the addressing of the issue of the legal capacity of artificial intelligence, systemic thinking requires considering all the structural components that ensure its functioning (Ruchkina et al., 2021, pp. 227–236).

to understanding artificial intelligence. Strictly speaking, at this point, they cannot be considered in their formal legal content. However, further exploration of this issue does not rule out such a possibility (including in the context of the ongoing development of the technological component of artificial intelligence).

The existing typology of artificial intelligence is also related to the characteristic of systematicity. Currently taking into account technological development, two types of artificial intelligence are distinguished, which can be conditionally labeled as "weak" and "strong" (Yuwen, 2022, p. 92). It seems that such a division of artificial intelligence may play a significant role in addressing the issue of its legal personality and the potential distribution of responsibility.

The characteristic of "weak" artificial intelligence is defined by its performance of specific tasks: text processing, image creation, data analysis, or providing recommendations on a given topic. Its functioning is implemented based on predefined algorithms that allow it to process queries and provide appropriate responses, but its actions are limited to certain frameworks. Such artificial intelligence systems operate on the basis of pre-built algorithms that allow them to process requests and provide appropriate responses, but their actions are linked to the existing framework of the programs created for them. This allows to speak about the limited nature of the capabilities of "weak" artificial intelligence, including its inability for flexibility and adaptation.

Therefore, this qualitative characteristic can be taken into account when determining the legal capacity of artificial intelligence. The limited nature of the capabilities presented above allows us to speak of an increased dependence on humans — both from the user's side and the developer's side — which objectively shifts the focus of responsibility onto humans when it comes to "weak" artificial intelligence.

The second type of artificial intelligence (the "strong" one) possesses systemic characteristics that enable it to perform complex intellectual and creative tasks, imitating human cognitive activity (Zhao et al., 2022, p. 69). It is noted that it may exhibit certain actions characteristic of humans, which indicate self-awareness, adaptation to circumambiency, and the ability to think logically (Kuteinikov et al., 2021). "Strong" artificial intelligence is also distinguished by the fact that it learns from a huge array of data and very different information; such a system is capable of processing large volumes of information at a high speed, which is critically important for performing complex tasks that require rapid data analysis and decision making.

It is evident that such a distinction in the qualitative capabilities of artificial intelligence cannot be overlooked when addressing the issue of its legal personality. In this regard, it is appropriate to discuss the necessity of differentiation and consideration of the systemic characteristics of artificial intelligence when determining the possibility or impossibility and the degree of its responsibility, if such is provided for.

Autonomy of artificial intelligence

Researchers emphasize the importance of distinguishing AI as an object of legal regulation from its status as a potential subject of rights, suggesting that the legal capacity of AI should depend on its ability to autonomously perform legally significant actions (Laptev, 2019, pp. 88–90). The existing contexts in the field of artificial intelligence allow it to be described as a system capable of rationally solving complex problems or taking appropriate actions to achieve its goals in the real world (Firth-Butterfield et al., 2018, p. 5). Furthermore, the anthropogenic nature of artificial intelligence, capable of performing actions that require human intelligence, defines its ability for intelligent behavior, which is broadly understood as the capacity to achieve complex goals.

Such a definition allows us to view intelligence as a characteristic inherent not only in humans but also in non-human actors, emphasizing that intelligence can be considered in the context of any systems capable of effectively solving problems. At the same time, the presence of such a characteristic as autonomy allows to talk about the possibility of developing independent criteria for the functioning of artificial intelligence.

Meanwhile, the autonomy of artificial intelligence is revealed through a complex of the following characteristics:

— independence of actions, meaning the ability to independently initiate and execute tasks that do not always require human intervention or confirmation for each action;

— adaptation to new conditions or changes in the circumambiency by independently adjusting one's actions to achieve goals;

— the duration of an activity that is associated with functioning for a certain period of time without external intervention;

— the ability to function without human intervention, encompassing the processing and analysis of large volumes of data necessary for performing multitasking and complex operations.[2]

Accordingly, artificial intelligence can be viewed as a functioning system capable not only of solving various tasks but also of operating in the real circumambiency, achieving its goals independently, not merely by copying human intelligence, but by creating its own logical approaches and arriving at qualitatively new and distinct solutions and conclusions.

Such a characteristic of artificial intelligence allows to speak of situations in which its functioning, strictly speaking, is carried out independently of humans (primarily the developer-subject), autonomously, which is an important condition when determining legal personality (Lawless et al., 2019).

It is important to note that regardless of the approaches to understanding of artificial intelligence, its influence on the material world, the ability to analyze and form behavioral algorithms make it a real and influential element of the real world.

Due to the risks associated with possible errors in the creation and operation of artificial intelligence systems, as well as with the data on which they are trained, there is a possibility of unforeseen consequences, in which operational situations may arise that contradict the expectations of the developers. While such systems have some impressive capabilities, their role in processes and autonomous decision making must be critically assessed in terms of their real contribution and potential risks, raising the question of human control and adjustment of their activities.

Cognitive autonomy of artificial intelligence

The concluding characteristic of the volitional elements of artificial intelligence is cognitive autonomy. Addressing this, it should be noted

[2] In particular, in the European Union, the current regulation (AI Act) defines artificial intelligence quite broadly, emphasizing its autonomy, which allows it to be distinguished from other technological solutions. See: The EU Artificial Intelligence Act: our 16 key takeaways. Available at: https://www.stibbe.com/publications-and-insights/the-eu-artificial-intelligence-act-our-16-key-takeaways [Accessed 02.06.2024].

that, the question of the will of artificial intelligence — if such a will exists — is related to defining its relationship with the will of the actors involved in its creation and operation (the programmer, the engineer, the developer, the owner, or other individuals who have access to its control).

At the same time, there is an opposing opinion, according to which it is necessary to distance oneself from such a category as "will" in relation to artificial intelligence in the legal sphere, since the presumption of the presence or absence of "will" is based on metaphysical and ideological argumentation, while decisions on legal capacity are primarily related to public interests (Kibalnik and Volosyuk, 2018, p. 177).

It is highlighted that artificial intelligence represents a way to reproduce human activity in the digital space based on formalizable information under conditions of temporal and resource constraints, uncertainty, and incompleteness of initial data, creating cybernetic objects (Gusarova, 2018, p. 7).

In this approach, artificial intelligence possesses a number of distinctive characteristics: the ability to perform cognitive and thinking actions, such as pattern recognition, understanding symbolic systems and languages, reasoning, analysis and evaluation, modeling, and abstraction (Morhat, 2017, pp. 68–69). The very fact that artificial intelligence can generate new ideas and solutions, the creative aspect of its activity, differs from that of humans. In this sense, any functioning of artificial intelligence ultimately results from a complex computational process. The ability to analyze substantial amounts of information and draw conclusions based on it does not negate the fact that artificial intelligence is dependent on the initial conditions and data from which it learned.

In this regard, it is appropriate to highlight a number of cognitive characteristics that distinguish artificial intelligence:

— the lack of subjective experience and intuition;

— inability for emotional perception.[3]

[3] In terms of answering the question of the legal capacity of artificial intelligence, this may mean that such institutions as exclusion of liability and mitigating circumstances are not applicable. However, comparing the identified characteristics with the general theory of legal liability is the next step in the work of the research team.

Considering cognitive autonomy as a characteristic of artificial intelligence functioning, it is necessary to take into account modern advances in deep learning and neural networks. Systems based on the transformer architecture, such as GPT-3 and its successors, demonstrate the ability to independently form complex conceptual models based on the processing of large amounts of data. This allows to generate new ideas and solutions that were not explicitly included in their original programming. For example, the latest generation of language models are capable of so-called "zero-shot learning", where the system can perform tasks for which it was not specifically trained, relying on its general "understanding" of language and context (Xian et al., 2020, pp. 1–2). This property can be viewed as a controlled form of cognitive independence, since the system independently generates solutions to a new problem. However, it is important to note, that this "autonomy" has its limitations. Despite the ability to generate new ideas, today's artificial intelligence systems do not have true understanding or self-awareness in the sense that we apply these concepts to humans. Their "decisions" are based on statistical models and data processing, not subjective experience or emotion.

However, the level of cognitive autonomy demonstrated by modern artificial intelligence systems is high enough to raise the question of the need to revise traditional approaches to defining subjectivity in the legal sphere. The ability of artificial intelligence to independently form decisions, even when limited by the framework of its original programming, creates new challenges for legal theory and practice.

Furthermore, the study of the cognitive autonomy of artificial intelligence is impossible without pointing out the absence of phenomena such as consciousness, feelings, interests, and freedom (in the sense of not being restricted) of will (Gadjiev and Voinikanis, 2018, pp. 30–34). However, it seems not entirely correct to approach the definition of artificial intelligence from the above point of view, since the introduction of metaphysical concepts into legal reality does not correspond to the nature of ongoing legal processes, as well as empirical data. Consciousness is not a necessary condition for legal capacity, and, therefore, is not an obligatory element necessary for

artificial intelligence, including considering the issue of determining its legal capacity.

In the context of legal regulation of artificial intelligence, it is important to note that, in conjunction with the artificial intelligence's ability to self-learn, there is a possibility of recreating a semblance of brain activity in artificial intelligence (Solum, 1992, p. 1236) by modeling the functioning of neural networks and synapses of the human brain, which allows for the imitation of human behavior (Minaeva, 2022, pp. 250–251).

In the legal discourse concerning the legal personality of artificial intelligence, several approaches can be distinguished, differing both in their methodological foundations and in the legal consequences arising from their application. The first approach proposes to consider the legal status of artificial intelligence as analogous to that of a legal person, with the primary emphasis placed on the actions of AI and the resulting economic consequences. In this context, the cognitive and volitional characteristics of artificial intelligence, as well as its potential differences from human intelligence, are either disregarded or regarded as secondary, even if AI exhibits forms of intellectual activity that differ from those of humans

The second approach pertains to more advanced forms of artificial intelligence, such as artificial general intelligence, which possess the capacity to act and experience emotions similar to those of humans. Within this framework, it is proposed that "strong" AI be recognized not merely as a technical or economic entity, but as a subject endowed with elements of human dignity and emotionality, thereby placing it in a legal position closer to that of natural persons (Gryszczyńska et al., 2024, pp. 55–57). This approach necessitates a more profound and comprehensive analysis of the ethical, philosophical, and legal aspects related to the recognition of AI as a legal subject, taking into account not only its functional capabilities but also issues of responsibility, free will, and the moral and social implications of such recognition.

In support of this position, it is argued that "strong" artificial intelligence, unlike "weak" AI, possesses the capacity to exhibit "collective intentionality" (Gryszczyńska et al., 2024, p. 60). This concept refers to cultural equivalence with humans, manifested in AI's ability to participate

in complex social and normative practices characteristic of human communities. Specifically, it involves engagement in "conventional cultural practices", such as law. Consequently, interactions between humans and "strong" AI acquire a character comparable to interpersonal interactions, opening new prospects for recognizing such AI as a legal subject and a full participant in legal and social relations (Linarelli, 2019, pp. 336–343). It should be noted that the cognitive activity of artificial intelligence, when based not merely on the imitation of understanding and applying ethical concepts, but on their genuine comprehension and integration into decision-making processes, represents a qualitatively distinct level of AI development. This level implies that AI does not only possess the capacity for formal processing of ethical norms, but also an internalized grasp of moral categories, thereby bringing its cognitive status closer to that of a human being. The attainment of such autonomous ethical reasoning would provide a compelling basis for re-evaluating the legal status of AI and considering the possibility of recognizing "strong" AI as a subject of law (Lovell, 2024, p. 13).

Despite this, to date, no artificial intelligence has demonstrated the ability to fully exhibit "collective intentionality" as understood in the human context, or to fully comprehend ethical concepts.

Contemporary AI systems, including the most advanced models, operate within limited specialized tasks and lack genuine understanding, consciousness, or the capacity to engage in social and normative practices at a level comparable to that of humans.

In addition to the aforementioned approaches, some scholars advance the concept of granting legal personality to artificial intelligence by analogy with corporate entities, where collective will be expressed through authorized representatives. This concept is based on the functional similarity between the cognitive activities of AI and human cognitive processes but emphasizes the absence of individual will and consciousness in AI, thereby allowing it to be regarded as a collective legal subject (Calverley, 2008). This perspective reflects an attempt to balance the need for legal recognition of AI to ensure accountability and control with the preservation of traditional conceptions of legal subjects founded on human will and consciousness.

IV. Functional Elements in the Characteristics of Artificial Intelligence

The functional elements of artificial intelligence reflect the qualitative characteristics that occur during its functioning, and whose presence must be taken into account when determining its legal capacity. Such elements are proposed to include:

— self-learning;

— adaptability.

The analysis of these elements is predetermined by the fact that they influence, to a certain extent, the independence and autonomy of artificial intelligence, which, in turn, is crucial for shaping the approach to understanding artificial intelligence in order to address the question of its legal capacity.

Self-learning of artificial intelligence

Self-learning of artificial intelligence is one of the key aspects of its development, allowing systems to accumulate knowledge and adapt to new conditions. With the property of self-learning, such systems are able to continuously improve their functionality without direct human intervention. This process is based on the use of complex algorithms.

Considering systemness as a characteristic of artificial intelligence, it is reasonable to assert the existence of a complex of technologies that are part of its structure and include, for example, knowledge bases, methods for solving specific tasks, interfaces for communication with humans, and access to the Internet, among others. These types of technologies enable artificial intelligence to self-learn and, as a result, perform tasks that traditionally require human intelligence by analyzing large amounts of data, identifying patterns, and applying the results to optimize its actions and decisions.

One of the mechanisms of self-learning of artificial intelligence can be the use of neural networks or connections that imitate the work of the human brain, which allows artificial intelligence to analyze complex data structures and make decisions after multi-level processing of information. The main methods of self-learning using neural networks are: reinforcement learning (interaction with the environment and receiving feedback in the form of “rewards” or “penalties”); learning

with a teacher; learning without a teacher (independent search for connections based on common features in the data volume).

The specified characteristic defines the necessity of considering artificial intelligence not only as a rationally functioning system but also as an actively operating entity capable of independently making decisions under certain circumstances to achieve specific objectives. From the perspective of regulating this area of social relations (including in the context of the legal subjectivity of artificial intelligence), the consequences of the decisions made — just like the decisions themselves — are the objects of reality that are of utmost importance.

In this regard, special attention should be paid to the existing possibility of autonomous selection among alternative options when addressing various tasks, which indicates the potential for subsequent legal assessment of such choices. Moreover, there is a possibility of using generative algorithms that facilitate the acquisition of new knowledge through learning from databases, self-learning from their own mistakes and experiences, as well as independently — without human guidance — develop and use additional algorithms, which allows the system not only to improve the accuracy of its forecasts and decisions, but also to reduce the likelihood of repeating the same mistakes in the future. Self-learning also implies the ability to generate new, previously unknown knowledge for artificial intelligence, which is especially important in a rapidly changing circumambiency. Accordingly, it is noted that the functionality described above enables the ability to make subjective decisions and perform creative tasks to a certain extent in an unpredictable environment through data collection (Humerick, 2018, pp. 396–398). In this regard, the ability to self-learn as a specific characteristic of artificial intelligence, reflecting its internal functioning, is aimed at increasing the degree of independence and autonomy, and subsequently independence from external actors interacting with it (Narendra et al., 2024, p. 4). Such a characteristic is an integral part of defining conceptual approaches to the legal personality of artificial intelligence.

Adaptability of artificial intelligence

Modern research highlights another characteristic of artificial intelligence that appears to have a significant impact on shaping

approaches to its understanding and the subsequent resolution of the issue of its legal personality. The speech in this case refers to the fact that artificial intelligence is viewed as a combination of technological and communication interconnections with the ability for logical reasoning and independent adjustment of actions in response to changing conditions (Yastrebov, 2018, p. 317). At the same time, its ability for self-regulation and adaptation does not affect the internal resilience and stability of its functioning as a complex system of interconnected structural elements.

The adaptability of modern artificial intelligence systems goes far beyond simple parameter tuning. Advanced machine learning models demonstrate deep adaptability, significantly expanding their potential scope of application and impact.

One of the most striking examples of high adaptability of artificial intelligence is transfer learning. This technique allows using knowledge gained from solving one problem to improve the efficiency of learning in another, related problem (Thommen and Roland, 2019, pp. 111–116). For example, a model learned to recognize objects in photographs can be quickly adapted to medical diagnostics using X-ray images. This portability significantly accelerates the process of adapting artificial intelligence to new areas of application, which has important implications for the legal regulation of the use of artificial intelligence in various professional fields.

Another aspect of artificial intelligence adaptability is the concept of meta-learning, or "learning how to learn". Systems that use meta-learning are able not only to solve specific problems, but also to optimize their own learning process. This allows artificial intelligence to quickly adapt to new types of problems, even if they are significantly different from those on which the system was initially trained. In the context of legal personality, this raises the question of how autonomous artificial intelligence can be considered if it is able to independently modify its learning algorithms.

In this regard, adaptability is an important characteristic of artificial intelligence from the perspective of its legal dimension. Firstly, it is a necessary condition for functioning in a dynamically changing world, including in terms of changing legislation. Secondly, adaptability

enhances the autonomy of artificial intelligence, as it reduces the degree of dependence on humans as actors in various fields who initiate the process of adjustment to align with the changed situation (Hussian et al., 2024, pp. 17–19).

The adaptability of artificial intelligence is its ability to perceive external changes, analyze them, and make appropriate adjustments to its algorithms and models to achieve optimal results. This adaptation process can be carried out both in real time and based on the analysis of accumulated experience and data. The adaptability of artificial intelligence also contributes to its sustainable development. A system that can adapt to changes has greater flexibility and resilience to external influences, which allows it to maintain its functionality even in the face of significant circumambiency changes.

Furthermore, adaptability refers to the ability of artificial intelligence to self-adjust and optimize without human intervention. An example of this approach is the use of machine learning algorithms, discussed earlier.

Taking into account the adaptability of artificial intelligence, it is permissible to speak of its functioning approaching human activity in the sense that it reacts to external stimuli and actively interacts with them, using acceptable and unacceptable solutions as indicators (Kotur, 2024). The adaptability of artificial intelligence does not only expand its functionality, but also emphasizes its autonomy and independence.

V. Objectification of Artificial Intelligence

The objectification of artificial intelligence is related to the external expression of its existence. In this regard, it is permissible to speak of the existence of two main forms of artificial intelligence: digital and cyber-physical.

The digital form implies a complete absence of a physical carrier and exists solely in virtual space. In turn, when there is a cyber-physical shell, there is a physical carrier,[4] with which the artificial intelligence is directly connected (Aljanabi, 2023, p. 16).

[4] Roadmap to a positive future powered by AI. Available at: https://www.figure.ai/master-plan [Accessed 12.07.2024].

The presence of a cyber-physical shell raises the question of the need to distinguish between categories such as a "robot" and "artificial intelligence" (Begishev, 2021, pp. 82–86). It should be noted that artificial intelligence possesses a set of characteristics described above (intelligence, ability for self-development, etc.), while a robot is a physical, automated, programmed mechanism designed to perform specific tasks. A robot has a physical substance, while the existence of artificial intelligence separately from a cyber-physical body is possible in digital form (Ponkin and Redkina, 2018).

The difference between the concepts of a "robot" and "artificial intelligence" must be doctrinally defined not only to avoid terminological confusion and form of unified approach researching these areas, but also to form an effective model of legal regulation of both artificial intelligence and robots.

Accordingly, the form of objectification of artificial intelligence ensures a distinction between it and related technological objects, integration into various technological and social contexts that determine the way it exists and interacts with the environment, which is necessary for the development of norms aimed at defining the status of artificial intelligence in legal reality.

VI. Conclusion

The conducted research based on the existing dogmatic and practical approaches in the field of artificial intelligence, including the development of conceptual approaches to the issue of extending legal responsibility to artificial intelligence, has allowed for the formulation of the following findings:

1) the lack of a unified representation of the essence of artificial intelligence in contemporary scientific discourse (in the sense of its fundamental characteristics and criteria underlie its activities) is largely predetermined by its complexity, which must also be taken into account addressing the issue of the legal personality of artificial intelligence as a formal legal characteristic;

2) it seems possible to distinguish volitional elements in the characteristics of artificial intelligence, namely, systematicity, which

implies the integration of various components into a single functional structure; autonomy, associated with independent initiation and execution of tasks; cognitive independence of artificial intelligence, which is associated with the absence of an emotional component, as well as the absence of consciousness, interest and freedom of will;

3) an important component is the functional characteristics of artificial intelligence, which are related, firstly, to the ability to self-learn, that is, to acquire new data, to learn from its own mistakes and experiences, as well as to independently develop additional algorithms; and secondly, to adaptability, which can be considered as the ability to take into account the changing factors of an uncertain circumambiency during operation;

4) the presented characteristics constitute a necessary set, the presence of which indicates the possibility of defining an information system as artificial intelligence. Therefore, it must be taken into account when addressing the question of its legal personality.

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Legal Vacuum in Kazakhstan's Platform Employment

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Abstract: Recently, Internet platforms have been increasingly active in Kazakhstan, providing services, passenger transportation and food delivery. With this in mind, in 2023 the Social Code of the Republic of Kazakhstan was adopted. The Social Code regulates platform employment and makes partial additions to the Labor Code of the Republic of Kazakhstan on this issue. These additions need to reveal the true essence of platform employment due to the need for more elaboration on certain problems and on the lack of consideration of many European countries' international practices and court decisions. Modern approaches to the regulation of platform employment have been revealed in European, Russian and Kazakh scientists' works. The analysis of the works of these scientists allowed the authors of this paper to draw several conceptual conclusions, such as the objective need to classify the self-employed into "independent self-employed" and "dependent self-employed", depending on which norms of civil and labor legislation can be applied. With this classification, particular importance should be given to the principle of authority — subordination in the relationship of the platform with its performers (or employees) in order to identify signs of a classic labor relationship. According to the authors' opinion, in the conditions of a legal vacuum, it is proposed to reflect the most optimal ways of regulating such employment in the future law of the Republic of Kazakhstan "On Platform Employment". The authors' main idea is that when regulating platform employment, a rebuttable presumption

of labor relations should be introduced and the burden of proving the absence of labor relations should be imposed on the platform.

***Keywords**:* platform employment; independent self-employed; dependent self-employed; social benefits and guarantees

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Contents

I. Introduction

Under the influence of economic, technological and demographic factors, the scale of platform employment has radically increased in the world over the past decade, the legal regulation of which and the analysis of its quality are the most important issues not only for the labor market but also for its subjects. Due to the demand for platform employment in Kazakhstan, much work remains to be done to develop effective mechanisms for protecting labor rights of platform workers.

In this regard, the study of the mechanism of legal regulation of labor and protection of labor rights of platform workers is conditioned by the need to improve civil and labor legislation regulating this non-standard form of employment using online platforms and digital technologies.

Currently, platform employment in Kazakhstan is not fully regulated. Small point-by-point changes to the Social Code of the Republic of Kazakhstan (hereinafter Social Code) and the Labor Code of the Republic of Kazakhstan (hereinafter Labor Code) do not reveal the essence of such employment, since they are worked out superficially,

without taking into account international practice and court decisions of several European countries.

Modern approaches to the regulation of platform employment have been revealed in the works of Kazakhstani scientists. Thus, in his scientific articles, M. Khasenov reviews concepts and research on regulating digital labor platforms. In his opinion, platform employment generates some challenges related to the increased vulnerability of employees called independent contractors (freelancers). The classical understanding of labor relations presupposes the signs of independent work and employee dependence, which is reflected in the business models of gig companies. The use of algorithmic control mechanisms and information asymmetry indicate the presence of authority in the relationship between the platform and the employee — subordination and dependence of employees on the platforms (Khasenov, 2022). Another Kazakhstani scientist, N. Lyutov, in his article "Platform employment: the draft of the new EU directive and the norms of Russia and Kazakhstan", based on a comparative analysis of the provisions of the draft EU directive[1] on improving working conditions within the framework of platform employment with norms, draft laws and judicial practice of Russia and Kazakhstan, concludes that it is necessary to consolidate the platform by workers having the status of employees within the framework of labor law (Lyutov, 2022). Russian scientists S. Golovina, A. Serova, O. Chesalina, S. Shuraleva and others also defend the opinion that the relationship between the platform and the contractor should be regulated by labor legislation.

Belarusian scientists have also studied the legal regulation of platform workers' work. Thus, K. Tomashevski, in his article "Platform employment: between labor, civil and tax law", notes that relations in platform employment have both an employment and a civil nature (Tomashevski, 2021). A similar opinion is held by A. Serova, who, in the article "In search of the concept of legal regulation of platform employment", formulated and scientifically substantiated the main provisions necessary for comprehensive normative regulation of labor.

[1] Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605 [Accessed 01.07.2024].

She proposed to start the process of reforming legislation by separating the self-employed as a separate category of citizens in order to give them an official independent employment status. At the same time, she also proposed to consolidate the Concept of "self-employment". Moreover, this is necessary in order to bring regulatory clarity to the definition of employment status in the labor market for the self-employed, including platform workers, due to the apparent specifics of their activities (Serova, 2022).

Conceptual issues related to the classification of the self-employed, as well as their rights and obligations, depending on which norms of a particular branch of law can be applied, were disclosed in Eva Kocher's monograph "Digital Labor Platforms at the Intersection of Labor Law: regulation of market organizers" (Kocher, 2022).

In the article "Platform Employment in Europe: Lessons Learned, Legislative Developments and Challenges Ahead", A. Aloisi aims to eliminate possible policy gaps and implications for the social law of the European Union by exploring lessons that can be learned from political and legal changes. It presents the results of trials at the national level with an emphasis on the role of algorithmic management. He also critically analyses the EU Directive on Transparent and Predictable Working Conditions[2] and the EU Recommendations on access to social protection for the self-employed.[3] It is argued that the targeted approach of the Court of Justice of the European Union may lead to the classification of platform workers as subject to social legislation in certain areas (Aloisi, 2022).

When classifying platform workers, particular importance is given to the principle of authority — subordination in the platform's relationship with its performers (employees) to identify signs of a classic labor relationship. In this context, the research of Norwegian scientists

[2] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union. Available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32019L1152 [Accessed 01.07.2024].

[3] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01). Available at: https://op.europa.eu/en/publication-detail/-/publication/7268ba21-079c-11ea-8c1f-01aa75ed71a1/language-en [Accessed 01.07.2024].

is interesting, highlighting three dimensions of power: direct power, agenda power and symbolic power. They attach particular importance to symbolic power when it is not manifested, since it receives tacit consent to the influence of this power. By making their own choices, people fall under the influence of a hidden form of power, where algorithmic control from the platform and information asymmetry limit the autonomy of employees (Nilsen et al., 2022).

From the labor law perspective, the article by T. Korshunova and O. Motsnaya, "Platform work and the changing of definitions of employee and employer", is of great interest. They note that with the development of technology and artificial intelligence, there is a need to reconsider the classical understanding of labor relations and its subjects. Considering that the introduction of new technologies into the field of employment and the departure from the Concept of a (single) employer is a necessary stage of social development, it is proposed to revise the concepts of "employee", "employer", "employment relationship" established in labor law. At the same time, it is considered necessary to reconsider the terminological aspect and determine how technological factors affect their legal nature.

Of course, it is impossible to disclose all the issues related to the revision of established concepts in labor law within the framework of one research paper. Nevertheless, a number of conclusions of the authors deserve attention, in particular, the following provisions: 1) persons working for the platform do not conclude an employment contract, do not have a particular legal status and depend entirely on who assigns and evaluates work through the online platform; 2) the advantage of the platform economy is the ability to maintain autonomy and freedom in choosing the schedule and volume of one's own work; 3) the relations arising between the platform and the contractor can be recognized as labor or civil law relationships; 4) it is proposed to legalize the Concept of "dependent self-employed"; 5) it is proposed to abandon the traditional emphasis on the status of employees and focus based on the concept of the employer; 6) it is proposed to determine the existence of an employment relationship through the performance by the prospective employer of its inherent functions (Korshunova and Motsnaya, 2022).

II. Methodology

The methodological approach of the study is a combination of the dialectical method of cognition of legal reality, general scientific methods of cognition and private scientific methods of legal science. The validity of the assertions and conclusions in this article is achieved through analysis, synthesis, deduction, the systematic approach, and the method of comparative jurisprudence. The dialectical method of cognition was chosen to detect causal relationships in developing the legal mechanism for regulating labor relations in digitalization. The study reveals the internal patterns inherent in modern labor relations. The methods of analysis and synthesis made it possible to study the structure, individual features and internal connections of the legal mechanism for regulating the work of platform workers. The synthesis method made it possible to combine the elements of the legal mechanism in dialectical unity with the allocation of their essential characteristics. With the help of inductions and deduction, both similar features of the legal status and activities of platform workers and specific differences were found. The formal legal method is based on analyzing sources of labor and civil and social law. The comparative law method made it possible to study the experience of foreign countries, taking into account the digitalization of various States.

III. Results

In Kazakhstan, two types of digital labor platforms are used.[4] They must be clearly distinguished by the legislator or judicial practice; this leads to the deprivation of various social benefits and guarantees for employees. The status of the employees should be determined based on the actual circumstances and not on how the parties formalized the relationship. Let's consider their differences in the tabular version to avoid errors in their classification.

[4] The Social Code of the Republic of Kazakhstan. Available at: https://adilet.zan.kz/rus/docs/K2300000224 [Accessed 01.07.2024]. (In Russ.).

Table 1. *Types of digital labor platforms currently operating in Kazakhstan*

Performers are independent self-employed	**Dependent self-employed workers**
A marketplace is an information system offering information about goods, works, services and their characteristics, ensuring contractor interaction. The system operators are not employers	A digital employer is an information system offering information about goods, works, services and their characteristics, ensuring interaction between employees, employers and contractors. The employers are the operators of the system
Rules are set in advance; performers and customers agree on the price; the platform does not control the quality of execution; platform performers independently search for orders and act on their behalf. Platform performers and marketplace operators are legally equal, and algorithmic control is not performed	The digital platform influences the terms of service provision and the price of the service, sets tariffs for services, and controls the performance of the service. Employees independently ensure working conditions and provide materials and equipment for business activities
They are independent self-employed	The employed include individual entrepreneurs who carry out their work personally. Employees are not limited by working hours and internal work regulations
These are services: copywriting, legal and accounting services, IT work, translation of texts, etc.	Transportation services, food delivery, cleaning services, etc.

As seen from the Table 1, no contracts formalize employment in either type. Internet platforms act as intermediaries, and this circumstance does not make it possible to determine the legal status of the parties who have entered into a relationship.

The main difference between a marketplace and a digital platform is the presence or absence of self-employed (independent or dependent) independence in their work. Most people who regularly earn their living by searching for customers on Internet platforms essentially turn out to be fictitious independent self-employed since their relationships with customers and platforms often have the character of labor; that

is, they are dependent and self-employed. Consequently, independent self-employed and dependent self-employed, on the one hand, are not identical concepts; on the other hand, they overlap, especially in conditions when platforms insist that they are not employers but intermediaries.

Under Subparagraph 133 Art. 1 of the Social Code, "an independent employee is an individual who independently carries out activities for the production (sale) of goods, works and services in order to generate income without state registration of his activities, except individual entrepreneurs, persons engaged in private practice, founders (participants) of an economic partnership and founders, shareholders (participants) of a joint-stock company, members of a production cooperative". This definition is new in Kazakh legislation and replaces the term "self-employed" that means a person who earns his living without an officially concluded employment contract. Based on the content of the activities of the two groups of "self-employed", it follows that the first group is *the independent self-employed*; the second group is *the dependent self-employed*.

The legislative definition of the "platform employment" concept is contained in the Social Code that entered into force on 1 July 2023. It notes that "platform employment is a type of activity for the provision of services or the performance of work using Internet platforms and (or) mobile applications of platform employment". This definition covers both types of employment, a marketplace and digital employer, since it deals with providing services and work performance. At the same time, in the following paragraphs of Art. 102 of the Social Code, many essential signs of such employment were mixed, namely: a) an "individual entrepreneur" or "legal entity" is called as an operator of the Internet platform, which does not correspond to reality, since persons register and work on the platform without an intermediary — an individual an entrepreneur or a legal entity; b) the third party is called the "executor", which is also incorrect, since the third party may be a "dependent self-employee", that is, an employee. This circumstance completely refutes the existence of an employment relationship; c) it is stated that the relationship between the operator, the customer and the

contractor is regulated by the Civil Code of the Republic of Kazakhstan,[5] which also does not leave the parties to the contract to formalize the relationship as an employment relationship. Thus, when developing this article, the legislator formally studied the issue's essence, qualifying the relationship only as a civil law relationship.

To develop the provisions of Art. 102 of the Social Code, the legislator provided for a new Art. 146-1 in the Labor Code that states "Peculiarities of labor regulation of employees employed by an individual entrepreneur or a legal entity operating using Internet platforms and (or) a mobile application for platform employment".[6] The article contains reference norms and some exceptions from the general norms of labor legislation (absence of restrictions in setting the deadline, freedom of contract, freedom of remuneration, working hours and rest time). According to this provision, relations with the participation of labor platforms are to be regulated only if an individual entrepreneur or a legal entity engaging employees uses the platform. However, the platform's business model differs in practice: a person registers on the platform and provides services without an intermediary — an individual entrepreneur or a legal entity. In our opinion, the article has also not been worked out by the legislator, which is why it does not clarify the legal regulation of the operation of platform workers. On the contrary, it will lead to confusion when distinguishing the types of self-employed employees.

The Resolution of the European Parliament on Fair Working Conditions, Rights and Social Protection of Platform Workers recognizes the difference in the approaches of States to defining the concepts of "self-employed" and "employee", which leads to erroneous qualifications of such employees.[7] In this regard, we support the resolution regarding the need to introduce a rebuttable presumption

[5] The Civil Code of the Republic of Kazakhstan. Available at: https://adilet.zan.kz/rus/docs/K940001000_ [Accessed 01.07.2024]. (In Russ.).

[6] The Labor Code of the Republic of Kazakhstan. Available at: https://adilet.zan.kz/rus/docs/K1500000414 [Accessed 01.07.2024]. (In Russ.).

[7] European Parliament resolution of 16 September 2021 on fair working conditions, rights and social protection for platform workers — new forms of employment linked to digital development (2019/2186(INI)). Available at: www.europarl.europa.eu/doceo/document/TA-9-2021-0385_EN.html [Accessed 01.07.2024].

of employment relations in platform employment and the burden of proving the absence of an employment relationship rests on the platform. Unfortunately, the absence of clear legislative criteria for distinguishing "independent self-employed" from "dependent self-employed" makes it impossible to define platform workers' legal status.

IV. Discussion

The criteria of labor relations in platform employment are defined by M. Khasenov, who identifies the following:

1) subordination and control (the work is performed under the instructions of the other party);

2) personal performance of work;

3) employee's integration into the organization and business model;

4) entrepreneurial opportunities — generating income in the service market and the presence of economic risks, to which the contractor is exposed;

5) economic dependence (Khasenov, 2022, p. 43).

It follows from the listed criteria that there are signs of traditional labor relations in the activities of digital platforms. At the same time, it cannot be said that there is wage labor on all labor platforms, as can be seen from *Table 1*, where, in addition to the "dependent self-employed", there are "independent self-employed" on digital platforms, who independently search for orders, act on their behalf, and they are not subject to algorithmic control.

Most of the court decisions rendered by the courts of the EU Member States proceed from the recognition of employees' fundamental rights inherent in wage labor. Furthermore, again, this does not mean that hired labor is used in all cases of platform employment. The main reason for similar court decisions is the lack of proper legal regulation of labor, services provided in platform employment, that is, a legal vacuum and the desire of the courts to protect the rights of precarious workers.

The automatic extension of all social guarantees to platform employment causes severe damage to the economy and poses a real threat to the platforms' existence (Sinyavskaya et al., 2021, p. 7). In this regard, we support the opinion on the soft regulation of this type of

employment and the expansion of opportunities for voluntary insurance of certain risks while maintaining the status of the "independent self-employed". Moreover, as for the "dependent self-employed", all the benefits and guarantees provided by labor legislation can be extended. To date, Kazakhstan does not have an adequate insurance system for both categories of persons, leaving them unprotected.

Currently, 9.1 million people are employed in the Republic of Kazakhstan, 6.8 million are employees, and 1.6 million are self-employed. The share of the self-employed population is about 17.5 %.[8]

The self-employed in Kazakhstan are those who earn their living without an officially concluded employment contract with employers, and these are not necessarily platform workers, whose number is more than 1 million people.[9] Identifying the specific number of platform employees is complicated since no general guidelines exist for such an assessment. According to some authors, it is difficult to estimate the number of people employed on digital labor platforms for the following reasons: a) the platforms themselves do not always provide such information; b) the same employees may be registered on different platforms; c) not all work full-time, some work for several hours a day. For some, this work is the primary source of income, while for others it is additional earnings (Petrovskaya, 2021). Furthermore, in this context, the number noted above — 1 million people — is an approximate number of platform workers.

The Concept of the Development of Kazakhstan's labor market for 2024–2029 draws attention to new approaches to formalizing platform workers.[10] It is noted that the main advantages of platform employment are flexibility of working hours, the ability to combine work with the main activity, and a balance of career and personal life. At the same time, it is emphasized that the main task of the state is to ensure the labor rights

[8] The main indicators of the labor market in the Republic of Kazakhstan (I quarter 2024). Available at: https://stat.gov.kz/ru/industries/labor-and-income/stat-empt-unempl/publications/158481/ [Accessed 01.07.2024]. (In Russ.).

[9] Self-employed and single aggregate payment in Kazakhstan in 2023. Available at: https://buh.mcfr.kz/article/852-samozanyatye?ysclid=lqp4dle143341273270 [Accessed 01.07.2024]. (In Russ.).

[10] Available at: https://adilet.zan.kz/rus/docs/P2300001050 [Accessed 01.07.2024]. (In Russ.).

protection and establish social guarantees for platform workers. At the same time, this Concept has no provisions regarding specific measures to protect platform workers' labor and social rights. However, it was possible to mention how "formalization" would occur. In our opinion, an independent law "On Platform Employment" is needed, where the categories under consideration would be fully described, depending on which it would be possible to determine the legal status, rights and obligations of the parties to the legal relations arising in this case, as well as social protection.

The Concept should also mention the risks of platform employment, such as a) unstable employment and income, and b) lack of the right to social benefits for unemployment, temporary disability, pension contributions, compulsory social health insurance, etc.

One of the main issues of platform employment is the issue of classifying the relationship between the platform and workers using platforms to provide services. The analysis shows that three types of relationships arise with such employment: civil, labor and mixed. It is difficult to identify mixed relationships since they may contain civil and labor relations elements. According to V. Vinogradova (2020), K. Tomashevski (2021), and others, these employees are not only in the field of joint normative regulation of civil, labor, and tax law norms.

A pilot project on platform employment of couriers and taxi drivers has been launched in Kazakhstan since 1 July 2023.[11] As part of this project, Internet platform operators are recognized as tax agents with the obligations to pay taxes and social payments.

As the relevant Agreement was signed with the *Yandex.Taxi* Internet platform, taxi drivers must register as individual entrepreneurs directly on the Internet platform. The Internet platform operator undertakes obligations to pay individual income tax, social contributions, mandatory pension contributions and contributions to compulsory health insurance from the income of taxi drivers. Therefore, if a taxi driver fulfils tax obligations in this way, he will receive social guarantees and access to medical care. On the one hand, the "dependent self-employed" is a

[11] Pilot project on platform employment. Available at: https://tsnik.kz/news/s-1-iyulya-zapushchen-pilotnyy-proekt-po-platformennoy-zanyatosti%20/?ysclid=lqp12yctiw102990848 [Accessed 01.07.2024]. (In Russ.).

business entity, and on the other, an employee with certain guarantees in terms of medical and pension provisions. The above obligations of a digital employer do not differ from those of an ordinary employer — the subject of labor relations. The question arises: why should such a complex scheme develop and register as an individual entrepreneur when an electronic employment contract can be concluded?

Moreover, in such activities of a self-employed individual entrepreneur, there is no entrepreneurial risk; he receives income for his work, not profit. It is also evident that transferring many social risks to such a dependent self-employed person makes him vulnerable with a compromised guarantee of labor relations, in other words, makes him precarious. In our opinion, this pilot project is mainly aimed at realizing the state's fiscal interests.

Yandex.Taxi does not limit its activities to an information intermediary only, since the platform fully coordinates and controls the process of drivers' work. It seems that at the end of this pilot project, it will be possible to legislate the specifics of labor activity and its characteristic features: the economic dependence of the employee; the asymmetry of the economic opportunities of the parties; the weakening of the integration of employees into the organizational structure of the enterprise (Akmanov, 2021). In practice, several countries have a situation where, due to the great competition between platforms, some platforms, the owners of their sites, hire them to attract responsible performers. Moreover, this approach guarantees constant customer access to platform services, even in times of crisis. Furthermore, this allows the platforms to maintain their niche in the employment system and continue to provide high-quality services. Such employees should be distinct from employees directly employed by the platform, who are internal employees ensuring the platform's functioning.

According to the pilot project organizers, taxi drivers will receive the following advantages: 1) exclusion of intermediary services in the form of taxi companies, which allows saving money for subsequent payment of taxes and social payments with the inclusion of the driver in the social security system; 2) simplified registration as an individual entrepreneur directly through the *Yandex* platform, without visiting the tax authorities; 3) income tax is set at 1 % of the actual

income received, whereas the standard income tax for an employee is 10 %; 4) no obligation to submit reports and calculate taxes and social payments independently. With the driver's consent, *Yandex* can withhold and transfer taxes and social payments calculated based on the driver's income.[12] As can be seen from the listed "advantages", the main drawback, in our opinion, is a minimal income tax of 1 %, which does not cover the necessary social protection level established for employees under an employment contract.

A. Serova considers it appropriate to provide platform workers with a package of social and labor rights and guarantees at three levels: general, which applies to all platform workers; specific that all the self-employed should have; and unique that only platform self-employed will be endowed with (Serova, 2022, p. 265). Agreeing with this opinion, we would like to clarify that such a differentiated regulation of social and labor rights and guarantees is suitable for the *independent self-employed*. As for the *dependent self-employed*, they should be considered as employees with the establishment of all social benefits and guarantees under labor law. We are talking about a social package for the platform self-employed, i.e., "dependent self-employed".

The legal literature contains papers were the authors doubt the purity of such regulation of the categories of the self-employed. Thus, L. Zaitseva notes that some platforms, to minimize possible costs, position themselves exclusively as an intermediary, although a quasi-employer platform may grow out of an intermediary platform. Such a digital employer has a solid and differentiated search system, offering users multi-level search conditions for performers, as well as a profound system of controlling influence on performers, carrying out not only selection but also training and evaluation, rating performers by evaluating the quality of their services in order to reward and punish in the future. As the contractor in such a platform eventually falls into organizational, personal and economic dependence, it becomes difficult to determine the status of such a contractor (Zaitseva, 2021). Moreover, this suggests that it is impossible in its pure form to single out and differentiate

[12] Platform employment: regulation: pros, cons. Available at: https://uchet.kz/news/platformennaya-zanyatost-regulirovanie-plyusy-minusy%20/?ysclid=lqpownsaoz260571939 [Accessed 01.07.2024]. (In Russ.).

the types of social protection for each of the categories of the self-employed mentioned above. The unclear formalization of labor relations and ambiguity in the issue of employee rights and responsibilities of platforms allows companies to control platform employees as employees but without the costs associated with the employer's social responsibility (Yanchenko, 2022, p. 922). Conceptualization of platform employment requires, firstly, defining the concept of various terms describing work based on digital platforms and, secondly, grouping them according to essential features and identifying categories of self-employed in order to establish social guarantees and prevent their precarization.

Some authors propose to divide platform employment into several components and to formulate for each component its regulatory framework by analogy with the types of entrepreneurships (Glotova and Gerauf, 2021, p. 26). Let us disagree with this statement of the question for the following reasons. Firstly, entrepreneurship is an activity that involves investing funds in order to make a profit based on a combination of personal gain and public benefit. Secondly, entrepreneurship is self-reliance and independence, the ability to make decisions regarding a particular issue within the framework of legal norms. With platform employment, a person can engage in certain activities that do not necessarily generate profit, but rather provide income. As principles of entrepreneurial activity, independence is not always inherent in a platform worker.

There are five types of entrepreneurships in Kazakhstan:[13] industrial entrepreneurship, commercial entrepreneurship, financial and credit entrepreneurship, intermediary entrepreneurial activity, and insurance. By analogy with these types of entrepreneurships, platform employment cannot be regulated, since such employment is not entrepreneurship.

Foreign researchers also believe many differences in platform employment exist, so courts classify legal relations with their employees differently. Nevertheless, the qualification of the status of persons working through digital platforms is necessary not only for their legislative consolidation but also for recognizing precarious employment

[13] The Entrepreneurial Code of the Republic of Kazakhstan. Available at: https://adilet.zan.kz/rus/docs/K1500000375 [Accessed 01.07.2024]. (In Russ.).

in the country with all its consequences and developing social measures to support this type of employment.

Due to the adoption of the Social Code in Kazakhstan and the inclusion of the norms on platform employment, self-employed citizens are subjects of entrepreneurial activity and their status is regulated by the norms of civil and tax legislation. Moreover, this suggests that a new organizational and legal form of entrepreneurship has emerged, which we categorically disagree with. Firstly, according to their economic situation, the self-employed are closer to employees than to business entities. Secondly, there is no entrepreneurial risk in the work of the self-employed. Thirdly, the self-employed receives income, not profit. Fourthly, all social risks that the employer must bear are shifted to the self-employed.

In a challenging international environment, the labor markets of the member countries of the Eurasian Economic Union (EAEU) show stability in comparison with the labor markets of many third countries. At the same time, they require transformation, considering the challenges of the time. Thanks to non-traditional forms of employment, markets are increasingly developing not for labor activity but for skills activity. At the same time, new forms of employment are developing faster than the legislative framework, which creates risks for parties to labor relations to remain without social protection and medical care. The absolute priorities of the EAEU are the creation of convenient platform solutions, digitalization of business processes aimed at removing barriers to doing business, and improvement of the quality of life of people in the Union.

Let us consider the state of legislative regulation of platform employment in several EAEU countries. In Kazakhstan, platform employment is available in taxi and courier services and IT services for software development. There are intermediary digital platforms that provide services from households to professionals. Negative consequences include inconstancy of income and work, reduction of job security, unavailability of social partnership, reduction of control over work hours, instability of safety and labor protection, reduction of coverage of social protection and insurance, lack of access to advanced training, etc. Legislative regulation of platform employment is provided for in the Social Code and the Labor Code (Art. 102 of the Social Code,

Art. 146-1 of the Labor Code). Platform employees do not enjoy the benefits and guarantees established by labor legislation, except cases provided for in the Labor Code. A pilot project is being implemented to provide social guarantees to taxi drivers and couriers.

In the Republic of Belarus, individuals employed through Internet platforms do not make an employment contract with the platform. The platforms use variants of civil law contracts to provide paid services to the contractor. The principle of voluntary payment of mandatory contributions for state social insurance (for pension provision and payment of temporary disability) has been established.

There is currently no legislative regulation of platform employment in Russia. A draft law "On Platform Employment" is being developed. It is expected to provide for the creation of a mandatory Register of digital platforms where each platform will have to register; the obligation for the platform to maintain a rating for platform-employed clients; the requirement to inform employees and customers; specific requirements for the payment procedure; creating conditions for voluntary social insurance of the employed; establishment of a procedure for resolving individual disputes between an online platform and the employed; creation of the Council of Digital Platform Operators; creation of a trade union of platform employees with voluntary membership. The participation of operators in the Council will be mandatory. Currently, social guarantees are provided through local initiatives: since 2020, *Yandex Services*, in partnership with an insurance company, have begun an experiment in providing social guarantees (paid sick leave and insurance). The program is implemented on a co-financing basis.

In the new Federal Law No. 565-FZ dated 12 December 2023, "On Employment of the Population of the Russian Federation", we do not find provisions on platform employment, let alone the mechanism of their legal regulation.[14] It is known that the deputies of the State Duma decided to develop and adopt a new law "On Platform Employment" but this does not mean that the fundamental law "On Employment of the Population of the Russian Federation" cannot even mention such employment that

[14] Available at: https://fs.czn.cap.ru/czn_home/www/laws/2023/12/12/f63ed296-afa6-4d33-a1be-be0be02365b3/zakon-o-zanyatosti-ot-301123.pdf [Accessed 01.07.2024]. (In Russ.).

not only exists in the country, but is also rapidly developing. Fifteen and a half million of workers in Russia have employment experience in the platform economy (we are talking about performers of one-time jobs who find customers using Internet platforms), including almost 2 million people who are permanent partners of the platforms. Regarding the number of the permanently employed, the platform economy is twice as large as all mining industries together, and three times as many are employed as in transport engineering, and five times in metallurgy. According to the trade unions, the initial draft of the law provided for creating a supra-platform Council that was developed mainly in the interests of platform companies. It provided for the legal regulation of the activities of platform workers using the norms of civil legislation without subjecting digital employers to proper social responsibility. Insufficient elaboration of the draft law led to the postponement of consideration and adoption to a later date.

There is an opinion among trade union representatives that creating a supra-platform Council and adopting the law "On Employment of the Population" are carried out in the interests of platform companies since both separate platform employment from labor relations.

In Kyrgyzstan, digital platforms are not legally regulated. The platform economy is widespread in passenger transportation (taxi), delivery services, trade, etc. Platform leaders are *Yandex*, *Glovo*, *2GIS*, *Lalafo*. Difficulties in the activities of taxi drivers include the illegal status of drivers, an opaque labor system, the use of fines, the lack of pension provision and social protection. Trade unions advocate determination of the legal status of platform workers and extending all guarantees to platform workers, developing protection mechanisms regardless of whether they are employees and have a civil contract. In February 2021, the taxi drivers' union was established. The life and health insurance program for *Yandex* users and drivers during trips has been in effect since June 2023.

There is no legislative regulation of platform employment in Armenia. Nevertheless, Armenia participates in all meetings of the CIS Interparliamentary Assembly to discuss legislative regulation of platform employment.

In the CIS region, there are no uniform legal norms for regulating platform employment. The CIS Model Law "On Platform Employment" (draft) will be adopted in 2025. According to this draft law, platform employment is a civil law relationship (subject to the criteria established in the law that distinguish these relations from labor). Platforms that comply with such criteria are immune from reclassification of relations with platform employees into labor ones. The platforms are assigned a list of responsibilities they owe to employees: to inform about all essential conditions of cooperation and available insurance products related to social protection. We concluded that it is necessary to introduce a single definition of a self-employed person throughout the CIS to ensure the introduction of social guarantees and protection for employees using the appropriate tax regime.

Currently, no EAEU Member State has an independent law "On Platform Employment" that would list the categories of self-employed and define their legal status to develop a set of social protection measures. After all, it is known that, if platform employment is regulated at the level of the law and its participants acquire a certain status, then platform employment will be an official way of earning money. The following three ways of regulating platform employment and establishing social guarantees are possible: 1) platforms will independently find a solution to provide basic social guarantees to performers; 2) platform workers will be endowed with all the rights and obligations established under the Labor Code; and 3) platform employment will be divided into several types and for each type regulatory measures will be established, while social protection measures will be determined and applied.

There are the countries where independent laws governing platform employment were enacted. In Spain, the Ley Rider Law has been in force since June 2021. The Law establishes the legal status of couriers and their right to: 1) carry out activities for the delivery and (or) distribution of any consumer product in exchange for remuneration; 2) receive information about the presence (or absence) of algorithmic control from the platform; 3) receive information about the rules and instructions established by the company. These rights are limited by inability to object to what has already been established by the platform. Thus, the platform, on the one hand, can establish algorithmic control,

but, on the other hand, the employee must know about it, i.e., the control must be transparent. The main advantage of this law is the extension of labor legislation to couriers. On 3 March 2021, the Government of Spain and the social partners concluded the Agreement regarding "The labor rights of platform workers", where they are recognized as employees provided with the right to access social services (this Agreement refers to workers subject to labor legislation).

Italian Law 128/2019 regulates the activities of all "organizationally" dependent employees: 1) those whose work is organized by the platform; and 2) the work of self-employed couriers delivering goods using two-wheeled vehicles. Even though couriers are called self-employed, the platform sets allowances for working at night, holidays, on days of adverse weather conditions, mandatory insurance against industrial accidents and occupational diseases. The platform unilaterally interferes with the activities of these employees, and the labor legislation applies to them. In 2020, the Protocol was signed between the Trade Union Conference and the Italian Ministry of Labor, according to which couriers are classified as employees.

In France, on 24 December 2019, the law regulating platform workers introduced significant changes to the French Labor Code. A new chapter entitled "Social responsibility of platforms" was included. The chapter concerns taxi drivers and couriers. Such responsibility of the platforms occurs if the platform determines the characteristics of the services and goods provided and sets the price.

As can be seen from the analyzed laws of European countries, the subject of regulation in all the three laws is the work of drivers and couriers who carry out their activities under the platform's direct (or indirect) control and are subject to labor legislation. Unfortunately, no laws in any country today distinguish the legal status of "dependent self-employed" and "independent self-employed". This is necessary in an environment where platforms sometimes reveal the true essence of relationships with employees to avoid social responsibility. Scientists researching this issue agree that legal classification is paramount for providing social protection to employees (Aloisi, 2022).

V. Conclusion

Regulation of the relationship between platforms and performers (employees) is carried out by the platforms unilaterally. Moreover, such regulation can lead to unfair competition between platforms, leakage of confidential personal data, and information asymmetry. Despite the attractiveness of such employment, as practice shows, it remains unstable, ultimately leading to the precarization of workers. Moreover, this fact cannot but worry the scientific community that is concerned about the legal vacuum that has developed in the majority of countries where the exploitation of the labor of platform workers continues, and the elimination of which can be carried out by state intervention through the development of effective mechanisms for the essential protection of the labor (services) of platform workers called the *independent self-employed* and *dependent self-employed*.

Lawyers of the Republic of Kazakhstan face the following tasks: 1) to identify the main transformations in the country in the field of employment and their impact on the labor mobility of citizens in the digital economy; 2) to study the current state of platform employment and identification of mechanisms for legal regulation of relations that develop in this area; 3) to study the essence of legal relations complicated by varying degrees of mixing elements of labor and civil law relations; 4) to define categories of platform workers depending on the services provided and to develop new theoretical provisions corresponding to the new realities of employment of citizens; 5) to identify the influence of technological factors on the legal nature of such well-established classical concepts as "employer", "employee", "labor relations"; 6) to determine the legal status of platform workers based on their categories and to develop specific measures to respect the rights and legitimate interests of these persons; 7) to substantiate characteristic features of platform workers as a legal category and the objective need for social protection of these workers. Some of these tasks are discussed to some extent in this research paper.

Thus, we hope that the results of this research will have a positive impact on the development of legislation in the Republic of Kazakhstan. The issues outlined in this paper are expected to be addressed in the new law "On Platform Employment", the development and adoption of which is a requirement of the digital economy.

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The Many Interpretations of Constitutional Morality

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Abstract: The concept of Constitutional Morality that is rooted in Dr. B.R. Ambedkar's vision has emerged to be an often contested and pivotal doctrine in the jurisprudence of the Indian Constitution. The concept broadly emphasizes adhering to the core Constitutional principles like liberty, fraternity, equality and justice over populist sentiments or majoritarianism. The judicial interpretation of the concept has evolved with considerable divUrsity that has at times led to contradictory or contrasting applications by the various benches of High Courts and the Supreme Court. In cases like *Indian Young Lawyers Association vs State of Kerala* and *Navtej Singh Johar v. Union of India* the concept was invoked to challenge the populist sentiments and expand individual rights. Conversely, in a few cases a restrained or deferential stance was adopted by the courts. This diversity in the interpretation of the concept raises critical questions about subjectivity of the concept and judicial over-reach. Some critics are of the opinion that an expansive and undefined use of the concept may blur the lines between moral policing and judicial reasoning. On the other hand, the proponents assert that it is necessary to enable social transformation and to uphold the constitutional ethos. The legal implications of the divergent interpretations are profound because it has a direct bearing on the civil liberties, policy and the balance between the three organs,

legislative, executive and judiciary. This commentary addresses how the concept of Constitutional Morality, though a powerful interpretative tool, requires consistent jurisprudential clarity to prevent arbitrariness and to ensure that it remains anchored in the constitutional values, text and democratic accountability.

***Keywords**:* constitutional morality; India; judiciary; individual rights; constitution

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Contents

We are under a constitution,
but the Constitution is what the judges say it is,
and the judiciary is the safeguard of our property and
our liberty and our property under the Constitution.
Charles Evans Hughes

I. Introduction

In India, the legal and social structure of the country has been greatly influenced by judicial interpretation of the Constitution. The rule of law and democracy have been protected by landmark rulings that have expanded fundamental rights, affirmed the basic structural doctrine, and ensured checks and balances. This flexible interpretation guarantees the Constitution's applicability in changing social environments. Judicial interpretation of the concept of Constitutional Morality in India is one such example that has been crucial in advancing progressive values and social justice.

Constitutional Morality is now a fairly common term used by the Courts, being more often used in India for the past few years. But what is *Constitutional Morality*? The Constitution of India does not use the expression "Constitutional Morality" but uses the expression "morality" as a restriction on the fundamental rights guaranteed to the people of India. However, on the other hand the term "Constitutional Morality" has been interpreted by the court as a restriction on the government in exercise of its powers.

Is "Constitutional Morality" the one as defined by the Court in *Manoj Narula vs Union of India*[1] or by Justice Indu Malhotra in *Sabrimala case*[2] or by Justice D Y Chandrachud in the very same case or by Justice Chandrachud himself in *NCT of Delhi vs Union of India*?[3] The dichotomy is starkly visible by the different interpretation of the term offered by Justice D Y Chandrachud in two different cases or by the fact a dissenting judgement was given by Justice Indu Malhotra in the same *case of Sabrimala temple* based on the different interpretation of the same term.

A commonly accepted interpretation of the term means adherence to the values of the Constitution as noted by Justice Dipak Mishra in *Manoj Narula vs Union of India*[4] and *Govt of NCT of Delhi vs Union of India*.[5] The first instance when the Indian judiciary used the term "Constitutional Morality" in any judgment was in the landmark *case of Keshvanad Bharti*,[6] also called *the basic structure doctrine case*.

II. Methodology

The methodology used is analytical and doctrinal supported by case law analysis.[7] The paper examines the theoretical underpinnings of the

[1] Manoj Narula v. Union of India (2014) 9 SCC 1sa.

[2] Indian Young Lawyers Association v. State of Kerala 2019 (11) SCC 1.

[3] NCT of Delhi v. Union of India C. A. No. 2357 of 2017.

[4] Manoj Narula v. Union of India AIR 2013 SC 168.

[5] Manoj Narula v. Union of India 2018 (8) SCC 50.

[6] Keshvanand Bharti v. State of Kerala AIR 1973 SC 146.

[7] The 4th Dr. Ambedkar Memorial Lecture on "Some Questions on Elections, Representation and Democracy". 17 December 2012. Release ID: 90853. Available at: https://pib.gov.in/newsite/erelcontent.aspx?relid=90853 [Accessed 5 May 2025].

concept of Constitutional Morality in the Indian context studying the constitutional provisions and landmark cases held before the Supreme Court of India and the High Courts. It gives an evaluation of how the concept has been invoked in different judgments and how it aligns with the democratic principles and the Constitutional values.

III. Constitutional Morality Definitions

In India, the term *Constitutional Morality* was first used by Dr. Ambedkar in the Constituent Assembly debate on 4 November 1948 Part II. Dr. Ambedkar referred to Grote's description of Constitutional Morality from his book *History of Greece* and the importance of having Constitutional Morality for any democratic Constitution's working.

Grote defined Constitutional Morality as "a paramount reverence for the forms of the constitution, enforcing obedience to the authorities acting under and within those forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts".[8]

In his speech *"Conditions Precedent for the successful working of democracy"* (Narain, 2017), Dr. Ambedkar stated that seven requirements must be met for a democracy to be successful, one of which was the observance of Constitutional Morality. In his opinion, "The constitution only contains legal provisions, only a skeleton. The flesh of the skeleton is to be found in what we call Constitutional Morality".[9]

IV. Constitutional Morality Interpretations

Constitutional Morality, a pillar stone for good governance

The Supreme Court had[10] observed that democracy expects constant affirmance of Constitutional Morality.[11] Justice Dipak Mishra opined that Constitutional Morality is a "pillar stone for good governance". The

[8] Keshvanand Bharti v. State of Kerala AIR 1973 SC 146.

[9] Narendra Jadhav, Ambedkar Speaks Vol. I 186 (2013).

[10] Manoj Narula v. Union of India AIR 2013 SC 168.

[11] Manoj Narula v. Union of India, AIR 2013 SC 168.

Court observed that Constitutional Morality essentially refers to abiding by the rules of the Constitution and refraining from acting in a way that would be considered a violation of the law or an arbitrary course of action. It functions like a laser beam that guides at the fulcrum.

To maintain the significance of Constitutional Morality, customs and traditions must develop. When the general public and the institution's leaders strictly adhere to the constitutional guidelines, avoiding deviation from the norm, and demonstrate in their actions the paramount concern of upholding institutional integrity and the necessary constitutional restraints, democratic values endure and flourish. One aspect of Constitutional Morality is adherence to the Constitution.

Constitutional Morality, a means to achieve preambular goals

The Supreme Court in *Navtej Singh Johar's case*[12] held that the goal of Constitutional Morality is to achieve responsive involvement. The Supreme Court cannot afford to lose its standing as the preeminent authority on constitutional principles. Democracy itself will be imperilled if it loses any power.[13] According to Constitutional Morality, every member of the society must be guaranteed a basic set of rights in order for them to live freely. In the Preambular to the Constitution, these rights are recognised as "Equality of status and of opportunity" and "Liberty of thought, expression, belief, faith, and worship". The goal of Constitutional Morality is to ensure that all forms of inequality are eradicated from the society and that every person has access to the tools necessary to assert their given rights. Constitutional Morality tends to foster a spirit of fraternity among a diverse population that includes people from many classes, races, faiths, cultures, castes, and sections in order to make Indian democracy vibrant.[14]

[12] Navtej Singh Johar & Ors v. Union of India Writ Petition (Criminal) No. 76 of 2016.

[13] Navtej Singh Johar & Ors v. Union of India Writ Petition (Criminal) No. 76 of 2016, Para. 144.

[14] Navtej Singh Johar & Ors v. Union of India Writ Petition (Criminal) No. 76 of 2016, Para. 143.

The Court further stated that "the Preambular goals of our Constitution which contain the noble objectives of Justice, Liberty, Equality and Fraternity can only be achieved through the commitment and loyalty of the organs of the State to the principle of Constitutional Morality".[15] These objectives of "justice, liberty, equality and fraternity" are the basic values and ideals of a democracy that can be achieved through Constitutional Morality.

Indian democracy can be made livelier by fostering a sense of fraternity among the diverse population that comes from various classes, races, faiths, cultures, castes, and social groups, according to Constitutional Morality.[16]

Constitutional Morality as a Fulcrum for Peaceful Democracy

The Court in *Navtej Singh Johar's case*[17] explained Constitutional Morality as a check upon both the citizens and the high functionaries of the State preventing tyranny and despotism that is likely to emerge if there are no checks and balances upon the functionaries and citizens.[18]

The Court opined that Constitutional Morality is the "fulcrum" that acts as a check to ensure that the free and peaceful democracy can thrive as was envisioned by Dr. Ambedkar when he quotes Grote in the constituent assembly. Further, it was remarked that, "Constitutional Morality acts as a check against lapses on the part of the governmental agencies and colourable activities aimed at affecting the democratic nature of polity".[19]

[15] Navtej Singh Johar & Ors v. Union of India Writ Petition (Criminal) No. 76 of 2016 Para. 115.

[16] Navtej Singh Johar & Ors v. Union of India Writ Petition (Criminal) No. 76 of 2016, Para. 143.

[17] Navtej Singh Johar & Ors v. Union of India Writ Petition (Criminal) No. 76 of 2016.

[18] Govt. of NCT of Delhi v. Union of India 2018 (8) SCC 50.

[19] Govt. of NCT of Delhi v. Union of India 2018 (8) SCC 50, Para. 61.

Constitutional Morality, constitutional culture to be absorbed

While making observations on Constitutional Morality, Justice DY Chandrachud in *Govt of NCT of Delhi vs Union of India* referred to several works which explained what Constitutional Morality is, one of which was Rajiv Bhagava's book titled "Politics and Ethics of the Indian Constitution" wherein the necessity of identifying constitution's moral values was emphasised and he remarked that allegiance to the substantive clauses and tenets of the Constitution is not the exclusive definition of Constitutional Morality. Constitutional Morality represents a constitutional culture that every citizen of a democracy needs to absorb.[20]

Strict adherence to the constitutional principles

Justice Dipak Mishra (then CJI) in the same case defined Constitutional Morality in the following words, "Constitutional Morality in its strictest sense of the term implies strict and complete adherence to the constitutional principles as enshrined in various segments of the document".[21] It can safely be inferred that this would imply adherence to all the democratic principles of the Constitution, which in turn would preserve the democracy.

Political morality and Constitutional Morality, distinct paradigms; Constitutional Morality, rooted in the principles enshrined within the Constitution

While hearing the matter of *Arvind Kejriwal's arrest,*[22] it was held that the courts are not concerned with political morality but only with Constitutional Morality. Since the parties' political morality is their problem and the Court is unable to make any judgements regarding

[20] Govt. of NCT of Delhi v. Union of India 2018 (8) SCC 50, Para. 11.

[21] Govt. of NCT of Delhi v. Union of India 2018 (8) SCC 50, Para. 57.

[22] Arvind Kejriwal vs Directorate of Enforcement, W.P. (Crl.) 985/2024 and Crl. M.A. 9427/2024.

it, courts, as the guardians of justice, are concerned with protecting Constitutional Morality rather than getting involved in that matter. Political morality and Constitutional Morality are two different concepts that inform decisions in their respective fields. While political morality is frequently influenced by partisan interests, ideological agendas, or populist sentiments, Constitutional Morality "is rooted in the principles enshrined within the Constitution, emphasising the protection of individual rights, adherence to the rule of law, and the promotion of justice for all" (Para. 178).

Regardless of political factors, courts have a duty to interpret the law and evaluate the conduct of investigative agencies in accordance with constitutional and legal standards when resolving legal issues. Courts preserve the integrity of legal institutions and guarantee that justice is administered impartially and free from the influence of political expediency by adhering to Constitutional Morality.

Political compulsion cannot outweigh Constitutional Morality

The Court held that political coercion could not take precedence over public morals, clean/good governance standards and Constitutional Morality. It was held in a matter where the question was whether to retain a member of legislative assembly as a minister without assigning him a portfolio, if the chief minister believes that a specific elected representative cannot be given the responsibilities of a Minister. The Court held[23] retaining such member would be against Constitutional Morality, good governance and ethos.

Rule of law and Constitutional Morality

The Court discussed the interplay of rule of law and Constitutional Morality.[24] It opined that the unique synergy between administrative accountability and active court engagement is the foundation of the

[23] S. Ramachandran vs The State of Tamil Nadu and Ors and J. Jayavardhan vs Principal Secretary Governor of Tamil Nadu and Ors. and M.L. Ravi vs Principal Secretary to Governor Government of Tamil Nadu and Ors MANU/TN/5131/2023.

[24] Manish Kumar Singh vs State of U.P. and Ors and Pushpa Nishad and Ors. vs State of U.P. and Ors. and Vinod Kumar Saroj vs State of U.P. and Ors MANU/UP/3880/2023.

vitality of the rule of law. The judiciary's exploration of the complex legal landscape that accompanies the administration of justice reveals that strong accountability frameworks and active court participation are essential to the development of a rule of law that is consistent with Constitutional Morality.

The courts are essential to promoting the rule of law because they provide the general public faith in the establishment of an open and responsible government. However, it is imperative to recognise that all departments of government bear an equally great duty for fostering and defending democratic values. The way these state agencies interact is crucial in fostering the general public's belief in the values of sound government. "Therefore, the vitality of the rule of law is contingent upon the collaborative efforts and commitment of all government branches to uphold accountability, transparency and Constitutional Morality, making the foundation for just and accountable administration".[25]

Constitutional Morality to have an overriding impact upon societal morality

The Court while disposing off a petition filed for protecting the lives of the petitioners in *Arti and Ors. vs State of Rajasthan and Ors*[26] relied upon the observation[27] that the Court is entirely committed to the idea that Constitutional Morality must always take precedence over societal morality. This Court cannot turn a blind eye to violations or neglects of fundamental rights, which are fundamental human rights. In particular, when the legal viability of the right to protection is vital, public morality cannot take precedence over Constitutional Morality.

In similar cases[28] where petitions under Art. 226[29] of the Indian Constitution were filed to ensure the protection of the lives and personal

[25] Manish Kumar Singh vs State of U.P. and Ors, MANU/UP/3880/2023, p. 5, Para. 21.

[26] S.B. Criminal Writ Petition No. 1005/2023.

[27] Leela & Anr. vs State of Rajasthan & Ors.

[28] Suman Kumari and Ors. vs State of Rajasthan and Ors S.B. Criminal Writ Petition No. 206/2023 & Jyoti Chelani and Ors. vs State of Rajasthan and Ors 2023/ RJJP/001735.

[29] Power of High Courts to issue certain writs.

liberties of the petitioners, the courts while deciding the matter referred to *Navtej Singh Johar vs Union of India*,[30] where the Apex Court held that the concept of Constitutional Morality, must serve as the Court's guide, not public morality. The rule of law must not be allowed to be subverted in a constitutional democracy like ours by enigmatic social moralities that lack any basis in the law. The idea of Constitutional Morality would help the Court reach a just ruling that would be in accordance with the citizens' constitutional rights, no matter how tiny that portion of the population may be. In this perspective, the concept of a number is worthless, much like the zero to the left of any integer.

In this sense, we must telescopically examine the relationship between social and Constitutional Morality. It does not need to be emphasised that whenever the constitutional courts encounter a situation of violation or dereliction in the area of fundamental rights, which are also the basic human rights of a section, however small part of the society, it is their responsibility to ensure that Constitutional Morality prevails over social morality through judicial engagement and creativity.

In a few similar cases[31] heard in the Rajasthan High Court where writ petitions were filed for the protection of the petitioners', reference had been made to *Leela & Anr. vs State of Rajasthan & Ors*[32] and the judgments were given in light of this reference. "This Court fully values the principle that at all junctures Constitutional Morality has to have an overriding impact upon societal morality. This Court cannot sit back and watch the transgression or dereliction in the sphere of fundamental

[30] MANU/SC/0947/2018.

[31] Chitra Kanwar and Ors. vs State of Rajasthan and Ors. S.B. Criminal Writ Petition No. 50/2023 and Manju and Ors. vs State of Rajasthan and Ors. S.B. Criminal Writ Petition No. 49/2023 and Monika and Ors. vs State of Rajasthan and Ors S.B. Criminal Writ Petition No. 54/2023, Raju Kumari and Ors. vs State of Rajasthan and Ors. S.B. Criminal Writ Petition No. 11/2023, Supriya Aanjana and Ors. vs State of Rajasthan and Ors. S.B. Civil Writ Petition No. 14902/2021, Taruna and Ors. vs Respondent: State of Rajasthan and Ors S.B. Criminal Writ Petition No. 71/2023, Kajal and Ors. vs State of Rajasthan and Ors S.B. Criminal Writ Petition No. 1887/2023 and S.B. Criminal Writ Petition No. 1908/2023, Monika and Ors. vs State of Rajasthan and Ors, MANU/RH/0945/2023, Radha Prajapat and Ors. vs State of Rajasthan and Ors. MANU/RH/0800/2023.

[32] S.B. Criminal Misc. Petition No. 5045/2021.

rights, which are basic human rights. The public morality cannot be allowed to overshadow the Constitutional Morality, particularly when the legal tenability of the right to protection is paramount".

Constitutional Morality prevails over social morality

In similar[33] criminal writ petitions filed for seeking protection of the petitioner's life and liberty, the Court relied upon *Navtej Singh Johar's case*[34] according to which the court should be guided by Constitutional Morality and not social morality and that there is no need to emphasise that whenever there is a violation of the fundamental rights of any section of the society no matter how small the courts have to ensure that "Constitutional Morality prevails over social morality".

The Court held that it is also important to note that in the present case,[35] the social morality that condemns adultery conflicts with the Constitutional Morality that partially accepts it as a partnership that has the characteristics of marriage. When social morality and Constitutional Morality clash in such a situation, Constitutional Morality prevails.

Constitutional Morality and social morality regarding marital institutions must be balanced

The Court[36] held that in order to achieve social coherence and the goal of achieving peace and tranquillity in society, the Constitutional Morality and social morality regarding marital institutions must be balanced. The Court emphasized the importance of both, Constitutional Morality and social morality in this case and how a balance between the two is important for maintaining peace and tranquillity in the society.

Social morality has to succumb to Constitutional Morality

While deciding upon the constitutionality of the Telangana Eunuchs Act,[37] the Court stated that any law that denies LGBT people's right to

[33] Rekha Devi and Ors. vs State of Rajasthan and Ors MANU/RH/1109/2023, Shivani Meena and Ors. vs State of Rajasthan and Ors MANU/RH/1022/2023.

[34] Navtej Singh Johar vs Union of India MANU/SC/0947/2018.

[35] Rhea Laila Pillai vs Leander Adrian Paes and Ors C.C. No. 25 DV 2014.

[36] Sneha Devi and Ors. vs State of U.P. and Ors MANU/UP/1389/2024.

[37] V. Vasanta Mogli vs The State of Telangana and Ors MANU/TL/0911/2023.

full and equal citizenship would be affected by Constitutional Morality. LGBT people have been denied the necessities of life, living under the danger of culturally moralised compliance. Prejudice and stereotypes have been applied to them. Such discrimination is prohibited under Constitutional Morality, which takes precedence over social morality. The Court while deciding upon the matter placed reliance upon *Navtej Singh Johar*[38] where it was stated that "Social morality has to succumb or give way to the higher concept of Constitutional Morality" and that "the morality that is conceived of under the Constitution is Constitutional Morality".

Public morality cannot be allowed to overshadow the Constitutional Morality

The Court while deciding a petition[39] for the protection of the life and liberty of the petitioners held that, the Apex Court has made it clear that the importance of public morality should be minimal when it conflicts with Constitutional Morality and that courts should uphold Constitutional Morality rather than relying on nebulous ideas of societal morality that lack legal validity. The courts have a duty to defend Constitutional Morality, but they also have a duty not to interfere with the intimate connection between two free-willed individuals.

This Court was fully committed to the idea that personal freedom cannot be constrained by social norms in a healthy democracy. The State must uphold a high standard of respect for people's freedom of choice. Since the legal viability of the right to protection is of the utmost importance, it cannot be permitted that public morality overrides Constitutional Morality.

Substantive equality in consonance with Constitutional Morality

The Court[40] was confronted with the question whether having a child means giving up dreams of working in public service, and whether

[38] Navtej Singh Johar v. Union of India AIR 2018 SC 4321.

[39] Sunita and Ors. vs State of Haryana and Ors 2022(2) HLR 593.

[40] Athira P. vs State of Kerala and Ors and Arya G. Krishnan vs State of Kerala and Ors ILR2024(1)Kerala185.

or not women should have to choose between having a job and having children. The Court answered the questions discussing substantive equality in relation to constitutional principles. It relied upon *Joseph Shine vs Union of India*[41] where it was noted that: "In consonance with Constitutional Morality, substantive equality is directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society".

The Court held that motherhood has numerous more complicated drawbacks. This could lead to a gender disparity. Discrimination will occur if the negative aspects of motherhood are ignored. Being a mother is not a sin, and pregnancy and parenthood should not be viewed as obstacles to women's ambitions in public service. The goal is to remove obstacles and give women the opportunity to compete with men on an equal footing, considering the situational realities of a woman.

Evolving Jurisprudence and philosophy must confine within Constitutional Morality

The Court while adjudicating[42] over the concept of "*pardanashin women*" and protection of the right of those who observe *purdah* under Art. 21 of the Constitution held that when the jurisprudence and philosophy on any subject evolves, it must confine itself within "Constitutional Morality".[43]

The Court gave much significance to Constitutional Morality in this matter as it defined the contours of evolving philosophy and developing jurisprudence within the confines of Constitutional Morality.

Articles 25 and 26 rights to be tested on the touchstone of the Constitutional Morality

The Allahabad High Court while deliberating upon a matter[44] regarding the right to worship made the observation with respect

[41] Joseph Shine v. Union of India (2019)3 SCC 39.

[42] Reshma vs The Commissioner of Police MANU/DE/1565/2024.

[43] Reshma vs The Commissioner of Police, MANU/DE/1565/2024, p. 3, Para. 4.

[44] Bhagwan Shrikrishna Virajman and Ors. vs U.P. Sunni Central Waqf Board and Ors 2023(6) ADJ 506.

to the exercise of the rights provided under Art. 25 and 26 in light of Constitutional Morality, "the rights under Art. 25 and 26 can be exercised when they are tested on the touchstone of the Constitutional Morality and the public order". Here, the court's observation provided another way of looking at Constitutional Morality, as a restriction on the exercise of fundamental rights. The Court held that the abovementioned rights can be exercised after they pass the test of public order and Constitutional Morality and thus kept both the restrictions *at par*.

Morality naturally implies Constitutional Morality

An elaborate discussion on the concept of Constitutional Morality[45] was made where the issue at hand was whether the practice of ex-communication in the Dawoodi Bohra community violates Art. 17, 19(1)(a), 19(1)(c) and 19(1)(g), 21 and 25 and, thus, cannot be said to be protected under Art. 26.

The person being ex-communicated suffers a civil death and thus the practise is contrary to Constitutional Morality. The Apex Court's judgment in *Sabrimala Temple case*[46] was relied upon to decide what morality under Art. 26 implies,

"The term 'morality' cannot be viewed with a narrow lens so as to confine the definition of morality to what an individual or a religious sect may perceive to mean. Morality naturally implies Constitutional Morality and any view that is ultimately taken by the Constitutional Courts must be in conformity with the basic tenets of Constitutional Morality. "Morality" for the purposes of Art. 25 and 26 must mean that '*which is governed by fundamental Constitutional principles*'".

The Court held that one could argue that the idea of Constitutional Morality, which supersedes the freedom granted by Clause (b) of Art. 26, will not allow the civil rights of those who have been excommunicated to be revoked because they stem from human dignity and liberty. Our Constitutional Morality undoubtedly includes the ideas of equality, liberty, and fraternity. Constitutional Morality is based on fundamental

[45] Central Board of Dawoodi Bohra Community and Ors. vs The State of Maharashtra and Ors. AIR 2023 SC 974.

[46] Young Indian Lawyers Association v. State of Kerala 2019 (11) SCC 1.

principles that are written in our Constitution. Constitutional Morality is the conscience of our Constitution.

Therefore, it is argued that the ideas of liberty and equality are incompatible with excommunication or ostracism. It is against the values outlined in the Constitution, which is anti-discriminatory. Since the idea of Constitutional Morality forbids the Court from doing so, the Constitutional Court should not allow anything that denies someone the right or privilege to live in dignity.

From the Court's perspective, the safeguarding of the right to excommunicate a member of the Dawoodi Bohra community under Art. 26(b) needed to be re-evaluated because it is contingent upon morality, which is understood to be Constitutional Morality. Thus, the Court ordered the present petition to be tagged with a review petition[47] being heard by nine judges' bench.

Article 38, good example of the Constitutional Morality

The Court while delivering a judgment[48] stated that Art. 38[49] of the Indian Constitution that calls for the abolition of inequality, is a good example of the Constitutional Morality as it relates to the guiding principles of the State. This Article serves as the cornerstone of public policy and provides enough direction to the executive and all other State organs to streamline the good judgements that serve the goal and object of social and economic justice equitably. This interpretation of the court indicated the view that Constitutional Morality acts as a guiding principle for the State, it guides the State actions and its policies.

Using standards of Constitutional Morality

The High Court of Rajasthan while deciding a matter[50] regarding maintenance and welfare of parents and senior citizens held that the suffering of old age and the uncertainty of life experienced by senior

[47] Review petition (civil) No. 3358 of 2018.

[48] Kusum Lata Yadav and Ors. vs State of U.P. and Ors 2022(5) ALJ 756.

[49] State to secure a social order for the promotion of welfare of the people.

[50] Nahid Parvej vs District Magistrate Pali and Ors. 2023(2) RLW 1270(Raj.).

individuals and parents frequently move the authorities discharging their duties or exercising their rights under the Act of 2007, including the Tribunals. The moral standards of society, including those of children, are falling with each passing day, which is a really bad situation. However, courts are supposed to decide cases or the rights and obligations of litigants using the standards of statutes and Constitutional Morality rather than solely following public or popular morality. Unless the law clearly provides for it, societal expectations and responsibilities cannot be enforced or ordered by courts of law. In the words of Dr. B.R. Ambedkar, "Constitutional Morality is not a natural sentiment. It has to be cultivated. We must realise our people have yet to learn it".

Advocate is a guardian of Constitutional Morality

The Court in one of the cases went on to state that as much as a judge is the guardian of justice and Constitutional Morality, so is the advocate. This was held in the case where the key issue was whether the District Magistrate or Chief Metropolitan Magistrate has the authority to designate an advocate and give him or her the go-ahead to seize the secured property and any related documents and give them to the secured creditor in accordance with Section 14(1A) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The Court while hearing the case[51] held, "It is well established that an advocate is a guardian of constitutional morality and justice equally with the Judge".

Protection for essential religious practices in line with Constitutional Morality

The Court[52] while dwelling on the question of essential religious practices held that the same must associate with the Constitutional

[51] NKGSB Cooperative Bank Limited vs Subir Chakravarty and Ors. AIR 2022 SC 1325.

[52] Resham and Ors. vs State of Karnataka and Ors AIR 2022 Kant 81.

values and referred to *the Indian Young Lawyers Association case*[53] wherein it was held that the courts have a responsibility to make sure that what is protected is in line with essential constitutional principles, protections, and Constitutional Morality. While the Constitution is careful to protect both denominational rights and religious freedom, it must be remembered that the trinity that characterises the Constitution's creed is dignity, liberty, and equality.

Constitutional Morality binds the might of the State

The Court very categorically stated that the "The might of the State is bound by the Constitutional Morality"[54] while deciding upon a matter of bail to the appellant detained under preventive detention. The Court's observation denoted that the State's actions are bound by Constitutional Morality, and it acts as a deterrent against the misuse of the authority against the rights of the people.

Constitutional Morality binds constitutional functionary

Another example of how Constitutional Morality acts as a check against the governmental functionaries is *Kishore Kumar vs P.K. Sekar Babu and Ors*[55] wherein the Court's observation was that a constitutional functionary is bound by Constitutional Morality and that is well settled. This morality requires the functionaries to be fair and neutral in their dealings with the people. The Court also made the observation that the Legislature should create a voluntary model code of conduct for those in public office that aligns with and reflects good governance and Constitutional Morality.

[53] Young Indian Lawyers Association vs Union of India (2019) 11 SCC 1.

[54] Atikur Rahman vs State of U.P. and Ors Criminal Appeal No. 2674 of 2022.

[55] And V.P. Jayakumar vs A. Raja and Ors. and T. Manohar vs Udhayanidhi Stalin and Ors MANU/TN/0988/2024.

Manipulation of information, breach of Constitutional Morality

In a matter[56] before the Court, the petitioners challenged the constitutional validity of a rule[57] because it violated Part III of the Indian Constitution; the challenged Rule had a "chilling effect" on the petitioners' right to free speech and expression. The petitioners had claimed that the government is the only entity that may determine the truth about any matter pertaining to itself, and they are upset about the contested Rule that gives the Fact Check Unit the right to determine whether or not "information" is true.

The Court held that the contested rule passed the proportionality test. The government's actions were in line with the goals of the legislation, and the harm of violating fundamental rights was not outweighed by the anticipated benefits. It was of the opinion that the ever-evolving information landscape facilitates the unparalleled speed and scale at which disinformation can propagate. In this "infodemic" era, the necessity of a nuanced regulation highlights the price of absolute free speech. Thus, there is a logical connection between the goal of the contested Rule and itself.

The court observed that "manipulation of information" if results in breach of Constitutional Morality needs deterrence but at the same time the state-imposed rule should not result in breach of Constitutional Morality as a measure to combat the situation. Thus, the Court once again used Constitutional Morality as a restraint on the actions of the State and expressly laid down that no State imposed rule can breach the Constitutional Morality.

[56] Kunal Kamra vs Union of India and Editors Guild of India vs Union of India and Ors. and News Broadcasters & Digital Association and Ors. vs Union of India and Ors. and Association of India Magazines vs Union of India MANU/MH/0569/2024.

[57] Rule 3(i)(II)(A) and (C) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules 2023 which amend Rule 3(1)(b)(v) of the IT Rules 2021.

Constitutional interpretation must flow from Constitutional Morality

The Court in a matter[58] revolving around the constitutionality of "The Haryana State Employment of Local Candidates Act, 2020" placed reliance upon *Manoj Narula vs Union of India*[59] where Justice Dipak Mishra had stated that Constitutional Morality being the pivot is to serve as a crucial check on both citizens and top bureaucrats. As a result, it has been suggested that unchecked power without any checks and balances would lead to authoritarian and autocratic conditions and be incompatible with the basic concept of democracy. The Court held that "a sense of Constitutional Morality, drawn from the values of that document, enables us to hold to account our institutions and those who preside over their destinies. Constitutional interpretation, therefore, must flow from Constitutional Morality".[60]

This observation substantiated the claim that Constitutional Morality serves as a check on the government in contrast to morality, which is a restriction on the rights of the people.

The Court opined that under the Act, by giving a group of individuals who do not belong to the State of Haryana a secondary position and restricting their ability to pursue their livelihood, the idea of Constitutional Morality has been flagrantly disregarded. The Court decided that the Haryana State Employment of Local Candidates Act, 2020 violated Part III of the Indian Constitution and was unconstitutional.

Constitutional Morality and not social morality must guide the courts

The Court[61] relied upon *Shafin Jahan vs Asokan K.M.*[62] while deciding a writ for protecting the petitioners' life and liberty who

[58] IMT Industrial Association and Ors. vs State of Haryana and Ors MANU/PH/2939/2023.

[59] Manoj Narula vs Union of India (2014) 9 SCC 1.

[60] IMT Industrial Association and Ors. vs State of Haryana and Ors, MANU/PH/2939/2023, p. 35.

[61] Manisha Kumari and Ors. vs State of Rajasthan and Ors MANU/RH/0860/2023.

[62] Shafin Jahan vs Asokan K.M 2018 (16) SCC 368.

married each other, holding that morality and social norms have a place, but they do not supersede the freedoms protected by the Constitution. This freedom is guaranteed by the Constitution and by human rights. It is unacceptable to deny someone their inherent right to freedom of choice on the basis of their religious beliefs. The Court then referred to *Navtej Singh Johar v. Union of India*[63] wherein it was held that it is Constitutional Morality that must guide the courts and not social morality and held that in light of the petitioners' constitutional rights, the State must guarantee the petitioners' right to privacy and freedom.

Idea of transformative constitutionalism rests on the pillar of Constitutional Morality

The Court once observed that Constitutional Morality is the cornerstone around which the entire concept of transformative constitutionalism is built.[64] In order to achieve transformative goals that is, embedding the ideals of equality, dignity, liberty, and fraternity within society in order to bring about a social change it is intended to uphold the moral standards of the Constitution.

V. Conclusion

To conclude, while the concept of Constitutional Morality serves as an important instrument in the promotion of the transformative vision of the Constitution of India, the variant interpretations by the Courts accentuate the need for consistent and principled framework. The application of the concept must be with judicial discipline in order to ensure that it does not turn into a vehicle for moral policing and to ensure that it avoids arbitrariness. An approach in applying the concept that is balanced in a way that it respects the constitutional ethos and text while also acknowledging the societal complexities is required and essential to maintain the legitimacy of judicial decisions. Constitutional Morality will remain an influential and dynamic force in constitutional

[63] Navtej Singh Johar vs Union of India MANU/SC/0947/2018.

[64] Singham vs Directorate of Education, Govt. of NCT of Delhi and Ors MANU/DE/8085/2023.

adjudication as India continues to grapple with the evolving social norms and rights-based claims. The continued relevance will depend on how transparently and coherently the courts articulate its contours ensuring strengthening of democratic governance instead of unsettling it.

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An Examination of the Protectability of Photographs: A Comparative Analysis of Germany, France, Italy and China

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Abstract: The majority of states nowadays grant legal protection to photographs. Most often, photography is the object of related rights. However, legislative solutions are not limited to this approach. The legal protection of photographs varies significantly across different jurisdictions, often due to historical, cultural, and legal influences. For example, in some countries, photographs are protected as objects of neighboring rights or as a separate group of objects. This article explores the legal protectability of photographs through a comparative analysis focusing on four countries: Germany, France, Italy, and China. It reveals that while all these countries offer some form of legal protection to photographs, the nature and extent of this protection can differ markedly. Based on the comparison of approaches, the peculiarities of legal regulation of photography (as an object of intellectual property rights) are revealed. This comparative study reveals notable differences in the legal criteria and scope of protection, reflecting diverse cultural and legal traditions associated with intellectual property rights. Understanding these distinctions is essential for photographers, legal practitioners, and policymakers involved in intellectual property rights, ensuring that the protection granted is appropriate to the cultural and legal context. This exploration highlights the ongoing need for international dialogue and convergence in the standards of photographic protection, particularly in an era of rapid technological advancement and global digital dissemination.

***Keywords*:** photographs; comparative analysis; copyrights; related rights; legal protection; originality; legal standards

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Contents

I. Introduction

The history of photography spans less than two centuries. Compared to the overall history of human society, this is not such a long time. However, the impact that photography has had and continues to have on human beings and culture cannot be overestimated.

The activity of creating photographs did not immediately become part of the cultural life of society. History knows examples of skeptical or even negative public attitudes towards photographs. For example, the newspaper *Leipziger Stadtanzeiger* wrote about the godlessness of photography, because, according to the authors of the article, the fixation of fleeting images is unnatural and therefore offends religious feelings by its existence (Benjamin, 1996, p. 2). The approach of the authors of the magazine article was that photography actually “stops

time", which, in their opinion, should not be done by a human being. Today, such views are not dominant, and photographs are actively created by both professional photographers and ordinary people in the course of their everyday activities.

In the past, creating a photograph required a lot of effort and cumbersome equipment. Today, however, creating a photograph has become extremely easy. In fact, the minimum required to create a photo today is a smartphone. At the same time, a smartphone allows you to carry out further processing of the photo, which will improve its aesthetic perception. In other words, today a person is not limited in the means of expressing their creative nature through photography.

In this regard, the issues related to intellectual rights to such an object are of particular relevance. For example, is it permissible to grant legal protection to photographs where the creative personal contribution of the author is not so obvious? Can a photograph be only a work or also an object of related rights? Are the rules on the protectability of photographs in separate laws or in full-fledged intellectual property codes? All these questions are answered in the legislation and court practice.

II. Approaches of Different States

Each State responds to these questions in a different way. While there is some commonality of approaches, there are also significant differences. This article analyzes the approaches developed by the judicial practice and legislation in Germany, France, Italy, and China.

II.1. Germany

Photographs are protected in Germany. They have been protected since 1907 with the adoption of the Copyright Act for Works of Fine Arts and Photography (*Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie*)[1] (hereinafter KUG).

[1] Available at: https://www.gesetze-im-internet.de/kunsturhg/BJNR000070907.html [Accessed 10.08.2024].

The adoption of the law depended largely on the need to protect not only photography, but also the right of the individual to decide on the distribution and public display of his or her image. The literature notes that the body of the deceased Bismarck was photographed without the consent of his relatives, which predetermined the debate over the need for comprehensive regulation of photographic rights and the imminent adoption of the KUG (Osterrieth and Marwitz, 1929, p. 161; Wandtke and Bullinger, 2014, p. 221).

Later on, a law was passed to protect two types of photographs. According to Art. 2 of the Act on Copyright and Related Rights *(Gesetz über Urheberrecht und verwandte Schutzrechte)*[2] (hereinafter UrhG), photographic works are protected works in the literary, scientific, and artistic domain. Only the author's own intellectual creations are works within the meaning of German law. Those photographs that do not meet these criteria are not works, but objects of related rights. For example, such objects may be photographs taken spontaneously, family photographs, photographs of paintings, or other two-dimensional objects in the public domain. In other words, the objects of related rights include photographs that are not the product of the author's creative activity, but perform only the function of fixing the surrounding reality.

It is noteworthy that, at the level of European Union law, only photographs that are the result of creative activity are protected. Namely, Art. 6 of Directive No. 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights[3] states that photographs that are original in the sense that they are the author's own intellectual creation shall be protected in accordance with the Directive. However, the act does not exclude the possibility of the state protecting other photographs as well, as the legislator in Germany has done.

The evaluation of a photograph for compliance with these criteria shall be carried out by the court. German jurisprudence has numerous

[2] Available at: https://www.gesetze-im-internet.de/urhg/ [Accessed 10.08.2024].

[3] *Official Journal of the European Union*. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:372:0012:0018:EN:PDF [Accessed 10.08.2024].

examples of a photograph being classified as a work or an object of related rights. This fact indicates a high degree of judicial discretion on this issue. In 2018, for example, the German Federal Court of Justice considered the case I ZR 104/17,[4] which concluded that photographs of paintings or other two-dimensional objects in the public domain (public) are not copyrightable, but are protected under the rules of Art. 72 UrhG. That is, they are subject to the legal regime of related rights. That does not exclude the responsibility of a museum visitor for photographing paintings and publishing them in the public domain on the Internet, if there is a prohibition established in the contract.

A different approach is reflected in the court practice with respect to other photographs. For example, a photograph of another photograph cannot be recognized as a protected subject matter. In Case I ZR 14/88[5] the Court concluded that there was no obvious need to protect such photographs, since to do otherwise would allow the legally defined period of protection of the photograph to be extended at the will of the individual through reproduction (photocopying) processes. The Court reached this conclusion with reference to authors such as Nordemann, Fromm and Hertin (Nordemann, 1987; Fromm et al., 1988).

Thus, it is incorrect to assume that photographs in Germany are protected either as works or as objects of related rights. In some cases, photographs are not protected at all. In this regard, it is acceptable to speak about three legal regimes of protection of photography: 1) an object of copyright; 2) an object of related rights; and 3) an unprotected object.

The discussion on the approaches to jurisprudence is also noteworthy. For example, Grischka Petri analyzed the doctrinal positions of scholars and concluded that a dispute has arisen among German jurists over the above-mentioned judicial acts, namely, whether it is justified to grant

[4] Bundesgerichtshof, Urteil vom [Federal Court of Justice, judgment]. 20.12.2018 — I ZR 104/17. Available at: https://openjur.de/u/2135129.html [Accessed 10.08.2024].

[5] Bundesgerichtshof, Urteil vom [Federal Court of Justice, judgment], Urt. v. 8. November 1989 — I ZR 14/8. Available at: https://www.prinz.law/urteile/bgh/I_ZR__14-88 [Accessed 10.08.2024].

protection to photographs of paintings or drawings, but to deny legal protection to photographs of other photographs (Petri, 2021, p. 69).

The discussion on this issue draws attention to itself. On the one hand, a situation arises in which one object is in a more "privileged" position compared to another object. A photograph of a photograph is not protected by law, while a photograph of a painting, which is freely available, acquires legal protection. Specifically, from this position, the approach of adopted in the judicial practice may seem debatable. However, if we proceed from the fact that in one case the object of the photograph is initially in free access, and the other object is not, the court's approach seems less controversial.

The differences in the legal regulation of photographs as objects of copyright and objects of related rights also lie in the term of protection. The general rule of 70 years after the death of the author applies to copyrighted photographs, according to Section 64 of the UrhG. The term of related rights for photographs in Germany is defined in Section 72 UrhG. Thus, the term of legal protection ceases if the photograph is not published within 50 years after its creation. At the same time, the term of legal protection will be extended for 50 years if the first publication of the photograph takes place during this period. For example, a photograph was created in 1950. If the photograph was first published in 1999, it is from 1999 that the 50-year term of its legal protection will begin to run.

However, such time limits have not always existed. For example, Section 26 of the KUG initially defined a term of 10 years from the date of publication; later, the term was changed to 25 years. On this basis, it can be assumed that in the future, the terms of protection for the named objects will be revised again. Of particular interest is the question of whether such terms will be revised upward or downward.

German law also provides grounds for the use of photographs without the consent and remuneration of the copyright holder. For example, Section 46 of the UrhG allows the use of photographs for educational purposes. The specificity of the legal technique of the UrhG is also noteworthy. In its essence, it is neither a code nor a part of a code, but only a law regulating copyright and related rights. Relations connected with trademarks or patents, for example, are regulated by

separate laws. Whereas in other European Union States, full-fledged intellectual property codes can be found. It seems controversial to assess which legislative solution (a code or a law) is better in the framework of this study, as this issue requires a separate article.

Conceptually, the German legislator's approach seems to be balanced, as it allows legal protection to be granted to a wide range of photographs. It seems that any photograph may not be a product of creative activity, but will most often be the result of human labor. The situation when the product of human labor is subject to legal protection seems to be justified. A different approach should probably be established with regard to photographs created with the help of technical means.

II.2. France

The French approach to the protection of photographic rights is that a photograph can only be an object of copyright — a work. By virtue of Article L112-2 of the French Intellectual Property Code (*Code de la propriété intellectuelle*),[6] photographic works are one of the 14 types of works named in the Code.

As France is a member of the European Union, photographic works are subject to the general rule established by Art. 6 of Directive No. 2006/116/EC of the European Union. 2006/116/EC of the European Parliament and of the Council of December 12, 2006 on the Term of Protection of Copyright and Certain Related Rights. The French legislator does not classify photographs as objects of related rights. This distinguishes the approach of French law from German law, where photographs that are not works of art are related rights objects.

The assessment of a photograph as a work is made by the court. In this regard, the current court practice on this issue is of interest. The degree of judicial discretion in France on the issue of qualifying a photograph as a work seems to be high.

[6] Available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006069414/ [Accessed 10.08.2024].

Thus, on 11 May 2023, the Court of Justice of Paris (*Tribunal judiciaire de Paris*) considered the dispute (No. 21/06001)[7] between a photographer and a theater about copyright infringement. The theater used the plaintiff's photograph, namely printed it, and installed it on the wall of the theater for the purpose of announcing the next theatrical season (2020–2021). According to the theater, the photo could be freely used, as it was not a work, but it offered compensation in the amount of 1.500 euros, which did not satisfy the photographer. The photographer went to court to protect his rights. In this connection, the question of the criteria for qualifying a photograph as a work became one of the main issues for the correct resolution of the dispute.

The Court referred to Art. 6 of Directive No. 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights in the context of the criteria of a photograph as a work. Moreover, the Court considered that a systematic interpretation of the provisions of the Intellectual Property Code leads to the conclusion that the original form of a work bears the imprint of the personality of its author. That said, when the originality of a work is challenged, the one claiming authorship must define and explain the contours of the originality of the work. The author, not the judge, can identify the elements that reflect his personality and justify his spiritual monopoly over the work.

The photograph was taken during a theatrical performance, therefore, the court came to the following conclusions in evaluating the photograph: 1) the photographer had no control over the production, the scenery, the costumes, or the lighting; 2) the photograph was taken on the spot, so that the photographer could not control the pose and facial expressions of the dancers during the shooting; and 3) the photographer did not use the equipment settings (choice of manual mode, lens, aperture). On the basis of it, the court concluded that under such circumstances, it is impossible to recognize the photograph as a work, and therefore such a photograph is not protected by copyright.

[7] Available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000047636349?fonds=JURI&page=1&pageSize=10&query=Les+oeuvres+photographiques&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT [Accessed 10.08.2024].

It follows that in France, there is no presumption of creative contribution in the creation of a work. On the contrary, the burden of proving originality and creative contribution in the creation of a work lies on the presumed author. This approach seems to be more oriented to the interests of society than to the interests of the author, since the absence of a presumption of creative contribution predetermines the need for the author to take active steps to protect his own rights.

In the case No. 21/08452,[8] the Court of Justice of Paris on 16 December 2022 (*Tribunal judiciaire de Paris*) also evaluated a number of photographs to determine whether they could be considered works and reached the following conclusions with regard to photographic correction. Correction in the form of light and sharpening alone does not indicate that the photograph is different from what any photographer in the same situation would have done. Neither cropping a photograph nor increasing the contrast indicate the same. In other words, the court concluded that only the correction of light, sharpness, and contrast and the cropping of the photograph were sufficient to recognize the photograph as a work of art.

However, it seems important to consider the extent of such manipulation of the photograph. To do otherwise would predetermine that the court's conclusion would be followed by the regime of a universal rule applicable to all photographs, which is not obvious. It seems that the court's finding in the above case should not be applied as a universal rule, but should be taken into account in conjunction with other positions of courts due to the high degree of judicial discretion in this category of disputes.

In the case No. 20/09672,[9] heard on 23 June 2023, the Court of Justice of Paris (*Tribunal judiciaire de Paris*) concluded that photographs created by bloggers for promotional purposes to be used

[8] Available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000047454931?fonds=JURI&page=1&pageSize=10&query=Les+oeuvres+photographiques&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT [Accessed 10.08.2024].

[9] Available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000047878963?fonds=JURI&page=1&pageSize=10&query=Les+oeuvres+photographiques&searchField=ALL&searchType=ALL&tab_selection=all&typePagination=DEFAULT [Accessed 10.08.2024].

on a social network were not works in themselves. The court came to this conclusion because the photos were taken with an ordinary model camera, and some of the photos were taken with a smartphone. In this case, the creative freedom of the bloggers was limited by the advertising campaign itself. Moreover, all the photos correlate with classic advertising clichés. For example, the advertising of tour operators and hotels in tropical locations is accompanied by images of beaches, palm trees, sunsets, water activities as well as tennis and golf on the one hand, and luxurious amenities designed for physical well-being in preserved environments, on the other hand, as well as by seaside fashion: unnatural attitudes and positions emphasizing clothing, silhouettes of models and locations. In addition, none of the photographed objects deviate from the aforementioned themes, which are particularly limited visually and conceptually. The creative nature of the photography is not evidenced in the sunset photograph, as the light in this photograph is a result of the place and its natural beauty.

From the analysis of the above-mentioned judicial acts alone, it is possible to formulate certain relationships and indications for understanding when a photograph does not qualify as a work in France:

1) a photograph will not be recognized as a work if the photographer did not control the staging, the scenery, the costumes, the lighting, the pose and facial expressions of the dancers during the shooting, nor did he use the settings of the equipment (choice of manual mode, lens, aperture);

2) a photograph will not be recognized as a work if only light, sharpness, and contrast correction and/or cropping of the photograph has been carried out;

3) a photograph created with an ordinary camera or a smartphone will not be recognized as a work if creative freedom has been restricted by an advertising company and created with classic advertising clichés (tour operators and hotels in tropical locations: beaches, palm trees, sunsets, water activities, as well as tennis and golf on the one hand, and luxurious amenities designed for physical well-being in preserved conditions, on the other hand, as well as seaside fashion: unnatural attitudes and positions emphasizing clothing, silhouettes of models and locations).

The term of protection of the author's right to use his work in any form and to profit financially from it is 70 years. In fact, this is a classic term of protection of intellectual property rights, typical for most legal orders. There is no other term for the protection of rights to photographs, since photographs in France are protected as works.

In general, the approach of the French legislator seems to be less diversified in comparison with the approach of the German legislator, for example, since in France only works that appeared as a result of creative labor are protected. In fact, photographs created accidentally, in a home environment or photographs of paintings that are freely available will not be protected either under the rules of copyright or related rights, since related rights in respect of such objects are not provided for.

The legislative technique of regulation of relations concerning photographs in France is characterized by the fact that mainly the norms of law are contained not in a separate law, but in the whole Code of Intellectual Property of France (*Code de la propriété intellectuelle*). Thus, the regulation of intellectual property rights in France is codified.

II.3. Italy

In Italy, photographic works are protected by Law No. 633 of 1941[10] on copyright and other related rights. However, they are not all treated equally and do not enjoy the same rights. The legal system distinguishes between three different types of photographs:

(1) copyright photographs (*le opere fotografiche*), or photographic works (Art. 2 of the Copyright Act);

(2) simple photographs (*le fotografie semplici*), or simple photographs (Art. 87 of the Copyright Act);

(3) purely documentary photographs, or photographic reproductions (*le riproduzioni fotografiche*) (Art. 87(2) of the Copyright Act).

[10] Law No. 633 of 22 April 1941, on the Protection of Copyright and Neighboring Rights (Italy), as amended by Legislative Decree No. 68 of 9 April 2003. Available at: https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/it/it211en.html [Accessed 10.08.2024].

Only the first type of photographs is fully protected by copyright. The second and the third types are protected by rights related to copyright. They are not protected as intellectual works, but may be protected by other laws, such as trade secret or personal data protection laws. To know when a photograph can be reproduced, on the Internet or on paper, and under what conditions, it is necessary to understand which of the three categories it falls into.

Article 2 of the Copyright Act contains a non-exhaustive list of copyrighted works. In 1979, the legislator finally included in this list "photographic works and works expressed in a similar manner". However, in the same article he specified, "unless it is a mere photograph", which instead enjoys another, weaker protection provided for copyright-related rights.

Photographic works, or copyrighted photographs, are protected in the same way as a painting, sculpture, music, book, or any other intellectual work protected by copyright. The term of protection is 70 years after the death of the author (*la protezione giuridica dell'opera per i 70 anni successivi alla morte dell'autore*).

But how can we determine that we are looking at a photographic work and not just a photograph? The answer lies in the requirement of "creativity" (*opere dell'ingegno di carattere creative*). Thus, a photograph is "authorial" if it fulfills the requirement of creativity, that is, if it is the result of the author's intellectual creativity (Galli, 2013). This means that the photographer must go beyond the mere representation of reality. He must convey his imagination, personal taste, sensitivity, and interpretation of reality in the photograph. Creativity has nothing to do with the artistic value of the work. A photograph may be considered ugly, technically poor, or devoid of any artistic merit. Nevertheless, if it is the result of the photographer's creative choices, it is considered a photographic work.

The creativity of the artist may be manifested at different stages of photographic production. The choice of lens, the positioning of light, the positioning of the subject or photographer, the composition of the image, the moment of capture, post-production, the choice of tones, printing, etc. (Pappani, 2019, p. 578). In each of these stages, the artist can put a part of himself. However, an author's photograph can also

be an extemporal, unreasoned snapshot, the result of lightning-fast intuition.

Thus, for example, Italian jurisprudence has affirmed that "The creativity that distinguishes the photographic work and differentiates it from mere photographs cannot disregard an activity of interpretation of the object datum that moves from the reading of that datum according to the author's personality and aims to isolate and transmit to the user of the work the communicative and emotional core contained therein";[11] "It is endowed with sufficient creativity in which the imprint of the author's personality shines through from more than one element, such as the choice and arrangement of the objects to be reproduced, their juxtaposition, the selection of lights and light sources, the dosage of light tones and in dark tones";[12] "Photographs that are the result of a personal creative activity of the photographer consisting in the originality of framing, perspective, setting of the image and the ability to evoke suggestions are works of the mind";[13] "A photograph constitutes a photographic work under Art. 2 that represents an artistic achievement, given the originality of the framing, the setting of the image and the ability of the image to evoke suggestions that transcend the common aspect of the reality depicted".[14]

The Court of Justice of the European Union has also affirmed a similar principle, ruling that photographic works are those "reflecting the author's personality", which "is the case if the author has been able to express his creative abilities in the making of the work by making free and creative choices".[15]

[11] Court of Appeal of Milan, Judgment of 20 September 2010. Available at: https://www.tribunale.milano.it [Accessed 17.08.2024].

[12] Court of Appeal of Milan, Judgment of 5 November 1993. Available at: https://www.tribunale.milano.it [Accessed 17.08.2024].

[13] Tribunal of Venice, Judgment of 17 June 2011. Available at: https://www.tribunale.venezia.giustizia.it [Accessed 17.08.2024].

[14] Tribunal of Florence, Judgment of 16 February 1994. Available at: https://www.tribunale.firenze.giustizia.it [Accessed 17.08.2024].

[15] EU Court of Justice, Case C-145/10 1 January 2011. Available at: https://www.lexology.com/library/detail.aspx?g=16806e75-1106-4f29-b6c9-e5966fc7b092 [Accessed 10.08.2024].

The principle that emerges from the decisions is thus crystal clear: a photograph is a "work" when the author does not limit himself through the mechanical instrument to reproducing reality, but manages to extract from the real datum what corresponds to his personal way of seeing, feeling, and interpreting it.

Another aspect worth mentioning regarding the defense of photographic works is the second type of photographs, "simple photographs" — are "depictions of persons or aspects, elements, or facts of natural or social life (...), including reproductions of works of fine art and cinematographic film stills" when they do not fulfil the above-mentioned requirement of creativity (Musso, 2010).

Unlike copyright photographs, "mere photographs" are protected only if they bear the name of the photographer (or the company for which he or she works, or the client) and the year the photograph was taken. In the absence of such indications, their use is free. Unless it can be proven that the user is aware of this information because mere photographs enjoy less protection than copyright photographs. Consequently, anyone who wants to use a photograph should know whether it is still protected (or whether it has been 20 years since its creation) and who should be contacted for permission. If this is not possible, one can use is freely.

In light of these considerations, it could be argued that for digital photographs, it is not necessary to include the author and the date of creation on the image. It should be considered sufficient to include this information in the metadata.

The third and final category of photographs is described in the second paragraph of Art. 87 of the Copyright Act: "photographs of written works, documents, business papers, tangible objects, technical drawings, and similar products". These include passport photographs for driving licenses, ID card photographs for enrolment in courses, photographs of the shape of a product for the design of a three-dimensional trademark, etc. What distinguishes them from simple photographs is their purpose. The former have a merely documentary purpose, while the latter may have other purposes, such as advertising or descriptive. The latter type of photographs are not protected by copyright or related rights.

However, their reproduction may be prohibited by various rules, such as privacy or industrial secret rules.

It is also worth noting that there are also certain exceptions to copyright in the area of photographic works. Thus, the new Copyright Directive provides in Art. 5 for the possibility of digital use of works and other copyrighted material for illustrative purposes for educational use only, to the extent justified by the non-commercial purpose pursued, provided that such use (Finocchiaro, 2020, p. 199):

(a) is made under the responsibility of an educational institution, on its premises, elsewhere, or through a secure electronic environment accessible only to students or students and faculty of that institution;

(b) is accompanied by an acknowledgement of the source, including the name of the author, unless this is not possible.

The *Cox v. Marras* case[16] concerns the legal dispute between a professional photographer, Richard Cox, and a visual artist, Giovanna Marras, concerning Marras's unauthorized use of Cox's photographs in her marketed artwork. Cox found that Marras had found her photographs on Google Images and used them as the basis for her multimedia creations, then sold these works without obtaining Cox's permission. The tribunal had to decide whether Marras's use of the images infringed Cox's copyright and whether Marras's artistic changes were sufficiently transformative to constitute a new independent work. In the end, the court ruled that Cox's photographs, while accessible through Google Images, were still protected by copyright. Moreover, Marras's edits were not found to be sufficiently transformative to create a new, independent work, so the unauthorized use of the images constituted infringement of Cox's rights. Therefore, the court ruled in favor of Richard Cox, recognizing the infringement of his copyrights by Giovanna Marras. "Copyright not only protects original creations, but also reinforces the need to obtain permission to use such works, regardless of artistic intentions or the means through which they were sourced. The accessibility of images on public platforms such as Google Images does not negate the rights of the original author". This quote

[16] Tribunal of Milan, the Case of Cox v. Marras. Judgment No. 2539/2020, 23 April 2020.

underscores the importance of respecting copyright even when original works are easily accessible online and the fact that unauthorized use, even resulting in an artistic transformation, can constitute infringement if not approved by the rights holder.

To conclude, the analysis of Italy's copyright laws with various case studies sheds light on the intricate framework that governs the protection and usage of photographic works within the country. Italy's Law 633/41 grants photographers a combination of moral rights and economic exploitation rights, each carrying distinct conditions and durations.

The distinction between different types of photographs under Italian copyright law — including copyright photographs, simple photographs, and purely documentary photographs — indicates varying degrees of protection afforded to these works. Copyright photographs, characterized by their creative nature and originality, enjoy full copyright protection akin to other intellectual works. On the other hand, simple photographs, which lack a certain level of creativity, are safeguarded to a lesser extent and require specific attribution to the photographer for protection.

Moreover, the differentiation between photographic works and mere photographs highlights the significance of creativity in determining the eligibility for copyright protection. A photograph is considered a "photographic work" only if it highlights the author's creativity and intellectual input beyond a mere representation of reality. This emphasis on creativity underscores the broader scope of protection offered to works that exhibit artistic ingenuity and individual expression.

II.4. China

Copyright Law of China[17] establish that a "photographic work" is a type of work. The Copyright Act grants copyright holders of photographic works a number of rights, including the rights to reproduce, distribute, exhibit and transmit on information networks. This means that reproduction, distribution (e.g., publishing a collection of photographic

[17] Copyright Law of the People's Republic of China (2010 Amendment), 1990. Available at: https://www.wipo.int/wipolex/en/text/466268 [Accessed 10.08.2024].

works, printing other people's photographic works as decorations on product packaging, etc.), public exhibition or distribution on the Internet (e.g., posting photographic works on a web page for others to view and download) in principle requires the permission of the copyright holder of the photographic work, otherwise it is an infringement of the copyright in the photographic work.

The Copyright Act also provides for the use of a work without the copyright holder's permission or payment of remuneration, which is referred to as "fair use", including the use of a work for personal study, research or enjoyment, and the use of relevant quotations from published works for the purpose of presenting, commenting on or explaining a particular work (Ma, 2016, p. 151). For example, if a landscape photograph taken by another person is enlarged and printed and then hung at home for enjoyment, although this involves reproduction of the photographic work, it does not require the permission of the copyright holder. For example, when teaching Copyright Law in an open online course, in order to discuss whether a photograph belongs to a photographic work, it is necessary to show the photograph in the teaching material (Zhang, 2023, p. 240). Even if the photograph does belong to a photographic work, such reproduction and distribution of the photograph online is an example of fair use. Copyright in a photographic work is usually held by the person who took the photograph (the author), and the best way to obtain permission is, of course, to contact the author directly (Wang, 2022, p. 79).

The definition of *originality* is the key to solving many copyright problems of photographic works, and the copyright problems of photographic works in the all-media era are closely related to the unclear definition of originality (Egloff et al., 2016). At present, almost all photographs taken in the judicial field are regarded as original works, making the definition of originality, which is an important rule of copyright in photographic works, almost futile. In recent years, scholars have criticized the low level of "originality" required to determine the originality of photographic works in the judicial sphere, and the fact that few courts across the country have even denied the originality of photographs, and have almost unanimously argued that courts should raise the standard for determining the originality of photographic works.

Regarding the judge's position on the standard for determining the originality of a photographic work, most scholars in China believe that the existing standard for determining the originality of a photographic work in Chinese jurisprudence is too low, which has led to many photographs lacking originality being recognized as photographic works (Liu, 2014, p. 75). For example, scholars believe that "courts in China need to raise the standard for determining the originality of photographic works". Other scholars believe that "the copyright system does not specify specific criteria for determining the originality of a work, the judicial practice of adopting a lower standard for determining the originality of photographic works leads to the inclusion of most mediocre photographs in the category of photographic works, which is contrary to the legislative intent of the copyright law to protect creative intellectual achievements". It can be said that due to the special nature of photographic works and the limited capacity of judges, there is little that judges can do in assessing the originality of photographic works, with the result that the vast majority of photographs are recognized as photographic works. In fact, judges face many difficulties in assessing the originality of photographic works. Photographic works differ from most other works in that they are created by technical means, are recordings of objective images, and are the least "creative" works. After all, the creation of a work of art, a musical work, or even a written work requires the creator to abstract objective facts (including thoughts, emotions, or objective images), and no one can "create" a work of art, a musical work, or a written work without thinking about it. This is not the case with photography: when an ordinary citizen takes out his mobile phone to photograph a beautiful landscape while sightseeing, he may not even feel that he is creating a work of art. As an extreme example, if a person takes a photograph without being able to see the scene clearly (perhaps because of poor eyesight), will the judge recognize the photograph as a photographic work? If so, on what basis would the judge deny the originality of the photograph? Of course, there are scholars who argue that most judges are not versed in photography (Liang, 2017, p. 143), and using their personal aesthetics as a criterion for determining whether a photograph is original or not inevitably gives them too much discretion. It is therefore safer for most judges to decide that all photographs are original, regardless of how they were taken.

This raises the question of how a judge determines whether a photograph is original (Wang, 2012, p. 3243). Generally, originality is determined by considering the creative process (dynamic), individual expression (static), or similarity to other photographic works (comparison). However, it is very difficult to consider these three aspects. The creative process (dynamics) of a photographic work is often very simple — the moment the shutter button is pressed. Especially in the case of capture photography, is its originality in the angle, distance, shutter, aperture, exposure and other factors of capture, or is it in the "search", "wait" or "cost", or "cost of investment" is a really subtle question. It is even more difficult to find the individual expression (static) of a photographic work, because it is possible to obtain almost the same work by using photographic equipment, and there is no shortage of such cases either at home or abroad.

As for the specific work, the Supreme People's Court can define the basic principle of "a photograph ≠ a photographic work" for courts around the world, guided by typical cases,[18] directing judges to determine the originality of a photograph through factors such as "the photographer's purpose in taking the photograph", "the method of taking the photograph" and "the aesthetic value expressed in the photograph". The People's Court can direct judges to determine the originality of a photograph through factors such as "the photographer's purpose in taking the photograph", "the photographer's way of taking the photograph" and "the aesthetic value expressed in the photograph", and then determine whether it is original or not, combined with the type of photograph, so as to appropriately raise the standard for determining the originality of a photographic work (Liang, 2014, p. 143). Back in the 1990s, in the case of *Jinzheng Technology Electronics Co. v. Motorola (China) Co.* the judge in that case held that the idiom "Real gold is not afraid of fire" was not original and rejected the plaintiff's request for litigation, which served as a good guideline. The definition of originality has been highly controversial since the inception of the copyright system,

[18] Beijing No. 1 Intermediate People's Court (196) No. 14 Civil Judgment (First Intermediate People's Court, 196); "World Winds and Oriental Love" Copyright Dispute Case, Shanghai Xuhui District People's Court (1993) No. 1360 Civil Judgment (First Intermediate People's Court, 1993).

and the two legal systems also support different concepts and judges adopt different standards of definition for different types of works in specific cases. Therefore, it is difficult to define a standard of originality for photography. However, at the end of the day, photography is the use of mechanical equipment to capture an objective image of the behavior of photographs created through photography should be from an "artistic and aesthetic" point of view to determine whether there is even "a little bit of creativity" in it, rather than avoiding the question of originality. In addition, the similarities between a photograph and a video recording should be reconciled in determining originality, and the controversial phenomenon of recognizing an automatic video capture as a photographic work should not arise. Overall, the standard of originality of photographic works should be improved, and the large number of mediocre photographs lacking "artistic aesthetics" should be excluded as photographic works.

From the perspective of the legislation, the law should meet the necessary requirements, especially the copyright legal system, which is greatly influenced by technological development. In recent years, media integration has been increasing, new media have flourished, and we have entered the era of all media. The discussion on the originality of photographic works should be in the context of the all-media era. While it is difficult for the law to create the legislation that is too far ahead of its time, responding to the demands of the times is essential to the viability of the law. Scholars have been quite critical of the lowering of the originality standard (Sun, 2005, p. 223). Some scholars argue that it is "inconsistent with the legislative policy of originality that courts simply assume that all photographs reflect the photographer's individual choices, or substitute a judgement of the originality of a photograph as an expression for the technical judgement (choices) necessary to create the photograph" (Wang, 2012, p. 3246). One can agree with the idea of raising the standard for judging the originality of photographic works. But as a judge, especially a civil law judge, it is very difficult to accurately determine the originality of a photographic work in the absence of appropriate adjustments in the law. After all, photography and other works are recordings of objective scenes, and the recording process is often difficult to reproduce, the presence of

the photographer's personalized creativity is very difficult to judge. In this case, the judge is likely to be involved in the case of recognizing a photograph as a photographic work.

In conclusion, the analysis of China's copyright laws regarding photographic works illuminates a nuanced legal framework designed to balance the rights of creators with the needs of society. China's Copyright Law provides robust protection for photographers, granting them exclusive rights to control the reproduction, distribution, and public display of their works. The concept of "works" versus "mere photographs" underscores the importance of creativity and originality in determining the level of protection afforded to photographic works. By emphasizing the author's creative input, China's copyright laws aim to incentivize artistic innovation while safeguarding the rights of photographers. Furthermore, the recognition of moral rights in photographic works highlights the cultural and personal significance of these creations, reinforcing the importance of respecting the author's integrity and attribution rights. Overall, China's copyright laws reflect a commitment to promoting creativity, cultural heritage, and authorship in the realm of photographic works, contributing to the vibrant visual landscape of the nation.

III. Comparative Analysis

	Germany	**France**	**Italy**	**China**
A photograph is subject to legal protection	Yes	Yes	Yes	Yes
Copyright on a photograph	Yes	Yes	Yes	Yes
Related rights to a photograph	Yes	No	Yes	No
A type of act that regulates relations	Law	Code	Law	Law

All the countries under consideration — China, France, Germany, Italy — recognized photographs as legally protected works. This indicates the high importance these countries attach to copyright protection for photographic works. However, despite the common principles,

approaches to the details and mechanisms of protection may differ significantly.

Copyright in photographs is enshrined in the legislation of all four countries. In this respect, China, France, Germany, Italy and China show unity in recognizing the importance of protecting the creative rights of photographers. However, not all countries recognize related rights in photographs in the same way, which is a key point of difference.

In particular, related rights in photographs are recognized in Germany and Italy. This means that these countries have additional legal mechanisms in place to protect the interests of those involved in the creation and distribution of photographs other than the author. In contrast, in France and China, related rights in photographs are not recognized, which may limit the range of persons protected by the law and affect the distribution of rights and obligations in the field of photographic works.

The type of the legislation governing the protection of photographs also varies among countries. In China, Germany, Italy and Germany, such relationships are regulated at the level of laws. This may indicate a detailed and elaborate legal framework for the protection of photographs. The protection in France, on the other hand, is established by a code, which may indicate a more systematic approach to the legislation and possibly the integration of photo protection into the general body of intellectual property law.

These findings underscore the importance of international analysis and comparative law in understanding and harmonizing legal rules on the protection of photographs. Differences in the recognition of related rights, as well as in the types of regulations governing the protection of photographs, show that legislative approaches may vary according to national traditions and legal systems.

IV. Conclusion

The example of the States examined shows that photography is now recognized as an independent object of intellectual property law. In general, the States are unanimous on the need to grant legal protection to photographs. All of the States examined establish copyright in

photography. As a general rule, photographs with characteristics of originality, made through creative endeavor, are subject to legal protection.

A number of the countries considered in this article also grant legal protection to photographs as an object of related rights. As a rule, these are photographs where the creator's creativity is not so strongly expressed. For example, these are family photographs. The most diversified approach is observed in Italian law, where, in addition to the object of copyright and related rights, a photograph may be included in the third group of objects (these include, for example, photographs for documents).

It can be stated that the approaches of the countries considered in this article are identical in most of the issues (the fact of protection of a photograph, copyright on a photograph, urgency of protection). However, some issues have not yet been resolved in a uniform manner for all countries. This is most clearly manifested in the issue of establishing different legal regimes for photography (somewhere it is only the object of copyright, somewhere it has other legal regimes).

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BOOK REVIEW

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Public Safety: Reviewing Szabolcs Mátyás's *Crime Geography*

Book: Crime Geography. By Dr. habil. Szabolcs Mátyás, Ludovika University of Public Service, Budapest, Hungary. Publisher: University of Oradea; 2024. ISBN: 9786061023462

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Abstract: Szabolcs Mátyás's *Crime Geography* is a groundbreaking book that explores the intersection of geography and criminology, offering theoretical insights and practical applications for understanding the spatial dimensions of crime. Published in English, the book is the first to present crime geography as an independent scientific discipline, bridging criminology, geography, and social sciences. The author emphasizes its interdisciplinary nature, outlining three main approaches: criminological, geographical, and interdisciplinary. The book traces the historical development of crime geography, from 19th-century French "moral statistics" by André-Michel Guerry and Adolphe Quetelet to the 20th-century Chicago School's "concentric zone model". Modern technological tools like GIS and crime mapping are discussed extensively, particularly their use in analysing crime hotspots and informing policing strategies. The author also introduces the innovative *Crime Classification System*, inspired by Köppen's meteorological classification, which integrates qualitative and quantitative data to enhance crime visualization and reveal regional crime trends. The book's standout feature is its practical focus, which includes examples from Hungary and international contexts. The author connects geographic

methods to crime prevention, exploring frontier areas like urban crime, demography, ethnography, and transport geography. His engaging writing style makes complex concepts accessible, although the technical terminology may challenge readers without a background in geography or criminology. Overall, *Crime Geography* is a significant contribution to the field, blending academic rigor with real-world applicability. It is a valuable resource for professionals and lay readers interested in crime's spatial and social dimensions.

Keywords*:* crime geography; crime; crime prevention; crime analysis; crime prediction; public safety

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Contents

I. Introduction

The crime analysis and crime prediction have paramount importance for public safety (Tihanyi et al., 2024), and crime geography has emerged as a promising avenue for expanding this field of research. The examination of crime prevalence maps and other advanced techniques borrowed from geography, and their consolidation in a single resource, can be beneficial for policymakers, law enforcement agencies, and researchers alike.

In this vein, the literature presents several contemporary studies grounded in the national practices of BRICS states Brazil (Lima et al., 2024), China (Wei and Pan, 2024), India (Bajaj and Lama, 2024), South Africa (Esan et al., 2025), Russian Federation (Krasnova et al., 2022), and Jordan (Alshbol, 2011), Nigeria (Adeyemi et al., 2021), EU countries (Doğan and Kurnaz, 2025) alike.

Published in 2024, "Crime Geography" by Szabolcs Mátyás[1] illuminates how geography's methods and approaches can contribute to understanding crime's spatial and social contexts. It is the first specialist book in English that not only presents the geography of crime as a scientific discipline but also discusses its practical application in detail. The author emphasizes the interdisciplinary nature of crime geography several times. According to Szabolcs Mátyás, investigating the spatial distribution of crimes is not only a part of criminology or geography, but an independent scientific field located at the intersection of geography and social sciences. Crime geography lies at the intersection of criminology, human geography, and sociology. It explores the spatial distribution of crimes and their underlying social, economic, and environmental causes.

II. Discussion

The book begins by clarifying the conceptual foundations of the geography of crime and then presents the place of the discipline within the social sciences. The book distinguishes three main approaches:

1. Criminological approach, which considers crime geography as a part of criminal sciences.

2. Geographical approach, which utilizes tools and methodologies from human geography.

3. Interdisciplinary approach, which combines elements of both, establishing crime geography as a unique field closely related to criminology and social geography.

The *First Chapter* establishes the discipline's conceptual and scientific foundations, situating it within the broader framework of social sciences. Szabolcs Mátyás emphasizes that crime geography is not merely a subset of criminology or geography but a distinct, interdisciplinary field that bridges these domains.

Importantly, Szabolcs Mátyás is credited as the first to divide crime geography into two branches: general crime geography and applied

[1] Szabolcs Mátyás, Doctor of Earth Science, a habilitated associate professor at the Faculty of Law Enforcement at Ludovika University of Public Service (Hungary). He also teaches at the University of Debrecen (Hungary).

crime geography. General crime geography focuses on theoretical questions, such as its place in science, methodologies, and connections with other disciplines. Applied crime geography, on the other hand, is oriented toward practical uses like crime mapping, predictive policing, geographic profiling, and, as a result, public safety.

The chapter also highlights how crime geography's unique spatial approach allows researchers to uncover relationships between crime patterns and geographic factors. Szabolcs Mátyás provides a comprehensive framework for understanding and applying crime geography by addressing both theoretical and practical aspects. This foundational chapter sets the stage for the innovative perspectives explored throughout the book.

The *Second Chapter* of the volume provides a historical overview of the development of crime geography. The author describes 19th-century French "moral statistics" pioneers, such as André-Michel Guerry and Adolphe Quetelet, who studied the territorial distribution of crimes. He then presents the results of the 20th-century Chicago school. Within this, he highlights the "concentric zone model" of Robert E. Park and Ernest W. Burgess, according to which the distribution of crime varies depending on the distance from the city centre.

The *Third Chapter* is a valuable resource for researchers, as it compiles a comprehensive list of potential sources for crime geography studies. These include police databases, GIS tools, demographic data, and historical crime records, providing a solid theoretical and practical research foundation. By organizing these resources, Szabolcs Mátyás significantly simplifies the work of researchers, enabling them to access relevant data more efficiently. This systematic approach enhances the quality and scope of crime geography investigations.

A valuable part of the book discusses applied crime geography. Here, Szabolcs Mátyás presents the role of modern technologies such as GIS (Geographical Information System) and mapping methods in criminal analyses. Analysing hot spots, i.e., the spatial concentration of crimes, can help develop policing strategies and crime prevention.

One of the most significant chapters is about Crime Mapping. This part of the book holds exceptional importance within the field of

crime geography as it focuses on understanding and representing the spatial distribution of crimes, leveraging the capabilities of Geographic Information Systems (GIS). This chapter is unique in that it goes beyond traditional mapping techniques, incorporating modern technology and statistical modelling to analyse crime patterns accurately.

What makes this chapter particularly noteworthy is its practical relevance. Crime mapping is not merely about visualizing data on a map; it aims to uncover underlying relationships and trends. For example, it explores how socioeconomic, demographic, and urban factors influence the concentration of crimes in specific areas. This analytical approach makes it a valuable tool for law enforcement, urban planners, and policymakers.

The chapter also highlights the historical evolution of crime mapping, illustrating how advancements in GIS technology have transformed the field. The shift has enabled deeper insights and predictions about future crime hotspots, from paper-based maps to sophisticated digital systems. It underscores the integration of physical and human geography, demonstrating that geographic context is critical for understanding the "where" and "why" of criminal activities.

Moreover, the chapter emphasizes the interdisciplinary nature of crime mapping, bridging geography, criminology, sociology, and urban studies. It highlights various applications, such as predictive policing, geographic profiling, and crime prevention through environmental design (CPTED).

This chapter not only provides theoretical foundations but also equips readers with actionable insights, making it an indispensable resource for those involved in crime analysis and prevention. Its innovative approach to combining data visualization with analytical tools sets a new standard in the study of crime geography.

The "Mátyás Crime Classification System", described in Chapter 8.9.1, is an innovative approach to spatially representing crime. It addresses common challenges in crime mapping by combining total crime representation with detailed insights into individual crime types. This method avoids the pitfalls of relying solely on absolute values, which can misrepresent the actual crime situation, or calculated indicators, which might not fully capture the nuances of crime patterns.

What sets this system apart is its inspiration from Köppen's meteorological classification system. By adapting Köppen's method of categorizing climates into a framework for crime classification, the system introduces a multi-dimensional perspective to crime analysis. It integrates base crime rates (e.g., total crimes per population percentage) with visual indicators of structural differences. This dual approach provides a comprehensive view of crime dynamics in a region, offering a balance between general trends and specific details.

This chapter is particularly valuable because it emphasizes the socioeconomic factors influencing crime trends and highlights their varying impacts on different types of crime, such as robbery and burglary. The Mátyás system bridges the gap between theoretical models and practical applications, offering actionable insights for policymakers, law enforcement, and urban planners.

The chapter highlights an innovative, adaptable framework that enhances the accuracy and depth of crime mapping, making it a cornerstone of modern crime geography research.

One of the greatest strengths of Szabolcs Mátyás's book is that he emphasizes practical applicability in addition to theoretical approaches. The author shows in detail how geographic methods can be used to explore the causes of crime and how they can help the police work. In the volume, he devotes a separate chapter to the frontier areas of crime geography, such as demography, ethnography, and transport geography, which all contribute to a better understanding of the spatial aspects of crime.

Another important topic is the analysis of urban crime. Szabolcs Mátyás gives examples from different countries, including the United States, where the geographic characteristics of crime were examined in light of the neighbourhood's social and economic situation.

Szabolcs Mátyás's writing style is easy to understand and conveys complex concepts. Although the book is positioned as a specialist book, it can also be an understandable and enjoyable read for interested lay people. The author's experiences and research results enrich the text, making what is read authentic and lifelike. The parts where Szabolcs

Mátyás shares his personal detective experiences and connects them with the scientific aspects of crime geography are exciting.

Although the book is highly informative, some readers may struggle with the technical terminology. For example, the details of GIS technologies and statistical methods can be a challenge for those who do not have prior knowledge of geography or criminology. Furthermore, although the volume also presents international examples, not all details are relevant for a global audience due to the dominance of the Hungarian context.

III. Conclusion

The book *Crime Geography* by Szabolcs Mátyás is a unique and pioneering work at the intersection of criminal sciences and geography. It provides a theoretical framework for the spatial investigation of crime and practical guidance for the development of policing strategies.

Looking at other crime geography books, we see that they focus exclusively on crime mapping. In his book, Szabolcs Mátyás demonstrated that crime geography is a much broader discipline and it is connected to far more scientific fields. Therefore, crime geography cannot be narrowed down to crime mapping. I also share the author's perspective. Geographical factors should be given more consideration during investigations. Numerous social and physical geographical factors, when examined, can bring investigators closer to identifying the perpetrator.

It is recommended reading for anyone interested in the social and geographical aspects of crime, whether a professional or a layperson. The book can contribute to crime geography as a scientific field gaining more recognition in Hungary and internationally.

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