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Status of Human Embryo *in vitro* as Ethical and Legal Issue: Religious Roots of Diverging Approaches

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Abstract

The paper is focused on the ontological status of the human embryo *in vitro*, a question that determines its ethical and legal status that is in turn of exceptional importance for ethical and legal regulation of manipulations with the embryo in the course of academic research as well as in clinical practice of assisted reproductive technologies. The author discusses different approaches (Roman Catholic, Protestant, Greek Orthodox, etc.) to the issue of embryo status that have emerged in different parts of the world in the course of history from the perspective of religious anthropology. It is argued thesis that the idea of God-likeness of human person in the Christian culture giving a powerful impetus to the scholar and technological change originally contained profound ideological premises capable of inhibiting the most dangerous intrusions into the nature of human nature created after the likeness of God. One such premise is the idea that the human embryo is attributed with a soul from the moment of its conception. Those countries, whose cultural matrix does not provide for such moral, religious constraints, have a competitive advantage in the globalized research and technological context that in a sense concerns the human civilization as such. This circumstance has become a contributing factor in the emerging change in the international ethical and legal regulation setting the limits to genetic research of the embryonic development of human person. The main vector of the change has been

determined by liberalization of former constraints date back to the dogmatic Christian view of the world. Moreover, the latest innovations in this area demonstrate an intention of the medical and biological academic community to share the responsibility for the development of regulatory policies concerning human embryo research with specialists of other branches of sciences and with public at large.

Keywords

human embryo *in vitro*, ontological status, legal status, moral status, ethical and legal regulation, genetic research, Christian doctrine, idea of God-likeness of man, technological change.

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Introduction

The question of the status of human embryo *in vitro* (that is, human fetus conceived and developing outside the mother's body) is at the heart of ethical and legal problems of human genomics and has become part of the agenda of public and scholar discussions in the last quarter of the past century when it was became possible to conceive and develop human embryos in a laboratory. This question can be viewed from different angles — ontological, moral and legal — with approaches to the understanding of its moral and legal status depending on what is the ontological status of the embryo. We assume that a human embryo (including *in vitro*) is a biological subject of a special ontological status that is specific in the fact that it can develop in a human being under certain conditions.

The progress in human genetics studies, that has enabled human embryos *in vitro* to survive, holds a promise for the development of such forms of assisted reproductive technologies as extracorporeal fertilization (ECF) widely used after the first test-tube baby was born in 1978 in the United Kingdom. This event instantly aroused a bitter controversy of the religious, moral and legal nature. Afterwards, the fertilization and early development of human embryos outside the maternal body has become often preceded by pre-implantation genetic diagnosis (PGD) to prevent hereditary disorders. This has

made the ECF procedure still more controversial, only to trigger moral and religious discussions because technology implemented assumes a selection of human embryos to discard those subject to intergenic mutation.

Following decades of disputes, the ECF and PGD procedures finally became legitimate and legal ones (subject to varying restrictions) in many countries of the world. Nevertheless, this did not clear sufficient divergences in the understanding of the ontological status of human embryo and ethical/legal constraints for the use of technologies mentioned. According to researchers, the historically conditioned variety of approaches to the problem of embryo status (including *in vitro*) in countries and regions around the world follows from sociocultural differences rooted in religious anthropology. It is anyway undeniable that technologically advanced countries developing in the wake of the Christian socio-cultural tradition have adopted a more wary attitude to the embryo as a beings to be potentially endowed with human consciousness and thus a more restrictive approach to possible manipulations with the embryo *in vitro*.

Moreover, the Catholicism and Russian Orthodox Church have taken the strictest stance concerning the ontological (and, therefore, moral) status of human embryo until now. According to official documents of the Roman Catholic Church, "the human dignity should be recognized in each human being from conception to natural death"[1] with the conception to be deemed the moment of ovum fertilization. In the Basics of Social Doctrine of the Russian Orthodox Church, the conception of human beings is considered God given and any infringement on their life a crime[2]. As for the Protestant Churches communities, they have adopted a much wider range of approaches "up to assertions that human life starts after the implantation rather than conception or 14 days after the conception when splitting of the embryo to give birth to twins is no longer possible, or after the first trimester of pregnancy, or after approximately six months of pregnancy when the fetus can survive on its own"; cited by: [Kiryanov D., 2020: 173][3].

[1] Instruction Dignitas Personae on bioethical issues. 2008. Available at: URL: http://www.//vatican.va roman_curia...20081208_dignitas…(accessed: 30.12.2019); Instruction Donum vitae. 1987. Available at: URL: http://www.ccconline.ru›donum_vitae.pdf. (accessed: 30.12.2019)

[2] Basics of the Russian Orthodox Church Social Concept. 2000. Available at: http://www.patriarchia.ru›db/text/419128.html (accessed: 12.04. 2020)

[3] For example, the General Convention of the Episcopal Church, United States, allowed in 2003 to use for research the embryonic stem cells produced from ECF "leftover" embryos, with the only reservation that embryos should not be created specifically for

Admittedly, an intention of Christian doctrine to recognize the human fetus as endowed with consciousness has become relevant and pronounced only in the last decades of the 20th century when as elective abortion at early stages of pregnancy was made legal in many countries of the West. Until the mid-19th century, the Roman Catholic Church did not consider abortion a crime at early stages of fetus development while recognizing it as a major sin called for contrition. The Russian Orthodox Church has been originally tougher on these issues and supported by the state: in the 15th–17th centuries an Orthodox priest would give 5 to 15-year penance to women for discharge of the fetus, while law of the second half of the 17th century introduced capital punishment for abortion later replaced with other sanctions decreed by Peter the Great. In Russia abortion was a crime until Soviet regime; the latter has decriminalized it in 1920, when the Soviet Government for the first time in the world made it possible to women to be operated for free in a health institution. However, regulatory policies on this issue would later repeatedly change.

Thus, despite that the embryo status discussions "refer to the Christian tradition this way or another, the range of problems to be discussed follows precisely from challenges of the day" [Kiryanov D., 2020: 173, 180]. However, the issue of ontological status of human embryo has come to the fore first as abortion became legal and later when it was possible to develop the embryo in the Petri dish at early stages, freeze it for conservation, grow in an artificial womb, isolate specific cells and manipulate the genes until the would-be child could be genetically improved, only to reveal profound religious, ideological divergences within the global community.

1. Different Interpretation of the Embryo Status in Different Parts of the World

The Working Party of the Human Embryo and Fetus of the Council of Europe's Steering Committee on Bioethics observed in a report published in 2003 that there are in the world four main approaches to the status of embryo (both *in vivo* — maternal body — and *in vitro*) adopted internationally and relevant for legal regulation: the embryo is as valuable as any human being and has the same right to life[4]; the embryo has no consider-

research and should not be subject to sale.

[4] The proponents of this position argue that abortion and any form of embryonic research involving destruction of the embryo are not acceptable, except where pregnancy, if continued, is an obvious threat to the mother's life.

able moral value and does not need any special legal protection; the status of the embryo is gradually evolving as it develops, with its highest at the point where the fetus is capable of surviving outside the maternal body; the status of the embryo is evolving gradually, but full set of rights are only achieved at birth. A state's stance on the status of the embryo *in vivo* largely determines status of the embryo *in vitro* and, therefore, legal regime of manipulations with such embryos. Three following interpretations of embryo *in vitro* are discussed in legal literature: the embryo *in vitro* is a person at law, it is a thing at law or it is a legal phenomenon *sui generis*[5].

With a variety of regulatory regimes emerging in practice, the overall situation in the Council of Europe was described in the European Court of Human Rights judgment on *Parrillo v. Italy* case where the subject of the dispute was whether a woman has a possibility donate an embryo *in vitro* for scholar research. The Court did not consider the case on its merits alleging a lack of European consensus. Moreover, the Court observed widely diverging positions among the parties to the Convention apparently due to the level of technological development and specific historical experience of countries. However, if we look beyond the borders of Christian Europe, the religious underpinnings of the approaches to the problem in question will become quite evident: the most soft regulation of the manipulations with embryos *in vitro* is taking place in those technologically developed countries which are predominantly Buddhist, or Islamic or Judaic, while the toughest regulation is observed in the European countries of the established Christian tradition, and in a number of states that are signatories of the American Convention on Human Rights; it provides in Article 4 that each person's right to life shall be protected by law from the moment of conception[6].

Thus, Switzerland whose Constitution starts with the words "in the name of Almighty God", has established a restriction of manipulations with the human embryo in Article 119 of the Swiss Constitution (Reproductive medicine and gene technology involving human beings)[7]. Switzerland

[5] Ethical considerations of the new reproductive technologies. 1987. By the Ethics Committee of The American Fertility Society. Available at: http://www. academia.edu›…Ethical_considerations…reproductive… (accessed: 30.12.2019)

[6] American Convention on Human Rights. Similar provisions are enshrined in the EU Guidelines for and Protection of the Rights of the Child. No. 874. 1979. On the European Charter of the Rights of the Child. Available at: URL: http://www. Consultant.ru›cons/cgi/online.cgi?req=doc&base…n… (accessed: 09.11. 2020)

[7] Constitution of Switzerland (Swiss Confederation). Available at: URL: http://www.legalns.com›download/books/cons/switzerland.pdf (accessed: 09.11. 2020)

has allowed ECF-based pre-natal genetic diagnosis only in 2016 (later than other member states of the Council of Europe) following protracted political debates and national referendum, but restricted to cases of a major risk of hereditary disease for the child to be born. Before the referendum the country allowed to grow embryos *in vitro* (maximum three) only for immediate implantation into the maternal body. Following the referendum, Swiss doctors were allowed to manipulate twelve embryos, something that enables to choose *a priori* pathology-free embryos to be implanted. German Human Embryo Protection Law of 1990 prohibits any transfer of genetically foreign embryos and human embryo based research while significantly restricting embryo freezing and banning ill-treatment of human embryos, sex-based selection and artificial modification of germ cells of human fetus [Albitsky V. Yu. et al., 2011: 13]. A medical doctor performing a PGD procedure was sued but acquitted by court in 2010, with the PGD rules adopted in 2012. In Italy, the Constitutional Court was called upon to smooth out the excessively firm legislation by declaring contrary to the Constitution the provisions of Article 14 of the Law No. 40/2004 that limited the number of embryos to be produced to three, required their simultaneous implantation and prohibited conservation freezing of excess embryos[8].

The signatory countries of the American Convention on Human Rights providing in Article 4 each person's right to life shall be protected by law from the moment of conception, also pursue prohibitive policies in this area[9]. In fact, the United States, Canada and a number of other countries did not sign this Convention, while Mexico ratified it with a reservation that allows not to recognize that right of embryo. Moreover, the countries where the influence of the Catholic Church is especially strong are adopting a clearly tough stance with regard to ethical and legal aspects associated with the embryo status. For instance, extracorporeal fertilization is banned in Costa Rica where Roman Catholicism is declared the state religion in the Constitution. This ban was challenged in the Inter-American Court of

[8] The court concluded that the said provisions jeopardized female health through recurrent ovarian simulation and induced a risk of multiple gestation due to prohibition of selective abortion (para 29– 30, ECHR Judgment on *Parrillo vs. Italy*. Application No. 464470/11, Parrillo vs. Italy, ECHR Judgment of 27.08.2015).

[9] Similar provisions are enshrined in the EU Guidelines for and Protection of the Rights of the Child, No. 874 (1979) "On the European Charter of the Rights of the Child". Available at: URL: http://www. Consultant.ru›cons/cgi/online.cgi?req=doc&base…n… (accessed: 10.11.2020)

Human Rights in 2012. The Court has exposed a crucially important legal position in its judgment on *Murillo and others vs. Costa Rica* case: while the embryo *in vitro* is not a human being in the meaning of provisions of the American Convention, it becomes such from the time it is implanted into the uterine cavity[10]. In support of its decision, the Court referred to the fact that the birth of a human being is signaled by a special hormone produced by the maternal body following successful implantation that in fact launches a mechanism supporting the embryo's life to make it fetus in the literal sense of the word.

The U.S. realize a special approach to the problem banning federal funding of research and medical practices resulting in the destruction of human embryos or expose them to risks beyond those allowed for studies of fetus *in vivo* [Posulikhina N.S., 2021: 170]. In the same time, this does not exclude private funding of such researches and practices provided under condition approved by the Food and Drug Administration (FDA).

Meanwhile, there is little reverence for the status of human embryo at early stages of development outside the Christian civilization. For a Muslim, human life begins on the 9th week after conception when an angel attributes soul to the fetus, given that only the creatures "endowed with a soul have consciousness similar to man" [Abd al-Majid az-Zindani et al., 2020]. Alien to the idea of soul, Buddhism does not consider the moment of birth to be of principal importance since it concerns "individual existence consisting of the whole sequence of lives which begin, continue and come to an end in order to begin again infinitely… endlessly repeating".[11] In this way, it is interesting to recall Albert Einstein's words that many outstanding researchers share a special "cosmic religious feeling" which, as he believed, pushed them to pursue unlimited research and which was common, in his view, to the ideas of Buddhism and Christian heretics [Einstein A., 1956].

Correspondingly, China does not prohibit embryonic research nor modification of human embryo and embryonic cells [Song L., Isasi R., 2020: 469]. The relevant regulatory policies pursued by executive authorities are based on the following normative acts: Ethical Guiding Principles

[10] Case of Artavia Murillo et al v. Costa Rica. November 28, 2012 decision by the Inter-American Court of Human Rights. Available at: URL:http://www.womenslinkworldwide.org/files/gjo_analysis (accessed: 11.10. 2020)

[11] Cited by: Spirit, soul and body. The Basics of Buddhism. From the Letters of E.I. Roerich. Available at: URL: http://www.enigma-vita.livejournal.com›276839.html. (accessed: 11.10. 2020)

for Research on the Human Embryonic Stem Cell (2003), Technical Norms on Assisted Reproduction (2003); Guiding Principles for Human Gene Therapy Research and Preparation Quality Control (2003); Administrative Measures for the Clinical Application of Medical Technology (2009). National Health Commission, National Department of Medical Products and the Ministry of Science and Technologies are currently the main agencies responsible for regulation of genetic research and technologies. Regulation at the executive rather than legislative level obviously allows to be flexible in responding to the rapidly evolving situation with regard to the development of genetic research and technologies.

Japan has also adopted less firm regulation of manipulations with the human embryo *in vitro* compared to European countries. Still, the regulatory powers were moved from the legislative level (like in China) to be "fully concentrated in the hands of the professional community of doctors of the relevant specializations". The main instrument is now the Fundamental Policy of Human Embryos Handling (2004) adopted by the Council for Science and Technological Policies of the Japanese Government. This document and the Act on Regulation of Human Cloning Techniques (2000) allow to "produce human embryonic stem cells from embryos left over from the ECF procedure to be used for research, conduct basic studies using germ line cells, produce germ line cells from stem cells, perform therapeutic cloning, create hybrid human-animal embryos with the purpose of growing human organs in animals, produce and use human embryos for research to improve reproductive technologies provided that the embryos are maximum 14-day old" [Ishii T., 2020: 447–448]; [Vlasov G.D., 2022: 26, 28, 30].

South Korea, while pursuing less liberal regulatory policies, will still allow to use embryos left over after extracorporeal fertilization for research after five years of conservation [Chogovadze A.G., 2012]. Moreover, under the Bioethics and Safety Act of 2005, the main normative act in this area, it is prohibited to produce embryos for any other purpose than childbirths, with neither fertilization for selection of offspring sex nor genetic therapy of embryos allowed. It is noteworthy that the Bioethics and Safety Act provides for criminal liability for illegal production and use of embryos. In 2015, this Act was amended to enable broader genetic research for treatment of sterility or severe disorders listed in a special Presidential Decree. Remarkably, "the Act makes no distinction between somatic and germ cells, to be interpreted as allowing to use germ lines for research if compatible with the said criteria applicable to its purpose" [Kim H., Joly J., 2020: 503–506].

Thus, these countries benefit from a sort of administrative rent resulting from simplified and — in certain important aspects — non-existing regulation. This provides advantages in current global (research, economic and political) competition in human genomics in some sense affecting the whole of civilization. China, Japan and South Korea are currently among the world's leaders in the development and application of genetic technologies. Still, Japan shares the top place with the United States in terms of the number of ECF procedures while China, according to the Science magazine, ranks second in terms of investments in CRISPR technologies and launches more clinical tests based on these technologies than any other country [Cohen J., 2019]. It is noteworthy that some experts believe China to become the global leader in the near future in terms of selection of embryos with improved intellectual potential as part of the PGD procedure: "Asia accounts for one half of nearly 500,000 test-tube births in the world, with China rapidly increasing its share. In view of information reported in 2018 on the emergence of technologies allowing to assess the risk of cognitive disorders and to identify the embryos with a lower IQ bias (25 points lower than average) [Kolenov S., 2019], it has been reported that one point added to the national average IQ will increase per capita GDP by USD 229 [Wang B., 2019].

2. The Human Embryo Status Problem in the Russian Regulatory System

The Russian Federation legislation defines the human embryo as the human fetus at the stage of development of maximum eight weeks[12]. The legislator's position on the legal status of the embryo is determined by part 2, Article 17 of the Russian Constitution whereby basic human rights (primarily rights to life and to protection of health) are owned by everyone at birth. Therefore, the subject of rights is human being from the moment of birth. Many specialists believe this approach to complicate the protection of the embryo or fetus (the embryo aged more than eight weeks from the time of conception) and propose to resolve this crucial and relevant issue by attaching to the embryo *in vivo* the status of person at law; sometimes invoking for this purpose the Roman legal institutions of *nasciturus* (rights of an unborn child) [Zhuravleva E.M., 2012: 24–30]. The supporters of

[12] Article 2, Federal Law No. 54-FZ "On Temporary Prohibition of Human Cloning" of 20 May 2002 // SPS Consultant Plus.

this approach argue that civil, labor, family and criminal law include some implicit references to the rights of the embryo and fetus; the most vivid example being the provisions of Article 1116 of the Russian Civil Code whereby a property may be inherited by a person conceived during the lifetime of the testator and born alive after the probate has been opened, as well as para 2, Article 7 of the Federal Law "On Mandatory Insurance from Job-Related Accidents and Occupational Diseases" whereby the children conceived during the victim's lifetime have the right to insurance benefits[13]. However, it is not the rights of an embryo or fetus that are meant by the legislator in these cases, but the rights of a born child arising on the premise that the child was born alive.

While the protection of the embryo *in vivo* as the source of life which develops in the maternal body is undoubtedly important, the status of person at law attached to the embryo would not only cut short the legal regulation of both abortion and assisted reproductive technologies but would be explicitly contrary to part 2, Article 17 of the Russian Federation Constitution. Meanwhile, the problem can be solved without a need to consider the embryo a person and attach to it the status of person at law. To introduce legal constraints on manipulations with the embryo *in vitro* and guarantee normal development of the embryo *in vivo* as demanded by society, it is enough to recognize its special ontological status of a *moral value* associated with *common good* to be protected by part 3, Article 55 of the Russian Constitution. In accordance with these provisions, human and civil rights and liberties may be restricted "to the extent it is necessary for protection of the constitutional principles, *morals* (emphasis added. — V. L.), health, rights and legitimate interests of other persons…". With this legal construct, it is possible to secure to the embryo as much protection as may be adequate in light of the ideas of morals adopted in the society[14].

Moreover, it should be added with regard to embryo *in vitro* that property rights may apply to it due to its separation from the maternal body. As was observed by H. Nowotny and G. Testa, European researchers, biological objects should be conceptualized as to make property rights either applicable or not [Nowotny H., Testa G., 2010: 68]; see also [Przhilensky V.I., 2021: 220]. Of course, it is necessary to introduce exceptions from the

[13] Federal Law No. 125-FZ of 24 July 1998 // SPS Consultant Plus.

[14] For instance, health workers may be required to report to the competent authorities the births with residual traces of alcohol or drugs in blood as practiced in certain states of the U.S.

general rule in view of the specific ontological status of embryo as source of potential life, however these should be the restrictions applicable to the regulatory regime, but not exempting from regulatory action. The attempts to overview embryo as a phenomenon *sui generis* outside the regulatory dichotomy of person-thing at law do not appear to be either theoretically grounded or of any practical use. As was observed, jurisprudence assumes all phenomena of real life "to be either about something giving rise to legal relationships, that is, things at law, or somebody engaging into relationships which involve these things, that is, persons at law" [Druzhinina Yu.F., 2020]. Once the legal nature of a phenomenon cannot be made clear within this dichotomy, how can we identify its place in the system of legal relationships?

V.V. Momotov, member of the Supreme Court of Russia, has concluded that the meaning of the effective Russian law is such that any cells and tissues (including embryos *in vitro*) separated from the human body "should be recognized as things and, except for specific rules, be subject to the general regulatory regime applicable to things". It is this conceptual reference point that, in my view, should make up basis of efforts to address the legal gaps and controversies of current regulation of medical manipulations with the human embryo. That researcher believes this solution to be generally in conformity with the legal practice emerging in the common law countries [Momotov V.V., 2018: 46]; see also [Avakyan A.M., Morozova A.A., 2022]. Such approach to a quite delicate problem will much better defend the human rights and dignity than moralizing in religions vein, only to leave the issue to an uncertain solution[15].

[15] This is eminently confirmed by an example from the Russian legal practice where a woman, following an unsuccessful ECF procedure and death of the husband, wanted to continue to be treated for infertility to exercise her right to a number of ECF procedures under the mandatory health insurance policy, only to be denied first by the clinic and later by the court on the ground of a mistake made by the couple in concluding a contract for embryo freezing (probably as a result of a faulty contract proposed by the clinic), a procedure deemed auxiliary for the ECF procedure. As a result, she failed to have even her own embryos or secure their conservation to bring the case for reproductive rights to the Supreme Court where she would stand a good chance of winning. While the plaintiff tried to prove she could inherit these embryos after the husband's death, the court argued that the embryo endowed with human dignity was not heritable and was thus subject to destruction under the contract for embryo freezing. It appears that the human dignity of the embryo was recognized, only to doom it to destruction while the woman had no right to let this embryo live and have a baby from her deceased husband. Sovietsky District Court Ruling (Rostov-upon-Don) on case No. 2-2540/2018 of 30 July 2018 // SPS Consultant Plus.

3. Influence of the Christian Doctrine on Development of Human Genomics

An analysis of differences between countries in the interpretation of the human embryo status (legal, moral, ontological) shows that the position of the Church even today continues to exert major influence on professional ethos of the research community working within a socio-cultural paradigm that has emerged on the basis of the Christian doctrine. Until recently, mentioned peculiarity of the Christian culture had practically no bearing on the competition in the field of science between different countries and regions of the world. However, the situation has changed as technoscience takes shape, and the role of technologies as most important factor of scientific progress increased sharply. It is well known that technologies are a form of knowledge and skill that is much cheaper to replicate than to create.

In this regard, it is worth recalling that science originally flourished in countries belonging to the Christian cultural tradition largely because of the Christian idea of God-likeness of human being and of human mind. The dogma of God-likeness of human being has become the ideological basis for legitimization of the idea of equality as a prerequisite of development of law that guarantees creative freedom required for technological change. As another major implication, the Christian anthropomorphism, helped to overcome the sharp antagonism between science and religion as ways of knowing truth[16], something that allowed to "accommodate the principles of Christian ideology with achievement of progressing science". These ideas had reached their peak in the Catholic interpretation of the dogma of God-likeness of man which characteristically recognized the rationality of the Creator in "giving consistent physical laws to His Creation" [Woods T., 2010: 87]. From the early modern times, the sociocultural development of Europe was marked by the conciliation of the "moral attitudes translated into the Christian theology with a new scientific view of the world emerging in the 17th century" [Rorty R., 1994]. The Catholic idea of knowing God through man and the possibility of regarding human activities as "likely to acts of creation albeit on a small scale" [Stepin V.S., 2011: 256, 258] was later developed by the Protestant philosophy. In its turn, the Russian Orthodoxy believes that "Revelation tells us about God and only then about

[16] One has to admit idea of possible coexistence of two truths, religious and scholar ones, was postulated in the European culture in the early 12th century by Ibn Rushd (Averroes), an outstanding Arab philosopher [Guseikhanov M.K. et al., 2009].

man to find what is likely in him to God"; see: [Sinelnikov S.P., 2010][17]. This approach to the dogma of God-likeness of man is taking the Orthodox culture away from the technological vector of development while promoting among believers the idea of non-admissibility of experiments with human nature endowed with a soul from the moment of conception.

Still, the Christian idea of God-likeness of human person that provided a powerful impetus to academic and technological progress originally contained profound ideological assumptions capable of blocking the most dangerous intrusions into the human nature created to the own image of God. For this reason, the countries whose cultural matrix does not have the incentives for research and technological development associated — as in the Christian culture — with religious and ideological constraints on dangerous intrusions into the human nature, now enjoy additional competitive advantages. Whether socio-cultural differences of this sort imply that proponents of the Christian tradition run the risk of lagging behind the new technological leaders, is a question is unlikely to be publicly discussed because it is politically incorrect for obvious reasons, only to make it still more relevant.

One of the hottest issues of present-day discussions related to the human embryo is about a possibility of editing the embryo's genome: in the process of researches, in clinical practice of etiotropic therapy [Grebenschikova E.G. et al., 2021: 87] to prevent the causes of genetic disorders in a yet unborn child, and with the purpose improving (or, as they often say, designing) physical and cognitive properties of the child to be born.

As for the so-called designer babies, the medico-biological and bioethical communities have diverging views on the technical possibility of such improvement and a general consensus that experiments of this kind are not acceptable. Still, these questions are widely discussed as part of a broader philosophical discourse while the range of approaches presented here varies from transhumanism welcoming the idea of accelerated and targeted transformation of human nature to religious philosophy warning against existential threats from the technological dehumanization of man. The problems under discussion extend, however, far beyond the possible limits of manipulations with the human embryo which will normally fall into the shade in the course of debates.

[17] The Idea of the Christian Anthropology on God-Likeness of Man in Education and Learning. Part 1. Holy Fathers on God-Likeness of Man. 2010. Available at: URL: https://www bogoslov.ru/article/817555 (accessed: 05. 02. 2021)

As for the prospects of clinical practice of editing the genome to be inherited, there is currently no consensus that previously allowed to add to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, endorsed for signing under the auspices of the Council of Europe in 1997, a provision that any intervention seeking to modify the human genome may be undertaken for medical purposes only provided it does not introduce any modification in the genome of the descendants (Article 13). At the time that stance was adopted by far not all technologically developed European countries (it is well known, for instance, that the United Kingdom did not join the Convention considering this provision as too tough). The medico-biological community (the main subject of ethical and legal regulation in this sphere of relationships) now tends to depart from strictly prohibitive regulatory policies of editing of the inherited human genome for medical purposes. The debate is focused on the objects of correlation of therapeutic pros and cons of such practice and the danger of therapy growing into upgrade.

The issue of the human embryo status under discussion becomes crucial in the field of regulating relationships involved in organizing and conducting research to edit embryos *in vitro*. This problem is key here since its solution will set the limits for such manipulations with human embryos. The research related to editing human germ line (including parent sex cells and embryos resulting from their fusion) is gaining momentum across the world powered considerably by emergence in 2012 of CRISPR-Cas9, a relatively simple and highly effective technology for targeted editing of the genome (named after Cas9 enzyme as the editing tool), which, according to J. Doudna, one of the inventors, "have already spread across the research community like a forest fire" [Doudna J., Sternberg S., 2019: 282]. It is largely thanks to the prospects brought about by mentioned technology for gradual, but quite serious changes in regulatory policies have been taking place over recent years to define the limits of genetic research of the human embryonic development .The main vector of the changes is determined by relaxing former constraints that date back to the dogmas of the Christian philosophy.

Conclusion

The optics for viewing the problem of the human embryo status proposed in this paper allows to highlight important factors behind different

approaches to its solution. To discuss the background at this angle, it makes sense to go back to 1982 when the United Kingdom set up the Human Fertilization and Embryology Authority to define the limits of possible in manipulating human embryos *in vitro*. Headed by Ms. Warnock, a British philosopher, the HFEA members interviewed almost 300 doctors and embryologists and studied the opinions of nearly 700 ordinary citizens over two years of work. As a result, it was concluded that research would be done on embryos not older than two weeks from the date of ovum fertilization. It is noteworthy that Ms. Warnock had managed to gain the approval of the term from foremost clerics of the Anglican Church whom she convinced that it was not before 14 days from the moment of conception that it would become clear whether one or more babies were to be born. Therefore "until this time it will not be clear whether there should be one or two souls. So, whenever a soul is attributed, it cannot happen before 14 days" [Watts G., 2019: 2118]. The so-called "14-day rule" was well received by the international research community and incorporated into a number of soft provisions of both international and national law across the world.

The next step in the regulatory development in the field was also made in the United Kingdom that before 2016 prohibited any editing of human germline [18]. However, following an article of Chinese geneticists in 2015 on mutation correction using non-viable embryos, researchers from London's Francis Crick Institute applied to the UK regulator for a permission to use the CRISPR–Cas9 technology for study of healthy human embryos that was given with a reservation that genetically modified embryos would not be used to give birth to human being. It was the first experience of legal regulating research on human embryos.

The next push towards liberalization has come from China where twin girls with the genome edited at the embryonic stage for protection from HIV were born in 2018. In the course of the experiment headed by He Jiankui, a young Chinese researcher, targeted elimination of CCR5 gene responsible for HIV infection of cells was performed. Several married couples with a HIV infected husband took part in the experiment. The researcher, who made the report public in November 2018 at the Hong Kong International Summit on Human Genome Editing, did not appear to expect the bitter condemnation from both international and domestic colleagues as well as Chinese officials. Moreover, while the risk was exorbitant and experiment

[18] Human Fertilisation and Embryology Act. Available at: URL: https://www http://www. embryo.asu.edu›…fertilisation…embryology-act-1990 (accessed: 03.10.2020)

not quite valid, the situation of the team was made worse by the fact that, as it turned out soon, CCR5 was directly related to human cognitive abilities: research on CVA and cranio-cerebral patients showed that CCR5, once activated, could reinforce cognitive abilities and lead to post-CVA recovery of motion activity [Joy M. et al., 2019: 1143–1157]. On these grounds, the Chinese geneticist was condemned by the research community that he had planned and run an experiment to identify the mechanisms for improving mental abilities by editing the embryo's genome.

In China, He Jiankui was sentenced in a closed trial for a heavy fine and three years in prison. He and two of his colleagues were incriminated with "violating the Chinese rules of research and crossing the ethical line both in science and medicine in pursuit of fame and profit while not being qualified as medical doctors" [Olekhnovich V., 2021]. Probably, they were prosecuted for violating the ''Ethical Review Guiding Principles on Biomedical Research Involving Human Subjects in People's Republic of China", adopted in 2016 by the Commission for Health and Family Planning. Under these Guiding Principles, researchers are required to comply with principles such as informed consent of test subjects, risk-benefit balance, free participation in research, protection of privacy, coverage of required costs and compensation of damage. Despite being ethical recommendations by their regulatory nature and regarded as administrative rules under the Chinese legal system, the Guidelines incorporate the provisions for not only administrative, but also criminal liability. Perhaps, position of the Chinese authorities was predetermined by a negative response of the international research community. However, as it turned out later, the experiment was not secret, with a relatively wide range of persons aware of it (almost 50 people from academic and business community, with "the intimate circle of high-ranking scientists from China and the U.S. including one Nobel Prize winner and one Chinese politician") [Song L., Isasi R., 2020: 499]; [Vlasov G.D., 2022: 24].

The experiment conducted in China vividly demonstrated that is was problematic and — very likely — even impossible to restrain human embryo editing technologies by way of prohibitions stipulated by soft law provisions. It is equally unlikely to introduce full-fledged international regulation at this stage since a global consensus is still not feasible, while regulation at any other level is devoid of any sense. But the main issue is that prohibitions are unlikely to stop the ongoing application of already available technologies will be only pushed into the grey areas and criminal

activities. For this reason, the World Health Organization Expert Advisory Committee on Developing Global Standards for Governance and Oversight of Human Genome Editing, set up in 2019, has so far only proposed to establish a global register of all such experiments and to develop applicable standards[19] while giving up the idea of a moratorium on heritable genome editing proposed by a group of eminent geneticists.

As a further major step towards liberalization, the International Society for Stem Cell Research (ISSCR) recently abandoned the 14-day rule earlier established by it whereby human embryos may be grown and used only in the laboratory context and only within 2 weeks from the date of fertilization, with the new Research Guidelines adopted on 26 May 2021 revoking this prohibition. Instead, it is recommended to national academies of sciences, professional communities, sponsors and regulators to involve the public into discussions of research, social and ethical issues related to 14-day limit to decide whether it should be extended depending on the purpose of researchers.

This decision effectively means that the medico-biological community abandons the main responsibility for the development of regulatory policies in human embryo research, to be shared, in view of the extent of the problem, with specialists of other branches of science and the public at large. It follows that discussions of such problems should reach a new level both in the system of humanities and in the society as a whole.

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New Concept of Employment: Development of Labor Relations in the Digital Age

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Abstract

The role and underlying functionality of labor law are radically changing in the current geopolitical and economic context. Though it gives rise of relations that follow specific rules non-standard forms of employment like outstaffing, gig employment, self-employment, spot employment etc., they may escape any regulation. At the same time, the role of integrative associations at work, transnational corporations is changing. The digitization in labor law is reaching a principally new level. While new methods of business cooperation and social communications will trigger the emergence of new effective forms of employment, the applicable labor law does not adequately follow realities of the day nor takes into account new and various forms of engaging people in specific activities including work. In December of 2022 a meeting on the draft "On Employment" was held at the State Duma. The draft had chapters addressing relations involved in platform work, non-standard forms of employment, etc. However, the draft raised a discussion and was revised, with outstaffing to be regulated under new principles. However, while the draft is not made effective, it can be amended and specified to make the proposed subject even more relevant. Therefore a need to conceptualize new forms of employment and to further improve the relevant legislation is a major area of action today. Moreover, automation at work, while bringing positive developments such as the use of robots able of better performing identical and repetitive tasks, is also fraught with various risks. At that, the increasing use of artificial intelligence is another threat to employment of the population. It is only logical that digitization at work entails non-standard forms of using classical institutions, opening up new possibilities to use social partnership, particularly, in the activities of sectoral unions for regulation of collective labor relations as discussed below in the paper. Author looks at issue of remote work and the nature of approaches to regulation of the underlying relations from a perspective of qualitative changes to regulation of electronic communication between workers

and employers as part of remote legal relationships. It is proposed to revise relevant areas of research of mentioned and other relations to address contemporary challenges emerging in the field of labor law in the digital age.

Keywords

digital age, labor relations, remote work, new forms of employment, automation, digital remote union.

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Introduction

The COVID-19 pandemic, automation of industries and of different spheres of social life, use of cognitive technologies and recruitment via digital platforms, geopolitical situation and other challenges in the context of economic war against Russia declared by the collective West have revealed a number of issues in the Russian labor and employment law including those of its inadequate flexibility. Thus it is currently important to conceptualize new forms of employment and to improve the employment law: approximately 30 thousand international companies that employed almost 2 million workers in Russia have suspended their operations.

While new methods of business cooperation and social communications will trigger the emergence of new effective forms of employment, current labor law does not adequately follow the realities of the day nor takes into account new and various forms of engaging people in specific activities including work. Indeed, informal employment merits a regulatory response.

It is necessary to timely assess and regulate such phenomena as gig and spot employment, just like other forms of employment emerging in the labor market, and also prevent the spreading of sham self-employment while avoiding to prohibit individual business activities. In 2017 the European Foundation for Improvement of Living and Working Conditions has published a report "Non-standard forms of employment: recent trends and future prospects"[1] noting an important phenomenon — characteristic of Russia as well — of the growing number of self-employed workers.

[1] Eurofound. Non-standard forms of employment: Recent trends and future prospects Background paper for Conference "Future of Work: Making It e-Easy", 13–14 Sept. 2017.

A positive evolution of the labor market is ensured, among other things, by labor legislation. This requires comprehensive studies at the nexus of economics, jurisprudence and sociology due to implications of labor market development and structural transformation of labor relationships as a result of technological change and workings of the market. Moreover, the mechanisms of digitization of labor relations reach a new level.

1. Traditional and Non-Traditional Understanding of Employment

To define employment and its correlation with contractual employment, it has a sense to refer to concept of employment as established by law and interpreted by jurisprudence. Under the Federal Law on Employment of the Russian Federation of 19 April 1991 No. 1032-1[2]; hereinafter the Employment Law), employment is an activity that is normally gainful, related to satisfaction of individual and public needs and not contrary to law.

The concept provides a socioeconomic standard and defines work in the wider sense as:

labor activity: work under a contract (the concept is explained above);

business activity: independent and systematic operations of private entrepreneurs in which they engage for profit at own risk under statutory contracts (for work/services), copyright agreements, as well as operations of members of production cooperatives and founders (stakeholders) of for-profit organizations;

academic activity: in-person training including as referred by public employment agencies;

service: military, substitute civilian, police, fire fighting and penitentiary system;

other activities.

Overall, Article 2 of the Employment Law lists ten categories of individuals deemed employed without making a clear distinction between different forms and types of employment. Thus, one can admit that legal definition of employment is not correct as it does not make clear what employment is

Available at: URL: https://www.eurofound.europa.eu/ sites/default/files/ef_publication/field_ef_document/ef1746en.pdf. (accessed: 28.01.2023)

[2] Vedomosti RSFSR. 1991.No.18. Article 565.

meant — labor, academic or other. This systematization follows only from the fact that the authorities do not provide social assistance and support to all those employed.

As a party to social relations, an individual could be employed at a job not covered by provisions of the labor law. There are several views on the division of employment. For instance, according to S.H. Dzhioev, there are three main types of employment: academic; military (army, internal and railway forces, security and police forces); and labor, that is, public and individual employment in a form not contrary to law, irrespective of whether it generates earnings or other remuneration or not [Dzhioev S.H., 2006: 21].

A different approach is contained in manual "The Russian Labor Law" that, depending on the nature of underlying activities, distinguishes labor (public production) and non-labor employment. The former is divided into hired/dependent and own-account employment. Hired employment includes work under an employment contract; work under statutory contracts with labor as the subject; work under an election/assignment order; contracted military or equally treated service. Own-account employment includes membership with production cooperatives (guilds); work at subsidiary industries and contracted sale of products; business activities; unpaid contributing family work [Khokhlov E.B. et al., 2005: 229]. The latter classification is based on the resolution adopted by the 15th International Conference of Labor Statisticians in 1993 and used in international and domestic practice.

In international statistics the entire population is classified as economically active (supplying labor for production of goods and services) and economically inactive. Both the employed and unemployed persons are economically active population. While this division is important for assessing labor supply and its evolution, it will leave out those performing socially important activities such as care after the disabled and children, household chores and other paid work. Types and forms of employment are thus treated differently.

There is an interesting interpretation by O.V. Sobchenko whereby "dealing with forms of employment we mean primarily their economic parameters that reflect the thrust of public employment policies as such... What is important as applied to individuals is the division into types where employment is regarded in place and time. We suggest a twofold division: employment based on employment contracts and employment based on other legal evidence" [Sobchenko O.V., 2005: 6].

The definition of the "form of employment" is not only about economic characteristics. As observed by O.V. Motsnaya, "assuming that labor employment is a type of employment (along with training and office), the following forms can be obviously distinguished as part of this type depending on external manifestations: work under employment contracts; work under statutory contracts; work as a private entrepreneur, etc. Forms of labor employment are regulated by norms of different branches of law. Therefore, the concepts of "labor employment" and "employment based on employment contracts" correlate as the type and the form of employment, that is, external manifestation" [Motsnaya O.V., 2009: 39– 40].

As it turns out, only one of ten types of employment makes up contractual employment (including its non-standard forms) still prevalent in the postindustrial society. However, the totally new stage of digitization, in particular, as applied to employment is enforcing a new understanding of employment in the wider sense as any — normally gainful — activity of individuals aimed at satisfaction of personal and public needs which is regulated by provisions of the Russian law irrespective of sectoral association[3]. Employment thus comes to include non-standard forms as discussed below.

Atypical (non-standard) employment assumes some extent of deviation from typical (standard) employment down to informality. It appears that the spreading atypical employment, unlike typical labor relations, is understood as any form of engaging labor that deviates from traditional employment contract in its various combinations.

Atypical employment forms are many and involve both legal and those not covered by law. They include the types of work which deviate from classical types by one or more features: effective term (term employment contracts); working time (part-time); production site location (from traditional home-based to remote work, platform and spot employment); day work, call work; temporary agency work etc. Thus, atypical employment also includes the forms where people, instead of working directly for an employer, work via branches and entities which make up a group of companies (network employer); mediators (private employment agencies), subcontractors. Since these forms of employment are often prejudicial to workers, they are qualified as "precarious (forms of) employment", a concept of judgmental colouring.

[3] In the narrower sense the author of article proposes to treat employment as a subject of employment relations governed by provisions of labor and employment law.

A comparative study of "atypical form of employment" and "precarious form of employment" allows to expose how they relate to each other. From a perspective of formal logic, they relate in terms of content as the general and the particular. Thus, precarious employment is always atypical (non-standard) while the latter is not always precarious. For example, part-time employment as a subject of labor relations arising from an indefinite term employment contract is atypical but cannot be considered precarious.

In view of the partial overlap of non-standard and precarious employment, it was proposed to introduce atypical (non-standard) forms of employment as a more general term since it comprises a whole set of precarious forms of employment.

For a meaningful analysis of the subject, it is important to define the notion of atypical employment as such. It should be remembered, however, that economic literature with its rich tradition of looking into the nature of employment does not offer a single approach to terminology due to the fact that atypical employment is a rather recent phenomenon with quite visible variations depending on the country.

The International Labor Organization (ILO) qualifies non-standard jobs as "precarious employment", a term often translated neutrally as "non-standard employment", but has negative connotations as it is associated primarily with social implications of the labor market flexibility. However, in sociological terms as applied to non-standard labor relations this concept can be regarded, firstly, as a threat to livelihoods and incomes of the working population, and, secondly, as a problem of discrimination at work directed against those employed in this sector.

S.I. Kotova has proposed a good definition of labor market precarization by describing it as "a process of change to socioeconomic relations in the structure of the labor market under the effect of different external social risks in the form of economic, technological and demographic processes which results in lower social and economic statutory guarantees available to (potential) workers irrespective of the way they are engaged in work" [Kotova S.I., 2019: 16].

Under the Labor Code of Russia, the parties to labor relations include the worker (person contracted by the employer) and the employer (individual or legal entity contracting the worker). This is due to the fact that the Russian doctrine has faced atypical employment much later than countries in other parts of the world.

However, there are studies qualify employment as an important socio-economic category, with the focus, as economists believe, on standard employment characterized by three main features: work for one employer; standard workload over a day/week/year; work at the employer's production facilities.

In light of that foregoing, it appears that where any of these is lacking, this signals a non-standard (atypical or flexible) form of employment. A similar approach to the definition of standard employment is supported by V.E. Gimpelson and R.I. Kapelushnikov, both of whom believe it to be "full-time wage employment at an enterprise/organization under direct supervision of the employer or manager appointed by him based on indefinite term contract" [Gimpelson V.E., Kapelushnikov R.I., 2006: 16]. While this economic definition is quite widespread, the underlying criteria are not quite accurate from a perspective of the labor theory. For this reason, legal literature has a slightly different concept of standard employment.

The traditional model of long-term relations between subjects of the labor law is now complemented with a set of "atypical" forms of work that are in rapid progression in the current environment. The main issue here might be that employers will use atypical forms to get around the law by arranging work in a way as to move waged, part-time or term workers out of the coverage of the social protection system through the use of specific contracts. The qualification of certain types of labor relationships as atypical should not in principle restrict the rights at work since classical labor relationships allow to change certain attributes as long as this does not prejudice the rights guaranteed to workers.

It is noteworthy the concept of individual work should not be confused with that of private enterprise. Individual work is associated with a variety of areas such as the performance of work and provision of services subject to special legal regulation[4]. Both private enterprise and individual work currently share a common attribute — an individual engaged in this activity at his own risk as different from a worker instructed by his employer to perform a work function.

To finally distinguish individual work, it is important to describe its features: sole performance of all operations; private, own-account nature of

[4] See, for example, Federal Law No. 307-FZ of 30 December 2008 "On Audit" // Collected Laws of the Russian Federation, 2009, No. 1, Article 15; Federal Law No. 63-FZ of 31 May 2002 "On Legal Practice and Advocacy in Russia" // Collected Laws of the Russian Federation, 2002, No. 23, Article 2102.

work at one's own discretion organized by the subject to the work process outside any production system; the outcome of work rather than production activities subject to regulation by law.

Labor relations have a social focus, assume the protection of public health and compliance with provisions of labor law. It appears that individual work today is own-account activities of individuals based on individual work and performed outside any production system [Savenko L.I., 1986: 42–47].

Thus dealing with employment covered by provisions of the labor law, the concept of atypical employment will apply to those forms that are based on labor and related relationships have specific attributes, as well as on relationships that do not exhibit the whole of the main attributes of a labor relationship. An atypical employment contract should be understood as an agreement between an atypical worker and/or atypical employer with regard to the work to be performed in atypical conditions (part-time employment, agency work, remote work, digital platform work etc.), i.e., the work which has the characteristic features of non-standard forms of employment.

All of the above-cited signals that the regulation of employment in Russia is inadequate to the emerging practice in this area[5]. Since atypical employment is a reality, it is important for the future to timely assess and regulate such emerging phenomena as gig and spot employment etc., and also to prevent the spreading of sham self-employment and informal employment while avoiding to prohibit individual economic activities.

2. Transformation of the Modern Understanding of Employment. The Place of Platform Employment and Labor Market Information Systems in the Regulatory System in Russia

Public employment policies have to be improved due to the progress of IT for employment promotion and electronic interagency operability, the need to remove interregional barriers to employment, staff recruitment and public service provision, as well as the need in comprehensive upgrad-

[5] According to the data reported, for example, by the international audit consult network FinExpertiza, part-time employment in Russia grew by 22% year-on-year, an absolute maximum over the whole period of observation since 2013.

ing of the public employment service for the implementation of digitization mechanisms in Russia.

The proposed changes are needed to develop a mechanism for employment promotion services on the basis of an integrated digital platform, streamline the relationships between public employment centers and applicants, and also replace federal state standards with those promoting public employment and covering not only public services.

Efforts were also made to support employability of minors, for example, by providing a digital service for specialists at schools on the basis of the "Working in Russia" platform with a capability of displaying modern content on occupations.

The Ministry of Labor prepared a draft On Employment that by December of 2022 comprised nineteen chapters[6] as a result of changes made in the course of coordination. It was announced to include the provisions establishing composition and range of those to be covered by the employment legislation, as well as defining relationships with the provisions of international law and preventing the dissemination of unreliable and discriminatory information on available vacancies. The draft had chapters on new relationships such as self-employment, platform employment and non-conventional employment; outstaffing was also regulated in the new light. The draft will radically change the concept of employment as such and the categories of those deemed to be employed. Thus, as understood in the draft, employment is a gainful activity of individuals for production of goods or provision of services not contrary to law[7], with the following categories to be considered employed:

workers under an employment contract including working full-time or part-time for remuneration, as well as doing other paid work/service including seasonal and temporary work, except for public works and full-time (staff) office of election/referendum commission members with the right of decisive vote;

entrepreneurs, public notaries and lawyers engaged in private practice and other professional activities are to be registered and/or licensed under the federal law;

self-employed workers;

[6] On 1 December 2022, a meeting of the working group to discuss the draft on employment was held at the State Duma of the Federal Assembly of Russia.

[7] SPS Consultant Plus.

engaged in subsistence farming, popular craftwork, traditional work and crafts of indigenous ethnic groups and contractual sale of goods;

workers under statutory contracts for performance of work and provision of services, copyright agreements, as well as members of production cooperatives (guilds);

elected, appointed or approved to a paid office;

those on military, substitute civilian, police, fire fighting and penitentiary system service;

temporarily absent at jobs due to disability, leave, retraining, skills improvement, suspension of production as a result of a strike, reservist training, participation in the events related to the preparation for military/substitute civilian service, performance of other public or civic duties or other viable reason;

founders/stakeholders of organizations, except non-profit organizations of a form which does not envisage the right of founders/participants to operational profits including condominiums, members of housing, development, garage, other specialized consumer cooperatives established to satisfy members' needs and not to distribute operational profits;

members of a (peasant) farm[8].

As follows from the list, there is a considerable change to the categories of those employed. There is a visible bias in favor of statutory regulation both in the concept of employment itself and in the list of workers deemed employed. Also it has come to include the category of self-employed workers (following success of a legal experiment with their taxation), while individuals on training were totally excluded.

Under the draft, self-employment is activities of (self-employed) individuals for own-account production of goods (provision of services) for regular income who are, however, not registered as private entrepreneurs nor hire workers for the purpose of self-employment. The following individuals are not deemed self-employed: those hiring workers on a contractual basis as employers; generating revenues in an amount lower or higher than established by the Government for calculation of the taxable base in the current calendar year; engaged in activity types to be established by the Government.

[8] Draft of Federal Law "On Employment in the Russian Federation" // SPS Consultant Plus.

Since the digitization program is gaining momentum in all spheres of social life, the draft is expected to comprise Chapter 3 "Platform Employment in Russia" applicable to the activities of (platform) workers for own-account performance of work and/or provision of services as organized by a legal entity and/or private entrepreneur (digital labor platform operator — a legal entity and/or private entrepreneur operating a platform) on the basis of statutory contracts between a digital labor platform operator and platform workers (registered as private entrepreneur and/or self-employed worker for own-account performance of work and/or provision of services via the digital platform without engaging a third party) and between customers (individuals or legal entities placing orders for performance of work and/or provision of service on the digital labor platform) and platform workers[9].

The digital labor platform was defined as a registered information system[10] — an information system of interactions between customers, platform workers and digital labor platform via Internet to facilitate contracting for performance of work and/or provision of services. Access to the system is ensuring by platform operator. Such platform is also used to place orders platform workers can execute for remuneration to be calculated under the terms of statutory contracts concluded with customers and the platform operator taking into account the platform worker's rating.

The drafters also attempted to identify a set of requirements to digital labor platforms including those applicable to the underlying operational technology, for example, a possibility to register someone as a platform worker (without requiring to possess skills or qualifications), and those ensuring functional comfort to workers, such as to exclude a possibility of limiting access of specific worker groups to orders posted by specific customers.

Without going into technical details of labor platform operation, it should be mentioned that the expert community has divided in their views on whether to qualify relationships of this sort as a form of employment long before this time. On the one hand, there is a common understanding that, once these relationships are a fact of life, it would be correct to provide at least minimum regulation in this sphere than to play them down or, worse still, deny their existence altogether (as was actually underlined in legal terms), like in the case of outstaffing in Russia today. Therefore, adequate regulation should follow but avoid a bias towards statutory regulation

[9] 9 SPS Consultant Plus.

[10] The register to be maintained by the Council for Digital Labor Platforms.

of the relationships involved in platform labor: it is important to identify social and labor rights, duties and guarantees available to the parties.

Changes proposed to the Employment Law draft discussed above were worked through and are currently considered in one more draft titled "On Employment in Russia". However, concept of employment itself and list of those deemed employed (10 categories were left with those on training excluded), they have remained the same as in the previous draft. The terminology of self-employment and platform employment also is practically the same as in the discussed draft but placed in Article 2 of the new draft [11].

It is noteworthy the chapters regulating self-employment and platform employment were removed from current draft of Employment Law whereas it just mentions that both are regulated by the legislation. This is likely to be the result of controversies occurring in respect of these categories, especially platform employment. While the relationships themselves are a fact of life, their regulation is lagging behind.

In regulating platform employment it is useful to study experience of other countries. For example, Italy and Spain have social partnership agreements concerning the occupational implications of the transition to digital technologies and the legal status of digital platform workers. In Italy there are local level agreements on working arrangements and conditions endorsed by institutional trade unions, autonomous worker groups and representatives of several platform companies of the food industry. In Sweden there are agreements in place at platform companies in the sector of transportation and education. A number of collective bargaining agreements — for example, in Denmark and Portugal — offer vocational training programs for productive use of labor in the digital sector. Collective bargaining agreements in Germany address the issue of protecting privacy of remote workers.

As reported by PWC, Russia ranked among the top ten countries in terms of the monetary value of the freelance market in 2020[12], with the

[11] Self-employment is an activity of individuals for own-account production of goods and/or provision of services for regular income. Platform employment is an activity of (platform) workers for own-account performance of work and/or provision of services on the basis of contracts facilitated by information systems (digital labor platforms) for web-based communication between platform workers, customers and digital labor platform operators.

[12] The labor market of the future: confronting trends to shape the work environment in 2030. Available at: URL: https://e-cis.info/upload/iblock/89a/89aa34fc14f176de66a08197495a348e.pdf (accessed: 04.11.2022)

growing number of people — normally of younger ages — choosing atypical employment.

This choice is explained by several things: firstly, as young people want to be free, they opt for an opportunity to work from anywhere in the world rather than to be waged workers. Secondly, as freelancing is believed to be a way to start one's own business, it provides a sort of launching pad. Thirdly, there is a category of those in permanent search for work they cannot find, only to be forced to resort to freelancing. As such, freelancing is gaining momentum, with nearly 3.5 million of self-employed workers in Russia in 2021[13]. Therefore, a well-designed legislative reform will provide a solid basis for regulation of this form of atypical employment.

It is worth noting the current draft provides a fairly good level of regulation of the status of information systems in the area of employment and labor relations. Thus, it contains the provisions governing:

Working in Russia, an integrated digital employment platform for employment relationships;

procedure and details of the interagency electronic communication system to be used by public employment services;

procedure of personal worker and employer e-files to be maintained by public employment services[14].

Meanwhile, outstaffing to be regulated by the previous draft in Chapter 4, escapes the current draft for reasons yet unknown. In fact, the Labor Code of Russia (Chapter 53.1; hereinafter the Code)[15] and still in force Employment Law (Article 18.1) provides only minimum regulation of these relationships.

Apparently, "the current labor law enforcement practices demonstrate that there is no effective mechanism to regulate the relations arising in connection with outstaffing by legal entities other than private employment agencies. There is, however, an objective need to legalize them as part of

[13] The number of self-employed individuals has more than doubled in 2021 // Federal Tax Service. Available at: URL: https://www.nalog.gov.ru/rn77/news/activities_fts/11632019/ (accessed: 04.11.2022)

[14] Personal worker/employer e-files are e-documents and/or details, and details of documents compiled, provided and/or received by public employment services in exercising their duties and implementing public guarantees of employment and protection from unemployment // SPS Consultant Plus.

[15] Rossiyskaya Gazeta. No. 256. 31 December 2001.

holding companies and specific business entities, interrelated business groups and parties to shareholding agreements by providing certain rules including restrictions/preferences, defining the ground and details for using this construct, something that may be of enormous value for both protecting workers' interests and guaranteeing employers' right to re-allocate workers as part of holding companies and other organizations, affiliated business groups and parties to shareholding agreements using the mechanism for outstaffing workers to entities other than their proper employer.

Whereas retained workers are parties to the relations arising in connection with atypical forms of employment in the wider sense, workers seconded by legal entities and individuals under an outstaffing agreement are parties exclusively to labor relations.

This allows to assert existence of the so-called "external workers" as the parties to labor relations applicable to "outstaffed workers".

To guarantee rights of the above workers, it is proposed to consider the following persons as affiliated with the outstaffing party:

capable of influencing the outstaffing party's operations,

whose operations can be influenced by the outstaffing party,

whose operations, just like those of the outstaffing party, can be influenced by a third party.

All of the said and other likely amendments to the Employment Law deserve a separate study. Since the draft has not yet in force, it can still be amended and specified.

There are also other factors negatively affect the labor market. As observed in the ILO report "World Employment and Social Outlook: Trends 2023", there is a slowdown in employment growth worldwide with reduced opportunities for decent work and negative implications for social justice. Also, employment is projected to grow globally in 2023 by just 1 percent, twice lower than in 2022. Global unemployment is projected to edge up in 2023 by about 3 million to reach 208 million because of limited supply of labor in high-income countries[16]. While unemployment globally declined in 2020– 2022, there will be now 16 million more jobless than before the 2019 crisis. The automation of economic sectors with robots assuming functions earlier performed by man is yet another factor to potentially

[16] Available at: URL: https://www.ilo.org/global/research/global-reports/weso/wcms-865332/landeng- -enlindex.htm (accessed: 20.12.2022)

affect the regional rates of unemployment. In this context, it is especially important to have a well-designed law-making process and enforcement practices. A growing use of big data and artificial intelligence is equally fraught with implications for employment. These technologies are already being introduced, for example, into the processes of diagnostics and selection of medication. Driverless transportation is also a thing of the near future. Computers are capable of replacing cashiers and bank employees, and ensuring automatic operation of warehouses etc. [Eremin V.V., 2019: 27].

It is widely discussed that lawyers and judges may be replaced by artificial intelligence to issue standard documents and draft resolution part of decisions at courts [Kostoeva V., 2020]. A likely use of artificial intelligence for recruitment and relevant risks are a promising area of study [Khubulova M.I., 2022: 47]. Therefore studies of implementing artificial intelligence for recruitment and further placement and of the risks involved are especially relevant.

The use of robots and other automatic systems exempts employers from the duty to pay wages, taxes and insurance contributions, or to provide leaves.

One robot is estimated to replace 1.3 workers in the first year, with the ratio to further reach 1.6. Thus, the global GDP is expected to grow by 5 trillion USD by 2030 just through industrial automation alone. In this context, it is important for the legislator to maintain the balance between inevitable social changes favorable to businesses and society as a whole and those who will be potentially and actually affected by these changes.

The semiskilled workers will be at risk of unemployment whereas a majority of occupations not involving soft skills will become extinct. At the same time, changes to employment are hard to predict. Lost jobs may be compensated by new jobs in the emerging economic sectors and by potential restrictions on automation of, for instance, financial and legal jobs to even out the transition to automation.

Some concerns with regard to robotics were voiced already in the ILO report at the Davos Forum back in January 2019, in which the ILO made a point that industrial automation should not affect the rights of workers such as those to adequate subsistence minimum, maximum working hours, safe working conditions, freedom of association and collective bargaining. Also, there should be guarantees of protection from forced labor, child labor, from gender discrimination at work. In 2021, experts of the Forum

again presented a report stated a need to address job loss for middle class workers at the expense of new emerging types of work. They argued, in response to critics of the widespread use of artificial intelligence, that the so-called strong AI (capable of independent decision-making) would emerge already in the coming decades and would be able to replace human workers almost completely. In the middle case forecast, the full automation of work would take place in 125 years (counting from 2016) [Edovina T., 2021].

Apart from job loss, there are concerns over the use of artificial intelligence for workplace control. The capabilities for ongoing monitoring of worker actions and their automatic analysis do not only add to tension and stress at work, but also potentially upset the balance of interests between the worker and the employer that the labor legislation is called upon to maintain. Automation may also exacerbate inequalities between workers at higher or lower risk of being replaced with robotic systems. There are proposals within the expert community to introduce a tax on robots, a four-day working week or six-hour working day. Also, it has been proposed to establish a network of entrepreneurial universities that could create innovative companies.

While the National Program for Digital Economy currently implemented in Russia and incorporating the Federal Training Project for Digital Economy does not identify the risks of replacing human workers with robots, the Passport[17] of this Project lists, in particular, the following tasks and deliverables:

universities training programs/modules for digital economy developed;

federal universities standards upgraded for digital economy;

digital service forming personal competency profiles, personal development paths and lifelong learning;

open-end format of competency profiles, development paths and formation procedures approved;

network of digital transformation centers, Digital University and supporting centers, created on the basis of universities;

trainees enrolled in university level IT programs to reach 120,000 by 2024;

[17] Approved by the Presidium of the Council for Strategic Development and National Projects under the President of Russia // Minutes No. 7 of 04 June 2019.

practicians including CEOs of organizations and officers of public agencies and local governments trained in competencies and technologies demanded in the context of digital economy etc.

This national program obviously prioritizes lifelong training and education for digital economy, something able to protect workers from unemployment as a result of the growing robots use.

To improve the regulatory framework, researchers propose to complement the social partnership institution by adding a provision for prevention of arbitrary replacement of workers with AI, for instance, by requiring mandatory trade union approval [Filipova I.A., 2020: 162– 182]. However, since employers in Russia are anyway restricted in dismissing workers, is it reasonable to introduce additional constraints and thus slow down the development of capital goods and digital economy as such?

Besides, the introduction of robotic technologies will not only make one or another worker redundant, but also change their service function. For example, a lawyer will no longer have to draft documents but only to check those generated by the designated algorithms and to ensure basic maintenance of the software.

How will the employment contract change? For instance, it has been pointed out that Article 74 of the Labor Code was not correctly applied to the said cases, only to reveal a regulatory gap [Belozerova C.I., 2022: 95].

The development of technologies that augment rather than altogether replace human intelligence appears to be an all-around solution to the human replacement issue. State will have to assume an obligation to provide all those willing with jobs while developing new social protection mechanisms, in particular, that of minimum income security.

The problem of employment in the context of widespread automation is not yet critical in Russia. According to the International Federation of Robotics, while Asian countries such as China and Japan (ranking, respectively, first and second followed by the United States) lead in the robotics market, Russia is not among top ten[18]. Russians regard robots largely as conventional assistants to perform a limited range of tasks or fulfill elementary operations. However, the accelerating international trend suggests that

[18] World Robotics Report. "All-Time high" with half a million robots Installed in one year // International Federation of Robotics. 13.10.2022. Available at: URL: https://ifr.org/ifr-press-releases/news/wr-report-all-time-high-with-half-a-million-robots-installed (accessed: 24.11.2022)

automation-related employment issues need to be addressed in our country as well.

This should, however, take into account the federal structure of Russia and a variety of regional economic and legal contexts such as unemployment rate, extent of digitization, potential for work process automation. A detailed study of new legislative solutions and federal programs is yet to be done.

3. New Digital Capabilities for Social Partnership and Teleworking

The digitization of labor relations logically entails atypical forms of using already familiar institutions, for example, by opening up new capabilities for social partnership, namely, for sectoral unions to regulate collective labor relationships.

Moreover, a "digital remote union" is understood by law exactly as a normal trade union would be, except for details related to the fact that it relies on digital equipment and operates from any location whatsoever.

This allows to improve union activities in workers' interests, streamline and specify the workings of social partnership. Remote unionism will increase union membership, with the use of multiple distributed ledges to provide protection from hacking. "Digital remote unions" can be independent and objective in voicing their members' concerns in the labor market by forming balanced opinions in the course of discussions of social programs and thus improving the mechanism for the exercise of the right to representation.

The digitization of unions means above all the formation of e-environment to put in place an integrated database/platform for record-keeping of members and covering the whole of the organization from grass root (local, district) to regional and interregional structures.

Digital technologies at trade unions should promote internal activism and institutional capacity building; shape enabling, organization-wise information environment for teamwork by way of promoting comfortable atmosphere and creating favorable conditions for performance of chairman offices through electronic record-keeping of members as a basis for boosting up motivation; introduce e-cards at trade unions in the form of virtual accounts activated via a mobile app, or in the form of a plastic card;

put in place an integrated electronic database of union members; create a passport for each union with an in-depth analysis of the social status of members; encourage workers (including in education) and students to join the union; establish environment for direct communication between the union's elected bodies and members (monitoring, polling etc.).

While the Russian economy recently was in the process of digitization, it was crucial to formulate principles and details of formalization of labor relations in the digital economy in terms of transition to electronic communication between workers and employers (introducing electronic employment contract, digitizing paperwork to be done by workers and employers etc.). Now a principally new stage of the "digital" development of social relations has begun.

Just like labor relations, teleworking is being constantly reformed under the impact of digitization of the economy. For this reason, it is important to study how the rights and duties of the parties to remote relations evolve, and to determine the legislative vector of development of their legal status since the effective law does not obviously address remote work in every detail.

At the same time, it follows from studying practices that work can be performed both remotely and at the employer's location. As workers, given the employer's consent, can combine both arrangements, it is relevant to study the opportunities for remote and fixed employment as part of the same relationship.

The system of atypical labor relations emerged in Russia in years of economic globalization and modernization, and development of ITC systems has determined further regulation of social relationships. Thus, as a result of adoption of Federal Law No. 60-FZ "On Amending Specific Regulations of the Russian Federation"[19] (in force since 19 April 2013), the Labor Code has come to include Chapter 49.1 on remote workers due to the growing interest in the regulatory principles governing status of the parties to remote relationships and the nature of linkages between them.

This chapter did not have a clear bias towards protection of the interests of either party to labor relations. Both workers and employers have gained from the opportunity to use e-documents and/or mail under a formal procedure rather than communicate personally to conclude, amend or take

[19] Collected Laws of Russia. 2013. No 14. Article 1668.

any other action to perform an employment contract. Workers adopting this regime were able to work freely with the maximum creative performance for decent, market-driven remuneration while transparent labor relations were to everyone's benefit.

Meanwhile, the outbreak of the COVID pandemic resulted in an expansion of offsite work and in promoting ITC-based labor relations between the parties for objective reasons, only to reveal conflicts between the actual processes at work and the Russian labor law, in particular, forms of employment and working-time regimes established by it.

The pandemic has revealed issues of the Russian law consisted in inflexibility and limited opportunities to apply ITC technologies to labor relations, with the following problems coming to the fore during this period:

Firstly, Chapter 49.1 of the Code on teleworking, in effect since 2013, was difficult to apply. As a result, very few workers and employers would use it. In 2019, according to Rosstat workforce survey, only 30.000 out of 67.1 million people worked remotely via Internet on the basis of a teleworking employment contract (telework), a tiny percentage compared to the known extent of remote and digital platform employment, and freelance web-based work.

Secondly, the Russian labor law turned out to be ill-prepared for a massive transfer of workers to remote work. Thus, various methods (e-mails, oral messages, CEO orders) were used to advise the affected workers, with orders on a new work regime rarely communicated for review and supplements to employment contracts on the regime and location of remote work concluded still rarely, despite being advised by majority of law experts. In fact, even such supplement proved impossible to conclude electronically, since it was not regulated by law[20].

The teleworking provisions were meant at one time to protect working remotely and communicating with the employer via generally available networks like Internet. Such workers include, for instance, journalists, web designers, programmers etc. However, the situation is now totally different. Remote workers are now covered by provisions of the labor law and related regulations subject to specific rules established by Chapter 49.1 of the Code. The recent amendments to the labor law, particularly the wording

[20] Explanatory note to the draft "On Amending the Labor Code of Russia Applicable to the Regulation of Teleworking and Remote Work" // SPS Consultant Plus.

of that Chapter (details of regulation of remote workers[21]) are devoted to electronic communication between workers and employers. Transactions to enter into electronic employment contracts and supplements thereto, financial liability agreements, on/off-the-job apprenticeship agreements, as well as to amend/terminate these by exchanging e-documents, require the use of an advanced qualified electronic signatures (of employer) and an advanced (non) qualified electronic signature (of worker) under the e-signature law of Russia. Each party is required to electronically confirm receipt of an e-document from the other party within dates established by a collective bargaining agreement, bylaw approved by a grass root trade union, employment contract or supplement thereto.

The remote worker and the employer may otherwise exchange e-documents through the use of other types of e-signature (forms of communication) envisaged by a collective bargaining agreement, bylaw approved by a grass root trade union, employment contract or supplement thereto which allow to establish that an e-document was received by the worker and/or employer. In this case, remote workers and employers will confirm the provision of information to each other by a procedure described above.

The following documents may be also communicated in an electronic form: staff regulations, other work-related bylaws, collective agreements (part 5, Article 312.2 of Code), employer orders/instructions, notices, requirements etc. to be served to workers (part 5, Article 312.3), documents to be submitted by workers prior to service under Article 65 (part 3, Article 312.2), explanations or other details to be reported by workers, certified copies of work-related documents to be issued to workers under Article 62, sickness certificate series/number to be provided by workers for payments under mandatory social insurance in case of temporary disability and maternity, outputs and progress reports requested by the employer (parts 6–9, Article 312.3).

As requested by a remote worker in writing, an employer shall forward (not necessarily by mail as the legislator does not establish or restrict the method of notice in the amended chapter in question — delivery service or a visit to the office etc. is also envisaged) a formalized duplicate (paper) copy of the employment contract (supplement thereto) within three business days from the date of request.

[21] See Federal Law No. 407-FZ "On Amending the Labor Code of Russia Applicable to Regulation of and Temporary Transfer of Workers to Remote Work in Exceptional Cases at the Employer's Initiative" of 8 December 2020 // Collected Laws of Russia, 2020, No. 50 (Part III), Article 8052.

If copies of work-related documents are requested by remote worker, a employer shall forward hard copies thereof or, if requested by worker, electronic copies in the same term, while worker may forward reports, explanations and other documents by any method adopted at the organization. E-signatures of remote worker (remotely employed individual) and employer shall be used as envisaged by Federal Law No. 63-FZ "On the Electronic Signature" of 6 April 2011"[22].

However, since exchanging documents in this way is quite cumbersome and time-consuming, the legal practice (starting from enforcement in specific cases and ending with generalizations) specifies the fact of labor relations between the parties could be established in some situations on the basis of their electronic correspondence[23]. The procedure for communication between remote worker and employer where standard electronic technologies cannot be normally used for this purpose for reasons beyond their control can also be added to the employment contract.

Apart from additional terms which should not change the worker's situation for the worse under Article 57 of the Code, the teleworking employment contract may stipulate the worker's duty to use hardware/software, data protection or other means provided or recommended by the employer for the performance of duties. In his turn, the employer will provide hardware/software, data protection and other means required to the remote worker for performance of functions (part 1, Article 312.6).

The procedure for contract termination notice/order to a remote worker has also changed. Under part 3, Article 312.8, where the termination notice of the contract for remote (permanent/temporary) performance of a work function is served in an electronic form, the employer shall mail a hard copy of the notice/order to the worker in three business days from the date thereof (previously this was to be done on the day of termination of the employment contract).

An electronic employment contract — or, more precisely, the information or the terms contained therein at the time of signing — may be amended under the procedure envisaged for a regular employment con-

[22] Collected Laws of Russia, 2011, No. 15, Article 2036.

[23] See: Supreme Court of Russia Plenum Decision No. 15 of 29 May 2018 "On the practices of applying the provisions governing workers employed by individual employers and small businesses qualified as micro enterprises" // Supreme Court of Russia Bulletin, 2018, No. 7; Kirov District Court of Ekaterinburg, Sverdlovsk area, Decision of 06 July 2016, case No. 2-4775/2016 // SPS Garant.

tract while taking into account the details related to the electronic contract. This means that the parties should enter into a corresponding agreement for amending the terms of an electronic employment contract.

In the context of the worldwide calamity of 2020, it has become imperative to urgently transfer workers across different sectors to remote arrangements on an exceptional basis. Thus, procedure for temporary transfer of workers to remote regimes in exceptional cases at the employer's discretion is regulated by Article 312.9 added to the Code.

A study of labor law and practices allows to distinguish essentially different types of work — telework and remote work — presented as synonymous as a result of the labor law reform. In fact, an acceptable, not ideal definition of telework was proposed by the legislator in Federal Law No. 60-FZ, that is, in the Code, when this type of work was addressed for the first time.

While telework cannot be performed for objective reason at fixed workplace and/or at the location/territory of the employer or his structural divisions, remote work can be performed at or outside such location irrespective of whether there is a fixed workplace or not. In addition, remote work may be performed outside a fixed workplace (including outside the employer's location) on a permanent, temporary or recurrent basis.

In view of these features, it is proposed to define remote work as the performance of a work function envisaged by the employment contract outside the location of the employer, his branch, representation office or structural subdivision (including those located elsewhere) on a permanent, temporary or recurrent basis outside a fixed workplace, territory or facility controlled directly or indirectly by the employer, to be performed through (or without) the use of ITC networks such as the Internet or other public networks irrespective of the location of the employer and his subdivisions, and of the availability of fixed workplace.

For a systemic use of the labor law's conceptual framework, it is proposed to define telework as a work function envisaged by the employment contract to be permanently performed for objective reasons outside the location of the employer, his branch, representation office or structural subdivision (including those located elsewhere) through the use of ITC networks such as the Internet in absence of workplace controlled directly or indirectly by the employer. In context of digitization, technological aspects also need to be clarified for broader opportunities to use alternatives

to electronic signature for document exchange (such as messenger apps, corporate websites etc.).

There was a sense in the Russia Popular Front initiative in a letter to the Ministry of Labor proposed to introduce to the law a term "temporary remote work" to enable workers to perform work outside the office in several circumstances (traffic jams, personal situation etc.).

In this regard, the second part of Article 312.1 of Code logically evolved to provide that employment contracts (supplements thereto) may envisage the remote performance of a work function permanently (throughout the contract's term) or temporarily (continuously over a period of maximum 6 months as defined by the employment contract or a supplement thereto, or recurrently with alternating periods of remote and fixed performance of a work function). That is, while the legislator proposed three remote work options, the content of these provisions need to be discussed.

Now the value of remote relations at work and a need in their careful regulation have become especially obvious. So, the Russian legislator has additionally identified temporary telework (maximum 6 months) and telework to be recurrently performed with alternating periods of remote and fixed performance of a work function.

In terms of scale, the development of remote labor relations follows that of the society. The criteria for classification of new forms of relations between the parties proposed by the ILO and European Union have been constantly evolving. The opportunity to work remotely for international corporations without leaving one's country has given rise to virtual work teams created temporarily for specific tasks, with remote objective-based and result-based management allowing to steer work processes in a vast territory.

As N.L. Lutov has observed, "what is more important for regulation is not the alternation frequency or geographic coverage of workplaces, but the extent of attachment and thus the opportunity for the employer to control the process of work" [Lutov N.L., 2018: 34].

Meanwhile, neither the use of ITC nor the nature of work to be performed should affect the concept of telework for regulatory purposes: it is problematic to classify the work as remote on the basis of its frequency or technologies involved. In fact, there is no objective indicator for differentiation. "The use of ITC networks or better qualifications required for the job will not make the work as specific as to differentiate regulation to the point of establishing different rules for home workers and teleworkers.

Assuming that the frequency whereby a piece-rate worker and a web designer (both working remotely) use ITC networks differs significantly just like their skills, it follows that the use of technologies to perform work will not by itself entail a major change in the nature of relationships between the worker and the employer. The main factor here — both for the piece-rate worker and the web designer — is more independent work than envisaged by traditional labor relations as a result of change of the workplace" [Stepanov V.O., 2013: 9–12].

If to take ITC and/or skills as a criteria we will have to recognize someone working at home and sending the outcomes by e-mail as a home worker rather than teleworker as soon as he decides to use a delivery service while no major change has occurred in the nature of work.

An analysis of the EU legislation suggests that the issue of possibility to enter into an employment contract without specifying a workplace — the so-called "remote access" — merits special attention. Meanwhile, under the ILO Home Work Convention No. 177 the "remote access" work is not considered to be homework.

A study of international regulations could reveal different types of telework with characteristic features allowing to differentiate them by a number of criteria, in particular: remote employer, ITC technologies used outside a fixed workplace (spatial decentralization), form of contractual employment relations, workplace type, contents of work to be performed, risk factors, work on a permanent or temporary basis. Moreover, the classification of telework in light of different criteria can provide a methodological basis for structuring managerial decisions at the international, national, regional and enterprise levels.

Providing detailed regulation of labor relations will make regulation in Russia generally more flexible and strike the right balance between the parties thereto and the state. However, one should be also aware of possible occupational risks related to network threats, employer misconduct realized too late by the teleworker, inadequate communication within the team, reduced opportunities for social and labor adaptation etc.

Resolving a number of issues related to remote employment at the legislative level has allowed to view telework as an important innovative practice for the Russian society demanded by high technology sectors which require high mobility and creative activity of workers. Today the amendment of the law on telework has provided Russia with evident competi-

tive advantages to engage skilled workforce as a basis for technological and economic growth.

In the Guidelines for Implementation of the Digital Agenda up to 2025 of the Eurasian Economic Union, the promotion of remote employment and hire is incorporated into the digital program for transformation of the labor market[24].

As for a current form of social and labor relations, remote employment offers a valuable potential to satisfy a number of societal needs, address a host of social problems such as youth employment, reduction of unemployment etc. Telework is attractive to workers as it allows to work at remote locations, have a free hand in planning one's working time, be creative and mobile, and get paid as a function of one's own ideas and outcomes of work.

Conclusion

Since the geographic distribution of work is no longer important, it appears necessary to compensate for the operational expansion of transnational companies as this expansion upsets the balance between public law and private law regulation. This can be done by using compensational remedies available to both labor law and international private law. It is crucial to study the implications of the country's exit from any international association as well as disseminate the best practices of employer compliance with labor standards and of raising awareness of individuals of their labor rights.

Promoting labor standards as part of Russia's economic policies should be aimed at making sure that partner countries apply national labor and social security law more efficiently. An adequate development of the national labor and social security law by partner countries should follow in the wake of the development of international law and Russia's national law depending on the depth of integration with these countries.

The current law enforcement points to a lack of mechanism for regulation of relationships arising in outstaffing by legal entities other than private employment agencies. To support the right to outstaffing it is proposed to define the range of entities affiliated with the outstaffer.

Resolving issues of remote employment at the legislative level has allowed to view teleworking as an important innovative practice for the Rus-

[24] Section III "Guidelines for development of the digital economy".

sian society demanded by high technology sectors require high mobility and creative activity of workers. However, a study of law and practices allows to distinguish essentially various types of work — telework and remote work — presented as synonymous as a result of the labor law reform.

In the age of digitization technological aspects also need to be clarified for broader opportunities to use alternatives to electronic signature (messenger apps, corporate websites, etc.) for document exchange. One should be also aware of possible occupational risks related to network threats, employer misconduct realized too late by the teleworker, inadequate communication within the team, reduced opportunities for social and labor adaptation etc.

The development of technologies that augment rather than altogether replace human intelligence appears to be an all-around solution to the human replacement problem. State will have to assume an obligation to provide all those willing with jobs while developing new social protection mechanisms, in particular, that of minimum income security.

The digitization of labor relations logically entails atypical forms of using already familiar institutions, for example, by opening up new capabilities for social partnership, namely, for sectoral unions to regulate collective labor relationships.

While emerging new forms of employment in Russia and elsewhere is a dynamic process, employment as a category acquires a new meaning. A totally new stage of digitization, in particular, as applied to employment is enforcing a new understanding of employment in the wider sense as any, normally gainful, activity of individuals aimed at satisfaction of personal and public needs is regulated by Russian law irrespective of sectoral association. In this regard, it is relevant to regulate in detail status of the parties to different forms of employment including guarantees for employed in order to maximize regulation of these forms by labor and employment law not to refer these issues to other branches of law. The qualification of some types of labor relationships as atypical should not in principle restrict the rights at work since classical labor relationships allow to change attributes without harm to labor rights of workers.

The application and modernizing labor and employment law in the digital age are undoubtedly positive steps taken by legislator to regulate emerging and future relations in a new economy amidst the development of information and communication systems following the post-pandemic

recovery. However, the response should be rapid, with new forms of employment — in particular, platform employment, self-employment, etc. to be regulated in light of the best international experience.

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The Scope of the Personal Data Concept in Russia

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Abstract

Personal data as an institution is gaining increasing attention on the part of both public authorities, business structures and private individuals as subjects of personal data. Meanwhile, an efficient and successful usage of the tools provided by this institution directly depends on whether the scope of the personal data concept can be unambiguously defined. The paper describes the main problems resulting from a lack of uniform approach, makes a case for a cross-jurisdictional approach to interpretation of the concept of personal data, and identifies four main criteria which can provide a basis for a procedure for assessing whether certain information amounts to personal data: information, relevance, definability and subject criteria. In assuming a single source of the institution's regulation across jurisdictions, the cross-jurisdictional approach to interpretation of the concept of personal data allows to follow the best international practices to define the scope of the personal data concept. In this paper, the cross-jurisdictional approach was successfully applied with respect to the European law and international law instruments. The information and subject criteria set the constraints on the assessment of whether information amounts to personal data from the perspective of object and subject, respectively. In assessing the relevance of information as personal data, the relevance and the definability criteria allow to account for the context in terms of content, purpose pursued and results achieved. The proposed criteria applicable to information, relevance, definability and subject, being universal, allow to unambiguously determine the scope of personal data concept at the level of regulation, enforcement and compliance, as well as exercise of rights envisaged by the regulation in question. The said criteria also contribute the development of uniform terminology in the research community to ensure comparability of research concerning personal data through an overarching approach to the scope of this concept.

Keywords

personal data, privacy, privacy protection, terminology, comparative analysis, information technologies, information law.

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Introduction

The number of life spheres and market segments directly depending on the amount and quality of data for successful and sustainable development is on the rise. In the 21th century, it is inconceivable to take a lead in any market or sector, be it telemedicine, targeted marketing, artificial intelligence (AI) model training for various purposes, robotics, pharmaceutics etc. without a sufficient amount of data. The social relationships arising in these life spheres and market segments increasingly become subject to all sorts of scientific research.

With the importance of data recognized worldwide, countries are adopting national strategies applicable to data[1] and artificial intelligence[2]. Soft law regulation is also progressing, with an AI Code of Conduct drafted and signed by Russia's major AI developers in 2021 to establish, in particular, the principles of using data (including personal data) for the purpose of developing AI solutions.

Russian business has also adopted a Code of Ethics for the Use of Data, a soft law regulation maintained by the Big Data Association (BDA) jointly with the Institute of Internet Development. The document entitled "An industry self-regulatory act"[3] lays down "the main principles of working with data"[4].

[1] See, for example, National Data Strategy. Policy paper. UK Government. Available at: URL: https://www.gov.uk/government/publications/uk-national-data-strategy/national-data-strategy (accessed: 22.02.2023)

[2] See, for example, Presidential Decree No. 490 "On Developing Artificial Intelligence in Russia" of 10 October 2019 // SPS Consultant Plus.

[3] BDA. Code of Ethics for the Use of Data // Available at: URL: https://rubda.ru/deyatelnost/kodeks/ (accessed: 01.03.2023)

[4] Ibid.

Personal data — "any information relating to an identified or identifiable individual"[5] or "any information relating to directly or indirectly identified or identifiable natural person[6] — is among the most sensitive data types. The analysis of the elements of this concept will be provided further in the text.

In 2023, according to the UNCTAD, regulation of data protection (including personal data) was effective in 137 out of 194 countries[7]. According to other data, (personal) data protection laws were adopted as of March 2022 in 157 countries, with regulation in the majority of them being similar to that effective in Europe [Greenleaf G., 2022: 3]. In Russia, the *lex specialis* regulation of (personal) data is ensured by Federal Law No. 149-FZ "On Information, Information Technologies and Data Protection" of 27 July 2006 (Law 149-FZ) and Federal Law No. 152-FZ "On Personal Data" of 27 July 2006 (Law 152-FZ).

However, regulation is not the cause but the effect of growing transactions with data, with the amount of data on the rise along with the number of sources of such data[8].

Back in 2018, analysts projected[9] the total amount of data to grow fivefold by 2025 — from 33 zettabyte to 175 zettabyte worldwide[10]. Moreover, the 2018 forecasts could not take into account the COVID-19 pandemic which broke out in 2020 resulting in an exponential growth of data. Thus, according to experts, more than 64 zettabyte of data were created/repli-

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[5] Convention for the Protection of Individuals with Regard to Automatic Processing of Personal data (Strasburg, 28 January 1981) // SPS Consultant Plus; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

[6] Federal Law No. 152-FZ "On Personal Data" of 27 July 2006 [hereinafter Law 152-FZ], para 1, Article 3 // SPS Consultant Plus.

[7] UNCTAD, Data Protection and Privacy Legislation Worldwide // United Nations Conference on Trade and Development. Available at: URL: https://unctad.org/page/data-protection-and-privacy-legislation-worldwide (accessed: 22.02.2023)

[8] "Personal data processing" should be understood as any action/transaction involving personal data (see para 3, Article 3, Law 152-FZ).

[9] IDC White Paper. The Digitization of the World. Available at: URL: https://www.seagate.com/files/www-content/our-story/trends/files/idc-seagate-dataage-whitepaper.pdf (accessed: 25.02.2023)

[10] 1 zettabyte equals 1 trillion gigabyte or 10^{21} byte.

cated in 2020[11] which is almost double the amount created or replicated before 2018.

Apart from state-required identifiers (INN, OGRN, SNILS etc.), the data of individuals available to public authorities and/or businesses now include the data on communication devices used by individuals, their geolocation, purchase history, preferences of food, music and communication, as well as finger/voice prints, face geometry etc.

Moreover, the growth affects not just the amount of data but also the number of persons involved in data processing. Thus, the Federal Supervision Agency for Information Technologies and Communications (Roskomnadzor) reported back in July 2018 that "the number of personal data operators registered in the register [for personal data processing] is more than 397 thousand"[12] while as of 8 January 2022 personal data operator register ("PDOR") contained more than 434 thousand records of the registered operators[13].

The term "operator" is conceptually similar to the term "controller" used also in the European regulation that can be more familiar to the foreign explorers and practitioners. As estimated by Roskomnadzor, "there are over 6 million of organizations and private entrepreneurs [involved in personal data processing] in the territory of the Russian Federation"[14].

Research of related industries also demonstrates the range of IT penetration. A study conducted in August 2021 by Leichtman Research Group, an organization for analysis of the US broadcasting, media and recreation markets, showed that nearly 78 percent of families were signed to at least one streaming service. Such services process a significant amount of subscribers' personal data.

With the growth of personal data, increasing number of those who need such data for business, and the development speed of personal data law, the fundamental practical and doctrinal question is what personal data means.

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[11] IDC. Data Creation and Replication Will Grow at a Faster Rate than Installed Storage Capacity, According to the IDC Global DataSphere and StorageSphere Forecasts, 2021. Available at: URL: https://www.idc.com/getdoc.jsp?containerId=prUS47560321 (accessed: 25.02.2023)

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[13] Roskomnadzor register of operators for personal data processing. Available at: URL: https://rkn.gov.ru/news/rsoc/news74048.htm (accessed: 25.02.2023)

[14] Roskomnadzor performance in 2021 for protection of rights and interests of individuals regarding personal data. Available at: URL: https://rkn.gov.ru/news/rsoc/news74048.htm (accessed: 25.02.2023)

In Russia, an entity processing personal data has to comply with numerous provisions of personal data law which normally require to considerably re-draft not only bylaws and agreements with customers and counterparties but also re-engineer corporate business processes and related information systems, with the cost of compliance to amount to millions or tens of millions depending on the scale and the extent of operations and specific industries.

For personal data subjects (individuals), the personal data law envisages a variety of rights and remedies including tools for control over one's personal data. In particular, a data subject has a right to know what kind of his personal data is processed by the organization in question, require to specify and update such data, and also prohibit such processing (except in cases provided by law). The remedies proposed by personal data regulation cannot be used unless subjects understand to what information they apply.

Understanding the personal data law is also crucially important for public authorities. In the context of separation of powers, the personal data law is simultaneously an object to be regulated by the legislative branch, enforced, and supervised by the executive branch, and interpreted and used for rendering justice by the judiciary branch.

Moreover, understanding the actual scope of personal data concept (hereinafter also referred to as the conceptual scope of personal data) as envisaged *de lege lata* is crucial for the execution of the above functions and duties. Where there is no such understanding of the personal data in law as a starting point, further progress in practice (legislative, enforcement) and theory (analysis, research) appears to be premature.

The relevance of that paper also comes from a lack of studies which would combine the latest theoretical framework with a practical form for solving both fundamental and applied issues. While normally focusing on narrower subjects, the available studies treat the concept of personal data *obiter dictum,* that is, incidentally [Saveliev A. I., 2018: 130], with the authors concluding on a need to either formally narrow down the concept of personal data [Burkova A. Yu., 2015: 21;]; [Naumov V.B., Arkhipov V.V., 2016: 190] or introduce "restrictive interpretation" [Miraev A.G., 2019: 80].

The above proposals to narrow down the conceptual scope of personal data through legislation or enforcement are barely acceptable since the underlying meaning, *raison d'etre* ("point of existence") of personal data concept and the regulation thereof do not assume nor accept restrictions.

Personal data is an institution designed to guarantee the exercise of the right to privacy, personal/family secret, and to provide data subjects with a minimum set of adequate data control tools optimally exercisable in the information society.

Nevertheless, there is one point in which these proposals elicit support: the concept of personal data needs to be transparent. This will be discussed further in the text.

Some authors point out that Russia's personal data law is catching up with that of Europe [Stepanov A. A., 2020: 93], a view possibly de facto correct from the perspective of the implementation speed of the relevant international law but wrong from a formally legal and historical standpoints since both the concept of personal data and the underlying legislation date back to 1995 when Federal Law No. 24-FZ "On Information, Information Technology and Data Protection" of 20 February 1995 (hereinafter Law 24-FZ) was approved. That Law preceded the currently effective regulation of personal data.

The branches of power perceive the conceptual scope of personal data each in a different way as reflected in the activities of their specific representatives. For example, in May 2022 the Council of Legislators under Russia's Federal Assembly accepted for consideration a draft law developed by the State Congress (Quriltai) of Bashkortostan, with "personal contact details" to be treated as a special category of personal data additionally protected by law[15].

In support of this proposal, it was stated that "[Law 152-FZ] does not have an exhaustive list of relevant details"[16] while "courts do not treat someone's phone number as personal data"[17]. Meanwhile, we believe the choice of tool to be wrong: the special personal data regime is not the primary criteria for treating information as personal data. The special category of personal data is a specific term compared to the general concept of personal data introduces higher requirements to the processing of such data considered more sensitive[18].

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[15] Draft No. 8-111 "On Amending Article 10 of the Federal Law "On Personal Data" // Available at: URL: https://sozd.duma.gov.ru/bill/8-111 (accessed: 26.02.2023)

[16] Ibid. The explanatory note to the draft.

[17] Ibid.

[18] In Russia, special categories of personal data include those "concerning racial, ethnic origin, political views, religious or philosophic beliefs, health status, private life" (part 1, Article 10, Law 152-FZ).

The fact of proposing this tool to address the said problem points to a lack of uniform approach to the conceptual scope of personal data at the legislative level.

In its opinion to dismiss the draft, the Commission for Information Policies, IT and Investment of the Council of Legislators under the Federal Assembly, had referred, in particular, to Ministry of Communications Letter No. P11-15054-OG of 7 July 2017 explaining provisions of the federal law, something which shows, in combination with explanations of other regulatory and supervisory authorities, a lack of uniform approach at the executive level. Thus, as indicated in the Letter, while a subscriber's (telephone) number could be considered personal data, the Roskomnadzor in its numerous statements and answers to queries pointed out that a phone number can constitute personal data exclusively in combination with other information[19].

Likewise, there is no uniform approach to interpretation of conceptual scope of personal data at the judiciary level, i. e. in case law. Thus, specific decisions do not recognize the taxpayer identification number (TIN)[20] and family name with initials[21] as personal data. The immaturity and ambiguity of the Russian judicial practice is reflected at the doctrinal level as well [Saveliev A.I., 2021: 60]; [Stepanov A. A., 2020: 95]. However, a lack of uniform judicial practice seems to be the consequence of imperfect law and immature institution of personal date *per se* rather than a standalone phenomenon.

The above-described problem of the uncertain conceptual scope of personal data as reflected in the activities of each branch of power considerably hampers the exercise of rights by data subjects on the one side, compliance by data operators on the other side, and the application of legal provisions by competent authorities on the third side. If we apply the logical induction method to this point, it can be said that "personal data protection in Russia needs rethinking by all parties to this process" [Dmitrik N. A., 2020: 25].

One solution to the issue is to develop a uniform approach. This requires a methodological framework that would ensure consistent interpretation

[19] Including Answer to Query No. 88584-02-11/77 of 29 September 2021 // Author's personal contribution.

[20] Saint Petersburg City Court. Appellate decision of 3 February 2015. Case No. 2-3097/2014 // SPS Consultant Plus.

[21] Supreme Court of Tatarstan appellate decision of 24 October 2019 on case No. 2-5801/2019, 33-18168/2019 // SPS Consultant Plus.

of the conceptual scope of personal data for all of the above listed purposes (authorities, operators and individuals — data subjects).

Thus, this study is focused on the conceptual scope of personal data and its goal is to lay down a uniform approach to defining of that scope.

To achieve this goal as part of this study, it is necessary to identify the main approaches to defining the scope of this concept and to make proposals on how to improve the existing approaches and, finally, to develop a new, singular one for better operation of the institution of personal data in Russia.

The main methods used in the study included formal legal analysis of the legislation, enforcement and judicial practice, comparative analysis of approaches to the interpretation of conceptual scope of personal data in Russia and abroad, as well as historical method used as part of the analysis of the context in which the concept of personal data had emerged.

The Concept of Personal Data

To understand the conceptual scope of personal data, one should apply the historic method of research not to the history of this institution *per se* because this would extend the study beyond its purpose but to the origins of the definition of "personal data" as interpreted by both domestic and international researchers.

The Russian personal data law in its fundamental terminology follows the Council of Europe's Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data No. 108 (Convention 108). As such, Law 152-FZ was approved as part of the ratification procedure of Convention 108, being one of four drafts envisaged by Russian Government Instruction No. AZh-П4-3825[22].

As regards the definition of "personal data", Law 152-FZ was harmonized with Convention 108 as late as in 2011 when it was considerably amended[23] and the definition acquired its current form.

[22] Draft No. 217346-4 "On Ratification of the Council of Europe's Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data"; draft No. 217352-4 "On Personal Data"; draft No. 217354-4 "On Information, Information Technologies and Data Protection"; draft No. 217355-4 "On Amending Specific Regulations of the Russian Federation in connection with the adoption of the Federal Law "On Ratification of the Council of Europe's Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data" and Federal Law "On Personal Data".

[23] Federal Law No. 261-FZ "On Amending the Federal Law "On Personal Data" of 25 July 2011 // SPS Consultant Plus.

In the European legislation, the main instrument governing personal data is Regulation No. 2016/679 of the European Parliament and of the Council of Europe "On the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC" ("GDPR") also borrowed from Convention 108 an essentially identical definition but completed with a number of example to facilitate the understanding of its meaning.

Since Convention 108 and its protocols constitute a single instrument of international regulation, a cross-jurisdictional fundamental approach is applicable, in our view, to the conceptual scope of personal data, the cross-jurisdictional approach being the approach allowing for the use of foreign regulatory instruments as a means of interpretation also of the Russian personal data regulation. Despite numerous variations in more specific parts of this are of regulation, the concept of personal data is shared by many or even by a majority of jurisdictions just like the institution itself. This approach is adopted by the research community [Saveliev A.I., 2021: 62] and confirmed by the consistent stance of the Russian Federation in respect of Convention 108 and its protocols[24].

Before undertaking a more specific analysis, it is important to underline one element of the concept which is universal due to the nature of the institution itself as it facilitates the exercise of a number of human rights: only an individual could be a data subject enjoying all rights provided by personal data regulation — this constitutes what will be further referred to as the "subject criterion".

To effectively perform a proper analysis of the conceptual scope of personal data, it is of need to identify the core elements of this concept in a comparative legal context.

The shortest definition is given in Convention 108 where personal data means "any information related to an identified or identifiable individual".

The definition provided in the GDPR seems generally more specific: personal data means "any information concerning an identified or identifiable natural person" where "an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identi-

[24] See Presidential Instruction No. 294-rp "On signing of the Protocol for amending the Convention for the protection of individuals with regard to automatic processing of personal data" of 10 October 2018 // SPS Consultant Plus.

fier or to one or more factors specific to the physical, psychological, genetic, mental, economic, cultural or social identity of that natural person".

Law 152-FZ apparently attempts to adapt the Convention 108 definition with a view to the legal, linguistic and semantic specifics: personal data is considered "any information related to a directly or indirectly identified or identifiable individual".

Instead of following one of the approaches of modern comparative studies in search of "legal institutions and provisions, different in their immediate content, [which] the authorities use to address the same social problems" [Syrykh V.M., 2012: 292], it would be more useful to assume the universality of the institution of personal data at least in the said sources and at least with regard to the definition of personal data. To establish this premise, we need to compare the fragments of three definitions of personal data and assess to what extent they are similar in terms of legal language and regulatory purpose.

The above comparison demonstrates minimum terminological differences *de jure*. Moreover, despite that this study also referred to the official translations of the said instruments into the Russian language, some differences are not found in the original texts. Thus, Convention 108 and GDPR contain definitions which differ in just one word: the former defines personal data as "any information relating to an identified or identifiable individual" while the latter as "any information relating to an identified or identifiable natural person", with explanation of who is "identifiable individual" also contained in the Explanatory Report[25] to the latest version of Convention 108 also endorsed by the Russian Federation.

The only point of possible controversy is what Table 1 describes as "definability criterion" since in spite of the originally (in the documents in English) identical definitions contained in both Convention 108 and GDPR, they clearly differ from the one contained in Law 152-FZ. However, as was stated above, we believe this difference to result from linguistic and semantic specifics rather than from diverging approaches to the conceptual scope of personal data.

The combination "identified or identifiable" exactly follows the logic behind the other definitions; meanwhile, the Russian definition adds "di-

[25] CETS. Explanatory Report to the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data § 17–18 // Council of Europe Treaty Series. No. 223.

Table 1. Comparison of the definitions of personal data contained in the Russian translations of the texts

Instrument	Information criterion	Relevance criterion	Definability criterion	Subject criterion
Convention 108	Any information	related	identified or identifiable	Individual
GDPR	Any information	concerning	identified or identifiable	Individual
Law 152-FZ	Any information	related	directly or indirectly identified or identifiable	Individual

rectly or indirectly" before the classical phrase "identified or identifiable". However, both Convention and GDPR include this element in their more specified approach to the definition of personal data: while Convention mentions it in the Explanatory Report[26] to the latest version to clarify the conceptual scope of "identifiable individual", the GDPR has it directly included into the text along with the phrase "directly or indirectly". As part of further analysis, this phrase is deemed to be covered by the scope of the relevance criterion in light of its nature and irrespective of the wording.

That is, if we imagine that all three definitions of personal data are used in English (original language for the both Convention 108 and GDPR, but not for Law 152-FZ), the differences could be removed altogether as demonstrated in Table 2 below.

Table 2. Comparison of the definitions of personal data in the English translations of the texts

Instrument	Criteria of information	Criteria of relevance	Criteria of definability	Criteria of subject
Convention 108	any information	relating to	an identified or identifiable	Individual
GDPR	any information	relating to	an identified or identifiable	natural person
Law 152-FZ author's t ranslation	any information	relating to	directly or indirectly identified or identifiable	natural person

[26] Ibid.

The above comparative legal analysis of the terminological framework of personal data regulation in Russia and abroad confirms again the possibility of cross-jurisdictional interpretation of the conceptual scope of personal data to define it on the basis of a uniform approach with a slight use of the Occam's razor principle, i. e. "entities must not be multiplied beyond necessity".

Two main approaches may be used to address the problem of uncertainty of the conceptual scope of personal data: a list-based and a criteria-based approach.

Under the list-based approach, the law should contain an exhaustive list of information types to be treated as personal data. This could potentially improve the legal certainty of personal data regulation *per se* while brutally undermining the extent of protection afforded to data subjects. Even with broader information categories replacing specific attributes (such as "contact details" instead of "mobile phone number"), the booming technological and information progress of the society will sooner or later result in new types of information outside the scope of personal data regulation but still allowing to identify and impact data subjects.

For this particular reason, it was stated already in the course of preparation of the European Parliament and Council of Europe Directive No. 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Directive No. 95/46), a pre-GDPR instrument for personal data regulation in Europe, that the definition of personal data should be as wide as possible to cover all information concerning or relating to an individual[27]. Later on, the European Data Protection Working Party noted that the definition of personal data contained in Directive 95/46 and similar to the above definitions should be applied "wide enough so that it can anticipate evolutions and catch all "shadow zones" within its scope"[28].

We believe the list-based approach to be potentially useful not for specifying the conceptual scope of personal data but for interpreting this concept exclusively in a non-exhaustive form (that is, with wordings such as "in particular", "including but not limited to" etc.). This approach, observed

[27] See COM (90) 314 final, 13.9.1990, p. 19 (commentary on Article 2); COM (92) 422 final, 28.10.1992, p. 10 (commentary on Article 2).

[28] Opinion 4/2007 On the concept of personal data. WP 136, 20 June 2007. Article 29 Data Protection Working Party. P. 5.

in the GDPR, was to some extent also present in Law 152-FZ before 2011. However, it can be used only at later development stages of personal data regulation because, if used at earlier stages, it could be perceived as the main approach, only to hamper the understanding of the conceptual scope of personal data.

In doctrine, the criteria-based approach enjoys wider support than the list-based approach. Thus, it has been asserted that "attempts to come up with sample lists of information to be treated as personal data… are doomed to failure because the personal data concept does not assume any list to be made" [Rozhkova M. et al., 2021: 130]; other authors argue that the list-based approach is impractical due to "a wide variety of relationships related to the processing of personal data and their rapid evolution characterized by the emergence of new data subjects and processing technologies" [Saveliev A.I., 2021: 70] and due to "the overall trend… towards a generalizing institution of personal data" [Bachilo I.L. et al., 2006: 19]. In this study, preference is made for the criteria-based approach as well.

Once the criteria-based approach to address the problem of uncertainty of the conceptual scope of personal data has been chosen as preferential, we need to assess each of the identified elements of this concept for uniform understanding of its scope.

a) "Any information"

"Personal data means any information…" as an element of the concept of personal data is at the heart of a majority of personal data regulations currently in effect. This element is not so much a criteria for establishing whether information amounts to personal data, but rather an indicator of the concept itself. It also serves to designate the legislator's will to "devise a wide concept of personal data and… apply a broader approach to its interpretation"[29].

In the Russian regulatory context, "information" should be understood as "details (messages, data)[30] irrespective of the form they are presented"[31]. Based on this definition, it can be concluded that personal data may be presented in any form (including text, graphics, photo, sound) and on any

[29] Ibid. P. 6.

[30] Whatever the effort, the translation here fails to be accurate for there is information is defined through its contextual synonym in the Russian regulatory framework information.

[31] Para 1, Article 2, Law 149-FZ.

media (including paper, flash card, computer memory)[32]. Also, it is of no importance whether this information is objective or subjective, or whether it is true or not — these criteria were left aside in designing the concept of personal data.

Nevertheless, even such a wide concept of "any information" specified not only in Russian regulatory instruments but also internationally allows to conclude that data should be somehow presented. Based on this approach, information not presented in any definite (including oral) form — assuming it is possible to confirm the information thus presented — is not to be protected as personal data.

b) "Relating to"

"Personal data means any information relating to…". The general approach to this element which can be called a "relevance criterion" suggests that personal data is information "about an individual"[33].

Meanwhile, as the analysis will demonstrate, the information to be protected as personal data may equally relate to objects, events, phenomena, and processes in the first place and only then to individuals[34].

An example of "classical" personal data relating to information "about an individual" is a combination of surname, first name and patronymic of a person or details of his/her income. Personal data relating to objects can be exemplified by an IMEI code of a mobile phone or IP address of a personal computer since these are technical details of devices or their operational artifacts in the first place.

A widespread approach to the understanding of the criteria of relevance with logical tools covering all possible cases of "relating" information to someone or something assumes the use of "content–purpose–result" triad[35] to describe the nature of such "relevance" depending on a particular case. One of the aspects of the triad — content of information, processing purpose or processing result — should be present for the criteria of relevance to be observed[36], making the triad a set of alternative tests.

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[32] Opinion 4/2007 On the concept of personal data... P. 7–8.

[33] Ibid. P. 9.

[34] Ibid.

[35] Ibid.

[36] Ibid. P. 10.

The aspect of content serves to assess whether information can be qualified as personal data where information by its nature concerns, relates to or describes an individual. Moreover, in assessing the content of information one should, in our view, assume a literal interpretation of the said criteria.

The typical examples of information relating by its content to personal data would then be passport details or results of medical analysis that relate to an individual "by default". Where this aspect is used, no account is made of either the purpose of processing or the extent it affects the data subject.

An exception from this aspect's application can readily be made for the data called "synthetic data" however we maintain that the issue of the interplay of the two concepts the second one being the personal data concept shall be subject to separate research. Yet, even for the "synthetic data" case does certainly fall within the scope of the following two aspects.

The "purpose of processing" is an independent aspect of assessing relevance to personal data irrespective of whether the content of such information concerns, relates to or describes an individual. The criteria of relevance will be satisfied with regard to purpose where the purpose of processing this or another information is to impact an individual in any way regardless of the extent or the scale of such impact.

A typical example of situations with the purpose as a main aspect is processing of information on operations with specific elements of a web interface, as well as on navigating from one web page to another when this information serves to identify the user among others (for example, by displaying to him/her a targeted advertisement).

Another example is corporate monitoring of the use of office equipment by workers: while the information on what documents were printed out relates to the documents in the first place, the purpose can be to identify unduly performance of job duties.

The "result" of personal data processing can also constitute a predominant aspect in assessing the relevance of information to personal data regardless of the content and purpose of such processing. This aspect serves as an additional filter designed to mitigate the risk of narrowing the scope of personal data regulation without good reason. According to the result criteria, personal data is information that, while not related to an individual by its content and not processed with the purpose of impacting a data subject in first place, will generate a result capable of affecting the rights, liberties and legitimate interests of a data subject.

Despite that this aspect is described as a kind of "filter", examples of its use are quite frequent to include monitoring of company vehicles for fuel consumption to timely identify fuel pump malfunctions or monitoring of taxis' position in order to optimize itineraries and reduce waiting time etc. While this information relates to cars and serves a technical purpose, it can be used to assess driver performance and make decisions affecting their employment.

Thus, information will be deemed relating to an individual if this follows from its content, purpose or result of processing. It is again noteworthy that these aspects should be understood as alternative rather than cumulative: any of them, if present, will suffice.

While this approach may seem unreasonably broad, one should bear in mind that the institution of personal data is designed to protect the rights, liberties and legitimate interests of data subjects, and thus should undoubtedly demonstrate "a substantial degree of flexibility, so as to strike the appropriate balance between protection of the data subject's rights and the legitimate interests of data controllers third parties and the public interest"[37], to be achieved through regulation applicable to all possible cases of personal data processing rather than artificial narrowing of the regulatory scope. The paragraph above shall be considered one of the most core elements of the case the author attempts to make.

Moreover, the adoption of such approach by specific representatives of the executive authorities is confirmed by the Roskomnadzor's position whereby "the principle of identifying individuals by their full name from the whole stock of data is not the only possible criteria to relate processed information to personal data"[38].

Since the so-called inference economy is currently gaining momentum [Solow-Niederman A., 2022: 117], with some authors, in view of the capabilities of big data technologies to make conclusions on specific persons, even asserting that "in the age of inference almost all data are sensitive" [Solove D., 2023: 18], a restrictive interpretation of the conceptual scope of personal data can obstruct the exercise of data subjects' rights even more than its uncertainty.

[37] Ibid. P. 5.

[38] Roskomnadzor letter No. 08AP-6054 "On consideration of the Treasury of Russia's query" of 20 January 2017 // SPS Consultant Plus.

c)"Identified or identifiable natural person"

"Personal data means any information relating to an identified or identifiable individual". Once we have determined what personal data means (any information) and how it is related to specific individuals (relevance criterion), we need to clear out the meaning of such elements of this concept as "defined natural person" and "definable natural person".

In this study, the use of the terms "defined" and "definable" instead of, for example, "identified" and "identifiable" does not mean that the author makes any difference between the definitions of Law 152-FZ and GDPR/ Convention 108 has been described in the analysis above. This terminology allows to make abstraction of unreasonable over-utilization of terminological frameworks proper to specific branches of law that contain legal definitions of the term "identification"[39].

These elements obviously differ in the "identifying potential" of information [Saveliev A.I., 2021: 61] in each particular case, that is, how fully and exactly it can relate to a natural person.

This criterion — to be called the "definability criterion" — is the most difficult to grasp due to subjectivity and dependence on both particular attributes contained in information and the processing context in each specific case. Nevertheless, we should attempt to systematize and clarify this concept, otherwise the purpose of the study will not be achieved.

This criterion is essentially evaluative not *per se* but with regard to the extent a natural person to whom information is related is *specific* and *distinguished* from the group he/she is part of. That is, the definability criterion is largely a measure of the relevance criterion.

Thus, an individual — data subject — will be deemed "defined" where he/she is singled out of the group he/she is part of (for example, users of the same online service) in the specific personal data processing procedure. That is, for sending a personal message to a web service user with a proposal to test a new version of the service, the administrator will distinguish the user on the basis of the available data and thus will process his/her personal data. In similar terms, someone receiving a marketing SMS with

[39] See, for example, Federal Law No. 115-FZ "On the Prevention of Legalization (Laundering) of Criminal Proceeds and Financing of Terrorism" of 7 August 2001 // SPS ConsultantPlus.

a personal proposal to visit a beauty parlor recently opened next door will be deemed "defined".

It is noteworthy that the above examples have a full triad of the relevance criterion: content of information is highly indicative of an individual (account with a web service, mobile phone number), purpose of processing envisages interaction with a data subject (respectively, service test or beauty parlor invitation) while the result implies a direct impact on the data subject (respectively, via a web service message or SMS).

It is argued that a "defined" individual can be only the one whose full name (if any) is known, but this approach appears unreasonably restrictive because it falls short of the regulatory purpose. Moreover, this argument contradicts the basic understanding that "the phrase on indirect definability of an individual on the basis of such data added to the definition will trigger a wider approach to interpretation of the concept of personal data" [Saveliev A.I., 2020: 85; 2021: 65]. A data subject could be "defined" beyond doubt using a variety of attributes not explicitly related to his/her name including, for example, a mobile phone number which allows to call someone directly without even knowing his/her name. This position is adopted in both European[40] and national[41] enforcement practices.

As for situations where an individual is deemed definable rather than defined, one should adopt a more comprehensive approach than the one which clearly distinguishes an individual within a group as was possible with a defined individual. Under the basic approach, a "definable" individual is the one who can be "defined" based on the concept of defined individual as distinguished from the group he/she is part of; but the accuracy of such definition is lower than in respect of a "defined individual".

To systemically and consistently approach the cases where an individual is deemed "definable" with information relating to him/her deemed personal data, it is needed to return to the criteria-based approach. As was stated above, definability criterion largely becomes a measure of the relevance criterion; however the opposite is also true since the triad explicating the relevance criterion can provide that of definability with tools for interpreting the concept of "definable individual".

[40] Judgment of the European Court of Justice C-101/2001of 06.11.2003 (Lindqvist), §27.

[41] Roskomnadzor letter No. 08AP-6054 "On consideration of the Treasury of Russia's query" of 20 January 2017 // SPS Consultant Plus.

Thus, a "definable" individual will be the one who, while probably not being clearly distinguished in the group he/she is part of, will exhibit information ("any information") allowing to individualize him/her or single out of the group or else to at least narrow down the group (for example, when it is possible to identify how specific data relate to a particular family or household).

Meanwhile, once a uniform methodology is not there, this approach does not allow to come up with a sustainable test for applicability of this conceptual element of personal data. The reason is dependence of an individual's "definability" on the processing context[42] rightly euphemized in law by the purpose of processing [Dmitrik N.A., 2020: 31]. The context does not only assume specific description of a place (circumstances) *per se* but also particular political, social and cultural expectations from the place (circumstances) [Nissenbaum H., 2004: 119].

We believe it possible to re-use the "content–purpose–result" triad of the relevance criterion to adequately take into account the dependence of "definability" on the processing context but in accounting for a number of peculiarities of such re-use characteristic of the definability criterion as such. The three aspects of the triad should be also understood as alternative and not necessarily cumulative.

In this case, the content aspect as a qualifying factor should be provided with additional tools to determine whether the information is associated with a specific individual rather than a "natural person" in principle. This could be done through an analysis of the means [Saveliev A. I., 2021: 63] used to process the information. Thus, the content of information will be deemed relating to the "definable individual" where in view of the required time, effort and other resources and the means reasonably likely[43] to be used[44] such information may be "associated" with a particular person in-

[42] See, for example, CETS 223 Explanatory Report. P. 3; Opinion 4/2007 On the concept of personal data. WP 136, 20 June 2007. Article 29 Data Protection Working Party. P. 13.

[43] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 On the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (hereinafter — GDPR), Recital 26 // EUR-Lex European Union Law. Available at: URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0679 (accessed: 04.03.2023)

[44] The study supports an argument that one should take into account not only the means available to someone who analyzes whether the personal data regime is applicable to certain information but also legitimately available means including those in possession of third parties, see. GDPR. Recital 26; Patrick Breyer v. Bundesrepublik Deutschland, ECJ, Case C-582/14, 19 October 2016, § 41.

cluding where his/her name and other attributes clearly identifying an individual cannot be indicated.

A.I. Saveliev pointed out a classic case of applicability of this criterion — associating traffic meta-data (in particular, details of established connections with timing and duration, numbers or IP addresses of the communicating devices) with personal data [Saveliev A.I., 2021: 72] as they may be used to determine political, religious, sexual and other preferences and opinions of a data subject as well as other data[45].

Adding to the list of examples, D. Solove indicates that religious opinions could be determined by the data on taste preferences and visited religious/political events identified on the basis of location data [Solove D., 2023: 22].

As equally relevant for "defined" and "definable" individuals, it is worth noting that when we refer to "defining" as a procedure which, depending on the degree of completion, leads to different conceptual elements of personal data we speak not only about "civic or legal identity"[46] but also about any means which allow to "individualize or single out"[47] a person within a group including anything allowing to treat such individual in a special way.

The aspects of purpose and result should be applied without specification. Thus, information will be deemed relating to a "definable individual" where the purpose or result of processing is to "individualize or single out" an individual within a group, narrow this group down, or use a "special interaction model" in his respect[48].

A defined individual will thus be the one clearly distinguished in the group he/she is part of, while a definable individual the one with respect to whom the information is at hand to be used to single him/her out of the

[45] Mayer J. et al. Evaluating the Privacy Properties of Telephone Metadata. Stanford University. 1 March 2016. Available at: URL: http://www.pnas.org/content/113/20/5536 (accessed: 30.05.2021)

[46] CETS 223, Explanatory Report to the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data // Council of Europe Treaty Series (hereinafter — CETS 223 Explanatory Report). Available at: URL: https://rm.coe.int/cets-223-explanatory-report-to-the-protocol-amending-the-convention-fo/16808ac91a (accessed: 03.03.2023)

[47] Ibid.

[48] A.I. Saveliev provides a good original translation of a term "treat differently" contained in CETS 223 Explanatory Report, see. CETS 223 Explanatory Report, p. 3; Saveliev A. I. Article-by-Article Commentary of the Federal Law on Personal Data for Research and Practical Purposes, comment to Article 3. Moscow, 2021.

group or narrow down the group or processed in a way (with a view to the purpose and/or result of such processing) as to impact such individual regardless of the extent of definition (including when all of the above is done in respect of a family or household).

One can also conclude that where the aspects of purpose and/or result from the "content — purpose — result" triad are considered applicable at the stage of the assessment under the relevance criterion, no specific assessment under the definability criterion will be necessary. Once other criteria are observed, such data should be deemed personal data.

Conclusion

The amount of processed personal data is invariably growing worldwide just like the number of data subjects, those involved in data processing and the methods they apply. Regulation of personal data processing is inextricably linked with guarantees of one of the crucial and vulnerable human rights in the 21th century, the right to privacy, personal and family secret. Thus, any drawback, shortcoming and even linguistic inaccuracy can result in major issues both for public authorities, companies required to comply with relevant provisions, and data subjects.

The personal data law in Russia, while rapidly progressing, is arguably not consistent enough. This results in a regulatory framework at the same time widely applicable, subject to increasing public supervision (control) and raising a growing number of questions for those whom it targets (personal data operators). In particular, there is no uniform approach to the definition of the scope of the personal data concept, nor there is a methodological framework to support the development of such approach for public authorities, personal data operators and data subjects (individuals).

However, this problem is solvable, with a uniform approach to the definition of conceptual scope of personal data being developed on the basis of the existing regulation, major doctrinal approaches to the study of the institution of personal data and, particularly, the conceptual scope of personal data with reliance on cross-jurisdictional application of fundamental approaches to the problem in question.

Based on the identified conceptual elements of personal data, criteria were proposed to significantly reduce the risk of ambiguous interpretation both in the legislative process and at the level of executive and judiciary authorities, and to ensure overall understanding of the basic terminology

of the institution of personal data within the research community. Thus, of 4 basic criteria being proposed, each was provided with an original or updated methodology of relevance for both practice and research.

The first criteria, that of information, restricts the conceptual scope from the perspective of the nature of content: personal data could be only something which is information.

The second criteria, that of relevance, does the same by requiring to identify a link between the information subject to analysis and an individual. Formal and functional at the same time, it is explicated by the "content–purpose–result" triad. Information will satisfy this criteria where it is essentially relevant to an individual (at this stage, regardless of the extent of the individual's definability) and processed to impact a data subject or in such a way as to affect his/her rights, liberties or legitimate interests.

The third — last but one — criterion, that of definability, is the most difficult to grasp as a conceptual element of personal data relating to the extent an individual is definable. An individual can be "defined" or "definable" depending on the extent of completeness of the "identification" procedure and definiteness of its result. As such, a "defined individual" is the one distinguished in the group he/she is part of (for example, by reference to passport details or other attributes clearly associated with him/her). Also, an individual can be "definable", with the "content — purpose — result" triad re-applied to explicate this aspect of the definability criterion. The aspect of content was modified to determine the relevance to a specific individual rather than generally to a natural person using the means which "reasonably likely" can be used to identify a specific person. Two other aspects of the triad — purpose and result — do not change.

As a matter of conclusion, where information and its processing satisfy the requirements of purpose and/or result, no specific assessment under the definability criterion will be necessary.

The fourth criterion, that of subject, allows to identify the main *beneficiary* of regulation who cannot be other than the individual to whom the information under analysis is related. This, however, does not mean that information relating to a legal entity cannot constitute personal data of a natural person (for example, the entity's business name can be specified as the place of employment).

The above criteria, being universal, can be applied by both public authorities and business entities to resolve controversies in the process of im-

plementation of functions and duties, as well as by data subjects to protect their rights, and in the field of research.

Despite that this approach can be criticized for too broad interpretation of the conceptual scope of personal data, we believe that the solution to problems of business entities arising from restricted access to data and various constraints for their use in business processes should arise from within the regulation, i. e. not avoiding or circumventing it by means of restrictive interpretation.

Meanwhile, it is worth pointing out that broader interpretation does not pose a danger but rather provides an incentive for the regulatory and functional enhancement for the legislative, executive and judiciary branches of power.

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Computer Games vs Law: Virtualization and Transformation of Political and Legal Institutions

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Abstract

The paper provides an analysis of virtual reality as a subject of regulation while underlining the similarity of principles in gaming and regulatory activities as the elements of virtual reality. A deeper insight into the relationships between regulatory and gaming activities allows to make a statement that gaming provides a tool for situational analysis to identify the most rational action among the available alternatives thus offering a way to construct a legal reality. Assuming that people will make decisions by weighing costs and benefits to maximize the "utility", and will interact with others by balancing preferences and constraints, the immersion into the gaming environment and observation of the process of rational decision-making will allow to construct predictive and explanatory models for pubic authorities to organize a relatively efficient law-making process. Moreover, the reciprocal influence of the gaming and legal environment has been persistently ignored by the law enforcement practices, only to result in legal gaps. A careful and comprehensive study of gaming as a legal phenomenon is thus a prerequisite of balanced and adequate lawmaking as well as enforcement. Therefore, this study purports to examine the points of contact between the gaming and the legal reality, and assess the existing legal gaps

and prospects of creating and eventually applying "virtual" law. The methodology of the study includes general philosophic and scholar methods (analysis, synthesis, logical and systemic methods), specific research and legal methods (including formal legal analysis). The authors propose to make a definition of virtual law and to identify the levels of virtual environment. In analyzing the virtual environment, the authors conclude that it needs to be viewed through the lens of legal regulation since the virtual nature of computer games gives rise to socially important and potentially controversial interactions between players, platforms and developers that need to be mediated. The authors finally conclude that superficial and skeptical attitude of jurisprudence towards the gaming industry is unacceptable while regulatory problems have to be addressed both in science and law. Internationally, the legal systems are already developing a set of provisions — virtual law, Internet law — designed to regulate socially important aspects of computer games.

Keywords

computer games, law, virtual reality, virtual law, virtual environment, legal regulation, virtual state.

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Introduction

The question of relationships between gaming and regulatory activities is something that strikes as odd, so much these things appear to be incompatible in terms of aims and methods at first sight.

Thus, while gaming is aimed at the process, regulatory activities target the outcome; gaming methods normally assume improvisation and simulation while regulatory activities involve the imperative and discretionary approach to legal regulation.

At the same time, if we regard gaming and law generally as phenomena based on communication between agents (and even more so, if we regard both phenomena in evolution), the case for such relationships is quite justified.

On the one hand, comparing law and gaming will oppose the seriousness and realism of law to the non-serious and "virtual" nature of computer games.

On the other hand, the realism of law is only manifested at the stage of enforcement, final stage of the regulatory mechanism, when the reality of social relationships will make the law an objective reality rather than abstract one.

As such, legal provisions exist exclusively in the abstract form containing subjective ideas, emotions and feelings [Baitin I.M., 2005] inseparable from the consciousness and thus inhabiting an exclusively virtual world.

Therefore, law as a phenomenon of social, mental and psychological life is shaped and exercised by the individual and collective consciousness [Sorokin V.V., 2007].

In being associated with the intellect, law is focused on what should be rather than what is. Thus, law does not describe the existing social arrangements but an ideal model.

In real life, the delinquent's duty to assume a punishment is not strictly determined by cause-effect relationships due to the essential difference between what is and what should be. Failures and errors of law enforcement agencies to find a perpetrator, active repentance, conditional sentences etc. do not allow to suggest any strict relationships of cause and effect.

Thus, the above considerations on the nature of law suggest that law as an element of conscious life is a product of virtual reality.

In fact, the evolution of legal institutions suggests that gaming was the main method of constructing virtual reality and of founding the human culture as it evolved across history. It thus played a key role in the genesis and evolution of law.

Emerging as a game, the law has partially preserved its gaming nature. Thus, J. Huizinga rightly noted the gaming nature of justice by stressing:

adversariality (competition, according to Huizinga, is a core feature of gaming);

place and time-bound justice (special environment for proceedings);

roles and ritual rules in the legal process;

reality opposed to sanctity and otherworldliness of justice as a way of correcting reality.

Following Huizinga's logic, the evolution of law as a system of rules and procedures is essentially interrelated with gaming.

One will find the attributes of gaming not only in justice but also in law-making, such as roles/masks of the parties to the public process, clear rules and procedures for public presentation and discussion of drafts, procedures separated from reality in place and time etc. It is not accidental that simulation and gaming (simulated processes, legislative hearings etc.) have long been part of the legal education.

Thus, the profound similarity between law and gaming manifests itself, in our view, in the fact that both come from virtual worlds.

The Relationships between Law and Computer Gaming

Gaming, especially computer ones, are undoubtedly related to workings of human imagination and creation of virtual reality. In this regard, the ideas of J. Huizinga and R. Caillois on outwardly, fictitious and irreal nature of games are echoed by computer gaming.

The fictitious nature of video games reaches its climax when technology creates a new and detailed reality.

For jurisprudence such goal setting might appear strange at the very least because law is always associated with something pragmatic and existential.

However, a deeper insight into the nature of law in light of the modern concepts of social construction of reality along the lines of Thomas Luckmann and Peter Berger redefined in today's environment suggests that law is a variety of virtual worlds [Berger P., Luckmann T., 1995] in the wider meaning (we intentionally depart from the understanding of virtual world in the sense of IT technologies):

law creates a model or image of what should be and what is outside of the real while the process of making behavioral rules a reality is rather complex and by far not always achievable;

legal regulation widely uses fiction — recognition or negation of facts (not) existing in reality.

Thus, the fiction of legal person allows to introduce a civil law concept of collective agent which does not exist as a physical reality but is necessary

for limiting the liability of the founders and for pooling of capital, reputation and labor.

An even more evident fiction is where the court declares someone as dead based on indirect facts in absence of direct evidence: failure to report within a certain period or in the situation of war, information on the disappearance under life threatening circumstances.

As a tool for constructing a reality, the law, in our view, always resorts to fiction as a second, complementary reality which affects the true reality in order to correct it via the behavior and communication between people.

One is tempted to conclude that the law exists as an imaginary political and legal condition shared by agents in the form of a system of rules, ideas, constructions as a model of social reality (zero crime, welfare state etc.); fictions help to shape a different and fictitious reality to achieve specific socially important objectives, with a new, simulated reality in place (recognition of someone as legally competent before the age of 18 as a result of contracting a marriage, engaging into business, finding an employment; recognition of space objects and aircraft as real estate etc.); gap between reality and legal form is manifest, no matter how efficient a regulatory system is; finally, there are widely used computer games for creating experimental social worlds with operating legal institutions (to assess the effectiveness of the provisions to be introduced).

Law and computer gaming are the tools for constructing a social reality. Both make a wide use of abstraction, fiction and simulation to bring a certain social order — one real, the other virtual — but in the third possible case where they deal with socially important matters of social relationships, there is in fact no difference between the social order in a game and social order in life.

Regulatory activities as well as games create a haven of order, stability and predictability as opposed to the chaos and non-predictability of reality.

Law could be thus regarded as a tool for reconciling indefinite and non-structured "objective" reality with the human strife for certainty including for achieving specific outcomes through teamwork.

Law is a virtual convention. While the actual relationships to be covered by law surpass legal abstractions, no socially important relationships could ever be structured without such abstractions.

Finally, the medial turn in philosophy has proposed the analogies between law and gaming via their links with the language, with law regarded as a game of language (H. Hart, A. Ross).

Thus, law can be metaphorically regarded as a zero sum language game, with the rules established by its semantic constraints.

Law and games are similar not only in their genesis, ludology (rules and procedures), fiction and simulation but also in their points of contact with social reality.

A common perception of serious law as opposed to non-serious nature of games turns out to be wrong in the light of an obvious interaction between legal systems and gaming practices.

A rule established by the Civil Code of Russia (hereinafter CCR) whereby claims associated with games and bets are not subject to legal remedies (part 1, Article 1062 of CCR) has resulted in a position that law recognizes only those games in which one can win or lose while the outcome itself is pecuniary (gambling) [Kovtun E.V., 2009].

Thus, Russian courts will dismiss claims associated with computer games as a general rule. The Russian justice refused to protect the pecuniary interests of players in relation with computer games in a number of disputes.

The Moscow City Court has dismissed V.V. Bulanov's claim against Mail. Ru LLC to collect 1 million rubles and remove the restrictions of access to an online game imposed for violation of the established rules: use of the "black market", "misrepresentations". At that, the game used a virtual currency to be exchanged for real money.

In dismissing Bulanov's claim, the Court argued that no legal remedies were applicable to these interests and that gaming rules had a priority in this case.[1] Other courts assume a similar stance in such cases while referring to legal provisions.

The relationships involved in the organization and holding of gambling, betting, sweepstakes and lotteries are in fact subject to fairly detailed regulation in the Russian law.

This area is covered by Federal Law No. 244-FZ of 29 December 2006 "On State Regulation of Gambling and on Amending Specific Provisions of the Russian Federation".

[1] Moscow City Court Civil Chamber appellation decision of 20 May 2019. Available at: URL: https://mos-gorsud.ru/mgs/services/cases/appeal-civil/details/0de6b77e-95c8-4707-8921-f762e36dd67d (accessed: 30.11.2020)

The said law defines gambling as a risk-based agreement on gain between two or more parties thereto, or else with the gambling organizer under the rules established by the latter.[2] Under the Russian law, a number of gambling games (gambling industry) can be organized in special gambling zones, with licensing and taxation requirements established for gambling businesses, sweepstakes and betting offices.[3]

Gambling as an industry is associated with those activities which thrive on people's addiction to games and make money on this perversity. It is no accident that the gambling business is restricted to only 4 constituent territories of the Russian Federation.

Even with this fairly superficial look it is clear that regulation covers the following games as the general measurement of human culture: gambling games and gambling business [Shevtsov V.V., 2005]; athletic games [Kovalenko E.Yu. et al., 2021]; computer games from a perspective of intellectual property regimes and allowable information from a perspective of the interests of minors etc.

Meanwhile, it is worth stressing a principal difference between these three phenomena.

Thus, gambling is not so much a game as a specific term to define a sort of agreement between the parties on the outcome of an event.

Athletic games are primarily a contest between people, with virtual reality as a context being in a sense secondary albeit important (with both physical facilities and computer games serving in this case only as tools to organize the contest).

Computer games (both single player and multi-player) are largely devoid of the aforementioned attributes and constitute a different phenomenon based on the reconstruction and immersion into a virtual world with interaction between players in the digital environment free of cause-effect relationships of the real world. At the same time, certain gambling and athletic games (cybersport alias computer sport) can be organized through the use of computer games.

Thus, a deeper insight into the relationships between the world of law and that of computer games reveals multiple links between these social

[2] Collected Laws of Russia, Article 7, No. 1 (part 1). 01.01.2007.

[3] Tax Code of Russia, part 2, 05.08.2000, Law No. 117-FZ // Collected Laws of Russia, Article 3340, No. 32, 07.08.2000.

institutions (in this part of the research, computer games are understood precisely as a social communication phenomenon, something that allows to speak of the institutional aspect).

The thing is not only that the law and computer games are similar in terms of their genesis, formal analogy as a system of rules, their role for constructing social reality, but also that the world of computer gaming gives rise to a whole set of legal issues and problems which are quite real.

Thus, for example, the legislation has failed to answer the question what screenplays, audiovisual plots and characters of computer games stand for and whether they are independent or derivative creations.

Apparently, each case of using a creation in another creation should be treated individually.

In establishing fact of violating the rights to a character as independent creation, the standard of proof should be adaptable depending on how strong the character's distinctive individual features are. [4]

Under that rule, the more recognizable is a character, the more there is reason to believe it can be used separately from the computer game and make up an independent creation.

In this regard, to establish a violation, it will be enough to prove in some cases that the assumed infringer uses only the character's name while in other cases the use of not only the character's name but also image does not constitute a violation of the rights because the character does not exhibit clearly distinctive individual features.

Thus, to establish that the exclusive right to a character as an independent creation was violated, it is enough to prove the use of distinctive features (major and recognizable) which trigger associations in the user's mind.

Meanwhile, one should be aware of the problems involved in examining disputes of this sort since a character as such cannot make up, strictly speaking, an independent creation because an objective form is required for protection of independent creations. However, a character, like a system of characters, lacks an objective form — such form is provided by the computer game in which it is actualized.

[4] Minutes of a meeting of the Scholar Consultative Board under the Intellectual Property Court. 26.04.2022. No. 29 // SPS Consultant Plus.

Apart from characters, other parts of a computer game — audiovisual plots, screenplays etc. — give rise to similar problems of legal assessment.

Moreover, many legal issues arising in the course of gaming tournaments are yet to be adequately addressed — for instance, whether a player violating the implicit code of virtual conduct can assume delictual liability. This question can be important if virtual actions of a player have discredited the developers of the computer game.

Another difficult legal controversy will arise if experienced players take money from less experienced players to help raise their ratings by accessing the game under their account names. This method of raising one's rating is normally treated as sham, with the player's account to be blocked.

Meanwhile, this sanction — legitimate on the one hand — is inadmissible on the other hand.

On the one hand, these actions can be qualified as paid services, in which case both players will be outside the gaming world and subject to the law of the real world where blocking of an account will constitute an unlawful restriction of the player's rights.

On the other hand, player ratings provide guidance for gaming companies. In this regard, where a company has decided to contract a player based on his rating, the "magical circle" will be broken and such contract may be considered to be made on largely fraudulent basis and, therefore null and void.

It is noteworthy that scaling of computer games increasingly results in the "magical circle" being broken and in the virtual world directly affecting that of real things.

Thus, the gaming industry is now one of the fastest growing and profitable high technology sectors.

However, there are few legal studies of this sector, primarily because legal regulation of the gaming industry is still not treated as "serious" research. As a result, it is only recently that computer gaming law is being studied as a specific branch of jurisprudence.

Meanwhile, the above examples of enforcement issues arising in the process of regulating social relationships in the troubled context of virtual reality vividly demonstrate a need to study virtual reality as a standalone and independent subject of jurisprudence.

So, a new virtual reality engendered by the achievements of information society has long prompted a need for regulation in view of its social importance [Duranske B., 2008: 2]. Over the last two decades, legal systems across the globe have witnessed the emergence of comprehensive provisions regulating the interactions of people in the virtual environment [Rassolov I. M., 2003]; [Azizov R.F., 2020]; [Lastowka G., 2011].

In international legal literature, the regulatory domain applicable to virtual worlds is sometimes called the "virtual law" [Kane S., Duranske B., 2008: 9]. Ironically, the law governing virtual worlds is called the "virtual law", only to mean, if we follow the logic of legal fiction proposed above, virtual worlds are regulated through the use of legal fiction, with virtual, fictitious phenomenon providing a regulatory tool for another non-real environment. It is not accidental that the rules of virtual games and worlds and their technical code are actually identical with specific legal provisions.

If we conventionally use the term "virtual law" based on the pioneering studies of this domain, it should be compared with a set of legal provisions of a different sectoral nature that purport to regulate the relationships emerging in virtual worlds. Moreover, in this example from international jurisprudence, two regulatory levels of the virtual environment are distinguished:

comprehensive institution of law for regulating a variety of relations in virtual worlds (such as evidential force of e-evidence, information dissemination rules in the virtual world, procedure for protection of rights against violation in the course of virtual interactions, protection of rights of game developers etc.);

rules and provisions created in virtual worlds themselves and recognized as binding by official public agencies under certain conditions. Virtual law is in fact those rules that are developed by the virtual community [Lastowka G., 2011].

Overall, the following main regulatory models for computer games have emerged over the last few years.

The first model assumes computer games are socially harmful, especially for minors, as they result in an addiction, loss of control and prodigality in case of adults since they involve manipulative practices (immersion, complications along the way, excitement etc.).

This assumption envisages significant limitation and prohibition of access to computer games for specific categories of users, primarily, children under 16. This strategy was approved in China and South Korea which limit gaming time and amount of resources to be spent.

This model assumes a licensing type of regulation based on the principle of "prohibiting everything except what is permitted".

The second regulatory model involves a number of premises:

balanced, reserved and non-emotional approach to games accounting for their pros and cons;

recognition of social value and utility in assessing gaming practices;

understanding computer games above all as incompatible with any state control and formalization and intended for free participation of players;

interventions into the gaming world aimed exclusively at bringing order to relationships and defusing possible conflicts.

The second, so-called "liberal" regulatory model allows to use the so-called general licensing type of regulation based on the principle of "permitting everything except what is prohibited". In this case, prohibitions concern specific actions in the gaming world, with player behavior being otherwise discretionary.

Thus, two radically opposed approaches to regulation of computer games have emerged today:

concept of non-intervention by the authorities in legal regulation of virtual reality, except for prohibition of some virtual actions which may entail harmful social implications [Smirnova E.O., Sokolova M.V., 2013: 5–10].

recognition that regulation of virtual reality is important and that social relationships arising in the virtual domain are legally relevant.

In light of the above examples of real legal issues arising in virtual reality, one can conclude that the modern state is forced to adopt the second strategy of regulating cyber relationships.

Interestingly, the construction of legal provisions is governed by the rules of formal logic that makes them similar to algorithms. In technical terms, they can be expressed as a software code and thus become analogous to the rules of a game.

A software code may determine the physics of the game (relationships of players to the external environment) and the virtual rules as such (relationships between players). Anyway, one can make a point that at a certain high level of theoretical generalization there is no major difference between legal provisions and gaming rules as formalized systems of the rules of con-

duct. Like games, the law will create a conventional virtual reality while expecting from community members to comply with the relevant rules of conduct.

A critically skeptical attitude towards computer games among the public at large and the research community determines the choice of restrictive legal tools in respect of the computer gaming industry.

We believe that the assessment of the computer gaming world should be more objective and balanced to account for not just drawbacks of games but also of their merits. It is not so much games as such but human nature that creates an addiction to games that can amount to the loss of control, something that was brilliantly demonstrated by Fyodor Dostoyevsky in his novel *The Player*.

That the knowledge of psychological aspects of the gaming machinery and various triggers of addictive behavior can be used by the gaming industry is another story.

Moreover, it is critically important to realize that the word combination "computer game" encompasses a wide range of phenomena. Intrinsically, games are above all a variety of modern media.

Games do not necessarily need an excitement in the legally relevant sense of the word; they can take the form of a creative environment devoid of negative passions — an environment for communication — convey certain narratives and generally (on a higher technological level with a multidimensional interactive machinery added) perform in the modern society the same role as other already familiar media including books, cinema and television (it should be specifically underlined that many games actually bring together different media — and can at the same time contain, for example, large amounts of artistic texts of high value written by professional authors, graphic art etc. These elements may organically make up a single multimedia interactive creation) [Galkin D.V., 2007: 62].

The idea of building "virtual states" as the basic plot of modern computer games has already become especially popular.

On the one hand, virtual states are a game, the idea of which is that any action is imagined by players, only to make the outcome unknown. Players are free to build any form of political entity.

On the other hand, it is a political and legal experiment which allows to introduce certain regulatory models, assess the quality and efficiency

of their legal implementation, exclude legal risks and arrive at an optimal regulatory option worthy of being adopted in the real society.

Since the physical borders become blurred, such feature as real territory is losing its past importance, only to assume that virtual states will sooner or later be on the same footing with traditional states.

Thus, computer game players, in order to become citizens or guests, can have citizenship, passport (or other personal identification document), acquire knighthood, earlship or dukedom, as well as buy the "national" currency of a virtual country already now.

Attempts to create virtual states have been made long before the creation and dissemination of the Internet as a worldwide web.

Thus, although there were attempts to create unofficial virtual states (such as Westarctica, Christiania, etc.), before the emergence of the Internet all of them had some territorial claims and were therefore associated with a territory.

The world's first virtual state in the strict sense was Wirtland, established in 2008 as a civil society initiative. [5]

It is worth noting that this has gone far beyond the computer game. Thus, there were reports of meetings, discussions to adopt the constitution, initiatives to purchase a watercraft or land plot for legalizing Wirtland's territorial borders.

In 2009, Wirtland issued gold and silver coins, the first in the world to be issues by a virtual state.

Meanwhile, there were media reports in 2013 on Wirtland's willingness to award citizenship to Edward Snowden.

On the one hand, this gesture of support could be regarded as a symbolic media stunt. On the other hand, the award of a virtual country's citizenship amid a political conflict in the context of cybersecurity was a far more significant step where Wirtland acted as a quasi-state willing to take political decisions of its own and exert political influence upon other countries.

So, Wirtland has become the world's first attempt to create a virtual state which proved quite popular among users. In auctioning their micro-state in 2019 the founders themselves said their virtual project proved to be more ambitious than they had expected.

[5] Available at: URL: http://www.wirtland.com/ (accessed: 16.11.2022)

Projects to create virtual states existing exclusively in users' minds are called micro-states which should be understood as self-proclaimed quasi-state structures.

Micro-state projects appear to be a new field of knowledge and research experiments which possesses an enormous potential for studying the patterns of creation, development and functioning of states of different legal forms.

In light of the above, one can conclude that modern multidisciplinary studies demonstrate the social value and utility of computer games.

The following socially useful merits of computer games are recognized in literature today:

development of cognitive skills and abilities: imagination, attention, memory, reaction etc.;

in psychological terms, games produce positive emotions and a feeling of happiness even if the player loses, something that people are often deprived of in normal life;

computer games are an environment for socialization, development of communication and cooperation between strangers, people of different cultures, ages and mentality, which is useful for real life communication;

gaming platforms are used for support and crowdfunding to address the problems of human civilization: fight against poverty, attention to those in need;

gamification practices are penetrating education, business, management to improve the motivation for and outcomes of teamwork;

computer games offer a virtual social environment for testing specific sociopolitical and economic decisions and for assessing their effect before they are applied to real life.

According to J. McGonigal, game developers pursue the goal of helping to address social problems of mankind, reducing human suffering, finding ways to overcome global crises and eliminating the divide between the two worlds, real and virtual [McGonigal J., 2018: 18].

Conclusion

To sum up, one can identify close links between computer games and law. In terms of history, genesis and functioning, games permeate the legal system as a phenomenon of human culture (gaming at the dawn of justice,

gaming themes in lawmaking and other types of regulatory activities). As regarded from the perspective of ludology, law is similar to the rules of a game: it is a system of formalized rules for the exercise of specific actions.

Moreover, at a deeper, existential level, law and computer games make up a variety of virtual worlds which widely use fiction to achieve social and other objectives: creating sustainable and predictable conditions for human life.

Another idea, provocative as it might appear, is that a legal system makes up a likewise virtual reality with its own rules (it seems especially relevant if viewed from the perspective of social constructivism advocated by Peter Berger and Thomas Luckmann), and one would be hard pressed to deny this in light of the above.

Finally, the virtuality of computer games gives rise to socially important and potentially conflictive interactions between players, platforms, developers to be mediated in legal terms. As a consequence, legal systems across the world are putting in place comprehensive provisions — virtual law, Internet law — designed to bring order to socially important aspects of computer games. A "superficial" and "skeptical" attitude of jurisprudence to the computer gaming industry should be overcome in doctrine as well as in legislation.

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Models of Legal Regulation of Digital Rights and Digital Currency Turnover

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Abstract

Currently all countries form or are in process of forming rules of law regulating turnover of new digital objects of rights that are called differently as digital rights, tokens, digital assets, digital currency, and cryptocurrency. The difference in wording does not allow to develop common international approaches to the cross-border turnover of such new objects of rights. States are only looking for ways to regulate relations in the digital economy. To find optimal solutions, a comparative legal research is needed to evaluate models of regulation and find effective ways and means of response to the modern challenges. Aim of the research is to analyze models of legal regulation of the turnover of digital rights and digital currency and offer model of regulation that allow such objects of rights to be fully included in the Russian civil turnover. The following tasks are being solved: choice of jurisdictions and analysis of legal norms that regulate turnover in the field; formulation of regulative models of the turnover of digital rights and digital currency based on legislation, doctrine and law enforcement; study of measures and means of regulation used in various states; analysis of different points of researchers on regulation of relations in the digital economy in Russia and abroad; proposal to the legislator of measures and means of regulation, based on the chosen regulative model of the turnover of digital rights and digital currency. Such methods as comparative legal, formal legal, legal modeling methods were used to compare experience of various jurisdictions and formulate regulative models in need. Also general methods of synthesis, analysis, induction, deduction, comparison, analogy, etc. were used. The study showed that the approaches used in the legal regulation in the field differ both in terms of legal norms and in creation of institutions and conditions for functioning digital market. Models of the corresponding legal regulation also differ. States use both prohibitive model of turnover regulation (prohibition of their issuance and turnover), partially prohibitive (restrictions on the turnover of digital rights and digital currency), partially

permissive (admission of turnover of digital rights and digital currency, subject to conditions — licensing, regulatory sandboxes, etc.) and permissive model (allowing the turnover of digital rights and digital currency to all market participants, subject to minimum requirements). Terms like cryptocurrency, tokens, crypto assets, digital assets are more popular abroad, while in Russia the concepts of digital rights and digital currency are used to refer to similar legal phenomena. It would be necessary to compare categories under consideration for the possibility of their use in supranational regulation, and cross-border relations, in order to be able to speak with representatives of other jurisdictions in the same language. From the foreign experience, attention of legislator should be drawn to the need and possibility of licensing in relation to participants in the digital market, as well as to the success of regulatory sandboxes in this area, for example in Britain. At the same time, when establishing law enforcement practice in Russia in the field, especially with participation of consumers, experience in US, Britain, Australia as well as the legal regulation of the crypto industry in Japan shall be considered.

Keywords

digital rights; digital currency; cryptocurrency; token; blockchain; comparative legal research; digital economy.

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Introduction

The study aims to find the best model for the legal regulation of digital rights and digital currency circulation in the Russian Federation with account for the existing international experience in this sphere. Conclusions will be made as a result of this search, in particular with respect to the means and methods of such legal regulation, and we would advise the Russian legislator to take them into consideration them.

Various aspects of digital rights and digital currency regulation have been researched in academic literature. Foreign publications point out that the regulators in various countries and even in different parts of a single country take differing points of view at the legal regulation and legal nature of digital currency [Trautman L., 2019: 473–491]. Importantly, the tasks

and directions of government regulation in this sphere have already been formulated. These include harmonisation of legislation, and search for and application of best practices (which is highly relevant for cross-border co-operation), alongside with taxation policy and tax planning, consumers protection, market development including better market transparency, monetary stability, and financial transparency [Allen J., Blandin A. et al., 2019: 30–34]. We are convinced that both the legislator and the law-enforcer should take all these spheres into account and develop them further.

Russian scholars hold different views on whether particular foreign experience is applicable and on the vectors of development in this sphere. Overall, A.B. Bylya notes that a thoroughly considered law development strategy (model) is needed to prevent the risks of digital rights and digital currency abuse, and that the non-existence of the relevant laws and regulations precludes the use of blockchain technologies, which creates additional problems for the state and prevents its growth into a powerful economy [Bylya A.B., 2020: 196]. This necessitates a search for acceptable alternatives to develop the legal framework.

I.A. Mankovskiy comes to an unhappy conclusion that there are no appropriate conditions in the Eurasian Economic Union, in particular legal ones, for development of the cryptocurrency market and for the safe use of cryptocurrency, nor are the rights of digital wallet holders safely protected against possible unauthorised access, which reduces investment prospects of the common economic space [Mankovskiy I.A., 2020: 64]. In our opinion, special attention must definitely be paid to investor protection in the digital market, including consumer protection against possible abuse stemming from the unique aspects of this technology.

At the same time, it is difficult to agree with A.G. Guznov and T.E. Rozhdestvenskaya that, for the purpose of public good, barriers should be established that would prevent both the use of cryptocurrencies instead of a legal means of payment (or by way of consideration) and legal functioning of exchange institutions such as cryptoexchanges, cryptocurrency bureaus de change etc. [Guznov A.G., Rozhdestvenskaya T.E., 2021: 63]. On the contrary, it would be desirable to bring the relations involving the circulation of digital rights and digital currency (cryptocurrency) into the scope of law; this would ensure proper regulation (taxation, in particular), help to protect consumer rights, make information available for the business sector and public at large etc. Furthermore, settlements in digital currency should not be artificially restricted because this would not prevent the successful use of such currency in the shadow economy. Legal regulation of

digital rights and digital currency circulation must be prudent and in line with reasonable needs of the digital agenda.

The Concept of Legal Regulation of Digital Currency Circulation Organisation Procedures in Russia approved 8 February 2022 is worthy of note. In the opinion of the Concept authors, both the lack of legal regulation of digital currency, a high-risk financial instrument, and imposing a blanket ban would result in the growing shadow economy, surging fraud cases, and economic destabilisation in general. The proposed legislative changes are intended to create legal cryptocurrency market, establish the circulation rules and the criteria for cryptocurrency market participants and their qualification requirements[1]. In agreement with the Concept, we believe that based on the current statutory regulations one can infer that the legislator is creating a new environment for cryptoprojects, introducing the electronic platform operator and regulating transactions of any other new operators[2], at the same time failing to regulate the present-day projects and cryptocurrency circulation. As a result, government bodies, law enforcement agencies and courts note there are lots of controversies in legal regulation of digital currency (cryptocurrency) and digital rights.

For instance, in case No. 22-5295/2020 the Petrograd District Court in Saint Petersburg ruled that cryptocurrency cannot be considered as the subject matter of a theft because it is not an object under civil law and cannot be categorised as a chose (which includes money, securities or any other property). The prosecutor did not agree with this view and appealed against it to the City Court. In the prosecutor's opinion, the decision of the court of first instance to exclude cryptocurrency from the scope of charges was unjustified; and the prosecutor stated that, by implication of civil law, cryptocurrency must be considered 'other property'. In its decision of 23 November 2020, the Court of Appeal agreed with the position of the court of first instance, clarifying that cryptocurrency cannot be considered as electronic money or currency[3]. However, the Third General Court of

[1] Available at: URL: httpv//static.government.ru/media/files/Dik7wBqAubc34ed649ql2Kg6HuTANrqZ.pdf (accessed: 18.11. 2022)

[2] Federal Law No. 331-FZ "On Amendments to Certain Legislative Acts of the Russian Federation and on Suspension of Individual Provisions of Article 5-1 of the Federal Law "On Banks and Banking Activities Official Internet Portal of Legal Information" of 14 July 2022. Available at: URL: httpv//publication.pravo.gov.ru (accessed: 18.11.2022)

[3] Ruling on Appeal of the Saint Petersburg City Court of 24 November 2020 No. 22-5295/2020 on Case No. 1-95/2020. Available at: URL: https://bsr.sudrf.ru/bigs/portal.html (accessed: 18.11.2022)

Cassation pointed out that the courts should have taken into account that digital currency, which should include bitcoins, may have been accepted as a means of payment. In essence, the main difference between cryptocurrency and money lies in the way it originates, and, although concept of cryptocurrency is not regulated by legislation, the Court was entitled to designate it as other property[4].

The study aims to tackle the above issues and propose adequate legal regulation, which would help fully include digital rights and digital currency in the Russian civil transactions with account for applicable foreign experience. It will be considered regulation of digital rights and digital currency circulation in Russia and abroad and draw digital rights and digital currency models that originate in this connection together with the corresponding means and measures of legal regulation. In doing so, it is necessary to look at the jurisdictions that have attracted the researchers' interest owing to application of legal regulation methods, means and measures that differ from the Russian ones. The author uses a dialectical approach to analyse the digital rights and digital currency legal regulation in its historical development in various foreign jurisdictions in the context of a set of objective and subjective factors. Also of use are methods of system and functional analysis, alongside with formal and comparative legal analysis and legal modelling methods that allow us to highlight the features of legal regulation and offer recommendations for its improvement to legally and effectively circulate digital rights and digital currency in Russia.

1. Prohibitive Model of Regulation

While most countries apply the permissive model to issue licences, apply anti-money-laundering laws etc. (in particular, countries of Europe, USA and Japan), there also are countries that use a most stringent approach to the regulation of digital rights and digital currency circulation.

China, for example, has the most stringent legal regulation for digital rights and digital currency (cryptocurrency) among the jurisdictions under review. The literature used also notes the stringency of this approach [Alekseyenko A.P., 2021: 55–65]; [Huang Y., Mayer M., 2022: 329]; [Martino P., 2021: 81–82], pointing out the Chinese government's desire to regulate all relations, including those in the digital sphere [Ponsford M., 2015: 35-37].

[4] From recognition to denial: how courts decide cryptocurrency cases. Pravo.ru. 11.05.2022. Available at: URL: https://pravo.ru/story/239374 (accessed: 18.11.2022)

One can list the following bans in China: financial institutions are prohibited from dealing in crypto currency; issuers are prohibited from issuing tokens (ICOs), and those who have already conducted their ICOs must return the funds to the investors. On the other hand, it is not prohibited to own cryptocurrencies and tokens. All national and foreign websites, and platforms related to trading and hosting crypto currencies have been included in the ban list and blocked. [Molotnikov A.E., Troschinsky P.V., 2019: 317]. We must agree that the downside of this is a less developed digital marketplace and a less developed relevant infrastructure, including crypto-exchanges and other professional and non-professional market participants [Huang R., 2021: 122–123].

China's approach to digital rights and digital currency is more than paternalistic. At the same time, China also takes advantage of the underlying blockchain technology and smart contracts based on this technology [Martino P., 2021: 90–91], and the recently adopted Civil Code provides for the inheritance of cryptocurrency. Available judicial practice confirms the legitimacy of ownership of cryptocurrencies (bitcoins). Courts perceive cryptocurrencies and tokens as property [Riley J., 2021: 142–144].

China has issued the digital Yuan, its digital currency used to effect payments on digital platforms. Crypto currency exchanges must undergo state registration in order to operate legally. The People's Bank of China protects the rights of consumers in the financial markets through control, management and supervision.

The Chinese government has been cautious in drafting and adopting legislation to regulate the area in question. The Chinese legislator uses an experimental procedure, which involves approving regulations with a limited validity period and making them final only after their advisability and effectiveness has been established.

The predominance of regulation at the level of secondary legislation, the deliberate vagueness and uncertainty of the terminology used in legal regulation, and the lack of clear procedures and mechanisms in the area under consideration also are largely negative aspects [Molotnikov A.E., Troschinsky P.V., 2019: 318–319]. In other words, the legal regulation is clearly prohibitive; it, however, does not completely prevent innovation in the digital sphere. It appears that the Russian legislator takes this model of regulation into account, but cannot fully embrace it, because, in the absence of Russian analogues of digital currency, it will lead to an outflow of funds abroad, and will not allow to develop new technologies at full scale.

2. Partially Prohibitive Model of Regulation

Another Asian jurisdiction that is tough and prohibitive is the Republic of Korea. Unlike China, Korea has not only banned cryptocurrency and digital rights. The issuance and circulation of tokens, i.e. digital rights, was originally banned in Korea, and this is still the case today. At the same time, cryptocurrency circulation is legal, provided that, as in other jurisdictions, the rules governing circulation of cryptocurrencies for anti-money laundering and counter-terrorist financing apply [Dolgiyeva M.M., 2018: 125]. As of 30 January 2018, only non-anonymous accounts ('accounts with real names') may be used for cryptocurrency circulation for the purposes mentioned in Korea [Tedeyev A.A., 2019: 137]. This partially prohibitive approach comes from the need to comply with FATF (Intergovernmental Organisation for Financial Monitoring) requirements, several major hacks of crypto currency exchanges, and the peculiarities of legal regulation in Korea. Compared to China, this approach has advantages in that it does not artificially prohibit the circulation of crypto currencies and stimulates economic development in this area.

Legal regulation in the Russia is another example of a partially prohibitive model. The reasons for this are: 1) Digital rights have been named in law[5]; the legislator has defined their categories, which currently include utility digital rights (rights to demand to hand over a chose or exclusive copyrights, demand the performance of certain works or granting of certain services),[6] and digital financial assets (monetary claims; the ability to exercise rights over stock and shares; the right to participate in the capital of a non-public joint stock company; the right to demand transfer of stock and shares)[7]; 2) digital currency, on one hand, is an asset and can be a store of value, even investment asset, but, on the other hand, its circulation is restricted for Russian legal entities and individuals. They cannot pay for goods, works or services with digital currency[8].

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[5] Civil Code of the Russian Federation (Part One) of 30 November 1994. No. 51-FZ (as amended on 25 February 2022). Article 141.1 // SPS Consultant Plus.

[6] Federal Law of 02 August 2019 No. 259-FZ (as amended on 31 July 2020) 'On Attracting Investment through Investment Platforms and on Amendments to Certain Legislative Acts of the Russian Federation'. Article 8 // SPS Consultant Plus.

[7] Federal Law of 31 July 2020 No. 259-FZ 'On Digital Financial Assets, Digital Currency and Amendments to Certain Legislative Acts of the Russian Federation'. Article 1 // SPS Consultant Plus.

[8] Ibid. Article 14.

Thus, digital currency is currently understood to be a *de facto* private digital currency (cryptocurrency), which is issued by private individuals and whose exchange rate is set in a speculative manner. Cryptocurrency is a special contractual right, the characteristics of which are also determined by its digital form. There are similarities in this respect to jurisdictions like Germany, where bitcoin is treated as a private means of payment; but in Germany there are no restrictions on cryptocurrency payments, except for anti-money laundering legislation.

There is a reason for conclusion that, based on Russian law, digital rights and digital currency exist and circulate within a certain information system. The legislator has defined individual types of digital rights, and their specifics are regulated; as for digital currency, its circulation is strictly limited in Russia. Digital currency acts more as a store of value and in very rare cases (acquisition of digital rights for digital currency or acquisition of one digital currency for another one) as a means of exchange payment. Therefore, legal regulation of digital rights and digital currency in Russia is stringent, and this model of legal regulation is partially prohibitive (because the circulation of digital currency is restricted; the legislator also limits the list of digital rights—these must be named in the law).

2. Partially Permissive Model of Regulation

The following jurisdictions are variations of the relatively lenient legal framework. At the same time, they can also be divided into smaller classification groups because the partially permissive model is the most used and most widespread model around the world.

The doctrine knows the following classifications of legal regulation models in the digital economy. For example, V.K. Shaydullina identifies approaches (models) such as new legal norms, including laws amending the current legislation, are adopted; the regulator provides clarifications on the application of the current legislation [Shaydullina V.K., 2019: 22]. Other classifications are also possible. A.A. Volos points out the following models: direct establishment of a new digital institution in civil law (some US states, Italy), i.e. direct regulation; application to a smart contract of the rules applied by similar legal institutions (the Electronic Transactions Acts in Australia and in New Zealand, Indian law), i.e. indirect regulation [Volos A.A., 2020: 24, 25]. L.G. Efimova, I.E. Mikheyeva, D.V. Chub adhere to a similar attitude by pointing out the models of legal regulation such as: creation of

special legislation on contractual relations in cyberspace (some US states, Italy, Belarus); application of general provisions of contract law to new institutions and relations (European countries) [Efimova L.G., Mikheyeva I.E., Chub D.V., 2020: 91]. N.B. Krysenkova similarly identifies models of legal regulation: adoption of a separate legal norm to regulate a given area of legal matters; amendments to existing legislation, e.g. on electronic commerce, contracts, information technology [Krysenkova N.B., 2019: 29, 30].

In view of author, the following conclusions result from the analysis. The jurisdictions under review range from those that have specifically adopted rules on digital rights and digital currencies circulation (some US states, France) to those that do not create any new rules, but adapt the existing rules to the new challenges of the times by establishing licensing requirements, etc. Clarifications from law enforcement agencies that extend the applicability limits of existing legislation can also be used (UK, Australia, Germany, Japan).

While all of the jurisdictions considered in this section establish a permissive model for the regulation of digital rights and digital currency circulation, ways and methods used differ from country to country. These will be discussed in detail below.

The US was one of the first jurisdictions to codify blockchain, cryptocurrency, tokens and smart contracts in the laws of individual states. Amendments to the laws were very general, one could even say superficial, codifying the possibility of using blockchain technology, cryptocurrency, and smart contracts in civil circulation [9]. The main purpose of legal regulation is to enshrine the possibility of using blockchain technology as a means of recording and storing information for the purpose of providing procedural evidence, and to recognise the legal validity of digital rights and digital currency circulation through a smart contract. The concept of token is considered instead of digital rights, and the legal norms use the

[9] See e.g.: Vermont Statutes, Title 12, Chapter 81, Subchapter 1. 2016. Available at: URL: https://law.justia.com/codes/vermont/2016/title-12/chapter-81/section-1913 (accessed: 18.10.2022); Senate Bill No. 398. Nevada Legislative Counsel Bureau. June 5, 2017. Available at: URL: https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB398_EN.pdf (accessed: 18.10.2022); Senate Bill 69. Delaware General Assembly. July 21, 2017. Available at: URL: https://legiscan.com/DE/bill/SB69/2017 (accessed: 18.10.2022); Legislative Bill 695. Legislature of Nebraska. April 18, 2018. Available at: URL: https://legiscan.com/NE/text/LB695/2017 (accessed: 18.10.2022); Tennessee Senate Bill 1662. Tennessee State Legislature. March 26, 2018. Available at: URL: https://legiscan.com/TN/text/SB1662/2017 (accessed: 18.10.2022)

concept of cryptocurrency instead of digital currency. There is also concept of cryptoassets, which refers to the economic value of tokens and cryptocurrency[10].

Owning and disposing of cryptocurrency is not restricted, but cryptocurrency exchanges in the US are required to identify customers so as to comply with anti-money laundering laws. Licensing requirements for digital rights and digital currency dealers are emerging at the level of individual states [Martino P., 2021: 76]. One example is BitLicense in the state of New York, which has received mixed reviews in terms of regulatory effectiveness [Alkadri S., 2018: 84] both from market participants and government agencies themselves. There are examples of regulatory sandboxes in individual states, but these are not widespread[11].

Moreover, the jurisdiction is known for its rigidity with regard to investment projects [Boreiko D., Ferrarini G., Giudici P., 2019: 684]; [Goforth C., 2021: 643–700] offering tokens for sale in exchange for investor funds. Foreign literature emphasises that the US Securities and Exchange Commission has been sufficiently active on tokens, applying both government regulation and educating the public about the implications of offering tokens to the public [Henderson M., Raskin M., 2019: 449–455]. This policy aims to prevent fraud and other unlawful behaviour.

In the US, if a token meets the characteristics of a security, the relevant securities market regulations are applied, including rules on registering the issue of securities, providing information on the person attracting the investment, on whether the person has the necessary capital etc.[12] This procedure involves the Howie Test. The test, which takes its name from the name of the defendant in the court case, answers the question of whether there is an investment agreement based on the main criterion, namely the existence of a reasonable expectation of profit resulting from the actions of someone other than the investor[13]. The position of US government bodies,

[10] Blockchain & Cryptocurrency Laws and Regulations 2022. USA. Available at: URL: https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/usa (accessed: 18.10. 2022)

[11] Ibid.

[12] The Laws that Govern the Securities Industry. US. Securities and Exchange Commission. Investor.gov. Available at: URL: https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry (accessed: 18.10. 2022)

[13] SEC v. W.J. Howey Co., 328 U.S. 293 (1946). US. Supreme Court. Available at: URL: https://supreme.justia.com/cases/federal/us/328/293/ (accessed: 18.10. 2022)

unchanged to this day, is that securities can take a variety of forms, and the purpose of the legislation on securities is to regulate investment relationships, no matter what they are called[14]. Thus, a similar position applies to tokens.

As an example, there have been a number of court cases involving the US Securities and Exchange Commission, the first of which was SEC v. REcoin Group Foundation. This case involved fraud and non-compliance with REcoin token securities registration requirements since those were not actually backed by investments in real estate and diamonds[15]. In the case SEC v. Reginald Middleton, Veritaseum Inc. and Veritaseum LLC[16] of a fraudulent scheme to sell tokens to investors and manipulate the markets for said tokens, the court applied a freezing order (freeze) to the assets acquired by the defendants in an illicit securities offer.

One can also cite the Munchee case, in which the SEC stated that a token can be recognised as a security even if it has some kind of perceived utility, regardless of the name of the technology used [Boreiko D., Ferrarini G., Giudici P., 2019: 685] and demanded that all funds collected be returned to investors[17].

In addition, the US Securities and Exchange Commission filed a lawsuit stating that Gram tokens to be delivered by Telegram Group constituted securities and therefore should have been registered with the SEC. The US District Court for the Southern District of New York supported the SEC's position in the case SEC v. Telegram Group Inc. and TON Issuer Inc.[18],

[14] Reves v. Ernst & Young, 494 U.S. 56 (1990). US. Supreme Court. Available at: URL: https://supreme.justia.com/cases/federal/us/494/56/ (accessed: 18.10. 2022)

[15] Securities and Exchange Commission v. REcoin Group Foundation, et al., Civil Action No. 17-cv-05725. Litigation Release No. 24081 March 26, 2018. US. Securities and Exchange Commission. Available at: URL: https://www.sec.gov/litigation/litreleases/2018/lr24081.htm (accessed: 18.10. 2022)

[16] Final Judgement as to Defendants Reginald Middleton, Veritaseum, Inc. and Veritaseum, LLC. United States District Court Eastern District of New York. 19 Civ. 4625. Available at: URL: https://www.sec.gov/divisions/enforce/claims/docs/middleton-judgment.pdf (accessed: 18.10.2022)

[17] Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing a Cease-and-Desist Order. US Securities and Exchange Commission. Available at: URL: https://www.sec.gov/litigation/admin/2017/33-10445.pdf (accessed: 18.10.2022)

[18] Securities and Exchange Commission v. Telegram Group Inc. et al, No. 1: 2019cv09439. US Law. Available at: URL: https://www.sec.gov/news/press-release/2020-146 (accessed: 18.10.2022)

upholding the SEC's motion on a preliminary injunction prohibiting Telegram Group Inc. from issuing the tokens. The court found that the SEC had succeeded in proving that the token issue would be an offer of securities. As a result, the company agreed not to issue the Gram token, to return $1.2 billion to its investors and pay $18.5 million in penalties to the government[19].

The Commission demonstrated a similar approach with regard to Kik, which issued Kin tokens in open and closed offerings to investors, which the Commission recognised as securities. As a result, the company had to stop this unlawful activity and pay $5 million in penalties to the government[20]. The argument offered by the plaintiff (SEC) was that the lack of registration of the securities offered by the defendant deprived investors of the information they were entitled to have under US law.

It is possible to observe a continuation of this policy in new SEC cases, such as the insider trading charges against a former Coinbase product manager, his brother and a friend for a trading scheme involved multiple advertisements promoting certain cryptoassets on Coinbase[21]. Actually, it means legal norms of investments, integrity and fair business practices have been spreading to the crypto-market as well. Numerous class action lawsuits against crypto-projects in the US confirm this[22].

This approach has certainly affected the digital market and caused an exodus of digital projects involving token issuance, whether tokens that in

[19] Telegram to Return $1.2 Billion to Investors and Pay $18.5 Million Penalty to Settle SEC Charges. US Securities and Exchange Commission. June 26, 2020. Available at: URL: https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1v2019cv09439/524448/227/ (accessed: 18.10.2022)

[20] SEC Obtains Final Judgment Against Kik Interactive For Unregistered Offering. US. Securities and Exchange Commission. October 21, 2020. Available at: URL: https://www.sec.gov/news/press-release/2020-262 (accessed: 18.10.2022)

[21] Available at: URL: https://www.sec.gov/news/press releases (accessed: 18.10. 2022)

[22] See e.g.: George Kattula vs. Coinbase Global Inc. and Coinbase Inc.. Complaint Class Action/ United States District Court for the Northern District of Georgia, Atlanta Division. Case 1v22-cv-03250-TWT. Available at: URL: https://storage.courtlistener.com/recap/gov.uscourts.gand.306368/gov.uscourts.gand.306368.1.0.pdf (access: 18 October, 2022); Jeffrey Lockhart v. Bam Trading Services Inc. and Brian Shroder. Jury Demanded Class Action Complaint. United States District Court Northern District of California. Case 3v22-cv-03461. Filed 06/13/22. Available at: URL: https://www.docdroid.net/zl5YX9G/binance-us-luna-class-action-pdf (accessed: 18.10. 2022); William Ballou and Joan Williamson v. Asset Marketing Services LLC. Class Action Complaint. United States District Court of Minnesota. CASE 0v21-cv-00694. Filed 03/12/21. Available at: URL: https://www.classaction.org/media/ballou-et-al-v-asset-marketing-services-llc.pdf (accessed: 18.10.2022)

some way resemble a security or tokens that grant rights to use a particular information resource. As a result, the US has not become a cradle of crypto-projects and other projects of digital industry. At the same time it has arguably protected the rights of thousands of consumers in the financial markets who suffer from fraudulent projects and schemes. To achieve this goal, the US Securities and Exchange Commission created *howeycoins.com*, which is a website of a fake token issuance project (ICO)[23]. This is a kind of educational tool designed to warn investors about the possible risks of participating in ICOs, pointing out the signs that a certain project is fake and fraudulent. It seems to be a very interesting and successful experience of presenting information to consumers in a plausible and compelling way. In has a sense to conclude that US government agencies are paying special attention to consumer protection in the digital environment and take a consumer-oriented approach.

Other US government agencies, alongside with the Securities and Exchange Commission, do the same. The US Commodity Futures Trading Commission (CFTC) filed a cryptocurrency fraud lawsuit. According to the CFTC, the defendants encouraged consumers to transfer funds and cryptocurrency in exchange for expert advice on real-time cryptocurrency trading, and in exchange for the defendants purchasing and trading cryptocurrencies on behalf of consumers. As a result, the defendants took possession of the consumers' assets, following which they shut down the website, removed all the information from social media, and ceased any interaction with the consumers. Following a review of the case, a US District Court judge for the Eastern District of New York found the defendants guilty of dishonest and fraudulent conduct and ordered them to pay over $ 1.1 million in restitution to consumers and a penalty to the government[24].

Upon analysing legislative and other measures to regulate digital rights (tokens), digital currency (cryptocurrency), and cryptoassets in the US, we see the following: basic concepts of the digital marketplace, such as cryptocurrency, are enshrined in the legislation of individual states; law enforcement agencies offer clarifications on the application of existing legislation related to tokens, cryptocurrency, etc. (US Securities and Exchange Com-

[23] Howey Coins. Available at: URL: https://www.howeycoins.com/#white-paper (accessed: 21.07. 2022); ICO–Howey Coins. Available at: URL: https://www.investor.gov/ico-howeycoins (access: 18.10.2022)

[24] CFTC Wins trial against virtual currency fraudster. August 24, 2018. Commodity Futures Trading Commission. Available at: URL: https://www.cftc.gov/PressRoom/PressReleases/7774-18 (accessed: 18.10.2022)

mission clarifies whether tokens can be considered securities); licensing of individual digital marketplace actors at state level; stringent regulation of token issuance and circulation among US citizens and residents due to the application of the securities law and the relevant registration rules, and, in the event of a breach of the above legislation, severe sanctions are imposed to protect the rights of individual investors.

The UK legal system is conservative and rigid in its approach to digital assets. There is no specific law for the circulation of these assets, but there is licensing persons offering such assets for sale[25]. In its Report 'Smart Legal Contracts. Advice to Government', the UK Law Commission explored and addressed, *inter alia*, issues related to the circulation of digital assets. It may be concluded from the paper its authors believe and advise the legislator not to change legislation, but to make good use of the existing laws, referring to the need to develop practices and model provisions by the market participants themselves[26]. The issues of the legal nature of digital assets have not yet been resolved and are still relevant in the UK today. The interim report of the Law Commission concludes that there is a need for a special legal regime for digital assets that would be different from the legal regimes for choses and liabilities. In particular, the report points to the need for international legal norms in this area due to the decentralised nature of blockchain, which underpins the emergence and circulation of digital assets[27]. However, no specific legislation on digital assets, i.e. digital rights and digital currency as understood by the Russian legislator, has been approved to date.

In general public bodies, such as the UK Financial Conduct Authority, that has a duty to respond to changes in the financial market and to warn consumers of the risks involved, issue statements on digital assets. Particularly, the Authority makes consumers aware about the legal consequences of purchasing cryptoassets. It explains the concept of crypto-assets includes payment tokens (cryptocurrency) security tokens, and stablecoins. Stablecoins, just like cryptocurrency, are used to make payments but their

[25] Available at: URL: https://www.fca.org.uk/publication/documents/cryptoasset-registration-flowchart.pdf (accessed: 18.10.2022)

[26] Available at: URL: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/11/Smart-legal-contracts-accessible.pdf (accessed: 18.10. 2022)

[27] Digital Assets. Interim Update. Available at: URL: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/11/Digital-Assets-Interim-Update-Paper-FINAL.pdf (accessed: 18.10.2022)

value is less volatile than the value of cryptocurrency. Hence, in this context, the concept of crypto-assets is synonymous with digital assets. The consequences of buying crypto-assets include the unclear nature of certain legal issues and the impossibility of seeking protection from consumer protection authorities[28]. At the same time, the Authority sets licensing requirements for digital asset operators, but not all of them have been licensed[29]. As a result, market participants file thousands of complaints about fraudulent schemes definitely of concern to the regulator, and government enforcement agencies commence investigations.

One example is a dispute that has reached the UK High Court. Ion Science Ltd., a company registered in England and Wales, and its CEO and sole owner, claimed they had incurred damages from the defendants in connection with a fraudulent ICO[30]. The company stated that it invested £577,000 in purportedly genuine cryptocurrency products and paid substantial commissions to the defendants for the promised profits. The defendants transferred the funds paid to accounts with cryptocurrency exchanges.

The High Court began by confirming that crypto-assets constitute property, mentioning also other courts rulings[31]. The Court considered that UK law was applicable to the present dispute on the basis of the *lex situs* test in relation to a crypto-asset, i.e. where the person in possession of such an asset is located. The Court also drew attention to a number of other criteria, namely that the assets were transferred within the UK, the cryptocurrency was in the jurisdiction of the UK, the documents were drawn up in English, and the witnesses were in the UK. The Court has issued two main orders: a freezing order covering assets located anywhere in the world (taking into

[28] Cryptoassets. Available at: URL: https://www.fca.org.uk/consumers/cryptoassets (accessed: 18.10.2022)

[29] The Risks of Token Regulation. Available at: URL: https://www.fca.org.uk/news/speeches/risks-token-regulation (accessed: 18.10.2022)

[30] Ion Science Ltd v Persons Unknown, No. CL-2020-000840. 21 December 2020. England & Wales Commercial Court. Available at: URL: https://uk.practicallaw.thomsonreuters.com (accessed: 18.10.2022)

[31] AA v persons unknown & Ors, Re Bitcoin [2019] EWHC 3556. England and Wales High Court (Commercial Court). Decisions. Available at: URL: https://www.bailii.org/ew/cases/EWHC/Comm/2019/3556.html (accessed: 18.10. 2022); Ruscoe v Cryptopia Ltd (in liquidation) [2020] NZHC 782. High Court of New Zealand. Available at: URL: https://www.grantthornton.co.nz/globalassets/1.-member-firms/new-zealand/pdfs/cryptopia/civ-2019-409-000544---ruscoe-and-moore-v-cryptopia-limited-in-liquidation.pdf (accessed: 18.10.2022)

account the nature of the defendants' operations); and an order to disclose information about the defendants. Based on the other decisions mentioned above, the Court also took into account such circumstances as the need for urgent measures regarding the cryptocurrency, the risk of its loss, a possibility of its circulation on a click of the mouse.

Another case, also heard in the UK jurisdiction, again demonstrates the willingness of English courts to satisfy plaintiffs seeking to recover cryptocurrency. In the following case, as in the previous case, a disclosure order against the defendants was used to enable the plaintiffs to trace the perpetrators internationally. In the Fetch case, the Court granted the plaintiffs, the two Fetch.ai companies, a wide range of remedies against: unidentified fraudsters who had accessed the plaintiffs' cryptocurrency accounts and transferred funds from them; two Binance entities, which managed accounts and exchanges; the recipients (guilty or not) of the misappropriated cryptocurrency [32]. This gives hope that it is possible to recover cryptocurrency even if someone has illegally gained possession over it.

Also of note is the development in the UK of a market institution, such as the regulatory sandbox that can also be used for cryptocurrency. Through such a sandbox, UK government agencies become more familiar with the regulated technologies, and market participants have the right to develop their own rules for regulating their business activities. Transparency of these regulatory sandboxes and the focus on innovative products and services are important criteria [Lessambo F., 2020: 35-36] as they serve to ensure that the interests of other market participants and consumers are taken into account. This experience should be viewed positively given the significant numbers of blockchain and cryptocurrency projects and cryptocurrency exchanges in the UK, despite the relatively high costs of setting up and maintaining such projects in a reputable jurisdiction such as the UK.

Analysing measures government applies to the regulation of tokens, cryptocurrencies, cryptoassets and digital assets, noteworthy is the following: no new legislation or legal norms relating to the regulation of digital market are approved; the question of legal environment to be created for the circulation of digital assets (crypto-assets) is raised at the level of doctrinal clarifications and law commissions; the need to change legislation has not been indicated (but the possibility of creating law enforcement

[32] Fetch.AI Lrd & Anor v Persons Unknown Category A & Ors [2021] EWHC 2254 (Comm) (15 July 2021). London Circuit Commercial Court. Available at: URL: https://www.bailii.org/ew/cases/EWHC/Comm/2021/2254.html (accessed: 18.10. 2022)

practices, building expertise by market participants and issuing international law norms on the relevant issues has); authorities pay attention to certain features of digital assets (crypto-assets) and pay increased attention to consumers of financial services; market entities, such as token issuers and cryptocurrency exchanges, are licensed; favourable environment is created for the development of the crypto-industry through the operation of a regulatory sandbox.

Australia, on the one hand, like the US and UK, develops its approaches to digital rights and digital currency in the spirit of the Anglo-Saxon legal system; on the other hand, it is not a favoured and likely place for crypto- and other projects related to the digital environment.

The Australian Digital Currency Commerce Association has adopted its Code of Conduct. This Code of Conduct sets basic standards for the industry, but only the members of the Association are obliged to observe it. An annual audit has been introduced to control the compliance and re-issue membership certificates. If the audit reveals violations, the Association imposes penalties[33].

At the same time, digital currency operations must be licensed, and the lack of a licence leads to sanctions, including criminal prosecution. It is also mandatory to comply with the anti-money laundering and counter-terrorism financing norms, so the Anti-Money Laundering and Countering Financing of Terrorism Amendment Bill was passed in 2017.[34] It is now mandatory to verify (identify) the clients and monitor suspicious transactions [Martino P., 2021: 83].

Australian authorities state while there is no law specifically dealing with the circulation of cryptocurrencies or tokens, this does not preclude their inclusion in control and oversight regimes under the Australian regulatory system[35]. With regard to law enforcement practice, we may note that the courts also include cryptocurrencies and tokens in the legal field

[33] Cryptocurrency regulation. A study of the experiences of different countries. Eurasian Economic Commission. January 2018. Available at: URL: httpv//www.eurasiancommission.org/ru/act/dmi/workgroup/Documents/Регулирование%20криптовалют%20в%20странах%20мира%20-%20январь.pdf (accessed: 18.11.2022)

[34] Available at: URL: https://www.legislation.gov.au/Details/C2017A00130 (accessed: 18.10. 2022)

[35] Available at: URL: https://www.austrac.gov.au/business/how-comply-guidance-and-resources/guidance-resources/guide-preparing-and-implementing-amlctf-program-your-digital-currency-exchange-business (accessed: 18.10.2022)

and the current legal regulation. The decision of the District Court of New South Wales in Hague v Cordiner case is one example. The court granted the plaintiff's request to secure court costs with cryptocurrency held on a cryptocurrency exchange, confirming the position that cryptocurrency is deemed as 'property'.[36] Moreover, the judge took an interesting approach to the volatility of cryptocurrency pointed out by the defendant, requiring the plaintiff to notify the defendant within 24 hours if the cryptocurrency account balance falls below the collateral amount and provide periodic bank statements to the defendant.

So, Australian government bodies use the following regulatory measures: Crypto currencies and tokens (crypto-assets) are included in regulation, particularly into norms of anti-money laundering and countering the financing of terrorism; mandatory licensing has been introduced for professional operators in the digital currency market; self-regulation has been introduced in digital currency circulation; law enforcement bodies have embedded new objects of rights in the existing legal framework with progressive views on the legal nature of digital currency and the possibilities for its use in circulation.

Germany also has no legislation that provides basic definitions of new digital law phenomena [Chiu I., Deipenbrock G., 2021: 100–135]. The approach of German law enforcers and researchers is that the current legal regulation is sufficient, and no additional regulation is needed to encourage private initiatives; only the absence of prohibitions in the area is required.

The German National Bank and other German public bodies repeatedly claimed regarding cryptocurrencies and tokens stating that acquiring it involves a risk of losing one's money, and in general, cryptocurrencies are volatile and their exchange rates are unpredictable [37] [Kamalyan V.M., 2020: 198–199]. These statements were mainly aimed at ordinary consumers, while at the same time they have little impact on the success and implementation of blockchain projects in Germany.

Crypto currency trading (exchanges and similar platforms) is licensed by the Federal Financial Supervisory Authority (BaFin). This implies meeting a

[36] Hague v Cordiner (No. 2) [2020] NSWDC 23. 24 February 2020. District Court of New South Wales. Available at: URL: httpv//www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWDC/2020/23.html (accessed: 18.10.2022)

[37] Available at: URL: https://www.bafin.de/EN/PublikationenDaten/Jahresbericht/Jahresbericht2017/Kapitel2/Kapitel2_7/Kapitel2_7_3/kapitel2_7_3_node_en.html (accessed: 18.10. 2022)

number of requirements, which include regular reporting, qualified personnel, a detailed business plan, a share capital of at least EUR 730,000, and application of anti-money laundering and counter-terrorist financing methods [Shaydullina V.K., 2018: 49–51]. It is the way anti-money laundering legislation is enforced in the field. At the same time, 'digital currency', in the understanding of the Russian legislator) is recognised as a contractual means of payment, private money, as an equivalent of legal tender [Pechegin D.A., 2019: 24–26].

As for approaches in law enforcement practice, they remain very cautious. The context of the case under review is as follows: the defendant was prosecuted for operating a bitcoin trading platform without obtaining an investment services licence, which would be a criminal offence if bitcoins qualified as financial instruments. The defendant was convicted by the first instance court and acquitted by the Land Court of Berlin, and the prosecutor appealed to the Higher Land Court in Berlin. And in 2018, the Berlin Higher (Land) Court ruled that bitcoins (a type of cryptocurrency) are not financial instruments. Therefore, the defendant did not have to obtain a BaFin licence[38], despite BaFin's position both at the time of the case and at the present time.

In general, state regulation in Germany is as follows: there are no additional legislation regulating the digital market; tax and banking regulations, as well as provisions of European anti-money laundering legislation, are applied to the regulation of cryptocurrency and token circulation; crypto currency exchanges are licensed; no special conditions for the digital industry are used, i.e. a general legal regime applies; there is a inconsistency in the statements and decisions of public authorities, largely due to a lack of specific legal provisions.

At the same time, despite the lack of special approaches to regulation and enforcement by government authorities, Germany is currently considered an attractive jurisdiction for crypto-investors due to its stable and favourable business environment in the area under review.

France offers another variation of the permissive model of regulation where one can observe specific legislation on digital assets. In 2019, the PACTE Law introduced a legal regime for digital asset providers and token (digital rights) issuers under the French Budget and Finance Code. These issuers voluntarily seek approval from the French Financial Market Authority in order to be whitelisted and obtain other related benefits. Failure

[38] The Higher Regional Court of Berlin — KG (4. Strafsenat), Urteil vom 25.09.2018 — (4) 161 Ss 28/18 (35/18). Available at: URL: https://openjur.de/u/2254032.html (accessed: 18.10. 2022)

to do so entails certain legal restrictions on the issuer. The following steps are required to obtain approval: the issuer is to register as a self-employed person in France; detailed transparent description of token issuance must be provided; security requirements to investor funds collected must be complied, as well as anti-money laundering and counter-terrorist financing legislation must be compiled [Barsan I., 2019: 22–23]. As for circulation of tokens (digital rights) and cryptocurrency (digital currency), both compulsory and voluntary licensing are provided for[39], depending on the type of operations carried out, their focus on the French market, and other criteria. At the same time, if not so much as voluntary licensing has been performed, this entails certain legal restrictions for the digital market operator, such as the inability to promote and market its services in France.

As for the law enforcement practice in France, it is so far very limited, as is the case in other jurisdictions, and reflects the inclusion of digital assets (understood in France as cryptocurrencies and tokens) in the current legal framework. For example, the Nantera Commercial Court of First Instance, analysing the loan agreements under which the borrower received bitcoins, considered that bitcoins were consumable, equivalent to each other and fungible, meaning that bitcoins could be freely exchanged and substituted for other bitcoins. In this case, BitSpread, a FinTech company offering alternative asset investment services, entered into several loan agreements with French crypto-asset exchange Paymium, receiving 1,000 BCH bitcoins. A few months later, upon the expiry of the loan agreements, BitSpread repaid Paymium the original amount of the loan in BTC bitcoins. However, Paymium also demanded the transfer of BCH bitcoins. The Court held that the defendant was not obliged to return BCH bitcoins specifically, but fulfilled its obligation by returning BTC bitcoins [40].

Thus, legal regulation of digital rights and digital currency in France has the following features: special legal norms are passed, largely due to the peculiarities of the continental legal system; both voluntary and compulsory licensing as well as registration are applied (the 'carrot and stick' principle); advanced law enforcement practices for the full incorporation of new objects of rights into civil law are developed.

[39] Blockchain & Cryptocurrency Laws and Regulations 2022. France. Global Legal Insights. Available at: URL: https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/france (accessed: 18.10.2022)

[40] Paymium vs BitSpread, Tribunal de Commerce de Nanterre, 26 février 2020, 2018F00466 Available at: URL: httpv//www.rdmf.es/wp-content/uploads/2020/03/TRIB.-COMERCIO-NANTERRE-26 February 2020-Bitcoin.pdf (accessed: 18.10.2022).

Japan is an example of a jurisdiction that skilfully regulates the circulation of new types of objects in the digital economy using licenses and regulatory sandboxes. Overall, the objects of rights in Japan include: digital currency and utility tokens included in the concept of crypto-assets subject to special regulation under the Payment Services Act; security tokens regulated as securities under the Financial Instruments Act and the Stock Exchange Act, respectively; stablecoins, i.e., tokens whose value is linked to the value of fiat currency, hence they are not volatile, are more secure, and are used as a means of payment [41].

Under the new regulations, the Financial Services Agency of Japan supervises cryptocurrency exchanges: these are to register, fill annual financial reports, and regular audits. The Japanese government believes this will prevent money laundering and increase consumer protection in the financial services marketplace. To a large extent, this policy was caused by the collapse of the major exchange MtGox in Japan back in 2014, which caused great public outcry and serious economic repercussions. And currently, cryptocurrency exchanges in Japan are the most trusted among exchanges based in different jurisdictions.

A significant development in global cryptocurrency regulation occurred in Japan in April 2017, when a law recognising cryptocurrencies as legal tender came into force. It resulted in the use of cryptocurrency as one of the payment methods in retail shops. Other benefits of this are that the law codified anti-money laundering, and counter-terrorist financing and KYC procedures with respect to entities dealing with digital currency and digital rights. So in this respect, Japan is one of the most advanced states in terms of legal regulation of digital rights and digital currency.

Japan has also issued the digital yen, which is used to pay for goods and services with smartphones (QR-codes) across the country. The issuer of the digital yen is a private bank, and its value is pegged to the yen. Moreover, Japan has successful regulatory sandboxes developing blockchain technology and other new digital technologies [Martino P., 2021: 81, 91].

Hence, the Japanese legislator's approach to the legal regulation of digital rights and digital currency should be considered justified and appropriate to meet the challenges of the times, both in terms of the introduction of

[41] Blockchain & Cryptocurrency Laws and Regulations 2022. Japan. Available at: URL: https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/japan (accessed: 18.10. 2022)

timely licensing of market participants and the integration of digital currencies into the Japanese payment system.

4. Permissive Model of Regulation

This final group of jurisdictions is the most lenient towards crypto-projects and the most focused on innovative collaborative development between business and the regulator.

Italy is an example of such a jurisdiction. It is one of the few countries in the world where certain aspects of digital economy are regulated by law. As early as back in 2017, Legislative Decree No. 9024, which makes cryptocurrency service providers similar to currency exchange operators, was issued. Italy does not recognise cryptocurrency as legal tender; it may only be a private, contractual means of payment, which brings this jurisdiction closer to Germany.

The key regulatory objective here, as in other legal traditions, is to protect the public interest relating to money laundering and terrorist financing. Therefore, professional digital market operators are subject to registration and, notably, all data on cryptocurrency transactions must be recorded. At the same time, entities need only to notify of their registration [Kamalyan V.M., 2020: 201-205], and there is no compulsory licensing. It is admissible to agree that the Italian state seeks to ensure full control over the use of digital technologies, given the increased risks of money laundering and financing of terrorism. At the same time, the approach is lenient owing to the absence of compulsory licensing.

The Decree approved by the Italian Parliament establishes the concept of a decentralised distributed ledger (blockchain) and its specific applications in civil law. Transactions in such a register may be qualified as the use of an electronic signature and meet the requirements for identification [Cappiello B., Carullo G., 2021: 104].

Recently, Decree of the Italian Ministry of Economy and Finance No. 100, in force since 17 July 2021, established regulatory sandboxes to enable the development of the FinTech sector.[42] The Decree establishes a Fintech Committee, comprising officers of all related executive bodies, that reviews applications from companies and grants them conditions for their business activities.

As for law enforcement practice, in Italy it is very varied with regard to the legal nature of the new objects of rights (e.g. cryptocurrency can

[42] Decreto no. 100. Ministero dell'Economia e delle Finanze. Gazzetta Ufficiale. 30.04.2021.

be deemed as a financial instrument or as an interchangeable commodity, or as a means of payment)[43]. Also, courts have pointed out that to be able to use crypto-assets to pay for an equity stake in a company, their value (exchange rate) must be determinable, usually on public cryptocurrency exchanges [De Caria R., 2020: 368].

Thus, Italy, just like France, a continental law country, has adopted legal provisions on new digital phenomena: blockchain, smart contracts, digital currency, digital regulatory sandboxes, etc.; it does not provide for compulsory licensing for digital market participants; registration is notification-based, which allows us to speak of a permissive model of legal regulation; it develops law enforcement practices with regard to new objects of rights and empowers market participants through the functioning of a FinTech sandbox.

Switzerland is another example of a permissive regulatory model. This jurisdiction has traditionally been regarded as a favourable jurisdiction for crypto and other projects related to the digital industry. The Guidelines issued by the Swiss Financial Market Supervisory Authority (FINMA) clarify the regulatory framework and the government's position on digital rights (tokens) [Kondova G., Simonella G., 2019: 45]. Tokens are classified based on their economic function as follows: payment tokens, which, like cryptocurrencies, are a means of payment for goods or services and a monetary expression of value (subject to Swiss anti-money laundering law); utility tokens intended to grant access rights to an application or service in blockchain; asset tokens, which grant rights of claim to the issuer similar to securities falling under the relevant legal requirements. It seems correct and reasonable that the classification is not exclusive and other variants of tokens may appear within the economic functions of tokens[44]. Also attached to the Guidelines is a questionnaire for persons wishing to issue tokens. It can be concluded for the Russian legislator that it is impossible to enumerate all categories of digital rights in an exhaustive way and that new varieties of digital rights may emerge over time.

Since 2018, Switzerland has been licensing fintech companies, and Swiss banks have been opening corporate accounts for companies operating in

[43] Blockchain & Cryptocurrency Laws and Regulations 2022. Italy. Available at: URL: https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/italy (accessed: 18.10.2022)

[44] Guidelines for Enquiries Regarding the Regulatory Framework for Initial Coin Offerings (ICOs). February 16, 2018. Available at: URL: https://www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/myfinma/1bewilligung/fintech/wegleitung-ico.pdf (accessed: 18.10. 2022)

the blockchain technology sector. The Swiss Bankers Association has issued Guidelines for the opening of such accounts [45].

The FINMA website provides comprehensive answers to questions about ownership and circulation of crypto-assets, including the need for a FinTech licence[46]. It also offers an opportunity to consult with FINMA staff in order to get clarification on the application of current legislation. FINMA also warns of the risks associated with crypto-assets (meaning both tokens and cryptocurrencies), namely the risks in the acquisition and use of crypto-assets due to the lack of full regulation in this area, the increased risks of money laundering, and informs about the investigation of violations of existing regulations related to crypto-assets[47].

It is of note many market participants vote with their feet for the favourable nature of the Swiss jurisdiction and the development of its cryptoeconomy. After the US and the EU introduced more stringent state regulation of cryptocurrencies and tokens, many companies found a safe haven in Switzerland[48] with its very cautious and transparent regulation of new technologies and a very limited number of requirements, which makes it an example of a permissive model of legal regulation. FINMA's experience in regulating the burgeoning fintech industry in Switzerland is undoubtedly positive.

5. Applicability of Foreign Experience to Legal Regulation of Digital Rights and Digital Currency in Russia

To answer this question, it is useful to consider the views of the Russian explorers and formulate our own conclusions on the object in question.

The position of V.K. Shaydullina is interesting, and an analysis of foreign experience confirms her views. She identifies the following government regulation measures in the sphere of digital rights and digital currency circulation: measures to prevent money laundering and the financing

[45] SBA Guidelines on Opening Corporate Accounts for Blockchain Companies. 2018. Available at: URL: https://www.finma.ch (accessed: 18.10.2022)

[46] FinTech Financial Services Providers. Available at: URL: https://www.finma.ch/en/authorisation/fintech (accessed: 18.10. 2022)

[47] Cryptoassets. May 1, 2022. Available at: URL: https://www.finma.ch (accessed: 18.10.2022)

[48] Switzerland and the cryptocurrency challenge. Available at: URL: https://www.swissinfo.ch/rus/швейцария-и-крипто-валютный-вызов-/47019366 (accessed: 18.10. 2022)

of terrorism; operators and other legal entities involved in the trade are obliged to introduce KYC procedures and other measures to mitigate general reputational risks in a particular jurisdiction; appropriate taxation systems are developed for new types of objects of rights; the accountability of exchangers and other operators performing operations with new objects of rights to their customers grows. This, in turn, includes providing financial security, increasing cyber security, and offering customers alternative dispute resolution mechanisms [Shaydullina V.K., 2018: 141]. Her proposal to the legislator to create a 'regulatory sandbox' to test new financial technologies and to set the rules for digital rights and digital currency transactions is worth noting, and there are examples of this kind in foreign practice. On 28 January 2021, Federal Law No. 258-FZ 'On Experimental Legal Regimes for Digital Innovation in the Russian Federation' came into force, which essentially implies using a regulatory sandbox (also called a digital sandbox) for digital innovation. The Bank of Russia monitors and evaluates the effectiveness and efficiency of experimental legal regimes in the financial market (Part 9, Article 18 of the Law)[49]. At the same time, the Bank of Russia's regulatory sandbox for piloting innovative technologies and services in the financial market whose implementation requires changes in legal regulation has been in operation since 2018[50] to test prototype services without real clients and without conducting market transactions. In this regard, we recommend using the experience of jurisdictions such as the United Kingdom that have successfully functioning regulatory sandboxes, including sandboxes in the digital domain, to improve the effectiveness of the domestic regulatory sandbox.

Also, based on analysis of Japanese legislation and practice, M.M. Dolgiyeva makes quite right observation: the model of digital rights and digital currency legal regulation chosen by Japan is worthy of attention and the most successful. At the same time, one cannot deny that even this model fails to resolve the issue of digital market actor identification [Dolgiyeva M.M., 2018: 126–127], and the experience of cryptocurrency exchanges confirms this [Hiramoto N., Tsuchiya Y., 2021]. Probably one possible solution to this issue is to require licensing of activities directly related to cryptocurrencies [Shaydullina V.K., 2018: 51–52] (cryptocurrency exchanges, issuing of digital

[49] Federal Law of 31 July 2020 No. 258-FZ (as amended on 2 July 2021) // SPS Consultant Plus.

[50] Regulatory Sandbox. Bank of Russia. Available at: URL: https://www.fca.org.uk/news/speeches/risks-token-regulation (accessed: 18.11. 2022)

rights and digital currencies, etc.). Surely, special requirements for compliance with anti-money laundering legislation could be introduced; the measure would oblige professional market participants to identify individual clients. To avoid and prevent hacker attacks, enhanced cyber security standards are required, with account for international experience in the field.

Protection of consumer rights in the digital marketplace is an undeniably important and urgent issue. Based on regulative models discussed above, the following most common and proven measures that may be recommended both to Russian legislators and law enforcement agencies: first, government agencies must inform token (digital rights) issuers on how this issuance should be conducted (what information to disclose, what legal requirements to comply with). Second, the agencies should explain to consumers in the digital marketplace the risks associated with acquisition of such token (digital rights). It is especially relevant because the Russian legal system does not yet regulate licensing of the activities of crypto-exchanges, bureaus de change and crypto-purses, which creates an unregulated crypto-space. Such approach of the legislator cannot be considered as well founded, as regulation would allow to weak illegal activities and risks for individuals and entrepreneurs.

Specific proposals for improving legislation should also be taken into account when drafting domestic legal regulation: issue a clarification from the Federal Tax Service on how to pay direct and indirect taxes depending on the situations in which digital rights and digital currency are used; publish investment risk assessment recommendations for investors; encourage development of voluntary certification systems for cryptocurrency projects [Ermokhin I.R.et al., 2019: 95-97]. It is reasonable to implement licensing for participants in the crypto-market similar to what is in use in Japan that is a jurisdiction that has proven to be adequate in its legal regulation experience.

Conclusion

Overall, the models of digital rights and digital currency legal regulation applied in various jurisdictions differ both in terms of the legal norms approved and the creation of institutions and conditions for functioning digital market. There is no uniform terminology in the area in question. For example, terms such as cryptocurrency, tokens, cryptoassets and digital assets are very popular abroad, while Russia uses the concepts of digital rights and digital currency. At the same time, the terms 'digital rights' and 'digital currency' have a different meaning abroad: 'digital rights' is under-

stood in the context of human rights, and 'digital currency' means central bank currency in digital form. Consequently, there is a need to clarify what term is implied in a particular context.

When assessing the regulation of digital rights and digital currency in Russia and foreign jurisdictions, the general conclusion is enshrining the basic concepts in law and reflecting specifics of their civil legal regime has yielded positive results in the form of legal certainty and the regulation of aspects of the digital economy. Still, creating favourable conditions for development of that sector and legalisation of the crypto-industry may be attained by other means. General regulation is necessary; law enforcers should develop approaches to digital currency and digital rights, and the necessary infrastructure should be established for the functioning of the digital market (including the licensing of participants, creation of a relevant control system, supervision over AML compliance etc.). In other words, what is required is a more lenient regulation system implemented under the permissive model is confirmed by practice in various countries.

Knowing regulatory experience abroad, the legislator should pay attention to the need and possibility of licensing crypto- and digital marketplace participants, which is done in one way or another in all jurisdictions surveyed, and to the successful experience of regulatory sandboxes in this area (e.g., in the UK, the first country to use them successfully). As for developing law enforcement in the field in Russia, particularly involving consumers, it would be purposeful to draw attention to the experience in jurisdictions like the US, the UK, and Australia. The protections and liability measures, the criteria used in selecting the jurisdiction under whose law a dispute over digital rights or digital currency should be resolved, approaches to allow for the volatility of cryptocurrency and the use of it as collateral etc. Certainly, the experience of more paternalistic jurisdictions like China, South Korea and Japan, is also significant, due to the respective specificities of doing business in the digital sphere.

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Comment

Key Issues in the Intellectual Property Court Presidium Rulings

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Abstract

This comment reviews key positions in the rulings of the Presidium of the Russian Intellectual Property Court (IPC) issued between March and July 2022. This Chamber hears cassation appeals against the decisions of the IPC first instance and deals primarily, but not only, with matters of registration and validity of industrial property rights. Therefore, this review predominantly covers substantive requirements for patent and trademark protection, as well as procedural issues both in the administrative adjudicating mechanism at the Patent office (Rospatent) and at the IPC itself. The current review encompasses a variety of topics related to trademark law, such as acquired distinctiveness, revocation for lack of use, unprotected elements; the protection of utility models; various procedural matters.

Keywords

case law; intellectual property; Rospatent; Federal Anti-Monopoly Service; trademarks; standard of proof; Paris Convention; utility models; procedural law.

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I. Trademarks

1. Pre-trial Offer Submission Period in Trademark Early Termination Proceedings

IPC Presidium Ruling of 15 July 2022 in Case No. SIP-645/2021

Pursuant to the provisions of Article 1486 of the Civil Code of the Russian Federation (hereinafter — CC RF) and Article 19 (1) of the TRIPS Agreement, the interested party may initiate the early termination of trademark protection by sending an appropriate offer to the trademark owner not earlier than after three years from the date of registration of the trademark. If the interested party submits the pre-trial offer before the three-year period expiring, the right to lodge a claim is lost.

The Company filed a lawsuit in the Intellectual Property Court seeking early termination of the legal protection of a trademark. The claimant was found to be the interested party; the Company's claims were satisfied with respect to part of the products, and the proceedings were closed with respect to the other products. The IPC Presidium overturned the verdict of the first instance court stating that the claimant had no right for the claim because it had lodged the claim before the set date.

In particular, the IPC presidium noted the following:

Under Article 5(C)(1) of the Convention for the Protection of Industrial Property (concluded in Paris on 20 March 1883), if the use of a registered mark is compulsory in a country, then the registration may be cancelled only after a reasonable period, and only if the person concerned cannot provide evidence to justify their failure to act.

Under Article 19(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (concluded in Marrakech on 15 April 1994), if it is required to use the trademark for the registration to remain valid, then the registration may only be cancelled after an uninterrupted period of at least three years of non-use, unless the trademark owner provides valid reasons based on the existence of obstacles to such use.

Pursuant to CC RF Article 1486(1), an interested party may make an offer to the right holder not earlier than three years after the date of the trademark registration.

Thus, both international agreements and Russian law stipulate that the legal protection of a registered trademark may only be terminated after a certain period from the date of granting legal protection to such a mark, during which period the mark was not used.

According to Russian law, this period may not be less than three years.

In the dispute under review, the claim for early termination of legal protection of the trademark was filed in the court before the three-year period from the date of registration of the disputed trademark elapsed.

The above circumstance is a separate ground for the application of the legal approach set out in Para 30 (3) of Resolution No. 18 of the Plenum of the Russian Federation Supreme Court 'On Certain Issues of Pre-trial Settlement of Disputes Considered in Civil and Arbitral Proceedings' of 22 June 2021 for qualifying the compulsory pre-trial procedure for dispute settlement as infringed, and, consequently, for dismissing the claim for early termination of legal protection of the disputed trademark.

Furthermore, the mistake of the first instance court was that even if the defendant hadn't lodged a plea of non-compliance with the compulsory pre-trial procedure for settling the dispute, if the interested party's offer was made earlier than three years after the registration of the disputed trademark, then the claim could not be granted in any event.

In view of the above provisions of CC RF Article 1486 and Article 19(1) of the TRIPS Agreement, the requirement that an interested party's offer cannot be submitted before the expiry of three years has two legal meanings:

as part of the compulsory pre-trial procedure for dispute resolution;

as part of the circumstances relevant to determining whether the plaintiff has standing to lodge a claim.

Pursuant to the above legal provisions, an interested party may initiate the process of early termination of legal protection of a trademark by sending a corresponding offer to the trademark owner not earlier than three years after the date of registration of the trademark.

2. Random Coincidence of Signs

IPC Presidium Ruling of 14 July 2022 in Case No. SIP-1228/2021

Unfair competition, being an act committed always with the specific purpose of obtaining an economic advantage at the expense of the ag-

grieved person(s), is always a deliberate violation. Such an advantage cannot be the result of a random coincidence.

If there is no direct evidence that the disputed trademark owner was aware that others were using the disputed sign at the time the application was filed, such awareness can be established on the basis of circumstantial evidence, depending on the 'balance of probabilities' standard of proof, i.e., how probable it is that the future rightholder did not choose the same sign by coincidence, but being aware of the sign and its use on the market.

This probability is established, inter alia, by taking into account the characteristics of the disputed sign itself: the more unique is the sign, the less it is probable that two persons could have begun using it on their own and independently of each other.

3. Recognising a Trademark Element as Unprotected

IPC Presidium Ruling of 11 July 2022 in Case No. SIP-763/2021

CC RF Article 1483 (1) (6) on the inclusion of unprotected elements in a trademark may apply only in a situation where the disputed sign is comprised of more than one element.

Where a verbal sign consisting of a single (verbal) element is assessed, that element cannot be qualified as unprotected.

4. Proving Acquired Distinctiveness

IPC Presidium Ruling of 11 July 2022 in Case No. SIP-1239/2021

The circumstances for establishing acquired distinctiveness depend on which of the grounds of CC RF Article 1483(1) the sign did not originally meet.

The provisions of CC RF Article 1483 (1) have been set forth primarily in the public interest and are intended to prevent one person from receiving an exclusive right to a sign which cannot perform the basic (individualising) function of trademarks (to individualise specific products for the consumer) and/or must remain free for use by others, since it is reasonable to assume that it may be used in relation to certain goods (i.e., name them, characterise them, define their shape, etc.).

These public interest restrictions do not apply where, as a result of the use of the sign in relation to a particular person's (affiliated or related per-

sons) goods or services, this person obtains the ability to individualise the goods or services of a particular person (CC RF Article 1483 (1) (1.1).) In this case, the public interests are not affected, because the relevant group of consumers begins to associate a particular sign with a particular person.

The circumstances for establishing acquired distinctiveness depend on which of the grounds of CC RF Article 1483 (1) the sign did not meet originally.

For signs that did not originally have distinctiveness (CC RF Article 1483 (1) Para 1), i.e. signs that cannot individualise a specific product for a relevant group of consumers, it is sufficient to prove that, as a result of its use, the sign has come to individualise specific goods in the opinion of consumers. This is sufficient to lose public interest in denying the registration of a trademark.

For signs that have come generic to designate products of a particular kind (CC RF Article 1483 (1) Para 1), in order to remove the public interest in retaining the ability to call the product by its name, it must be established that, as a result of the acquisition of distinctiveness, the relevant group of consumers has come to associate the particular sign only with the products of a particular person or affiliated persons.

Equally, for signs consisting only of elements that are common symbols and terms (CC RF Article 1483 (1) Para 2), in relation to specific products, the relevant group of consumers must begin to associate the named symbol or term with only one person or affiliated persons.

In the case of the acquisition of distinctiveness by signs characterising goods or services (CC RF Article 1483 (1) Para 3), which, in the public interest, must be free for use by others (because it is reasonable to assume that they can be used in relation to certain goods and services, and characterise them), it must be established for such signs that, as a result of acquiring distinctiveness, the relevant group of consumers no longer perceives them as a particular characteristic of goods offered by different producers (but associates it only with one person or affiliated persons); therefore it is no longer reasonable to assume that other manufacturers will use these signs to describe their own goods.

5. Protection of the Exclusive Right to a Trademark until the Transfer of the Right is Registered with Rospatent

IPC Presidium Ruling of 30 June 2022 in Case No. SIP-979/2021

During the period from the conclusion of the agreement on the assignment of the exclusive right to the service mark and until the public regis-

tration of the transfer of exclusive right to the new rightholder, the original rightholder may be deemed as a person interested in filing an administrative action against the registration of a similar trademark by another person under CC RF Article 1483(6).

Rospatent believed that during the period from the conclusion of the agreement on the assignment of the exclusive right to the prior service mark and until the registration of this transfer to the new rightsholder, neither the initial rightholder, nor the new rightholder may be deemed as a person interested in filing an administrative action against a similar trademark registered by another person on the grounds set out in CC RF Article 1483(6) Para 2.

Disagreeing with this position, the IPC Presidium noted that this approach by the administrative body deprived the persons in question of the right to defend their distinctive signs in an administrative procedure and, as a result, substantially infringed the rights of the 'senior' trademark owner.

The 'senior' trademark owner's right to lodge an administrative action to the registration of the 'junior' trademark (CC RF Article 1483(6)) is one of the ways to protect the 'senior' trademark from its dilution, i.e. from infringement of a trademark's basic function (the individualisation).

By virtue of CC RF Article 1 (2), civil rights may be restricted on the basis of federal law and only to the extent necessary to protect the foundations of the constitutional order, morality, health, rights and lawful interests of others, national defence, and state security.

Neither the CC RF nor any other federal law stipulates that the right to protect a trademark is limited in any way (including in terms of opposing the trademark to 'junior' trademarks) from the date of conclusion of an agreement on the assignment of an exclusive right to a trademark until the date of public registration of the transfer of the right under that agreement (CC RF Article 1232).

In this sense, the view of Rospatent and the first instance court on the period of 'defencelessness' of the trademark contradicts the provisions of Article 44(1), Article 45 (1) and Article 55(3) of the Russian Federation Constitution.

If one takes Rospatent's position to its logical conclusion, it seems that other means of protecting the exclusive right to a trademark are also excluded during this period (because, according to the said organisations, the

current rightsholder no longer needs protection and the acquiring party has not yet obtained the right to protection).

However, the registration of trademarks is intended to protect the rights of their owners and others, and hence ensures the sustainability of civil circulation in general (Decision of the Russian Federation Constitutional Court No. 28-P of 03 July 2018). Thus, Rospatent cannot use the registration of the transfer of an exclusive right under an assignment agreement in contradiction with its objective, i.e. to reduce the level of protection.

At the time of registration of the transfer of the exclusive right under the assignment agreement, the trademark has an owner as expressly defined by law (the person listed as such in the State Register, i.e. the alienator under the contract.)

As the Plenum of the Supreme Court of the Russian Federation notes in Para 37 of Resolution No. 10 of 23 April 2019 'On Application of Title Four of the Civil Code of the Russian Federation' (hereinafter referred to as 'Resolution No. 10'), if the transfer of an exclusive right under an assignment agreement is subject to public registration, the date of the transfer of the exclusive right is determined by law imperatively: it is the date of public registration of the transfer of such right. The transfer is not deemed to be effective before the public registration of the transfer of the exclusive right to the trademark (CC RF Article 1232(6).)

6. False Associations about the Place of Origin

IPC Presidium Resolution of 21 April 2022 in Case No. SIP-1197/2021

Rospatent refused to register the combined sign with the 'Tamanskaya Usadba' (*The Taman' homestead*) verbal element that was used for the goods of ICGS Class 33 "wines; wine made of grape pomace" based on CC RF Article 1483 (3) (1).

The first instance judgement, upheld by the cassation instance, rejected the claims to invalidate Rospatent's decision.

In particular, the IPC presidium noted the following:

Irrespective of which of the two words in the disputed verbal element is the stronger and dominant one, 'Taman' or 'homestead', the whole verbal element has a certain geographical connotation: it is not just any homestead, but a homestead located in Taman'.

The first instance court recognised that the disputed sign had a plausible geographical connotation. Therefore, the granting of such broad legal protection (i.e., in relation to any wines) was rightly recognised as to falling short of the requirements of CC RF Article 1483(3)(1): for wines not associated with the Taman' Peninsula, the disputed designation would be plausibly false.

II. Patents

7. Novelty of a Group of Utility Models

IPC Presidium Resolution of 05 July 2022 in Case No. SIP-606/2021

Novelty assessment of a utility model can be performed in two ways:

by comparing all the features of the utility model with the features of a technical solution known from the prior state-of-the-art, and if all the features are found to be known, then a conclusion on the lack of novelty is made (if all the features are known, the essential character of those features does not need to be determined);

by identifying the essential features of the disputed utility model and comparing them with the features of the technical solution known in the prior state-of-the art, and if all the essential features are found to be known, the conclusion is made that the novelty does not exist.

Company 1 holds the exclusive right to the group of utility models 'Flexible (deformable) container for bituminous materials (versions)' under the disputed patent. Company 2 lodged an objection with Rospatent against the granting of the disputed patent. The motive was that the application documents for which the disputed patent was granted did not comply with the sufficiency of disclosure requirement, and that the group of utility models under the disputed patent did not meet the novelty condition of patentability.

Rospatent rejected the objection, but the court of first instance invalidated its decision and ordered Rospatent to re-examine the objection. After examining Rospatent's appeal, the IPC Presidium upheld the first-instance court's ruling.

The issue of compliance with the requirement of utility model sufficiency of disclosure was not raised in the appeal procedure. Thus, the court examined Rospatent's conclusions only in relation to the novelty requirement within the meaning of CC RF Article 1351(1).

The subject matter of the dispute was the relationship between the group of utility models under the disputed patent and a technical solution that was known from one of the opposing patent documents and had the same purpose.

The Presidium of the Court reminded that the verification of the conformity of a utility model with the novelty condition of patentability implies the need to establish the purpose of the disputed and opposing technical solutions and assess their mutual relationship; it furthermore implies the need to identify the essential (i.e., those that affect the technical result) features of the utility model under the disputed patent, and to compare them with the features known from the prior source of information.

From the point of view of methodology, such comparison for the purposes of assessing the novelty of a utility model can be exercised in two ways:

by comparing all the features of the utility model with the features of a technical solution known from the prior state-of-the-art, and if all the features are found to be known, then a conclusion on the lack of novelty is made (if all the features are known, their essential character does not need to be determined);

by identifying the essential features of the disputed utility model and comparing them with the features of the technical solution known in the prior state-of-the art, and if all the essential features are found to be known, the conclusion is made that the novelty does not exist.

In the case under review, Rospatent first compared all the features and, upon finding no overlap, analysed the essential character of the non-overlapping features.

While doing so, as the court of first instance pointed out, Rospatent has also failed to analyse one of the technical solutions known from the prior art document.

8. How to Establish Borrowing in a Utility Model Authorship Case

IPC Presidium Ruling of 29 June 2022 in Case No. SIP-250/2017

The 'beyond reasonable doubts' standard of proof widely used in criminal law does not apply in cases where utility model's authorship is challenged. Instead, the 'balance of probabilities' standard of proof corresponding to the nature of claim applies.

The balance of probabilities involves a factual analysis of how likely it is that the defendants created the technical solution in question independently rather than borrowing it from the plaintiffs.

Borrowing can be established in various ways: based on direct evidence of the defendants' knowledge of the outcome of the plaintiffs' intellectual activity; based on evidence of the author's style; or based on circumstantial evidence.

The probability of independently producing the same result does exist (even the probability of random coincidence, as in the infinite monkey theorem), but the extent of this probability depends, inter alia, on the extent of coincidence. The larger the volume of the text coinciding word-for-word, the less likely is parallel creation and the more likely is the later writer's awareness of a previously existing text.

9. Author of a Utility Model and the Paris Convention Priority

IPC Presidium Ruling of 06 June 2022 in Case No. SIP-960/2020

The Paris Convention priority is not relevant to a dispute over the authorship of a utility model in a judicial action. The correct establishment of the date of priority is necessary to test protection of a disputed utility model, as this is relevant to establishing the state of the art.

The plaintiff filed a claim before the Intellectual Property Court against two defendants for the invalidation of a utility model patent on the basis of CC RF Articles 1398 (1) (5) and 1398 (2) (para 2) (incorrect indication of the author or patentee in the application).

The disputed patent was applied for in Russia based on a prior application filed in China. The Russian application listed the names of the defendants as the author and right holder, while the Chinese application listed three other persons as the authors and a different company as the right holder.

In view of the discrepancy between the authors and the rightsholders in the disputed and priority applications, and despite the evidence of co-authorship and the absence of a dispute as to authorship between the said persons, the court of first instance satisfied the plaintiff's claim for invalidation of the disputed patent in its entirety. The Court also found that, for Article 4 (A) of the Paris Convention and CC RF Article 1382 to apply, only the person who filed the priority application or their successor in title may be the applicant for a patent claiming conventional priority.

The IPC Presidium did not agree with the conclusions of the first instance court and ordered a new examination of the case. With regard to the first instance court's reference to a mismatch between the applicants for the disputed application and for the priority application, the IPC Presidium noted the following:

CC RF Article 1382 does not set forth who is authorised to apply for a patent. The scope of such persons is defined in CC RF Article 1357 and is verified, as stated above, based on who is the actual author of a particular technical solution patented in the Russian Federation, and with account for whether the right to obtain a patent has passed from this actual author to another person.

CC RF Article 1382 defines the rules for establishing the Paris Convention priority, and, if they are not complied with, then such priority may not be applied to a particular technical solution. This, in turn, means that the priority of a particular technical solution must be determined according to the general rules, i.e. on the basis of CC RF Article 1381.

The correctness of the priority date of the disputed patent affects the scope of information to be included in the state-of-the-art to test the validity of the disputed utility model. The impossibility of establishing priority based on the date of an earlier application means that, in certain cases, such an application may be opposed to a Russian technical solution. However, this is outside the scope of the present dispute.

10. Intrinsic Attributes of a Utility Model

IPC Presidium Resolution of 14 April 2022 in Case No. SIP-34/2021

Application of the formal methodology can lead to the conclusion that a utility model is novel in a situation where the feature in question is not formally stated in the prior art document but is intrinsic to the opposing device.

A company applied to the Intellectual Property Court to invalidate the decision of Rospatent, which cancelled the patent for the utility model 'High-strength stainless steel rod' because the latter did not meet the novelty criterion.

The decision of the court of first instance, upheld by the court of cassation, granted the company's application, imposing an obligation on Rospatent to re-examine the objection to the granting of the patent.

The court of the first instance agreed with Rospatent that the independent claim of the disputed utility model reflected alternative implementations and that part of those alternative versions were characterised by ranges of values for the elements of steel known from opposing sources.

Upon analysing the opposing sources, the court found that there was no restrictive condition that was known from the prior art documents and that represented a mathematical ratio which the quantitative values of the steel elements selected from the ranges must satisfy. Thus, the disputed model satisfies the novelty condition of patentability.

In its cassation appeal, Rospatent referred, in particular, to the fact that the court had incorrectly applied the formal approach to the novelty of the model as set forth in paragraph 2.1 (3) of the Rules for the Preparation, Filing and Examination of the Application for a Utility Model Patent, approved by Order No. 83 of the Russian Agency for Patents and Trademarks of 06 June 2003. According to this approach, a utility model protected by a patent is deemed to meet the novelty condition of patentability if no means is known in the prior state-of-the-art for the same purpose as the utility model which would possess all the essential features listed in the independent claim of the utility model, including the feature of its purpose.

Agreeing with the conclusion of the first instance judgement, the IPC Presidium noted the following:

The court of first instance went beyond the formal approach to assessing the novelty of the disputed utility model by pointing to the fact that it was possible to carry out a further investigation and determine whether the distinctive feature of the disputed utility model was formally inherent in the opposing steels.

In view of the above, the court of the first instance considered it possible to apply the methodological approach as per paragraph 1.5.4.3 of the Recommendations on Examination of Applications for Inventions and Utility Models approved by Order of the Russian Agency for Patents and Trademarks No. 43 of 31 March 2004 with regard to the examination of the novelty of inventions.

The IPC Presidium considered that this methodological approach was justified because no similar methodological approach for testing the novelty of utility models has been developed.

A known methodological approach can be applied with account for the specifics of the legal relationship in question (all the features contained in

the claims are analysed when investigating the novelty of an invention, but only the essential features are analysed when investigating the novelty of a utility model).

The court noted that the fact that Rospatent denies the possibility of applying such a methodological approach leads to the need for a formal analysis of the novelty of a utility model: if an essential feature of its claims is not known from an opposing source, the utility model must be recognised as new.

However, the application of such a methodology would lead to the recognition of the novelty of utility models in a situation where the feature in question is not formally stated in the opposing source but is inherent in the opposing device.

III. Procedural Issues

11. Parties not Involved in Administrative Proceedings Challenge Rospatent's Actions

IPC Presidium Ruling of 14 July 2022 in Case No. SIP-39/2022

Interference of third parties in the procedure for granting legal protection to a trademark may be allowed only in cases expressly provided for by law (e.g., CC RF Para 3 of Article 1493 (1)).

The absence of restrictions on third parties to interfere with the granting of legal protection to trademarks would block the granting procedure itself and the verification of the sign for compliance with the conditions of eligibility for protection.

The inability of non-participants in administrative proceedings to appeal against a particular inaction of Rospatent does not in itself violate the rights of such persons.

12. The Competence of IPC as a Court of First Instance

IPC Presidium Ruling of 23 May 2022 in Case No. SIP-989/2021

Acquisition of the exclusive right to a trademark may be either initial (on the basis of an application filed) or derivative (in particular, on the basis of an agreement on the assignment of an exclusive right).

Both options of acquiring an exclusive right can be exercised in bad faith and may be found to be so, including in judicial proceedings.

A dispute over the unfairness of a derivative acquisition of an exclusive right to a trademark is not a dispute over the granting or termination of legal protection to intellectual results and similar means of individualisation of legal entities, goods, works, services and enterprises (except for copyright and related rights subject-matter, and integrated circuit topologies) within the meaning of Article 34(4)(2) of the Code of Commercial Procedure of the Russian Federation.

Thus, such a dispute is not subject to the IPC in its capacity of a court of first instance.

13. The Competence of a Territorial Anti-Monopoly Agency

IPC Presidium Ruling of 20 May 2022 in Case No. SIP-1046/2019

If a person in respect of whom an unfair competition case has been initiated operates in several constituent entities of the Russian Federation, the case is subject to review by the Federal Antimonopoly Service (FAS) of Russia, and not by a territorial body.

The FAS may vest a territorial body with the right to consider a case of an antimonopoly violation committed in several constituent entities of the Russian Federation, but such vesting must be carried out before the end of the proceedings.

In an appeal against the decision of the Moscow Department of the Federal Antimonopoly Service, the court of first instance found that the person against whom the case was brought had operated in several constituent entities of the Russian Federation, but that a significant number of transactions had taken place in the city of Moscow. In view of the above, the first instance court agreed with the antimonopoly body's conclusion that the city of Moscow was the geographical boundary of the product market and, as a consequence, the Moscow City FAS had jurisdiction to hear the antimonopoly case.

Disagreeing with this conclusion, the IPC Presidium referred the case to the RF FAS for consideration on the merits, taking into account the following:

Pursuant to Article 39 (3) of the Federal Law of 26 July 2006 No. 135-FZ 'On Protection of Competition', an antimonopoly body may consider a case concerning the infringement of the antimonopoly legislation at the place of the infringement or at the location or place of residence of the person against whom the application or materials are filed. The FAS may examine

the case irrespective of the place where the infringement occurred or where the person in respect of whom the application or the materials are submitted is located or resides.

Para 3.12 of the Administrative Regulation of the FAS on the execution of the state function to initiate and consider cases of violation of the antimonopoly legislation of the Russian Federation (approved by FAS Order No. 339 of 25 May 2012) stipulates that an application or materials indicating violation of the antimonopoly legislation shall be submitted:

to the relevant territorial authority at the place where the infringement was committed or at the location (residence) of the person against whom the application is made;

to the FAS of Russia irrespective of the place where the infringement was committed or the location (residence) of the person in respect of whom the application or materials are submitted.

Pursuant to Para 3.13 of Administrative Regulation No. 339, the relevant territorial authorities submit an application or materials indicating that an infringement of antimonopoly law has been committed in two or more constituent entities of the Russian Federation to the FAS of Russia, which is then to decide whether to examine the application or materials, and the applicant is notified thereof.

Pursuant to Para 3.118 of Administrative Regulation No. 339, the Commission has the right to refer the case for consideration:

to another antimonopoly body if the consideration of the case is within its competence;

to FAS of Russia on its request to accept the case for its consideration;

or, in the event that during the case proceedings it is found that the antimonopoly law violation was committed in the territory of two or more territorial entities, to another antimonopoly body (in accordance with the procedure laid down in the Rules for the Transmission by the Antimonopoly Authority of Applications, Materials and Cases Concerning Violations of Antimonopoly Law to Another Antimonopoly Authority for Review, as approved by Order of the FAS No. 244 of 01 July 2007).

By virtue of para 1.4.3 of Regulation No. 244, the antimonopoly authority shall transfer applications, materials and case files if during the examination of the application and materials or in the course of the proceedings it is established that an infringement of antimonopoly law has been com-

mitted in the territory of two or more territorial authorities. In this case, the relevant territorial authorities submit the application, materials, and case to the FAS of Russia to decide whether to consider the application, materials, and case.

Thus, the regulations establish an obligation for the territorial antimonopoly authority to refer the application or case to the federal antimonopoly authority if the alleged infringement occurred in two or more constituent entities of the Russian Federation.

In the case under review, the Moscow Department of the FAS independently examined the case of an infringement of antimonopoly law involving the acquisition and use of the exclusive right to the disputed means of individualisation, despite the fact that the alleged infringement was committed in at least two constituent entities of the Russian Federation.

Consequently, the decision contested was approved by an incompetent body.

The FAS of Russia takes a similar approach. In Para 25 of its Review of the Practice of the of Anti-Monopoly Legislation Application by the Collegial Bodies of the FAS of Russia (for the period 1 July 2018 to 1 July 2019), as approved by the minutes of the Presidium of the FAS of Russia, the FAS states that 'if a territorial body lacks the authority to consider an antimonopoly law violation committed in several entities of the Russian Federation, it is a ground to cancel the rulings issued in the case.'

The IPC Presidium rejected the antimonopoly authority's argument that the letter from the deputy head of the FAS of Russia submitted during the new consideration of the case confirmed the case could examined by the territorial authority, i.e. its Moscow City Department. The Presidium explained the letter was signed after the disputed decision was issued, whereas the question of vesting the territorial body with the authority (obtaining consent from the FAS of Russia) to consider the antimonopoly case on economic activities in different constituent entities of the Russian Federation should be resolved before the relevant decisions are issued.

14. Limits for Re-examination of an Objection at Rospatent

IPC Presidium Ruling of 31 March 2022 in Case No. SIP-669/2021

Rospatent does not have right to re-examine those claims asserted in the objection, the outcome of which has not been appealed in court and therefore was valid at the time the objection was re-examined.

In re-examining the objection, Rospatent shall not be entitled to re-examine on its own initiative the uncontested result of the claims examination.

Rospatent refused to register the trademark with the verbal element "Istoki Baikala" (Origins of Baikal) on the ground that the sign does not meet the requirements of CC RF Article 1483 Para 1, 4 and 6. It then dismissed the applicant's objection, reducing the grounds for dismissal to non-compliance with the requirements of CC RF Article 1483(4).

The applicant contested the Rospatent decision. Upon consideration of case No. SIP-677/2018 in first instance, in cassation, and again in first instance, this decision was overturned, and the court ordered the administrative body to reconsider the objection submitted by the company. Rospatent, after examining the objection, removed the obstacle based on CC RF Article 1483 (4), but adopted a new decision rejecting the objection on the basis of CC RF Article 1483 (6) (2). Rospatent found similarities between the disputed sign and seven different trademarks previously registered in the names of other persons for similar goods and services.

The applicant again appealed to the Intellectual Property Court claiming that, in re-examining the objection, Rospatent had no right to refuse registration of the claimed sign based on CC RF Article 1483 (6) (2). The administrative authority withdrew this ground during the initial examination of the objection, taking into account the letters of consent submitted by the rights holders of the opposing trademarks and the shortening of the list of goods.

The decision of the court of first instance, upheld by the court of cassation, invalidated Rospatent's decision as being inconsistent with CC RF Article 1483 (6).

The IPC Presidium rejected the argument in Rospatent's cassation appeal that, since the previous court decision (No. SIP-677/2018) had found Rospatent's decision to be invalid in full, the latter was entitled to consider the objection in its entirety, including the applicant's disagreement with the examiners' position that the claimed sign does not meet the requirements of CC RF Article 1483 (6) (2).

The court reminded that the examiners initially revealed three separate grounds for refusing registration of the trademark. Each of the three grounds became the basis of a separate claim in the applicant's objection. Rospatent granted two of these claims, removing two grounds for refusal of registration (CC RF Article 1483(1) and (6)), and rejected one (CC RF Article 1483 (4)). The applicant contested Rospatent's decision in court with

respect to the remaining unsatisfied claim. The court examined Rospatent's decision in this part only and upheld the applicant's claim in its entirety.

In view of this, an objection was submitted to Rospatent in respect of the claim that had been the subject of the court examination. Rospatent was not entitled to review, on its own initiative, the outcome of those objection claims that had not been the subject of judicial review in case No. SIP-677/2018.

The IPC Presidium agreed with the finding of the first instance court that the applicant was in a position to have a legitimate expectation that the re-examination of their objection would not result in a different decision in relation to the provisions of CC RF Article 1483 (6).

The Russian Federation Constitutional Court noted repeatedly principle of maintaining citizens' confidence in law and in the actions of the state must be respected. This principle implies that reasonable stability in legal regulation must be preserved; that it shall be inadmissible to grant retroactive effect to regulations that worsen the legal position of a citizen; and that the rights and lawful interests of the subjects of continuing legal relations in the event of changes in the regulatory parameters of their implementation shall be unconditionally guaranteed (Resolutions of the Constitutional Court of May 2001 No. 8-P, of 29 January 2004 No. 2-P, of 20 April 2010 No. 9-P, of 20 July 2011 No. 20-P, and others.)

The Court noted, in particular, that the provision of CC RF Article 1483 (6) had not and could not change (see Para 27 of Resolution No. 10), and the appealing party's argument that, by the time the applicant's objection was re-examined, Resolution No. 10, Para 162 of which served as the basis for changing the administrative body's position, was not substantiated. The clarifications in Para 162 of Resolution No 10 do reveal some of the criteria applicable when analysing the similarity of comparable signs. However, they do not fundamentally alter or contradict the provisions of CC RF Article 1483 (6), that existed when the company submitted its application, or Rospatent Regulation 482 on trademark examination, and cannot constitute grounds for the administrative body to adopt a decision is fundamentally different from its earlier decision made upon the initial examination of the same objection.

15. Irregularities in the Proceedings at Rospatent

IPC Presidium Ruling of 28 March 2022 in Case No. SIP-571/2021

If the examiner has indicated an incorrect deadline for responding to a request, this does not provide a basis for concluding that the deadline has not

been missed, but should be the grounds for restoring the missed deadline. In this case, the claimant does not have to pay the fee for restoring the deadline.

An individual applied to Rospatent for a patent for invention. During the assessment of the application on the merits, the administrative body on 13 June 2019 sent the applicant another request for assessment on the merits in which it proposed to rectify the irregularities in the updated materials.

The applicant received the request on 25 June 2019.

A response to the request (the amended claims and description of the invention) was sent to Rospatent on 25 September 2019 and received by the latter on 04 October 2019.

In response, Rospatent has sent a letter to the applicant stated that, pursuant to CC RF Article 1386(6), the deadline for responding to the request have expired on 13 September 2019. The letter also advised that the deadline for submitting additional material could be restored by filing a request for an extension of the missed deadline and paying the patent fee.

In view of this, Rospatent decided to consider the application as withdrawn due to the failure to submit the documents requested by the examiners within the prescribed time limit.

The applicant requested the administrative authority to restore the missed deadline for providing the requested documents and objected to the decision declaring their application withdrawn.

The applicant based the request to restore the missed deadline on the fact that they had sent the requested documents within the time limit specified in the examiners' request (three months from the date of receipt of the request). Furthermore, the applicant pointed out that the statutory 12-month time limit set out for lodging an application to restore the time limit to respond to an examiners' request had not expired at the time the decision recognising the application withdrawn was made. In view of this, the decision to recognise the application withdrawn was unfounded.

Rejecting the objection, Rospatent upheld the decision to recognise the application as withdrawn.

The applicant applied to the IPC to challenge Rospatent's decision.

The first instance court upheld Rospatent's decision. The IPC Presidium overturned the decisions of Rospatent and the court of first instance, ordering Rospatent to reopen the assessment. The IPC noted, in particular:

CC RF Article 1386 (6) provides that, during assessment of an invention application on the merits, the Federal executive body in the field of intellectual property may request the applicant to provide additional materials (including the amended claims), without which the assessment cannot be performed or decision to grant a patent for the invention cannot be made. In this case, additional materials (without altering the substance of the application) must be submitted within three months from the date on which the request or copies of the materials opposed to the application were submitted, provided that the applicant has requested copies within two months of the date of the request from the said federal executive body. If the applicant fails to submit the requested materials within the prescribed period or to request an extension, the application shall be considered withdrawn. The deadline set for the applicant to submit the requested material may be extended by not more than ten months by the designated federal executive agency.

The first instance court found the following: the request from the examiners erroneously mentions that the response to the request must be provided within three months from the date of the receipt of the request. The response to the request was submitted to Rospatent within three months from the date of the receipt of the request by the applicant.

The first instance court concluded that the examiner's erroneous reference to the length of the deadline for responding to their request did not constitute grounds for holding that the deadline had not been exceeded, but should be grounds for restoring the missed deadline.

The rulings of the Russian Federation Supreme Court of 07 September 2016 No. 310-ES16-8163 and of 27 June 2017 No. 307-AD16-20892 contain a similar legal position in relation to the missed procedural deadlines applicable when a case is considered in court.

Pursuant to the legal position stated in Ruling No. 8-P, 24 May 2001, of the Constitutional Court, the principle of maintaining citizens' confidence in law and in the actions of the state must be respected. Thus, even if the deadline for appeal is erroneously stated in the court ruling, if the persons involved in the case could have perceived it as real and the complaint was lodged within the deadline stated in the ruling, then the deadline missed by the appellant must be restored.

The IPC Presidium pointed out the following: The Constitutional Court stressed unequivocally that in the situation under review the deadline must be restored without any doubts.

A similar approach to the issue of restoring a deadline missed due to the fault of a public authority should apply to disputable relationships. However, this approach must take into account the difference between procedural law and the procedure for examining an application by Rospatent.

One of the distinctive features of the procedure for restoration of the missed deadline for reply to the examiners' request is the need to pay an additional fee for restoration of such deadline (Para 1.16.1 of the Regulation on Patent and Other Duties, approved by the Government Resolution No. 941 of 10 December 2008).

However, the IPC Presidium recognised that the mistake made by the administrative body's examiner in the request regarding the deadline for a reply, in a situation where the reply to the request was sent within the time limit referred to by the examiner, could result for the person filing an invention application in negative consequences such as the need to pay a fee for restoring such a time limit. Rospatent should have restored the missed deadline for responding to the examiners' request proactively.

A different position in a situation where the applicant perceived the deadline to be realistic and submitted the documents within the deadline stated by the examiner undermines confidence of citizens in law and in the actions of the state at large.

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Вопросы права **В ЦИФРОВУЮ ЭПОХУ**

ЕЖЕКВАРТАЛЬНЫЙ НАУЧНО-АНАЛИТИЧЕСКИЙ ЖУРНАЛ

«Вопросы права в цифровую эпоху» — научный ежеквартальный электронный журнал, направленный на всесторонний анализ права в цифровую эпоху. Его главная цель заключается в рассмотрении вопросов, связанных с правовыми последствиями постоянно меняющихся информационных технологий.

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ЕЖЕКВАРТАЛЬНЫЙ НАУЧНО-АНАЛИТИЧЕСКИЙ ЖУРНАЛ ТОМ 4

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СТАТЬИ

Научная статья

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СТАТУС ЧЕЛОВЕЧЕСКОГО ЭМБРИОНА *IN VITRO* КАК ЭТИКО-ПРАВОВАЯ ПРОБЛЕМА: РЕЛИГИОЗНЫЕ ИСТОКИ РАЗНОГЛАСИЙ В ПОДХОДАХ

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Аннотация
Предметом исследования статьи является вопрос об онтологическом статусе человеческого эмбриона *in vitro*, от решения которого зависит определение его морального и правового статуса, имеющее исключительно важное значение для этико-правового регулирования манипуляций с эмбрионами в процессе научных исследований и в клинической практике применения вспомогательных репродуктивных технологий. Различные подходы к решению проблемы статуса эмбриона, исторически сложившиеся в разных странах и регионах мира, автор рассматривает в плоскости религиозной антропологии. Обосновывается тезис о том, что сформировавшаяся в рамках христианской культуры идея богоподобия человека, давшая мощный импульс научно-технологическому прогрессу, изначально содержала в себе глубинные мировоззренческие предпосылки, способные блокировать возможность наиболее опасных вторжений в природу человека, созданного по образу Божию. Одна из таких предпосылок заключается в представлении о том, что человеческий эмбрион с момента своего зачатия является одухотворенной личностью. Поэтому страны, культурная матрица которых не содержит подобных морально-религиозных ограничителей, в условиях глобализации научно-технологической сферы получают преимущества в глобальной конкуренции, которая в определенном смысле имеет цивилизационный характер. Это обстоятельство стало одним из факторов, способствующих наметившимся изменениям в международном этико-правовом регулировании, определяющем границы генетических исследований эмбрионального развития человека. Главный вектор изменений задан ослаблением прежних ограничений, истоки которых восходят к догматам христианского миропонимания. Причем последние новации в этой сфере демонстрируют стремление медико-биологического сообщества разделить ответственность за выработку регуляторной политики в области исследований человеческого эмбриона со специалистами других отраслей науки и с широкой общественностью.

Ключевые слова
человеческий эмбрион *in vitro*, онтологический статус, правовой статус, моральный статус, этико-правовое регулирование, генетические исследования, христианская догматика, идея богоподобия человека, технологический прогресс

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НОВАЯ КОНЦЕПЦИЯ ЗАНЯТОСТИ И РАЗВИТИЕ ТРУДОВЫХ ОТНОШЕНИЙ В ЦИФРОВУЮ ЭПОХУ

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Аннотация
В современных геополитических и экономических реалиях кардинально изменяется роль трудового права и функционал, который в нем заложен. Формируются отношения, выстраивающиеся по определенным правилам, однако правовое регулирование может при этом отсутствовать: нетипичная занятость, в том числе привлеченный труд, гиг-занятость, самозанятость, спот-занятость и др. Одновременно изменяется роль интеграционных объединений в сфере труда, транснациональных корпораций. Цифровизация трудового права выходит на качественно новый уровень. Новые методы организации делового сотрудничества и социальных коммуникаций влекут за собой появление новых форм занятости, тогда как трудовое законодательство не в полной мере отвечает реалиям развития новых разнообразных форм вовлечения граждан в активную деятельность, в том числе и трудовую. В декабре 2022 года в Государственной Думе состоялось заседание

по законопроекту «О занятости населения в Российской Федерации». В законопроекте были главы по таким отношениям, как платформенная занятость, неконвенциональная занятость и др. Однако законопроект вызвал дискуссию и подвергся переработке. Пока он не стал законом, возможны его дополнительные изменения и уточнения, что делает его тематику ещё более актуальной. Поэтому важным вектором сегодняшнего дня является необходимость обновления концепции занятости и совершенствования законодательства о занятости. Кроме того, роботизация трудовых отношений находит отражение не только в положительном использовании промышленных роботов, способных лучше выполнять однотипные повторяющиеся задачи, но и таит в себе риски. Занятости населения также угрожает возрастающее использование искусственного интеллекта. Цифровизация в сфере трудовых отношений порождает нетипичные формы использования классических институтов Например, новые возможности открываются перед институтами социального партнерства в регулировании коллективных трудовых правоотношений. В исследовании описана проблематика дистанционной работы, сущности подходов, применяемых в правовом регулировании обозначенных отношений с позиции качественных изменений в правовом регулировании в сфере электронного взаимодействия работника и работодателя в дистанционном правоотношении. Предлагаются направления исследования указанных и иных отношений в рамках вызовов трудовому праву в цифровую эпоху.

Ключевые слова
цифровая эпоха, трудовые отношения, дистанционная работа, новые виды занятости, роботизация, цифровой дистанционный профсоюз.

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ОБЪЕМ ПОНЯТИЯ «ПЕРСОНАЛЬНЫЕ ДАННЫЕ» В РОССИЙСКОЙ ФЕДЕРАЦИИ

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Аннотация
Институт персональных данных привлекает все большее внимание как государства, коммерческих организаций, так и граждан — субъектов персональных данных. При этом успешное использование предоставляемых этим институтом инструментов напрямую зависит от возможности однозначно определить объем понятия «персональные данные». В статье описаны основные проблемы, встающие в связи с отсутствием единообразного подхода, предложен кросс-юрисдикционный подход к толкованию понятия «персональные данные» и выделены четыре основных критерия относимости к персональным данным, которые могут лечь в основу процедуры оценки относимости к персональным данным. Кросс-юрисдикционный подход к толкованию понятия «персональные данные» исходит из единства источников, лежащих у истоков развития института персональных данных в ряде юрисдикций, и позволяет осуществлять рецепцию лучших практик иностранных государств при определении объёма понятия «персональные данные». В статье кросс-юрисдикционный подход применяется к европейскому законодательству и международно-правовому регулированию. Критерий информации и критерий субъекта ограничивают оценку относимости к персональным данным с предметной и субъектной точек зрения соответственно. Критерий относимости и критерий определённости позволяют постичь контекст, в котором осуществляется оценка относимости к персональным данным, с точки зрения содержания этого контекста, преследуемых в этом контексте целей и достигаемых в нем результатов. Сформулированные критерии — критерий информации, критерий относимости, критерий определённости и критерий субъекта — универсальны и позволяют установить единый объем понятия «персональные данные» на уровне государственного регулирования, применения и соблюдения положений соответствующего регулирования, а также реализации гражданами предусмотренных этим регулированием прав. Данные критерии также способствуют выработке научным сообществом единого терминологического аппарата и обеспечат сопоставимость различных исследований в области персональных данных за счёт использования сквозного подхода к объёму понятия «персональные данные».

Ключевые слова
персональные данные, приватность, неприкосновенность частной жизни, терминология, компаративный анализ, информационные технологии, информационное право.

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Научная статья

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КОМПЬЮТЕРНЫЕ ИГРЫ VS. ПРАВО: ВИРТУАЛИЗАЦИЯ И ТРАНСФОРМАЦИЯ ПОЛИТИКО-ПРАВОВЫХ ИНСТИТУТОВ

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Аннотация

В статье анализируется виртуальная реальность как предмет правового регулирования, подчеркивается сходство принципов игровой деятельности и юридической деятельности как элементов виртуальной реальности. Углубленное погружение в тему соотношения юридической и игровой деятельности позволило сформулировать тезис, что игровая деятельность выступает инструментом анализа ситуаций с целью выявления наиболее рационального действия из имеющихся альтернатив, являя собой тем самым один из методов конструирования юридической реальности. Если исходить из предположения, что человек принимает любые решения, взвешивая издержки и выгоды, стремится максимизировать «полезность» и вступает во взаимодействие с другими индивидами соизмеряя свои предпочтения и ограничения, то погружение человека в игровое пространство и наблюдение за ходом осуществления им рационального выбора позволяет создавать предсказательные и объясняющие модели, а государству организовать относительно эффективный процесс правотворчества. Кроме того, взаимовлияние игрового и юридического пространства решительно игнорируется правоприменительной практикой, что приводит к образованию правовых вакуумов. Авторы исходят из того, что тщательное и всестороннее исследование игровой деятельности как правового феномена является необходимым предварительным условием взвешенного и корректного как правотворчества, так и правоприменения. В этой связи целью настоящего исследования выступает изучение областей соприкосновения игровой и юридической реальности, оценка правовых проблем и перспектив дальнейшего формирования и последующего применения «виртуального» права. Методология исследования включает общефилософские, общенаучные (анализ, синтез, логический, системный методы), частно-научные и специально-юридические методы исследования (включая метод формально-юридического анализа). Авторы

предлагают сформулировать определение виртуального права и выделить уровни виртуального пространства. Анализируя виртуальное пространство, авторы приходят к выводу о необходимости его рассмотрения сквозь призму объекта правового регулирования в связи с тем, что виртуальность компьютерных игр порождает социально значимые и потенциально конфликтные интеракции игроков, платформ, разработчиков, которые нуждаются в юридическом опосредовании. В заключение авторы приходят к выводу о том, что поверхностное и скептическое отношение юриспруденции к индустрии компьютерных игр требует научного и законодательного преодоления. В настоящее время в правовых системах мира формируется комплекс норм права — виртуального права, интернет-права, предназначенных для упорядочения социально значимых аспектов компьютерных игр.

Ключевые слова
компьютерные игры, право, виртуальная реальность, виртуальное право, виртуальное пространство, правовое регулирование, виртуальное государство.

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Научная статья

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МОДЕЛИ ПРАВОВОГО РЕГУЛИРОВАНИЯ ОБОРОТА ЦИФРОВЫХ ПРАВ И ЦИФРОВОЙ ВАЛЮТЫ

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Аннотация

В настоящее время все страны формируют или находятся в процессе формирования норм права, которые регулировали бы оборот новых цифровых объектов прав, получивших различные названия — цифровые права, токены, цифровые активы, цифровая валюта, криптовалюта. Различие формулировок не позволяет выработать единые международные подходы к трансграничному обороту новых видов объектов прав. Страны только ищут пути регулирования отношений в цифровой экономике, и для поиска оптимальных решений необходим сравнительно-правовой метод исследования, позволяющий оценить наиболее эффективные модели. Целью исследования является анализ моделей правового регулирования оборота цифровых прав и цифровой валюты и предложение законодателю модели правового регулирования, которая бы позволила полноценно включить такие объекты прав в российский гражданский оборот. Решаются следующие задачи: выбор юрисдикций и анализ имеющихся в них норм права, регулирующих оборот цифровых прав и цифровой валюты; формулирование моделей правового регулирования их оборота исходя из законодательства, доктрины и правоприменительной практики; изучение мер и способов правового регулирования, используемых в анализируемых юрисдикциях; анализ различных точек зрения исследователей по вопросу правового регулирования отношений в цифровой экономике в России и за рубежом; предложение мер и способов правового регулирования, исходя из модели правового регулирования оборота цифровых прав и цифровой валюты. Использованы специальные методы: сравнительно-правовой, формально-юридический, метод правового моделирования для сравнения опыта различных юрисдикций и формулирования моделей правового регулирования оборота цифровых прав и цифровой валюты. Также использованы общенаучные методы синтеза, анализа, индукции, дедукции, сравнения, аналогии и пр. Исследование показывает, что подходы к регулированию оборота цифровых прав и цифровой валюты, различаются как правовыми нормами, так и институтами и условиями функционирования цифрового рынка. Различаются и модели правового регулирования. Страны используют как запретительную модель правового регулирования оборота цифровых прав и цифровой валюты (запрет их выпуска, обращения), частично запретительную (ограничения оборота цифровых прав и цифровой валюты), так и разрешительную (допущение их оборота при соблюдении условий — лицензирование, регулятивные песочницы и пр.) и дозволительную (допущение оборота цифровых прав и цифровой валюты всех участников рынка при соблюдении ими минимальных требований). При рассмотрении терминологии очевидно, что популярностью за рубежом пользуются такие термины, как криптовалюта, токены, криптоактивы, цифровые активы, в то время как в России для обозначения аналогичных правовых явлений используются понятия цифровых прав и цифровой валюты. Имеет смысл сравнивать рассматриваемые категории для возможного их использования в наднациональном регулировании, в трансграничных отношениях. Из опыта зарубежных стран следует обратить внимание на необходимость и возможность лицензирования участников цифрового рынка, а также на успешный опыт функционирования регулятивных песочниц в рассматриваемой сфере, например, в Великобритании. При этом при становлении отечественной правоприменительной практики оборота цифровых прав и цифровой валюты, в особенности с участием потребителей обратим внимание на опыт в таких юрисдикциях, как США,

Великобритания, Австралия. Также полезно воспринять опыт правового регулирования криптоиндустрии в Японии.

Ключевые слова
цифровые права; цифровая валюта; криптовалюта; токен; блокчейн; сравнительно-правовое исследование; цифровая экономика.

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КОММЕНТАРИИ

Обзор

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ОБЗОР КЛЮЧЕВЫХ ПОЗИЦИЙ ПРЕЗИДИУМА СУДА ПО ИНТЕЛЛЕКТУАЛЬНЫМ ПРАВАМ

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Аннотация
В настоящем обзоре содержатся ключевые позиции из постановлений Президиума Суда по интеллектуальным правам, принятых в период с марта по июль 2022 года. Президиум Суда по интеллектуальным правам рассматривает кассационные жалобы на решения суда первой инстанции, в частности, по делам, связанным с регистрацией объектов интеллектуальных прав

и с оспариванием их правовой охраны. Соответственно данный Обзор преимущественно посвящен вопросам охраноспособности объектов патентных прав и средств индивидуализации, а также отдельным процессуальным аспектам деятельности Роспатента и Суда по интеллектуальным правам. В новом Обзоре рассмотрены различные вопросы, связанные с товарными знаками: приобретенная различительная способность, досрочное прекращение охраны в связи с неиспользованием товарного знака, неохраняемые элементы обозначения, а также связанные с полезными моделями различные процессуальные вопросы.

Ключевые слова
судебная практика; интеллектуальные права; Роспатент; ФАС; стандарт доказывания; Парижская Конвенция; товарные знаки; полезные модели; процесс.

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Н.И. Капырина — части 1, 6, 7, 9, 10, 14.
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АВТОРАМ

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Аннотация предоставляется на русском и английском языках объемом 250–300 слов.
Аннотация к статье должна быть логичной (следовать логике описания результатов в статье), отражать основное содержание (предмет, цель, методологию, выводы исследования).

Сведения, содержащиеся в заглавии статьи, не должны повторяться в тексте аннотации. Следует избегать лишних вводных фраз (например, «автор статьи рассматривает…»).

Исторические справки, если они не составляют основное содержание документа, описание ранее опубликованных работ и общеизвестные положения, в аннотации не приводятся.

Ключевые слова
Ключевые слова приводятся на русском и английском языках. Необходимое количество ключевых слов (словосочетаний) — 6–10. Ключевые слова или словосочетания отделяются друг от друга точкой с запятой.

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