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Legal Issues in the **DIGITAL AGE**

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ISSUED QUARTERLY

"Legal Issues in the Digital Age" Journal is an academic quarterly e-publication which provides a comprehensive analysis of law in the digital world. The Journal is international in scope, and its primary objective is to address the legal issues of the continually evolving nature of digital technological advances and the necessarily immediate responses to such developments.

The Digital Age represents an era of Information Technology and Information Communication Technology which is creating a reliable infrastructure to the society, taking the nations towards higher level through, efficient production and communication using digital data. But the digital world exposes loopholes in the current law and calls for legal solutions.

"Legal Issues in the Digital Age" Journal is dedicated to providing a platform for the development of novel and analytical thinking among, academics and legal practitioners. The Journal encourages the discussions on the topics of interdisciplinary nature, and it includes the intersection of law, technology, industry and policies involved in the field around the world.

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Articles

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Regulatory Models in E-Sports

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Abstract

The paper provides an analysis of regulatory models in e-sports with the purpose of identifying regulatory gaps and ways to address them. The methodology of the study embraces the general philosophical method (analysis, synthesis, logical and systemic methods) and specifically legal methods (including formal legal analysis). The study comprises two stages: firstly, examination of regulatory gaps in e-sports from the doctrinal perspective; secondly, case studies arising in the course of and/or in connection with e-sporting events and causing enforcement problems. The authors identify the following doctrinal gaps: nature of relationship between the concepts of computer sports and e-sports, and other related concepts involved in virtual reality contests; delimitation of the public and private spheres in the legal regulation of e-sport; feasibility of e-sports law as a complex branch of sports and digital law; two regulatory approaches/models: self-regulation of e-sports by approving gaming rules, gaming codes of conduct etc. versus external regulation, with the existing legal institutions and legal provisions applicable to disputes at the nexus of virtual and actual reality; rules and methods of applying real law to virtual reality; limits of applying sports provisions and rules to relations in e-sports.The authors identify the following enforcement gaps: legal status of e-athletes from the perspective of labour and civil law; taxation of the income gained in the course of or in connection with an e-sporting event; legal status of computer games as an object of civil law; legal regulation of game streaming; legal status of book-makers in the e-sports market. Based on the findings, the authors conclude the explosive growth of the computer game market argues in favor of detailed regulation of legal relations in e-sports.

Keywords

e-sports; computer sports; computer games; e-athlete; e-sports relations; legal regulation.

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Background

An explosive growth of digital technologies has resulted in the expansion of gaming industry taking a major share of the world market [Galkin D.V., 2007: 58].

While e-sports date back to the first online contests in the United States in the early 1970s, the generally acknowledged birth date is 26.06.1997 when the Cyberathlete Professional League was established [Sutyrina E.V., 2017: 24–31].

Even with the League already in existence, it has been a long time before e-sports were officially recognized. Remarkably, this recognition happened for the first time in Russia in 2001, probably because this country has traditionally been among the leaders both in terms of the market volume and computer sports audience [Novikov I.V., 2020: 426–438].

However, e-sports were de-listed in 2006 as having failed to comply with the requirements to the All-Russia Sports Register, only to be re-listed 10 years later and officially recognized again. Thus, the listing procedure for e-sports started off in Russia already in 2001 and ended with the Ministry of Sports Order of 2017 "On Recognizing and Listing Computer Sports in the All-Russia Register".[1]

Similar trends to officially recognize computer sports are observed in other countries such as the United States, Malaysia, China, South Korea.

[1] Ministry of Sports Order No. 183 of 16.03.2017 "On Recognizing and Listing E-Sports in the All-Russia Sports Register and Amending. All-Russia Sports Register"// Available at: http://www.pravo.gov.ru (accessed: 25.08.2023)

And the countries where e-sports have yet to be recognized by law (for example, CIS countries) are actively promoting e-sports associations. Thus, computer games have evolved from teenager pastime to an officially recognized sport over a relatively short period. Despite a short history, e-sports develop at an explosive rate and are likely to be recognized among the Olympic sports.

Meanwhile, despite of legal efforts in this area, regulatory framework applicable to the relationships in cyberspace is a laggard. The paper proposes an analysis of the major regulatory gaps in e-sports and the prospects to overcome them.

1. Doctrinal Regulatory Gaps in E-sports Relations

1.1. The Delimitation Aspect of Related Definitions

The terminological ambiguity is a key regulatory gap in e-sports because it hampers adequate enforcement.

Firstly, the terminological problem is rooted in different understanding of the terms computer game and e-sports from the perspective of technological and legal categories.

The content of the terms computer game and e-sports has been evolving as computer games become different, more complicated and improved in terms of their engine, interface and technology. While the same term describes computer games of 1990s and 2010s, the level of technological sophistication achieved in 20 years offers no point for comparison.

Thus, at the early stage of computer gaming, e-sports were understood as a sphere where people would develop their mental or physical abilities through the use of ITC technologies.

More modern definitions proposed by M.V. Demchenko and A.D. Shvedova treat computer sports as a contest between individuals or groups using computer simulation of a given virtual reality [Demchenko M.V., Shvedova A.D., 2019: 88–93] while J. Hamari and M. Sjoblom define them as sports where the main aspects are mediated by electronic systems, with the player/team input data just as e-sports output data mediated by a man–machine interface [Hamari J., Sjoblom M., 2017: 112].

Thus, today's e-sports are a combination of virtual reality with competition [Arkhipov V.V., 2018] marked by the following integral features:

competition; virtual reality; equal opportunities for the competing parties; non-randomized outcome [Tarasenko V.A., 2018: 148].

Secondly, the researchers of computer game problems disagree on how the connected concepts relate to each other and whether the concepts of cyber sports, e-sports, computer sports are synonymous.

Under the Statute of the Computer Sports Federation of Russia approved by the Federation's Constitutive Congress on 24.03.2000 (hereinafter — Statute), computer sports are a kind of contest and special training practices based on computer and/or video games, with the game providing the interaction medium for the objects under control by ensuring a level field for competition between individuals or teams.[2]

Moreover, the related terms such as cyber sports, computer sports, e-sports, electronic sports are deemed identical to avoid legal uncertainty.

A similar legal approach is found in the Computer Sports Rules approved by Ministry of Sports Order No. 22 of 22.01.2020.[3]

Meanwhile, it is just computer sports that have been listed in the All-Russia Sports Register pursuant to Ministry of Sports Order No. 470 of 29.04. 2016 On Recognizing and Listing Sports in the All-Russia Sports Register and Amending the All-Russia Sports Register and Ministry of Sports Order No. 606 of 17.06.2010 On Recognizing and Listing Sports in the All-Russia Sports Register.[4]

From the formal legal perspective, e-sports have also been recognized since it is underlined in the Computer Sports Rules that computer sports and e-sports are synonymous.

Meanwhile, the concepts of computer sports and *e-sports* have a different doctrinal interpretation.

The former is understood as the sports pursued through the use of computers [Goncharenko D.I., Brovkin A.P., 2022: 84–91].

A.V. Gapanovich and I.V. Gapanovich underline that the meaning of cyber sports is carried by the prefix cyber which means in Greek "the art of control" [Gapanovich A.V., Gapanovich I.V., 2023: 28–33].

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[2] Statute of the All-Russia Civil Society Organization "Computer Sports Federation of Russia" //Available at: https://resf.ru/about/resf/ (accessed: 25.08.2023)

[3] Ministry of Sports Order No. 22 of 22.01.2020 "On Approving the Rules for Computer Sports" // https://www.consultant.ru/document/cons_doc_LAW_345045/ (accessed: 25.08.2023)

[4] Available at: http://www.pravo.gov.ru (accessed: 25.08.2023)

Norbert Wiener was the first to apply the term with the prefix *cyber* to data technologies to designate self-regulated mechanisms [Wiener N., 1983].

Thus, what makes computer sports principally different from other sports is the use of computer as indispensable for the pursuit of this kind of activity.

However, the virtual world is more important for holding multi-user online games than any device whatsoever [Sutyrina E.V., 2019: 13], with mobile devices and game consoles as much usable in e-sports as computers [Alekseev S.V. et al., 2020: 5–10]. Thus, the concept of e-sports has a wider meaning than that of computer sports.

1.2. Associating E-sports with a Particular Branch of Law

A.V. and I.V. Gapanovich note that the Computer Sports Rules assume public regulation aimed at adjusting computer sports to traditional sports by identifying the procedure for sporting events. In other words, the Rules do not regulate e-sports from the perspective of civil law elements.

Hence, the concept of computer sports only fits into the category of public law aimed at identifying its the legal status from the perspective of athletic and sports law. The concept of e-sports covers that of computer sports, as was defined in the previous paragraph.

Moreover, as a social and legal phenomenon, e-sports are placed at the nexus of public and private law.

Thus, legal relations in e-sports embrace the following groups of relations:

covered by the concept of computer sports and regulated by sports law and the Computer Sports Rules;

labour and/or civil law relations between players and e-sports entities;

civil law relations applicable to the protection of computer game authors and copyright (intellectual property) holders; contractual and delictual relations arising from e-sporting events being held.

Thus, regulation of e-sports combines private and public law. Meanwhile, computer sports understood by the regulator as a kind of sports covered by athletic and sports law are subject to public law regulation. Other legal relationships arising before, in the course of or in connection with e-sports events are subject to private law regulation.

Currently only computer law, that is, the public domain of e-sports law, has been regulated albeit in a fragmented way with the private domain still outside any specific legal regulation.

Meanwhile, legal prerequisites for the development of special (sectoral and comprehensive) regulation of e-sports relations are apparently absent today.

Firstly, it is yet unclear whether it is objectively possible to regulate social relationships of this kind. Whereas the code of conduct is universally applicable in traditional sports, the e-sports rules are defined in each case by the machinery of each particular game. Hence e-sporting events are often regulated on the principles established by computer game copyright holders themselves.

Secondly, the complexity of developing comprehensive legal regulation is due to the still unresolved issue of subordination and jurisdiction of disputes in e-sports. E-sporting events are rarely confined to one country but bring together the residents of different countries. Therefore, a dispute in e-sports is almost invariably complicated by the involvement of foreign residents, only to make supranational regulation more feasible than the development of domestic rules.

Thirdly, it is not the gaming process itself but some para-gaming relations arising before or in the course of a tournament that are relevant. Moreover, labor and private law disputes arising in the course of organizing and holding e-sporting events are governed by the existing provisions envisaged by the relevant branches of law.

Meanwhile, the complicated range of relationships in e-sports cannot always be coherently regulated, with certain regulatory problems to be conceptualized by the doctrine and resolved through legislation and/or enforcement.

1.3. Regulatory Approaches to E-sports Relations

The regulatory approaches to e-sports relations adopted in literature could be conventionally described in terms of two models:

self-regulation of gaming world based on the principles of non-interference with the gaming and para-gaming relations;

national and/or supranational regulation of relations involved in e-sporting events.

The feasibility of such delimitation is obvious and beyond doubt. However, the legal problem is to determine what are the limits of interference with gaming relations and whether real law can possibly apply to virtual legal relations.

The feasibility of applying "real law" to computer games was analyzed by V.V. Arkhipov, prominent author of research papers on the Internet law, who noted that, once we apply real law to the virtual environment of computer games, it can cause an intuitive sensation of strangeness and abnormality despite formal compliance [Arkhipov V.V., 2018: 80–92]. Law should not cross the line of common sense [Fuller L., 2009: 313].

Meanwhile, the circumstances sometimes force judiciary bodies to apply the provisions of real law to virtual relationships.

In this regard, one approach to address the problem is the magic circle test that serves to find out whether the user was aware of real implications of his virtual actions [Castronova E., 2004: 185–210].

Thus, where virtual actions deliberately assume real implications, real law should be deemed fully applicable. One example is an exchange of valuables in a computer game mediated by "real" money while beyond the scope of statutory regulation [Arkhipov V.V., 2014: 105–117].

Meanwhile, the proposed rules fail to provide perfect regulation.

Thus, many legal issues arising in the course of gaming tournaments are not coherently addressed, for instance, whether a player can be made delictually liable for violating the implicit code of virtual conduct if his actions inflicted losses on the respective computer sports organization. In this case it is barely possible to substantiate a causal link between virtual non-physical actions and real physical consequences.

Another legal controversy arises where experienced players help their less experienced counterparts to increase their rating by accessing the game from their accounts. This method of bumping up one's rating appears to be unfair, with the player's account to be blocked.

However, that legal sanction, albeit legitimate, is not admissible.

On the one hand, these actions could be qualified as remunerable services. Under V. Arkhipov's rule, both players are in this case outside the gaming world and thus subject to the real world's law, so blocking of the account will constitute an illegitimate restriction of the player's rights [Arkhipov V.V., 2018: 92].

On the other hand, player ratings provide guidance for gaming firms. In this regard, if a company's decision to contract a player was based on such rating, the *magic circle* is broken, and such contract can be regarded as made on the basis of material misrepresentation and hence void.

Therefore, we can formulate the first regulatory rule for e-sports — assessing whether the real world's law is applicable to virtual relationships depending on the impact of virtual action on real implications.

1.4. The Applicability of Sports Law to E-sports Relations

Federal Law of 04.12.2007 No. 329-FZ On Fitness and Sports makes no mention of computer sports and/or e-sports. However, listing computer sports in the All-Russia Sports Register assumes that this Federal Law equally applies to computer sports. In particular, the general, economic and social foundations and principles of organizing sporting activities apply to computer sports.

Thus, it is vital to stress the importance for e-sports of the combination of public regulation of the underlying relations with self-regulation by sports subjects.

This principle established by Federal Law No. 329-FZ[5] appears to be especially crucial for building the legal model of non-interference with the gaming and para-gaming relationships.

Another aspect of sports law's applicability to relationships in e-sports is the approval of the federal athletic performance standard in computer sports[6], and of the sample extracurricular training programme in computer sports[7], both in force since 01.01.2023.

These regulatory decisions apparently pave the way for the introduction of mandatory programmes in academic institutions and for mainstreaming of specific higher education programmes.

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[5] Available at: https://www.consultant.ru/document/cons_doc_LAW_73038/ (accessed: 25.08.2023)

[6] Ministry of Sports Order No. 900 of 02.11.2022 On Approving the Federal Athletic Performance Standard for Computer Sports // Available at: https://www.consultant.ru/document/cons_doc_LAW_433183/ (accessed: 25.08.2023)

[7] Ministry of Sports Order No.1116 of 30.11. 2022 On Approving the Sample Extracurricular Training Programme for Computer Sports // Available at: https://www.consultant.ru/document/cons_doc_LAW_435078/ (accessed: 25.08.2023)

The federal athletic performance standard in computer sports evidently takes into account specific details applicable only to e-sports. For example, it approves the list of equipment and gear required to undergo e-sports training.

Particularly, such gear covers a personal computer with input/output device, video game installed and Internet access provided, a monitor, TV set, full-fledged keyboard, gaming console with a set of peripherals, wired headset with full-sized headphones and regulated microphone, operating system matching the video game specifications, armchair, table, etc.

Moreover, universal parameters and characteristics are established for each item of the gear.

Meanwhile, a comparison of the said federal athletic performance standard and the extracurricular training programme in computer sports with those in other sports suggests that the programmes for computer sports and traditional sports are identical in terms of structure and content.

The said standard, like other federal standards of this kind, contains identical requirements to the content of training programmes, their implementation subjects and participants, as well as to the outcomes of implementation, list of performance points etc.

On the one hand, the identity of training programmes and federal standards for sports in general and computer sports in particular is a mark of self-sufficiency of computer sports that equates them with traditional sports. Another positive thing, that is adoption of the regulations mentioned provide broader opportunities to establish departments (branches) for implementing extracurricular training programmes in computer sports under federal standards.

On the other hand, the standard structure of the instruments approved by the Ministry of Sports assumes that general physical and specific performance points are identical for athletes in both traditional and e-sports.

While computer sports appear to be an inclusive activity, a study of the text of the federal standard gives rise to a concern that its requirements could result in unequal access to e-sports of persons with unequal physical abilities in spite of the fact that they are not decisive in e-tournaments.

Another problem of legalizing e-sports and attempting to bring them under a common umbrella — federal standard is a lack of technical facilities to provide training in e-sports under the rules envisaged by the standard.

The federal standard is thus fully implementable only at large clubs capable of providing athletes with the required gear, premises, etc.

Meanwhile, e-sports are represented in Russia today by numerous but small computer clubs which by and large fail to comply with the said standard.

We believe that in view of e-sports specifics the federal athletic performance standard for computer sports should be more flexible.

Ministry of Sports Order No. 900 of 02.11.2022 On Approving the Federal Athletic Performance Standard for Computer Sports also provides for the following requirements to students' participation in tournaments:

students' compliance with the rules of procedure in terms of age, sex and qualifying standards;

medical opinion on admission to tournaments;

compliance with anti-doping rules;[8]

The issue of compliance with anti-doping rules is apparently ambiguous.

Thus, the use of doping agents to increase the physical abilities of athletes in sports is prohibited. Unlike traditional sports, the doping agents in e-sports could include brain stimulants (such as adderall widely used by players).

Meanwhile, the doping control in e-sports is problematic because the player is an *avatar* rather than man in the physiological sense. A lack of direct contact will undoubtedly make it more difficult to prove the effect of drugs on the outcome of computer game. Moreover, for lack of specific programmes the doping control in e-sports is guided by practices adopted elsewhere. This visibly wrong approach opens up huge opportunities for evasion.

Apart from classical doping practices involving drugs to artificially improve the player's abilities and thus bolster up his performance, it is currently relevant to regulate the so-called technical doping.

The technical doping is to be understood as the use of software to artificially gain an advantage in competition.

It is worth noting that the legal fight against classical and technical doping practices in e-sports should be preceded by extensive efforts by phar-

[8] Ministry of Sports Order No. 900 of 2.11.2022 On Approving the Federal Athletic Performance Standard for Computer Sports …

macologists to make a list of drugs capable of affecting the cyber-athlete's performance as well as by IT experts to identify and block any software capable of affecting the outcome of tournaments.

These efforts are yet to be made in the respective fields.

While sports standards and rules generally apply to legal relationships in e-sports, it is nevertheless crucial to account for the specific features of e-sports to amend accordingly the regulations that govern the procedure and organization of sporting activities in computer sports.

2. Enforcement Gaps in Regulating E-sports Relations

2.1. The Issue of the Cyber-Athlete's Legal Status

The cyber-athlete's distinctive features arise in the first place from the need to seek the copyright holder's consent for admission to a gaming tournament, and, secondly, from avatar-mediated participation. Thus, sponsors often value the avatar as a virtual *alter ego* rather than the cyber-athlete himself as a real person.The cyber-athlete's status is thus of dual nature.

Moreover, the cyber-athlete as a virtual personality (avatar) operates in the virtual reality generally immune from any national and/or supranational regulatory interference until real consequences occur. However, the cyber-athlete's actions as a real person are subject to national and/or supranational legal regulation.

The player's legal status depends on the nature of relationships between the cyber-athlete and the e-sports organization which may be subject to labour or civil law.

The study of literature reveals a number of options to formalize the relations between the athletes and their organizations: contract for the purchase of services, surety contract, agency contract [Sutyrina E.V., 2019: 18–23], registration of the athlete as a private entrepreneur [Ivanov V.D., 2020: 59–63].

Contracts for the purchase of services and employment contracts provide the most widespread forms used in e-sports between organizations and athletes.

Apart from contractual duties under a contract for the purchase of services or functions to be performed at their e-sports clubs, athletes will often assume public relations functions (participation in native advertising and

promotional events as well as in meetings with fans, sponsors etc.). In such cases, athletes are contracted under an agency contract whereby they undertake to perform certain legally binding actions on behalf of the e-sports club. The contract for the purchase of services appears to be the most rewarding for e-sports organizations and thus the most widespread.

This contract allows to e-sports organizations to maximize the advantages of irregular and time-bound activities of cyber-athletes and to evade the provisions and requirements of the labour law.

Moreover, cyber-athletes, once under a civil law contract, lose a number of social guarantees (paid leave including in the event of temporary disability, right to rest, employment record-keeping, etc.).

In addition, while the worker can terminate his employment contracts at any time, the contractor has to perform his obligations under a contract for the purchase of services until losses to the customer are fully reimbursed.

In 2016 a cyber-athlete was convicted in Russia for the first time for having violated the provisions of contract with Arcade eSports. The contract required the player to stay with the organization for three months — a period during which the player started to negotiate with other e-sports organizations. As a result, the player was required by the court to pay approximately 115,000 rubles in compensation[9]. This outcome could have been avoided in the event of employment contract entered with the e-sports organization.

In addition, under Article 15 of the Labour Code, civil law contracts cannot be used to regulate employment relationships between workers and employers.[10]

This is why the actual relations between athletes and e-sports organizations, in spite of civil law contracts, can be qualified as those of employment and entail the underlying rights and obligations.

2.2. Taxation of the Cyber-Athlete's Income

The legal form of relationships with cyber-athletes directly affects the tax rate applicable to income from wins and prizes awarded by e-tournament organizers.

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[9] Cyber-athlete convicted in Russia for the first time for violating contractual terms // Available at: https://www.dota2.net/ (accessed: 25.08.2023)

[10] Available at: URL: https://www.consultant.ru/document/cons_doc_LAW_34683/823fdde09a529d3735916aa9fc1fe8d29ee04afb/ (accessed: 25.08.2023)

In a letter of 10.06.2021 on taxes payable from cyber-athlete income[11], the Ministry of Finance explains that the awarded win is an income subject to personal income tax. Moreover, travel, accommodation and subsistence costs paid by the e-sports organization are also considered as income received in kind. The duty to collect and transfer the personal income tax (hereinafter — PIT) should be assumed by a tax agent (in this case either the e-tournament organizer or the cyber-athlete).

Importantly, the PIT rate applicable to wins gained at e-tournaments depends on the status of the sporting event in question.

While the PIT rate of 13 percent will apply to income under 5 million rubles gained from e-tournaments over the taxable period (year), it will rise to 15 percent if the amount of income gained from e-tournaments over the taxable period (year) exceeds 5 million rubles. Meanwhile, wins and prizes in excess of 4,000 rubles a year gained at e-tournaments organized for promotion of goods or services are taxable at the rate of 35 percent. Income under 4,000 rubles gained at such events is exempt from tax.[12]

The Russian regulatory approach to taxation of e-athletes' income obviously fails to account for the fact that e-tournaments tend to be held outside Russia, only to expose cyber-athletes to double taxation.

For example, a cyber-athlete winning USD 1,000 in an e-tournament held in the United States will pay income tax in the United States at the rate of about 30 percent and another 13 percent under the Russian law, only to lose almost one half of the gained income through double taxation.

If we count the fees charged by e-sports organizations at the rate between 10 and 30 percent, the cyber-athlete will end up with less than one half of USD 1,000 he won.

Thus, since e-sporting activities extend beyond national borders, it is crucial to envisage a mechanism to avoid double taxation of cyber-athletes' income gained at e-tournaments.

2.3. Legal Status of Computer Games under Civil Law

Under Article 128 of the Civil Code of Russian Federation things at law include physical assets and other property such as ownership rights; out-

[11] Available at: URL: https://www.garant.ru/products/ipo/prime/doc/402515998/ (accessed: 25.08.2023)

[12] Tax Code of Russia // Available at: URL: https://www.consultant.ru/document/cons_doc_LAW_28165/9b06776ae7a39546ad4e3ba04bebef14baabf8d2/ (accessed: 25.08.2023)

comes of work and services; protected intellectual assets and equivalent elements of visual identity; intangible assets.[13]

Computer games are treated as intellectual assets.

Under Article 1225 of the Civil Code intellectual assets include: works of science, literature and art; computer programmes (software); databases; recorded performances; phonograms; over-the-air or cable broadcasting; inventions; utility models; pre-production prototypes; selection inventions; integrated circuit layouts; industrial secrets (knowhow); brand names; trademarks/service marks; geographic names; designations of origin; business designations[14].

Meanwhile, this list of intellectual assets does not include anything fully comparable with a computer game.

Some authors count computer games into computer software [Grishaev S.P., 2004].

The Russian judicial practice will also sometimes qualify computer games as computer software, one example being the ruling of the Moscow City Arbitration Court on case No. A40-5470/2011.[15]

Meanwhile, a computer game apparently embraces several types of protected intellectual assets including graphics, texts, video, photo, animation, background audiovisuals, screenplay logic, original idea and characters, computer software etc.

The Russian civil law will treat such objects as "complex assets" along with motion pictures, audiovisual works, theatrical performances, multimedia products and databases.

It is feasible to add computer games to this list. However, before a provision explicitly regulating computer games as intellectual assets is made part of the civil law, it is apparently possible to categorize them as a kind of multimedia products; from Latin *multum* (many) and *medium* (center, focus).

The feasibility of this approach — equating computer games with complex assets, in particular, multimedia products — is underlined in doctrine [Kalugina E.N., 2013: 18–23].

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[13] Civil Code of Russia // Available at: URL: https://www.consultant.ru/document/cons_doc_LAW_5142/f7871578ce9b026c450f64790704bd48c7d94bcb/ (accessed: 25.08.2023)

[14] Available at: URL: https://www.consultant.ru/document/cons_doc_LAW_64629/2a4870fda21fdffc70bade7ef80135143050f0b1/ (accessed: 25.08.2023)

[15] Moscow City Arbitration Court Ruling No. A40-5470/11 of 14.11.2011 // SPS Consultant Plus.

Thus, we believe that the civil law provisions on the legal status of complex assets (multimedia products) should apply in the event of disputes on violation of intellectual property rights to computer games.

Meanwhile, the specific features of computer games give rise to concomitant copyright protection problems. Being a complex asset, the computer game often requires a creative group to come together including programmers, artists, scriptwriters, etc. And copyright under the Russian civil law does not cover ideas and concepts, only to bring forth the problem of clones whose authors will borrow the game's idea by changing only the external design.

Thus, despite that civil law contains the provisions applicable to computer games on the basis of analogy, some legal problems arising from the computer game design specifics need to be addressed by amending and/or adding specific regulatory controls.

2.4. Regulation of Game Streaming and Bookmaker Activities

Game streaming is online broadcasting of a video game by a player/streamer or organizer of an e-tournament. Streamers will gain income in a number of ways: through native advertising, paid subscriptions to the streamer's account, donations.

The legal nature of donations poses the worst regulatory problem.

On the one hand, donations are monetary transfers not conditioned by a cash consideration, that is, given away to the streamer. On the other hand, donations will sometimes serve as a way to hide what is gained from professional streaming activities.

Thus, as explained by the tax service[16], donations will be counted into the streamer's taxable income where streaming is pursued professionally as a business activity and/or where donations are exchanged for a cash consideration. So, today streaming can be a kind of professional business activity.

Meanwhile, the question is about the legal status of streaming as intellectual asset.

As was defined above, the computer game as such is a multimedia product. Therefore, a recording of the computer game (e-tournament) will be

[16] Federal Tax Service Department for Moscow Region Letter No. 16-12/021313 of 21.02.2018 // SPS Consultant Plus.

subject to associated rights in the form of public performance of a work of art. Importantly, despite a similarity between streaming and over-the-air or cable broadcasting, these information transmission techniques are not identical from the legal standpoint.

Under Article 1329 of the Civil Code, any activity related to over-the-air or cable broadcasting is reserved to specific entities to be registered exclusively as a legal person.

Streaming is thus the outcome of performing activities. However, streaming of e-tournaments is largely a self-regulated sector at the moment, with the solution of legal issues related to the use, reproduction and publication of e-sports streams depending on licensing agreements entered with computer game copyright holders.

As a general rule, streaming is effected only with the copyright holder's consent. Moreover, under Article 1270 of the Civil Code, any adaptation of video broadcasting including translation should be consented by the author.

In fact, streamers' ideas to duplicate the original broadcasting live on their channels including to provide Russian translation of an e-tournament or comment the gaming process have a legal dimension.

Moreover, according to provisions of Article 1274 of the Civil Code, no quotation, parody or other free use of an intellectual asset envisaged by law is possible unless consented by the author.

While streamers are not required to seek the consent of copyright holders to broadcast video reviews or parodies of e-tournaments as well as reviews of player actions for educational purposes, they are obliged to specify the copyright holder's name. However, it makes a video review or parody different from an adaptation may not be quite obvious. Moreover, there is no explicit legal prohibition for spectators to broadcast e-tournaments via social media. Since the audience of many social media services is comparable to that of the channels authorized by the copyright holder to officially broadcast online, such social media broadcasting poses a serious risk of copyright violation.

Thus, there is a need to approve a regulation defining both the legal status of streaming and the limits of streaming activities to avoid major ownership risks for computer game authors and other copyright holders.

Streaming activities are inseparable from those of bookmaker's offices.

Bookmaking business is subject to provisions of Federal Law No. 244-FZ 29.12.2006 On State Regulation of Gambling and on Amending Specific Regulations of the Russian Federation.[17] Bookmaker's offices can accept bets on sporting events qualified as official competitions.

Since e-sports are officially recognized, bookmaker's offices will accept bets on e-tournaments as well.

Meanwhile, the Computer Sports Rules list the following sports in Russia:

Combat arena; Competitive puzzles; Sports simulator; Real-time strategy; Tactical 3D combat; Technological simulator; Fighting.

While the list is exhaustive from a formal legal standpoint, it fails to cover the whole range of e-sports. Thus, the shooter, a popular e-tournament, is not listed among the officially recognized e-sports.

A limited list of sports for bookmaker's offices to legally accept bets brings down both the profit potential of the betting industry and the e-sports market value.

On the other hand, the development of bookmaking business has a negative side. Thus, cases of game-fixing are often reported at e-tournaments in relation with betting frauds.[18] Therefore, administrative barriers are appropriate from this perspective. Meanwhile, the ambivalence of bookmaking business in full progress at the e-sports market is fraught with risks for bona fide bookmakers.

Conclusion

E-sports are a competition between computer game players. With computer games upscaled into a major industry of the world market, e-sports gained official recognition.

With regard to doctrinal questions, the authors stress unclear correlation between concepts of computer sports and e-sports, as well as other connected concepts related to virtual reality sporting activities. A terminological analysis suggests that in spite of the legal identity between the terms e-sports

[17] Available at: URL: https://www.consultant.ru/document/cons_doc_LAW_64924/ (accessed: 25.08.2023)

[18] Cyber Legacy Team for CS accused in 322, one month after Dota 2 roster's reported involvement in the same scandal // Available at: URL: https://escorenews.com/ru/csgo/news/12846-sostav-cyber-legacy-po-cs-go-obvinili-v-322-mesyatsem-ranee-roster-organizatsii-po-dota-2-okazalsya-zameshan-v-takom-je-skandale (accessed: 25.08.2023)

and computer sports, they carry a different meaning. The term *e-sports* has a wider meaning that includes but is not limited to that of *computer sports*.

For this reason, it is proposed to delimit the said definitions by designating a regulatory field for each of them: while computer sports are subject to public law, other e-sports relations are governed by private law involving some self-regulatory practices. In delimiting the applicable regulatory models as self-regulation and public interference with e-sports relations, the authors assess the feasibility and the extent of applying sports law to the relationships in e-sports.

With regard to prospects of developing specific (comprehensive sectoral) regulation of e-sports relations, we conclude such innovations are premature now and fraught with objective difficulties.

As for enforcement, the authors analyze the cyber-athlete's legal status and related tax obligations, as well as define the place of computer games as a multimedia product among things subject to civil law.

Because of it, relationships in e-sports need more detailed regulation to avoid the aforementioned problems.

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Digital Services Tax: Comparative Analysis of Individual OECD Countries and Potential Risks of Introducing a Digital Tax in Russia

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Abstract

The need to ensure compliance with the fiscal interests of the state requires the transformation of essential approaches to the regulatory regulation of tax relations in the context of the regulation of the tax base taxed in Russia. At the same time, the problems that arise when taxing the activities of digital companies abroad are relevant for Russia. The relevance of the study is due to the fact that digitalization has allowed companies to access a large number of customers around the world without a physical presence in the countries where these customers are located. Thus, there is a discrepancy between the level of physical and economic presence in the market country. Currently, international tax coordination can no longer be identified only with traditional double tax treaties. In the absence of consensus, many jurisdictions have begun to formulate unilateral rules for taxation of the digital economy. Inconsistency of these rules is likely to increase the tax burden of a number of multinational corporations, given that each state seeks to protect its interests. The author discusses national digital taxes introduced in OECD countries. It is proposed to divide these taxes into three groups: income taxes, consumption taxes (VAT for electronic services) and hybrid taxes. Based on a comparative legal analysis of the legislation of the states in which digital taxes have been introduced, possible scenarios for tax regulation in Russia been developed. It is concluded that the introduction of a digital tax in Russia is not appropriate. In addition, in the context of the introduction of various benefits for IT companies increasing the tax burden in the field through the introduction of a new tax does not seem logical.

Keywords

tax law; international taxation; digital economy; digital business models; global profit; digital services tax; VAT for electronic services.

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Introduction

Multinational groups of companies make profits by providing digital services around the world. According to the existing tax agreements, such companies are not obliged to pay the corporate income tax in a given country unless they have declared a physical presence there.

World's largest digital services providers, mainly US corporations like Google, Apple, Amazon, establish their headquarters in low-tax jurisdictions, thus avoiding taxes in the consumer countries and in the countries of origin. It has raised concerns of governments and international organisations due to the clear trends of tax base erosion and profit withdrawal in today's digital world.

The Organisation for Economic Co-operation and Development (OECD), the United Nations Organisation and the European Union have identified the main fiscal challenges of the digital economy. However, the digital tax rules have not been assessed for risks to the tax system and the economy as a whole either at the OECD level or at the level of individual countries. The lack of such an assessment makes further research essential. Moreover, in the absence of international consensus, countries begin to introduce unilateral digital taxes, and most of these countries are members of the OECD.

Issues pertaining to digital company taxation are highly topical in Russia, too. Oftentimes, the federal budget cannot tax the profits of foreign digital corporations from their operations in the Russian market despite the fact that it is Russian users who generate such profits because their data is used in the value chain. The reason for this inability is simple: those companies often are not physically present in Russia. Currently, the Russian tax law does not have any tools for effective taxation of foreign digital com-

panies are only virtually present in this country. Moreover, Russian companies are at a disadvantage as compared to foreign companies because they face a higher tax burden due to the need to pay personal income tax and insurance contributions. All of this raises questions regarding the need for new rules on the taxation of digital companies. Russia is both a digital services consumer and provider owing to the numerous Russian IT companies that are quite competitive at the international level.

The article considers national digital taxes introduced in individual OECD countries and suggests dividing them into three groups: income taxes, consumption taxes (VAT for e-services), and hybrid taxes. The article proposes to look at the experience of France as a digital tax pioneer, Israel as a country with interesting and rather unconventional ways of taxation, and Turkey as a country with a wide range of taxes on digital companies, both direct and indirect. All these countries are OECD members.

The first country to introduce a tax on digital services was France in 2019. Several another countries soon followed suit. To date, more than 20 countries in Europe, Asia, Oceania, and Africa have introduced taxes on digital services. The main reasoning offered by these countries is current international tax rules cannot be applied to an out of date model of the economy.

However, since most of the IT behemoths are US corporations, the US government has branded the digital services tax as discriminatory and proposed sanctions against Austria, India, Italy, Spain, Turkey, and the UK. The retaliatory measures have been suspended, since countries seek consensus on changes to international tax rules in light of the pending final versions of the OECD documents as part of a two-pillar plan for digital economy taxing.

National digital taxes introduced in various OECD countries can be divided them into three groups: income taxes, consumption taxes (VAT for e-services), and hybrid taxes. It has a sense to consider national digital taxes in detail using individual OECD countries as an example.

1. Unilateral Tax Practices in the Taxation of Digital Business Models in OECD States

1.1. Regulatory control of digital services at the OECD and UN level

To present date, taxes on digital services have been introduced in Austria, France, Hungary, Italy, Poland, Portugal, Spain, Turkey, and the UK.

Belgium, the Czech Republic and Slovakia have published proposals for taxes on digital services, while Latvia, Norway and Slovenia have officially announced their intention to introduce such taxes[1].

However, there are many differences in these taxes, resulting in double taxation, lack of legal certainty and distortion of competition. E.g., Austria and Hungary tax only income from online advertising. The tax base in France is much broader, including revenues from the provision of a digital interface, targeted advertising and the transmission of user data collected for advertising purposes. Tax rates range from 1.5% in Poland to 7.5% in Hungary and Turkey (although the tax rate in Hungary has been temporarily reduced to 0%) [Olbert M., Spengel C., Werner A.-C., 2019: 149].

International organisations have repeatedly expressed the view in the past years that the current international tax system fails to reflect the trend towards digitalisation of the economy. These concerns are widely discussed in Russian and foreign tax studies [Kudryashova E.V., 2021: 37–40]; [Becker J., English J., 2019: 161–171]; [Dimitropoulou C., 2019: 268–281]; [Devereux M., Vella J., 2018: 161–171]; [Sinnig J., 2018: 903–915]. Under current international tax rules, multinational corporations usually pay corporate income taxes where they are physically present, rather than where consumers or, in the digital sector, users are located. Thus, the classic rules of territorial and resident taxation are no longer relevant for digital companies.

In context the OECD has developed a two-pillar approach to address the tax challenges arising from the digitalisation of the economy.[2] Pillar One focuses on adapting the international income tax system to new business models by changing the rules for allocating income tax between countries. Pillar Two deals with the global minimum tax: its main idea is a global minimum tax rate of 15%.

As the OECD Secretary-General report of 11.07.2022 notes, global minimum tax rules for the Pillar Two are ready for implementation, and key rules for the first pillar have been made available for public consultation. The new target date envisages completion by the first half of 2023.[3]

[1] Digital Tax Update: Digital Services Taxes in Europe. Available at: URL: https://tax-foundation.org/digital-tax-europe-2020/ (accessed: 10.01.2023)

[2] Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy. 08.10.2021. Available at: URL: https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf (accessed: 10.01.2023)

[3] OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors. July 2022. Available at: URL: www.oecd.org/g20/topics/international-taxation/

On 11.07.2022 the OECD Secretariat has published a progress report on Amount A of Pillar One.[4] The report indicates that Amount A rules will not come into force in 2023, as planned under the OECD/G20 BEPS Inclusive Framework,[5] as more work needs to be done. Amount A is a new tax rule that applies to a portion of the residual profits of large and highly profitable enterprises in favour of jurisdictions in which goods or services are supplied or consumers are located (market jurisdictions). This rule operates as an overlay to the existing profit allocation rules, and includes a mechanism to reconcile the respective different profit allocation systems and prevent double taxation. The rules for Amount A are detailed in the OECD statement of 08.10.2021.[6]

Using comparative method in the study does not lead the author to the opinion legislation of OECD states or of states in the OECD Inclusive Platform on BEPS should be standardised. As K. Zweigert and H. Kötz noted, 'in a political-legal sense, the aim of unification is to strive, as far as possible, to eliminate or mitigate differences in national legal systems on the basis of universally recognised principles of law' [Zweigert K., Kötz H., 2000: 42]. In the case of digital taxes, the opposite is rather the case: under the OECD two-pillar approach, the condition for member states is that no new taxes on digital services or other similar measures are introduced from 8.10.2021 until the end of 2023 or until the Multilateral Convention (MLC) comes into force. Under the MLC, all countries that sign up to it will have to abolish all taxes on digital services and adopt similar measures, and to commit not to introduce such measures in the future.

Since digital taxes mainly affect US corporations, which perceive the taxes as discriminatory, the US has responded to the policy with tariff threats. As the case of France has shown, there is a high risk of international tensions when a digital tax is unilaterally introduced. In July 2020 the US

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oecd-secretary-general-tax-report-g20-finance-ministers-indonesia-july-2022.pdf (accessed: 10.01.2023)

[4] Progress Report on Amount A of Pillar One, Two-Pillar Solution to the Tax Challenges of the Digitalisation of the Economy, OECD/G20 Base Erosion and Profit Shifting Project. OECD, Paris, 2022. Available at: URL: https://www.oecd.org/tax/beps/progress-report-on-amount-aof-pillar-one-july-2022.pdf (accessed: 16.12.2022)

[5] Working within the OECD/G20 BEPS Inclusive Framework, 141 countries and jurisdictions collaborate on 15 measures to combat tax evasion, improve the consistency of international tax rules and ensure a more transparent tax environment.

[6] Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy…

government announced a decision to impose 25% duties on French handbags and cosmetics, but did not do so. In January 2021 it was announced that the introduction of the duties would be postponed[7]. The duties have never been introduced. In October 2021 Austria, France, Italy, Spain, the UK and the US set out a plan to abolish digital services taxes and retaliatory tariff threats once Pillar One rules are in place.[8] In November 2021 Turkey agreed to the same terms.[9]

Digital services taxes have generally been regarded as a temporary measure. In 2021 the European Commission launched an initiative to introduce a digital levy in the EU, but the initiative has not yet been developed, either.[10]

At the same time the UN has added specific provisions on income from automated digital services to the UN Model Double Tax Convention (Article 12B), which will apply to the treaty parties that agree to its inclusion.[11]

Thus, about half of the European OECD countries have either announced or already introduced digital taxes. To date, countries that apply digital services taxes have not yet abolished them.

1.2. VAT on E-services

The progress of digital technology has changed the way goods and services are provided and received. Today, it is often online platform, not local service provider that is party to the contract.[12] In 2019 the OECD has pub-

[7] US suspends tariffs on French goods in digital tax dispute. Available at: URL: https://www.france24.com/en/live-news/20210107-us-suspends-tariffs-on-french-goods-in-digital-tax-dispute (accessed: 10.08.2022); Macron backs down on digital tax following Trump's tariff threats. Available at: URL: https://www.euractiv.com/section/global-europe/news/macron-backs-down-on-digital-tax-following-trumps-tariff-threats (accessed: 10.01.2023)

[8] Joint Statement from the United States, Austria, France, Italy, Spain, and the United Kingdom. Regarding a Compromise on a Transitional Approach to Existing Unilateral Measures During the Interim Period Before Pillar 1 is in Effect. Oct. 21, 2021. Available at: URL: https://home.treasury.gov/news/press-releases/jy0419 (accessed: 10.01.2023)

[9] Ibid.

[10] A fair & competitive digital economy — digital levy. Available at: URL: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12836-A-fair-competitive-digital-economy-digital-levy_en (accessed: 10.01.2023)

[11] UN Model Double Taxation Convention between Developed and Developing Countries: 2017 Update. Available at: URL: https://doi.org/10.18356/cc8f6035-(accessed: 10.01. 2023)

[12] 2021 Global Guide to VAT on Digital Services.pdf. Available at: URL: https://www.dlapiper.com/~/media/files/insights/publications/2021/12/2021-global-guide-to-vat-on-digital-services.pdf (accessed: 10.01.2023)

lished a report on the role of digital platforms in the collection of VAT and sales tax on online trade (2019 OECD report)[13].

E-commerce is becoming a subject of regulation not only at the national level, but also at the supranational one. The EU e-commerce package came into force on 1.10.2021, introduces new VAT rules in EU cover distance sales of goods and cross-border services[14]. The purpose of these rules is to simplify VAT obligations for taxpayers effecting cross-border sales of goods or online services to end consumers, and to ensure that VAT is correctly paid to the EU member state that is the destination country. The European Commission has published a clarification on the new rules on e-commerce with VAT.[15] The new rules should apply in particular to small and medium-sized enterprises, suppliers or electronic interfaces involved in e-commerce.

It will be recalled that the introduction of a one-stop shop ('OSS') as the point of contact for documentation, reporting and payment is at the heart of the European VAT reform. The OSS is designed to develop a Mini-OSS (MOSS) procedure, simplify intra-Union trade and unify taxation according to the destination country principle for a delivery value of EUR 10,000. Until this threshold is reached, taxes are imposed in the country of origin. The purpose of this threshold is to support microbusinesses.

The idea behind the OSS is that the supplier must withhold VAT from EU customers at the time of sale. However, the supplier will only need to register once. This should eliminate the need to register and declare VAT in each EU member state that will be the destination country. OSS allows

[13] The Role of Digital Platforms in the Collection of VAT/GST on Online Sales. OECD. 2019. Available at: URL: www.oecd.org/tax/consumption/the-role-of-digital-platforms-in-the-collection-of-vat-gst-on-online-sales.pdf (accessed: 10.01.2023)

[14] EU Council Directive 2017/2455 of 05.12.2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods / OJ L 348, 29.12.2017; Council Directive (EU) 2019/1995 of 21 November 2019 amending Directive 2006/112/EC as regards provisions relating to distance sales of goods and certain domestic supplies of goods / OJ L 310, 02.12.2019; Council Implementing Regulation (EU) 2019/2026 of 21.11.2019 amending Implementing Regulation (EU) No 282/2011 as regards supplies of goods or services facilitated by electronic interfaces and the special schemes for taxable persons supplying services to non-taxable persons, making distance sales of goods and certain domestic supplies of goods / OJ L 313, 04.12.2019.

[15] Explanatory Notes on VAT e-commerce rules. Available at: URL: https://ec.europa.eu/taxation_customs/sites/taxation/files/vatecommerceexplanatory_28102020_en.pdf (accessed: 10.01.2023)

taxpayers to declare their transactions falling under the scheme in a special VAT return and to send this VAT return to one tax authority only.

The MOSS rules previously covered only telecommunications, broadcasting and e-services, but from 2021 have been extended under the OSS to all types of cross-border B2C services. Usually, in cases involving B2B customers, VAT is levied through a reverse charge mechanism as recommended by the International VAT/GST Guidelines of the OECD[16]. While this mechanism works well in the B2B context, it is not as effective in the B2C sector. This makes it more difficult to collect VAT that is also becoming increasingly important due to the increase in online B2C transactions.

The procedure is intended for taxpayers who are registered in an EU member state and provide services to consumers (individuals) in EU member states in which they are not established; carry out remote sales of goods within the EU; or provide an electronic interface through which they support the supply of goods within the member state by an unidentified taxable person and are therefore treated as if they were supplying goods themselves.

Also, the procedure is intended for taxpayers who are not registered in the EU and who have a warehouse in the EU from which goods are supplied to individuals in other EU member states.

1.3. VAT Collection on Digital Platforms

As regards sales via digital platforms, many jurisdictions have already introduced provisions that hold digital platforms responsible for calculating, collecting and remitting VAT. According to their approach, two operations are performed with the VAT: first, the seller sells the goods on a VAT-exempt B2B marketplace, and second, the marketplace sells the goods to the consumer applying the VAT rate of the consumer's country of residence.

Online platforms must therefore keep records of deliveries and services. The records must be sufficiently detailed to enable the tax authorities of the EU member state in which these goods and services are subject to taxation to determine whether VAT has been correctly paid. The digital platform may have a 'sole' responsibility for collecting and paying VAT, or it may have this responsibility on behalf of the respective supplier who uses the platform to make online sales.

[16] International VAT/GST Guidelines, Paris: OECD, 2017.

Many EU members of the OECD, proceeding from the optional rule set out in Article 205 of the Council Directive on the Common System of Value Added Tax ('VAT Directive'),[17] have for many years applied such rules in their national legislation, often referred to as 'third-party liability'.

Because of development of the platform economy, VAT solidarity rules are becoming increasingly relevant. The issue of how to apply VAT to the platform economy is currently on the agenda of the OECD, the EU and individual states around the world. The 2019 OECD report looks at different levels of integration of online platforms into VAT compliance and collection: full VAT liability regimes, joint and several liability regimes, information sharing obligations and training obligations for suppliers selling on the platform.

The report notes: "Jurisdictions may wish to consider introducing joint and several liability (JSL) provisions in legislation as a means to help to support compliance for the collection of VAT/GST on online sales." These provisions may apply to digital platforms in cases where a platform has no liability for the VAT on online sales that were carried out through its platform. Such JSL is generally not considered to be a primary tool in securing the collection of VAT on online sales, as either a platform or an underlying supplier will have statutory liability for the VAT. However, such a provision can be useful as a tool to support tax authorities in cases of non-compliance and indeed can deter non-compliant behaviour."[18].

The OECD proposes two variations in applying JSL. Under variation 1, the digital platform is held jointly and severally liable for the future undeclared VAT of the underlying suppliers, once the tax authority had spotted cases of non-compliance, has reported these cases to the digital platform and the latter did not take appropriate action within a specified number of days. Such action by the digital platform typically consists of securing compliance from the underlying supplier or removing the supplier from its platform. Under variation 2, the digital platform may be held jointly and severally liable for the past undeclared VAT of underlying suppliers not registered for VAT purposes[19].

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[17] Council Directive 2006/112/EC of 28.11.2006 on the common system of value added tax / OJ L 347. 11.12.2006.

[18] The Role of Digital Platforms in the Collection of VAT/GST on Online Sales. Paris: OECD, 2019.

[19] Ibid. P. 162.

At EU level, these different levels of online platform integration into the VAT compliance and collection process have been implemented in parallel (each for a different supply). The rule on taxable persons who facilitate (full liability regime) has come into force for certain supplies of goods through an online platform since 01.07.2021 (new Article 14a of the VAT Directive). In similar fashion, starting from that date, online platforms are to keep certain records of the supply of goods and services to a non-taxable person (new Article 242a of the VAT Directive).

And finally, some EU member states, including Austria[20], Germany[21] and the UK[22] (while it was still in EU) have unilaterally introduced the JSL rules for VAT based on Article 205 of the VAT Directive. Under that norm online platform operators are liable for payment of VAT on the supplies they effect if they have failed to exercise due diligence with respect to VAT compliance by the underlying supplier selling goods or services via this platform. The scope and operation of the rules on joint and several liability varies considerably among the member states. [Spies K., 2022: 8]. In 2019 the European Commission initiated legal proceedings against Germany, arguing that German rules for online platforms prevent EU businesses from freely accessing the German market and thus violate EU law.

The Court of Justice of the European Union (hereinafter the Court) has settled disputes relating to Article 205 of the VAT Directive (or its predecessor Article 21 of the Sixth Directive) four times[23]. Finally, in May 2021 the Court delivered its judgment in the ALTI case. The Bulgarian Court asked the ECJ whether Article 205 of the VAT Directive permits EU member states to provide that, in addition to the supplier, the recipient of a purely domestic supply is another "person liable for the payment of VAT" and can be held liable not only for third party VAT obligations, but also in the event of a third party default. Contrary to the opinion of J. Kokott, Advo-

[20] Österreich: Bundesgesetz über die Besteuerung der Umsätze (Umsatzsteuergesetz 1994), zuletzt geändert durch das Bundesgesetz BGBl I 663/1994, 819/1994. NR: GP XVIII RV 1715 AB 1823 S. 172. BR: AB 4861.

[21] Deutschland: Umsatzsteuergesetz. 21.02.2005. Available at: URL: https://www.gesetze-im-internet.de/ustg_1980/BJNR119530979.html (accessed: 10.01. 2023)

[22] UK: Value Added Tax Act, An Act to consolidate the enactments relating to value added tax, including enactments relating to VAT tribunals. Art. 77B (9). 1994. Available at: URL: https://www.legislation.gov.uk/ukpga/1994/23/contents (accessed: 10.01. 2023)

[23] CJEU. 13.03.2014. C-107/13, FIRIN, EU: C: 2014:151; CJEU. 11.05.2006, C-384/04, Federation of Technological Industries, EU: C: 2006: 309; CJEU, 21.12. 2011, C-499/10, Vlaamse Oliemaatschappij NV, EU:C: 2011: 871; CJEU, 26.03 2015, C-499/13.

cate General of the Court of Justice of the European Union[24], the EU Court reached the following conclusion. The law requiring the person jointly liable to pay late payment interest on that amount in addition to VAT does not contravene Article 205 of the VAT Directive[25].

Uniform rules on platforms will probably be applied together with the rules on JSL adopted by individual states. It is possible to admit that if all states introduce their own national liability regimes, the burden on platforms will become excessively high. According to European researchers, there may be sufficient grounds for introducing JSL based on the social responsibility model applied by individual states, as this model is based on collaboration with platforms. That said, it must be clear which platforms can be held liable for which transactions and in what circumstances [Janssen A., 2021: 231–239].

In is also important to clarify when and for what platforms are liable, and prevent them, to the extent possible, from inadvertently falling under the scope of national liability rules. If a platform fails to act within the specified period of time and receives a formal notification, the researchers believe it would be justified to hold the platform liable for unpaid VAT.

However, even when platforms are willing to contribute to the combat against VAT fraud, they should not carry such a huge burden as long as there is no regulation of the above problem at EU level [Lamensch M., 2015: 13]; [Merkx M., 2019: 84].

2. Digital Tax Experience of Individual OECD Countries

Before raising the question of the need for a digital tax in Russia, it is worth considering the models introduced in other countries, most of which are members of the OECD. Since most national digital taxes have been developed along the EU model, it us useful to study the experience of France pioneered the digital tax, as well as examples of Israel and Turkey, whose experience is rather specific.

It has a sense to look at the experience of these countries in introducing national tax measures to tax digital business models and companies with a significant economic presence in the country.

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[24] Opinion of AG Kokott, 14.01.2021, C-4/20, ALTI, EU: C: 2021:12.

[25] C-4/20 — ALTI. Judgment of the Court (First Chamber) of 20.05. 2021 "ALTI" OOD v Direktor na Direktsia "Obzhalvane i danachno-osiguritelna praktika" Plovdiv pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite / SPS Garant.

2.1. Digital Economy Taxation: French Experience

The French government in 2020 has imposed a 3% tax on digital services[26]. The law is retroactive and applies to the relevant relations after 01.01.2019. Taxpayers are French and foreign companies with annual income from taxable services in excess of EUR750 M of global income and EUR25 M received in France. In addition, such companies must calculate a portion of their income from taxable services deemed to have been rendered in France.

The tax is levied on two types of digital services provided in France.

1. An interface that enables users to interact with others (mediation services).

In March 2020 the French tax administration issued Guidelines for calculating the tax on digital services.[27] According to this document, the first category of digital mediation services includes interfaces that allow users to carry out transactions, i.e. deliver goods or provide services. The second category is online services through which users interact with each other without being able to conduct transactions through the digital interface itself (e.g. social networks and online games).

The definition mentioned, however, excludes some services — e.g., when a company operating through a website sells goods or services that it owns. For example, Amazon, which sells books from its own warehouse, would not fall under the digital tax. And, vice versa, if a small production company sells books through this platform, then such a service from Amazon acting as an intermediary would fall under the digital services tax.

2. Services to advertisers for placing targeted advertising messages on a digital interface based on user data collected and generated in coordination with such an interface. Advertising services on the digital interface that do not focus on user data are exempt from tax.

The services of an Internet platform are linked to the location of its users. If a user has been in France during the tax year, the service will also be deemed to have been rendered in France. User location is determined by the IP-address.

[26] BILL n° 2019-759 of 24.07.2019 on the creation of a tax on digital services (1). Available at: URL: https://www.legifrance.gouv.fr (accessed: 10.01.2023)

[27] Digital Services Tax in France. Available at: URL: https://www.twobirds.com/en/insights/2019/global/digital-services-tax-in-france (accessed: 10.01.2023)

The tax does not apply to platforms that do not focus on collecting user data. Digital content, communication services and payment services are not taxed.

Thus, the tax base will depend on what proportion of the payments are linked to France, the type of service, and the type of platform.

The reporting rules and digital tax compliance system has been established along the lines of VAT.

If the taxpayer is not established in the EU or a state party to the Agreement on the European Economic Area that has concluded with France an agreement on administrative assistance to combat tax fraud and tax evasion and a mutual assistance agreement on the collection of taxes, then this taxpayer will appoint a representative that is established in France and subject to VAT. The representative is obliged to carry out the formalities on behalf of the represented and to pay the tax.

The company or responsible group member pays the tax in two instalments: in April and in October. When calculating the revenues covered by the digital tax, companies can exclude the amounts that went to VAT.

The collection period for the digital services tax is six years (three years for VAT). The digital services tax will be deducted from the French corporate income tax base. Moreover, a consolidated group of taxpayers may be formed. Then, one company must be designated as the responsible taxpayer on behalf of all group members.

2.2. Digital Economy Taxation: Israeli Experience

Israel is one of the most interesting countries in terms of analysing the digital taxation experience. Israel uses a substantial economic presence model and the so-called digital factors approach (in OECD terminology). This model focuses on the local presence of a company in a particular state to determine whether the company focuses on providing a certain service or product to the residents of that state, and hence on creating there value attributable to the state. Digital factors can be: a local domain name, local digital platform (including the national language, local promotions and discounts, prices in local currency, etc.).

In 2019 the Israel Tax Authority (ITA) and the Ministry of Finance announced they were considering introducing a tax on digital services. The idea was to set the tax rate between 3% and 5% of the turnover of com-

panies providing digital services, following the example of the DST in France[28]. This tax was intended as a response to digital companies' failure to cooperate with the Israel Tax Authority regarding the application of Circular Letter No. 4/2016.

Circular Letter No. 4/2016 sets out the position of the Israel Tax Authority regarding the charging of income from the provision of digital services to a permanent establishment in Israel. The letter uses the concept of substantial economic presence for the purpose of taxing permanent establishments.

In terms of VAT, Circular Letter No. 4/2016 requires foreign providers of digital services to Israeli customers to register in Israel for VAT purposes if one of the following conditions is met:

a foreign company forms a permanent establishment for income tax purposes;

a foreign company has a subsidiary or employees in Israel, a rented office in Israel or a branch office in Israel;

company's business activities are supported by a representative in Israel or an Israeli subsidiary.

But on 22.06. 2021 Ministry of Finance announced Israel supports the OECD two-pillar approach.[29]

To date, there is both a direct tax for companies that have formed a digital permanent establishment in Israel and a VAT on electronic services.

Corporate income tax (on substantial economic presence) is levied on non-resident Israeli legal entities with a permanent establishment in Israel that provide digital services and/or sell goods to Israeli resident consumers via the Internet.

The object of taxation is the sale of goods and provision of digital services to Israeli resident consumers via the Internet by a non-resident with a permanent establishment in Israel.

A permanent establishment may be deemed to be located in Israel if:

a foreign company operates in Israel;

[28] Israel Preparing Digital Services Tax Modelled off Pending French Proposal. Available at: URL: https://tax.thomsonreuters.com/blog/israel-preparing-digital-services-tax-modelled-off-pending-french-proposal/ (accessed: 10.01.2023)

[29] Israel Digital Taxation Monitor. Tax Research Platform. IBFD. Available at: URL: https://research.ibfd.org/#/doc?url=/collections/dtm/html/dtm_il.html (accessed: 10.01.2023)

a foreign company directly contacts clients in Israel to provide services or connect them with clients in Israel (e.g., through a website in Hebrew);

representatives of a foreign company in Israel are involved in identifying Israeli customers, marketing and/or information gathering; or

a foreign company has authorised its Israeli representative to carry out local transactions that are binding on that foreign company.

The business profits derived from Israel form the tax base; they are attributed to the permanent establishment of Israel on the basis of transfer pricing principles. Taxpayers may deduct expenses related to turnover received from Israel in accordance with general corporate income tax rules.

The tax rate is 23%.[30]

The value-added tax / turnover tax for electronic services is essentially a classic VAT which regards digital services provided to Israeli resident consumers in Israel via the Internet as the tax object.

Taxpayers are non-residents providing digital services in Israel to consumers residing in Israel who conduct business operations through the Internet, subject to one on more of the following additional conditions (including but not limited to):

if the activities of the non-resident dealer constitute a permanent establishment in Israel for corporate tax purposes;

if there are real business processes in Israel (a branch office, employees and rented offices in Israel, etc.)

if a non-resident provides services jointly or with the assistance and/or co-operation of a representative in Israel and if the non-resident has a significant economic presence in Israel.

The tax base is the turnover generated in Israel from digital services provided in that country. The tax base is 17%.

As with the taxation of a permanent establishment, the taxpayer must be registered in Israel. A non-registered foreign entity carrying out operations in Israel must register within 30 days of commencing operations there.[31]

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[30] Tax Circular 4/2016; Income Tax Ordinance. New version of 1961). Israel — Digital Taxation Monitor. Tax Research Platform…

[31] Tax Circular 4/2016; Value Added Tax registration regulations — 1976; Value Added Tax law, 1975. Source: Israel. Digital Taxation Monitor. Tax Research Platform. IBID. Available at: URL: https://research.ibfd.org/#/doc?url=/collections/dtm/html/dtm_il.html (accessed: 10.01.2023)

2.3. Digital Economy Taxation: Turkey's Experience

Turkey introduced the tax on digital services in 2020.[32] The law is retroactive; it applies to any operations beginning on 01.03.2020. The tax is levied on the turnover of digital services at a rate of 7.5% of the gross income derived from digital services during the tax period (one month).

Since its introduction, the digital services tax in Turkey has raised criticism, mainly due to its broad and undefined scope as well as its high rate.

The lack of compensation mechanisms or any exemptions for intra-group transactions also triggered discussions (hence, the tax can be levied twice on intra-group intermediary structures whose revenues exceed the thresholds: at the reseller level and at the supplier level); the lack of a group registration mechanism and exemptions in cases where two or more different national digital taxes apply to the same transaction.

The unclear scope of the digital services tax has already been the subject of two court cases resulting in the first victories of taxpayers[33].

The first case concerned a dispute over what should be understood as sales carried out in a digital environment. The issue at hand was how to interpret Article 1/1-b of the Law on Digital Services which dealt with sales of digital content and in the context of which sales must be considered to be 'on a digital medium.'

The claim was lodged by the Turkish subsidiary of a leading global software developer, which operates as a distributor for software licensing and sales of the group's cloud services in Turkey. The taxpayer argued that sales to end-users should not fall under section 1/1-b of the Law because these sales are not made on a 'digital medium' as Law requires.

According to the taxpayer, the Law only targets sales made in virtual shops without human intervention. This argument relies on the legal definition of a digital medium under Article 2 of the Law: all types of media in which online activities take place without any physical contact.

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[32] Turkey: Law No. 7194 on the Digital Service Tax and Amendments on Certain Laws and the Decree No. 375.

[33] Turkey: Digital Services Tax (DST). New precedential court victories released! — Global Compliance News. Available at: URL: https://www.globalcompliancenews.com/2022/03/13/turkey-digital-services-tax-dst-new-precedential-court-victories-released280222/#:~:text=Turkey%27s%207.5%25%20DST%20covers%20digital,services%20and%20digital%20platform%20services (accessed: 10.01. 2023)

The dispute concerned complex software products used by large enterprises and public sector organisations that cannot be implemented on a 'click and buy' basis. These sales required personal interaction between the sales and technical support staff to identify the client's needs.

In August 2021 the Tax Court of First Instance ruled in favour of the taxpayer. Its arguments were as follows: The activities of the taxpayer cannot be considered to be carried out in a digital environment because most of them depend on activities carried out in a real life (e.g., long meetings with clients to determine their needs, face-to-face training sessions and negotiations on sales contracts), even if the software /service is provided online.

The second digital services tax claim was lodged by a non-resident software company. The claim dealt with whether the granting of the right to resell software or cloud services falls within the scope of the digital services tax. In the taxpayer's opinion, the granting of the right to resell products to a distributor under a distribution agreement should not fall within the scope of the Law on Digital Services, since the disputed sales are not made on a digital medium as the Law requires.

In December 2021 the Court of First Instance ruled that the disputed sales were not made on digital media. In view of the fact that the parties agreed on the wording and signed the distribution agreement, the distributor may not sell the products directly to end users in Turkey, nor use or store keys, codes, licence files, account information or passwords without the client's consent[34].

On 22.11.2021 the US and Turkey have reached an agreement on the transition from a national digital services tax to a multilateral solution agreed within the OECD Inclusive Framework. The joint statement states that Turkey will levy a digital services tax until such time as the OECD Pillar One rules come into effect, and the Turkish digital tax liability accrued by US companies during the transition period will be offset against future income taxes accrued under Pillar One. The US, in their turn, will lift additional tariffs on Turkish goods[35].

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[34] Turkey Expands Scope of Provisions on Partial Withholding VAT — Tax Research Platform–IBFD. Available at: URL: https://research.ibfd.org/#/doc?url=/linkresolver/static/tns_2021-02-22_tr_1%23tns_2021-02-22_tr_1 (accessed: 10.01.2023)

[35] Joint Statement from the United States and Turkey Regarding a Compromise on a Transitional Approach to Existing Unilateral Measures During the Interim Period Before Pillar 1 Is in Effect. 22.11.2021. Available at: URL: https://home.treasury.gov/news/press-releases/jy0500 (accessed: 10.01.2023)

In addition, Turkey has introduced VAT on electronic services in 2018. 19.12. 2018 President of Turkey has issued Decree No. 476 introducing 15% tax on Internet advertising service providers or intermediaries[36].

The above-mentioned digital taxes are presented in a table.

Table 1 **Digital services taxation in Turkey**

Tax components	Description of tax component
Income and revenue taxes: tax on digital services	
Taxable item	Provision of the following digital services: all online advertising services (including ad monitoring and performance measurement services, services related to user data transmission and management, and technical services related to the presentation of advertisements); sales of audio, video or any digital content in a digital environment; any services provided in a digital environment, which allow such content to be listened to, viewed and/or played in a digital environment; audio, video or any digital content recorded or used in electronic devices; provision and management of services in a digital environment that allow users to interact with each other (including services performed to enable or facilitate sales of goods or services between users); intermediary services performed in a digital environment related to the above-mentioned services
Taxpayers	Resident and non-resident corporations and individuals with worldwide turnover from taxable services exceeding EUR 750 million and turnover from taxable services in Turkey exceeding 20 million lira
Tax base	Turnover resulting from taxable services provided in Turkey. Some exceptions to the tax base are allowed, including turnover resulting from the following services services subject to a 'treasury duty' and a communication tax; sale of products developed in R&D centres; payment services. The turnover resulting from mobile electronic communication services, banking services, and electronic payment services is exempt from this tax

[36] Presidential Decision 476. Source: Turkey Clarifies Obligation to Provide Information on Internet Advertisements for Tax Purposes — Tax Research Platform — IBFD. Available at: URL: https://research.ibfd.org/#/doc?url=/linkresolver/static/tns_2022-05-31_tr_1%23tns_2022-05-31_tr_1 (accessed: 10.01.2023)

Tax components	Description of tax component
Tax rate	7.5%
Procedure and method of tax payment	Taxpayers must file their tax returns electronically and pay the tax by the end of the month following the tax period. Moreover, the Ministry of Finance is authorised to hold payers or intermediaries liable for withholding tax on digital services payments if the taxpayer has no residence, legal entity, legal headquarters or business centre in Turkey.
Registration requirements	Taxpayers must register at https://digitalservice.gib.gov.tr in the first declaration period
The statute that governs the payment of this tax	Law No. 7194 on digital services tax and amendments to certain laws (Law No. 7194 on the Digital services Tax and Amendments on Certain Laws and the Decree No. 375 General Communiqué on Implementation of Digital Services Tax)
Income Tax	
Taxable item	Advertising services provided through the Internet
Taxpayers	Residents and non-residents providing advertising services and Internet advertising intermediaries
Tax base	Income derived from Internet advertising or intermediary services
Tax rate	15% for resident and non-resident individuals as well as non-resident advertising service companies and Internet advertising intermediaries; 0% for resident advertising service companies and Internet advertising intermediaries
Procedure and method of tax payment	The tax is levied on payments made to taxpayers
Registration requirements	None
Additional information	The tax rate is 0% on payments made to resident intermediaries (companies) for the provision of Internet advertising services. Such resident intermediaries must then withhold a tax at the rate of 15% on payments made to resident individuals or non-resident Internet advertising service providers. Intermediary service providers, social media providers and hosting providers acting as intermediaries in the publication of advertisements for the purchase, sale or rental of movable and immovable property, goods and services must submit reports on their

Tax components	Description of tax component
	transactions within one month from the end of the relevant calendar year (Communiqué No. 538/2022).
The statute that governs the payment of this tax	Article 94 of the Personal Income Tax Law; Articles 15, 30 of the Corporate Income Tax Law; Presidential Decree No. 476; Communiqué No. 538/2022
Value-added tax / Turnover tax	
Taxable item	B2B: cross-border provision of services by non-resident entrepreneurs; B2C: cross-border supply of services by non-resident entrepreneurs without a permanent establishment in Turkey
Taxpayers	Non-resident entrepreneurs
Tax base	Total amount of remuneration received; VAT not included
Tax rate	18% For commercial advertising, partial withholding of a 30% VAT
Procedure and method of tax payment	For B2B transactions: in accordance with the general rule (reverse chargeback mechanism). For B2C transactions: if the supplier has a permanent establishment in Turkey — in accordance with the general rule; If the service provider is a non-resident, has no legal entity in Turkey and provides electronic services, such a provider must be registered for VAT purposes
Registration requirements	For B2B transactions, there is no need for registration for non-resident suppliers, as the reverse chargeback mechanism applies. For B2C transactions: If the supplier has a permanent establishment in Turkey, the VAT return is filed according to the general rule. If the service provider is a non-resident, has no legal entity in Turkey and provides electronic services, such a provider must be registered for VAT purposes In addition, invoices and related documents must be issued and retained for 5 years.
The statute that governs the payment of this tax	Law No. 3065 on value-added tax (Law_No. 3065 on Value Added Tax)

Source: compiled by the author on basis of data: Turkey Expands Scope of Provisions on Partial Withholding VAT — Tax Research Platform — IBID. Available at: URL: https://research.ibfd.org/#/doc?url=/linkresolver/static/tns_2021-02-22_tr_1%23tns_2021-02-22_tr_1 (accessed: 10.01. 2023)

Thus, the experience of Israel and Turkey shows that the legislator does not take a consistent stance on the taxation of digital services and digital companies, taxing these companies with both special types of corporate tax and VAT on electronic services.

In addition, one may conclude that the more digitally advanced countries have set lower rates (for comparison: 3% in France and Italy, and 7.5% in Turkey). The reason for this is there are only consumers of digital services in developing countries, and the companies that provide such services are exclusively foreign companies, so their taxation has a purely fiscal purpose: to generate additional revenue from foreign companies for the state budget. We see no additional regulatory target for the development of domestic IT companies here.

Conclusion

To ensure the state's fiscal interests are respected requires a transformation of the substantive approaches to the regulatory control of tax relations in context of of the Russian tax base regulation. As A.I. Lukashov notes, digitalisation of any process will attain the best possible results if the state of the digitalisation object is optimal [Lukashov A.I., 2021: 68]. The issues arising from the taxation of digital companies' activities abroad are also characteristic and relevant for Russia.

For years, countries have adopted solutions from unilateral to bilateral to multilateral, to reduce or eliminate problem of double taxation in cross-border transactions. As new business models emerge, gaps in bilateral agreements only increase and pre-existing differences are exacerbated.

The stated objective of the OECD is to resolve outstanding technical issues and reach an agreement so as to implement the new approach by 2024. While this timeline seems ambitious, it should be borne in mind that in the absence of action on Pillar One of the OECD, more and more countries are moving towards a unilateral solution—in particular, the use of digital services taxes.

Both at the UN and OECD level, active efforts are underway to develop new concepts and methods on profit taxation in context of globalisation. Considering fact OECD approach is revolutionary, a more conservative UN approach to tax reform may end up being more realistic as an international consensus for implementation by a wide range of countries.

The matter with digital tax laws is quite controversial. National digital taxes can deter the digital transformation of traditional businesses and impair the country's attractiveness as a business location. Moreover, they could provoke retaliatory measures, such as tariffs and sanctions aimed at harming businesses in other countries.

As an analysis of national laws shows, lack of international cooperation on a common definition of digital goods and services has led to confusion and uncertainty, especially for foreign companies. It has effectively become the responsibility of foreign suppliers to determine how jurisdictions define digital goods and services. Therefore foreign suppliers should familiarise themselves with consumption tax legislation in each country of supply to ensure compliance. As a result of uncertainty, foreign suppliers could cease to supply consumers in jurisdictions with onerous consumption tax rules altogether. It could have a negative impact on international trade and the economic development of states.

Three types of unilateral approaches to fair taxation of the digital economy (digital services taxes, VAT on electronic services, and national concepts of digital permanent establishment) can lead to double or multiple taxation and violation of the existing double taxation treaty ('DTT') provisions.

It is widely believed digital services tax contravenes principle of avoiding double taxation because it is applied to revenue and not to income. By their legal nature, digital services taxes in general are close to turnover taxes.

The digital services tax was designed so that it would not fall within the scope of the DTT. Meanwhile, if we take corporate taxation into account, the picture is likely to be as follows. Profits will be taxed firstly as "income" under the digital tax and secondly as "income" under the corporate income tax of the country where the company pays that tax. The reason for it is country of the company's residence will not exclude income related to the digital permanent establishment from its base or provide a deduction for any amount paid.

The foreign experience shows there is a trend towards countries adopting their own digital taxes. However, there is no harmonisation in the field. It results in double taxation cannot be remedied through acting international treaties and national legislation. Furthermore, this approach leads to lower transparency and certainty for business, distorting both international and local competition.

This experience can also be used in Russia. However, a dialogue with IT corporations can only begin if they establish an office in Russia, what is unlikely in the changing international environment. Otherwise, there will be an inequality between Russian and foreign digital companies, with Russian companies, whose profits are taxed, finding themselves in a worse position.

The argument for choosing to unilaterally introduce a temporary digital tax for foreign companies in Russia could be to ensure that Russia's fiscal interests must be protected.

However, statistics for countries such as France, the UK and Italy show that revenues from the digital services tax are not always substantial. For comparison, it is necessary to look at data used by national governments in planning introduction of their respective taxes.

The French example shows the costs of developing and then managing the new tax can in the current context exceed the amounts collected. The French digital services tax was expected to add EUR 400 to 650 to the total tax revenues in 2019. For comparison, total tax revenues in France in 2016 were EUR 1,013,100[37]. In 2019, the total tax revenues in France reached EUR 1,145,006. The digital services tax paid to the budget in 2019 was only EUR 375 M[38]. In Austria, the case is the opposite. The Austrian Ministry of Finance supposed annual revenues from digital services tax would range from EUR 25 M in the year 2020 to EUR 34 M in 2023[39]. The total tax revenues in Austria in 2016 were EUR 149,200[40]. Hence, revenues from the digital tax amounted to 0.02% of the total of 2016. In 2020, the tax brought EUR 56.5 M to the Austrian budget significantly exceeded expectations[41].

In addition, should a digital services tax be introduced and the OECD Pillar One mechanisms be not adopted, the main risk would be the creation of significant barriers to business, as such a tax would not be recognized for accounting purposes by countries sharing the OECD approach.

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[37] OECD. Revenue Statistics 2018. Available at: URL: https://read.oecd-ilibrary.org/taxation/revenue-statistics-2018_rev_stats-2018-en (accessed: 10.01.2023)

[38] Digital Services Tax in France. Available at: URL: https://www.twobirds.com/en/insights/2019/global/digital-services-tax-in-france (accessed: 10.01.2023)

[39] Preamble and effects-oriented result assessment to Draft of Digital Tax Act 2020. Available at: URL: https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00132/fname_746835.pdf (accessed: 10.01.2023)

[40] International VAT/GST Guidelines. Paris: OECD, 2017.

[41] Digitalsteuer bringt Österreich 57 Mio. €. Available at: URL: https://www.medienkraft.at/digitalsteuer-oesterreich/ (accessed: 10.01.2023)

The situation with the digital tax carries other risks for Russia, too.

First, the introduction of a digital tax in Russia in current context will not have the necessary effect for the state budget: number of multinational IT corporations offices is not high, and considering the changing international situation the chances it will grow are weak. Moreover, statistics on other countries show that revenues from the digital services tax are insignificant, and the costs to implement it oftentimes exceed the fiscal effects.

Secondly, such taxation can result in inequalities between Russian and foreign companies. And Russian companies whose profits are taxed would be worse off.

Thirdly, a higher tax burden could deter the digital transformation of traditional businesses, weakening the country's attractiveness as a business location or provoking retaliation against Russia IT businesses abroad. Also, it is unclear how the burden from the digital tax will be distributed since it is quite clear that, by its legal nature, this is an indirect tax. Users who will carry the tax burden are the disadvantaged party here.

Thus the best way to develop taxation of digital services in Russia is to apply the current VAT mechanisms to electronic services and pay attention to the international processes underway as part of the discussions of the OECD two-pillar approach and the update of the UN Model Tax Convention.

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Financial Assets in Digital Form and How They Influence Classification of Crime

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Abstract

The approval of new legislative acts regulating the financial assets in digital form, including digital rights, digital currencies and the digital ruble, gives grounds for rethinking their legal status and influence on the sphere of criminal law enforcement. The purpose of the study is to identify the legal nature of financial assets in digital form, taking into account the current state of legal regulation of their turnover, to assess the existing approaches and develop recommendations for the qualification of crimes in which the subject or means of committing them are digital rights, digital currency, digital ruble or electronic cash. From these perspective are considered the issues of qualification of crimes against property, drug crimes, corruption crimes, laundering of money or other property acquired by criminal means, bankrupt crimes, malicious evasion of repayment of accounts payable, concealment of funds or property from the collection of taxes, fees, insurance premiums. The general conclusion based on the results of the study is that financial assets in digital form, representing property rights, must be considered as a sign of these crimes, except when their actual involvement is beyond the scope of the crime. In order to determine the dimensional characteristics of the relevant crimes, the issues of assessing the value of digital rights and digital currencies are considered.

Keywords

cryptocurrency; crimes qualification; digital rights; digital financial assets; utilitarian digital rights; digital currency; digital ruble; electronic money.

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Introduction

One of the most popular topics of academic research nowadays is the study of how the global digitalisation affects modern social relations and how to discover the search the best ways of their legal regulation in the digital transformation. Following this trend, the criminal law theory includes more and more new works dealing with the substantiation and systematisation of digital crimes, revision of criminal policy related to the criminalisation of socially dangerous acts in the digital sphere, and the forecast of new criminal risks generated by digitalisation of social relations [Dyakonova M.O., Efremov A.A., Zaitsev O.A. et al., 2022]; [Russkevich E.A., 2022]; [Russkevich E.A. et al., 2022]; [Khilyuta V.V., 2021]; [Grachyova Yu.V. et al., 2020].

Offering a criminalist's perspective on the issue of digitalisation in its narrow utilitarian aspect, the author of the study considers the relevance for modern law enforcement practice of qualification of crimes committed in relation to or with the use of financial assets in digital form.

Author define digital financial assets as property values in digital form (in the form of a digital code), the circulation of which is effected with the use of information systems and regulated by Russian financial legislation, namely digital rights (including utilitarian digital rights, digital financial assets), digital currency (including cryptocurrency), digital rouble, and electronic cash[1].

Law enforcers consider the current state of legal regulation of their circulation and criminal law protection to be insufficient, that point forces them to give new meaning to classical legal constructions, expanding their content to adequately respond to modern challenges and threats caused by the emergence of new and the widening circulation of known financial assets in digital form.

When conducting the research, author used general methods of scholar cognition, among them analysis, synthesis, induction, deduction, logical

[1] The author leave out of the scope of this study traditional (analogue) non-cash money, non-cash precious metals and uncertificated securities, as well as varieties of so-called "digital money", including virtual currencies of multiplayer online games and corporate currencies (bonuses, points, discounts, etc.), which are not regulated in financial legislation.

and functional methods, that allowed to shape conceptual framework of the study. Also were used special methods of academic cognition. It was implemented the formal legal method to analyse modern financial legislation in order to identify the peculiarities of regulation and legal nature of financial assets in digital form. Was used the systemic-structural method to investigate the elements of offences related to the circulation of digital financial assets. Statistical analysis and interpretation of the law were useful to analyse law enforcement practice and to develop rules for the classification of these offences.

1. Current Legal Regulation and Legal Nature of Digital Financial Assets

The first form of so-called "digital money" realised in the Russian legislation is electronic funds, which means funds that one person (the "money provider") has provided in advance to another person who takes into account information on the amount of the provided funds without opening a bank account (the "liable person") to fulfil the financial obligations of the money provider before third parties and in respect of which the money provider is entitled to transmit orders exclusively using electronic means of payment (Clause 18, Article 3 of Federal Law 27 June 2011 No. 161-FZ "On the National Payment System").

Electronic funds are a special case of non-cash funds and, like them, represent the customer's contractual rights of claim to the credit organisation, which is the operator of electronic funds [Baibak V.V., Ivanov O.M., Karapetov A.G. et al., 2019].

Supreme judicial authorities have also commented on the contractual nature of non-cash funds[2].

Federal Law No. 34-FZ 18 March 2019 "On Amendments to Parts One, Two and Article 1124 of Part Three of the Civil Code of the Russian Federation" (hereinafter — Civil Code) has introduced the concept of "digital rights" as a type of property rights (Article 128 of Civil Code).

[2] See, e.g.: Resolution of the Russian Federation Constitutional Court of 27.10.2015 No. 28-P "On the case of verification of the constitutionality of paragraph 1, Article 836 of the Civil Code in connection with the complaints of citizens I.S. Biler, P.A. Guryanov, N.A. Guryanova, S.I. Kaminskaya, A.M. Savenkov, L.I. Savenkova and I.P. Stepanyugina" // SPS Consultant Plus.

According to Clause 1 of Article 141.1 of Civil Code, digital rights are contractual and other rights named as such in the law, the content and conditions for the exercise of which are determined in accordance with the rules of an information system that meets the characteristics established by law. The exercise, disposal, including transfer, pledge, encumbrance of the digital right by other means or restriction of the disposal of the digital right is only possible in the information system without recourse to a third party.

The approval of Federal Law No. 259-FZ 02 August 2019 "On Attracting Investments with the Use of Investment Platforms and on Amendments to Certain Legislative Acts of the Russian Federation" led to the emergence of the first kind of digital rights — utilitarian digital rights. They are understood as rights acquired, alienated and exercised in the investment platform, including the right to demand item(s); the right to demand transfer of exclusive rights to intellectual property and (or) rights to use the intellectual property; the right to demand performance of work and (or) provision of services. Utilitarian digital rights are recognized as contractual rights (rights of claim) [Efimova L.G., 2022]

The approval of Federal Law 31 July 2020 No. 259-FZ 'On Digital Financial Assets, Digital Currency and Amendments to Certain Legislative Acts of the Russian Federation' (hereinafter — Federal Law No. 259-FZ) regulating in detail the circulation of digital financial assets and lays the foundations for regulating the circulation of digital currencies has became another major step.

By virtue of part 2 of Article 1 of this Federal Law digital financial assets are digital rights, including monetary claims, the possibility of exercising rights under equity securities, the right to participate in the capital of a non-public joint stock company, the right to demand the transfer of equity securities, which are provided for by the decision to issue digital financial assets in the manner prescribed by law, the issue, recording, and circulation of which is possible only by making (changing) entries in the information system on the basis of the distribution of financial assets. The doctrine of civil law does not recognize digital rights a new object of civil rights, but considers them as a new form of fixation of traditional property rights (including obligatory, corporate, exclusive rights) [Sukhanov E.A., 2021]; [Vasilevskaya L.Y., 2019]; [Konobeyevskaya I.M., 2019: 332]. By the method of recording digital rights are close to book-entry securities [Rozhkova M.A., 2021: 39], particularly digital financial assets that record the rights to participate in the capital of a non-public joint-stock company ("digital shares").

The differences between digital rights and book-entry securities boil down to the infrastructure supporting their circulation [Guznov A., Mikheyeva L. et al., 2018]. A more modern distributed ledger system (DLT technology[3]), including blockchain, is used to record and enforce digital rights.

Digital financial assets are also compared to non-cash funds [Shevchenko O.M., 2022].

In accordance with part 3, Article 1, Federal Law No. 259-FZ, digital currency means a set of electronic data (digital code or designation) contained in the information system, which are offered and (or) may be accepted as a means of payment that is not a monetary unit of the Russian Federation or a monetary unit of a foreign state, and/or international monetary or settlement unit and/or as an investment and in respect of which there is no person liable to each holder of such electronic data, except for the operator and/or nodes of the information system, whose only obligation is to ensure the compliance of the procedure of issuance of this electronic data and actions on making (changing) entries in such information system with its rules.

Norms of part 5, Article 14 of this Law prohibits Russian residents from accepting digital currency as a counter-payment for goods they transfer, work they perform, services they render or in any other way that allows them to assume payment for goods (work, services) with digital currency.

As a consequence, some sources say that the movement of means of payment not related to the movement of goods (works, services), including donation, granting a loan (credit), payment of interest, return of unjust enrichment, compensation for damage, payment of contractual damages, contribution to the charter capital, payment of income (dividends), inheritance, does not fall under the above prohibition [Novosyolova L. A., 2021: 6].

Other papers conclude that Russia has not realised the payment function of digital currency and can only use its investment function [Staroverova O.V., 2022].

The legal nature of cryptocurrency, as the most common form of private digital currency based on cryptography technologies, is a widely debated topic. The range of opinions is impressive: cryptocurrency is not recognized as an object of civil rights under Article 128 of Civil Code [Sidoren-

[3] DLT: Distributed Ledger Technology.

ko E.L., 2018], it has signs of a thing [Sazhenov A.V., 2019]; [Babina K.I., Tarasenko G.V., 2018]; [Kostko V.S., Sklovsky K.I., 2018], of other property [Tolkachev A.Y., Zhuzhalov M.B., 2018]; [Savelyev A.I., 2016], and of property rights [Belomytseva O.C., 2014: 26].

It seems that given the current state of legal regulation of digital currencies and in the context investment transactions with digital currencies of prevailing in circulation (their exchange for fiat money and vice versa), they manifest themselves as property rights close to absolute rights, although without full correspondence [Rozhkova M.A., 2020: 76]; [Yankovsky R.M., 2020: 50].

The approval of Federal Law No. 339-FZ 24 July 2023 "On Amendments to Articles 128 and 140 of Part One, Part Two and Articles 1128 and 1174 of the Civil Code" has led to the emergence of a new form of non-cash funds, namely the digital rouble, transactions with which will be carried out by the Russian Federation Central Bank using the digital rouble platform and digital rouble accounts.

High-ranking employees of the Central Bank have announced there will be marking ("colouring") of the digital rouble, which will be a unique code that will allow tracking the chain of transactions throughout the life of the digital rouble, including control over its intended use. According to the regulator's representatives, it will make it possible to increase the transparency of the use of the digital rouble and de-anonymise transactions involving it[4].

In the author opinion, the above-mentioned undoubted advantage of the digital rouble over other forms of non-cash and cash funds, while contributing to increased control over its circulation in legal economic activities, hardly excludes it from the sphere of criminal interests. The use of fake digital currency account holders and the possibility that it may always be transferred outside the digital currency platform into other less transparent forms of fiat money does not preclude the use of digital currency as a subject or instrument of crime.

Digital currencies of central banks are opposed to private digital currencies [Dyakonova M.O., Efremov A.A., Zaitsev O.A. et al., 2022], which can act as an actual (contractual) means of payment, but are not universally recognised as such.

[4] O. Skorobogatova, First Deputy Chairman, Bank of Russia, and A. Zabotkin, Deputy Chairman, Bank of Russia. Russian Central Bank prepares 'coloured' roubles without competition for savings. 8 December 2020. Available at: URL: https://cbr.ru/press/event/?id=8345 (accessed: 25 July 2023)

In civil law doctrine the digital rouble as a kind of non-cash money is usually described as an object of law of obligations [Sarnakova A.V., Zhizhin N.C., 2022].

In summary of the peculiarities of financial and legal regulation and doctrinal views on the legal nature of financial assets in digital form, we can conclude that they correspond to such an object of civil rights as property rights, in respect of which appropriate digital methods of their fixation are applied.

2. Digital Financial Assets in Property Offences

In the light of the identified legal nature of digital financial assets, the most pressing issue is whether they can be recognized as the subject of property offences.

The classical concept of the subject of crime as a tangible value or other object of the material world in the conditions of modern information (digital) society loses its universality and requires revision.

'Property' as a feature of property offences is also traditionally associated with material form

In accordance with this classical understanding of "property"in Note 1 to Article 158 of the Russian Federation Criminal Code (hereinafter — Criminal Code) discloses the concept of "theft". Obviously, such attributes as "unlawful uncompensated seizure and/or conversion of another person's property to the use of the perpetrator and other persons, causing damage to the owner or other legal holder of this property", assume the proprietary nature of another person's property.

The material form of another person's property is confirmed by such a method of fraudulent actions as "acquisition of the right to another person's property", which is identified along with theft, and by the "right to property" in extortion, which is envisaged as an alternative to another person's property.

Despite doctrinal conservatism of criminal law, more and more authoritative academic research says about the need to expand the concept of "property" for the purposes of application of criminal law prohibitions set out in Chapter 21 of the Criminal Code [Lopashenko N.A., 2005: 36-44]; [Bezverkhov A.G., 2002: 90]; [Kochoi S.M., 2000: 91].

Judicial practice also follows the path of expanding the concept of "property" and the related concept of "theft" to include objects related to property rights in the subject of theft.

By virtue of Para 5 of the Resolution of the Plenum of the Supreme Court of the Russian Federation 30 November 2017 No. 48 "On Judicial Practice in Cases of Fraud, Appropriation and Embezzlement", non-cash funds, including electronic funds, are recognised as the subject of fraud in the form of theft of other people's property[5].

But, in fact, the supreme judicial authority of the state has confirmed the approach already established in court practice, when fraud with non-cash funds is recognised as theft of such funds[6]. It would be logical to extend the legal position mentioned above to the new form of non-cash money, i.e. the digital rouble.

Law enforcers often recognise uncertificated securities as an object of theft as well[7].

As for immovable property, the dominant judicial practice so far recognises it as the subject of fraud in the form of acquisition of the right to another's property[8], although in some cases the courts confirm the possibility of its theft[9].

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[5] The legislator has recognised theft as a way of unlawfully taking possession of non-cash funds, including electronic funds, by criminalising the qualified offence of theft from a bank account, as well as in relation to electronic funds (Para D, Part 3, Article 158 of RF Criminal Code).

[6] Verdict of Kirovsky District Court of Tomsk 24 June 2015 in case No. 1-18/2015; verdict of Severouralsky City Court of Sverdlovsk region 17 June 2015 in case No. 1-93/2015; verdict of Sovetsky District Court of Stavropol Area 03 February 2015 in case No. 1-6/2015. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

[7] Verdict of the Ukhta City Court of the Republic of Komi 25 November 2016 in case No. 1-492/2016; verdict of the Podolsk City Court of the Moscow region 14 February 2012 in case No. 1-3/2012; verdict of the Tagansky District Court of Moscow 28 March 2011 in case No. 1-47/2011. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

[8] Appeal ruling of the Kamchatka Regional Court 06 June 2023 in case No. 22-479/2023; cassation ruling of the Eighth Cassation Court of General Jurisdiction 20 September 2022 in case No. 77-4240/2022; appeal ruling of the Moscow City Court 20 December 2021 in case No. 10–20218/2021; verdict of the Povorinsky District Court of the Voronezh region 16 February 2021 in case No. 1-22/2021; verdict of the Moscow Garrison Military Court 13 August 2019 in case No. 1-49/2019. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

[9] Cassation definition of the Third Cassation Court of General Jurisdiction 28 January 2021 in case No. 77-152/2021. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

Thus, in the author opinion, criminal law doctrine and practice are gradually coming to an agreement on the concept of "property" in property offences, applying a more flexible approach to its interpretation and endowing it with content close to its civil law analogue.

As a consequence, there should be no obstacles in classifying digital rights and digital currency, which are objects of property rights, as the subject of theft, thus making it possible to fully cover all known criminal ways of illegally taking possession of them through the application of existing criminal prohibitions.

There are some other researchers who recognise digital rights and digital currency as a subject of theft [Obrazhiyev K.V., 2022]; [Mochalkina I.S., 2021]; [Prostoserdov M. A., 2019: 79].

However, the supporters of the classical approach, who deny cryptocurrency as a subject of theft, thus narrowing the range of criminal forms of encroachment on "digital property" do not give up either [Nemova M.I., 2020: 118–119]; [Khilyuta V. B., 2018: 58–68].

Some researchers recognise digital currency as an object of criminal protection with the controversial restrictive clause that its owner must meet the requirements of Part 6 of Art. 14 of the Federal Law 31 July 2020 No. 259-FZ on informing the tax authority of cases of possession of digital currency, transactions and operations with it [Arkhipov A.V., 2020].

Theft of electronic money is the most common among property offences committed against digital financial assets.[10] Cryptocurrency has more often been the subject of fraudulent theft[11], but it has also been the subject of illegal possession through robbery[12] and robbery with violence[13].

[10] Verdict of Verkh-Isetsky District Court of Yekaterinburg 15 November 2019 in case No. 1-503/2019; verdict of Leninsky District Court of Saratov 17 July 2019 in case No. 1-344/2019; verdict of Kovylkinskiy District Court of the Republic of Mordovia 17 June 2019 in case No. 1-50/2019; verdict of Leninsky District Court of Makhachkala 11 June 2019 in case No. 1-281/2019; verdict of Sovetsky District Court of Novosibirsk 16 March 2017 in case No. 1-103/2017. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

[11] Ruling of the Sovetsky District Court of Makhachkala 09 March 2021 in case No. 1-499/2021; verdict of the Oktyabrsky District Court of Tambov 15 February 2019 in case No. 1-134/19; verdict of the Leninsky District Court of Cheboksary 07.03.2019 in case No. 1-58/2019; verdict of Kirovsky district court of Kazan 25 April 2019 in case No. 1-37/2019; appeal determination of the Supreme Court of Tatarstan 18 October 2019 in case No. 22-7705/2019. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

[12] Verdict of the Kirovsky District Court of Kazan 25 April, 2019 in case No. 1-37/2019. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

[13] Appeal determination of the Leningrad Regional Court 04 March 2020 in case No. 22-106/2020. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

3. Digital Financial Assets in other Offences

Perhaps the earliest references to digital currency in criminal proceedings relate to its use in drug offences. Cryptocurrency was used in these offences long before of the approval of Federal Law No. 259-FZ, that has laid the foundations for the legal regulation of the circulation of digital currencies. Since then, it has taken root in criminal settlements for drugs and psychotropic substances and is constantly mentioned in judicial practice in the corresponding category of cases[14].

At the same time, it should be noted that the paid nature is not a mandatory feature in transactions involving narcotic drugs and psychotropic substances, and criminal remuneration remains outside the objective side of drug offences.

Digital currencies are also used as a means of criminal settlements in other offences related to illicit trafficking in restricted items (e.g., weapons[15]), but are, likewise, not considered as an element of these offences. The doctrine considers others (less common) crimes related to circulation of cryptocurrency that is not theirs attitude, including illegal activities of crypto exchanges as illegal entrepreneurship (Truntsevsky Yu.V., Sukharenko A.N., 2019], and computer crimes related to illegal mining of cryptocurrency [Russkevich E.A., Malygin I.I., 2021].

Cryptocurrency is becoming a popular form of illicit reward in corruption offences.

By virtue of para 9, Ruling of the Plenum of the Russian Federation Supreme Court 09 July 2013 No. 24 (24 December 2019 version) "On Judicial Practice in Cases of Bribery and other Corruption Offences", money, securities, other property, illegal rendering of services of a property nature and granting property rights (including digital rights) are recognised as the subject[16] of

[14] Verdict of the Yaroslavsky District Court 02 March 2021 in case No. 1-45/2021; verdict of the Volokolamsk City Court of the Moscow Region 24 November 2020 in case No. 1-198/2020; verdict of the Penza District Court of the Penza Region 28 September 2020 in case No. 1-86/2020; verdict of the Sovetsky District Court of Tula 26 December 2019 in case No. 1-153/2019; verdict of the Petropavlovsk-Kamchatsky City Court 19 February 2018 in case No. 1-107/2018; verdict of the Yakutsk City Court 22 February 2018 in case No. 1-180/2018. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

[15] Verdict of the Perovsky District Court of Moscow 17 June 2019 in case No. 01-0603/2019. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

[16] In reality, illicit reward is not an subject but a means of committing corruption offences.

bribery (Articles 290, 291, 291.1, 291.2 of Criminal Code) and commercial subornation (Articles 204, 204.1, 204.2 of it).

In 2019, when supplementing that ruling, the supreme judicial authority mentioned digital rights as a possible object of bribery and commercial subornation, as this type of property rights was already provided for in Articles 128 and 141.1 of the Civil Code. Digital currency was not mentioned, probably due to the uncertainty of its legal status at the time. The approval of Federal Law No. 259-FZ[17] has, in opinion of the author of present paper, created the necessary prerequisites to fill the gap mentioned.

The following so far rather unique case is of interest in the context of the issue of the corruption offences committed using cryptocurrency as illicit reward.

Persons employed in the Investigative Department of the Federal Security Service of Russia before, were convicted for taking a bribe in the cash form in a particularly large amount (RUB 60 million), for taking actions in favour of the bribegiver to create more favourable conditions during the preliminary investigation and for illegal actions to mitigate the charges against the bribegiver's father, with extortion of the bribe, by an organised group, under Part 6, Article 290 of the Criminal Code. The first tranche of the bribe in the amount of RUB 3 million was converted into bitcoin cryptocurrency (7.64664403 BTC) at the request of one of the convicts and transferred to a crypto purse belonging to him, following which it was partially cashed out[18].

On appeal against the verdict, the defence referred to the incorrect assessment of the subject of the bribe as cash, although cryptocurrency was transferred, the actual value of that cannot be determined, which is not an object of civil rights and cannot be considered the object of a bribe. However, the appellate instance disagreed with these arguments and pointed out that the object of the bribe was correctly defined, based on the intent of the perpetrators to receive money, and the conversion of part of the demanded bribe into cryptocurrency and its transfer to a crypto purse controlled by one of the convicted persons was recognised as a legalised way of transferring a bribe in the form of cash[19].

[17] Digital currency has also been recognised as property for the purposes of application of the Federal Law 25 December 2008 No. 273-FZ "On Combating Corruption" (Part 10, Article 8) // Body of Laws of the Russian Federation. 2008. No. 52. Art. 6228.

[18] Verdict of the Second Western District Military Court 26 February 2021 in the case No. 1–7/2021 Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

[19] Appeal determination of the Military Court of Appeal 17 May 2022 in case No. 55-115/2022. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

While the subject matter of the bribe in this case is somewhat controversial, it should be noted that in the context of the uncertainty of the legal status of cryptocurrency the courts have taken an interesting approach by ignoring the intermediate state of the subject of the bribe in the form of cryptocurrency, which is similar to the position of the supreme judicial authority on money converted from virtual assets (cryptocurrency) as a subject of money laundering.

According to paragraph 1 of the Ruling of the Plenum of the Russian Federation Supreme Court of 07.07.2015 No. 32 (ed. of 26.02.2019) "On Judicial Practice in Cases of Legalisation (Laundering) of Money or Other Property Acquired by Criminal Means, and on The Acquisition or Sale of Property Known to Have Been Obtained by Criminal Means", not only money or other property, the illegal acquisition of which is an element of a specific offence (e.g., theft or bribery) are recognised as the subject of offences under Articles 174 and 174.1 of the Criminal Code; the same classification also applies to money or other property received as material reward for a committed offence (for example, for murder for hire) or as payment for the sale of items restricted in civil turnover. In the latest amendments, the same paragraph of the ruling includes a provision that the subject of these offences may be money converted from virtual assets (cryptocurrency) acquired through the commission of the offence.

As a consequence, the supreme judicial authority has evaded a direct answer to the question of the possibility of classifying cryptocurrency as money laundering, which again can probably be explained by the ambiguity of the legal status of digital currencies in this case.

Prior to these clarifications, judicial practice in criminal proceedings sometimes recognised cryptocurrency (usually obtained as part of the sale of narcotic drugs or psychotropic substances) as "other property" and its conversion into non-cash or electronic money as a "financial transaction" within the meaning of Articles 174 and 174.1 of the Criminal Code[20].

After the highest court clarified its position on this issue, the courts began to follow it, skipping the stage of conversion of cryptocurrency into

[20] Verdict of the Kirovsky District Court of Ufa 07 February 2018 in case No. 1-14/2018; verdict of the Kirovsky District Court of Perm 05 February 2018 in case No. 1-11/2018; verdict of the Zheleznodorozhny District Court of Penza 14 February 2018 in case No. 1-15/2018; verdict of the Yalta City Court 30 August 2017 in case No. 1-337/2017. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

fiat money and evaluating subsequent transactions and activities therewith from the laundering perspective.

However, the Supreme Court of the Russian Federation later has issued a decision that many perceived as a change in its position regarding the possibility of recognising cryptocurrency as a subject of money laundering. This decision overturned the acquittal verdict and appeal ruling in a case involving the legalisation of the cryptocurrency "bitcoin" worth RUB 8.2 million received as a reward for the illegal production of the narcotic drug "mephedrone". The lower courts saw no laundering in the exchange of cryptocurrency for non-cash money transferred to the front man's bank accounts, cashed and received by the defendant. The supreme judicial authority disagreed, returning the case for a new trial[21].

Proceeding from the reasoning of this decision, it is difficult to say that the Supreme Court recognised that it was legal to launder cryptocurrency, since the existence of a legalisation purpose is explained by the totality of financial transactions to convert cryptocurrency into non-cash and then into cash. Although, without considering cryptocurrency as a laundering object, the supreme judicial authority would likely have ignored the first financial transaction to convert cryptocurrency into non-cash money.

In any case, in the author opinion, the current state of legal regulation of the digital currencies circulation allows to consider them as "other property" within the meaning of Articles 174 and 174.1 of Criminal Code[22].

Can digital financial assets, as property rights, be the subject of other offences relating to illicit transactions and financial operations?

Bankruptcy offences (Articles 195-197 of Criminal Code) are usually committed through such transactions with the debtor's property that result in the impossibility of using it in settlements with creditors.

By virtue of Articles 131 and 132 of Federal Law 26 October 2002 No. 127-FZ "On Insolvency (Bankruptcy)", the bankruptcy estate includes all property of the debtor available as of the date of opening of bankruptcy

[21] Cassation ruling of the Judicial Board for Criminal Cases of the Supreme Court of the Russian Federation 08 July 2023 in case No. 6-UDP23-6. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

[22] Digital currency is also recognised as property for the purposes of application of Federal Law No. 115-FZ 07 August 2001 "On Combating Legalisation (Laundering) of Proceeds of Crime and the Financing of Terrorism" (Part 3, Article 3). // Corpus of Laws of the Russian Federation. 2001. No. 33. Art. 3418.

proceedings and identified during the bankruptcy proceedings, except for property withdrawn from circulation, property rights related to the debtor, and certain other types of property stipulated by law.

Property rights are explicitly mentioned as an alternative subject of the offence under Part 1, Article 195 of the Criminal Code, and are implied in other bankruptcy offences.

As for digital currency, illegal transactions involving it in bankruptcy offences are not yet common. However, in insolvency (bankruptcy) cases, the issue of including cryptocurrency in the bankruptcy estate has repeatedly become a matter of dispute.

Judicial practice in arbitration proceedings started with a complete denial of cryptocurrency as a negotiable property value[23]; however, arbitration courts gradually began to recognise it as property within the meaning of Article 128 of the Civil Code and include it in the bankruptcy estate[24].

In the author opinion, after the approval of Federal Law No. 259-FZ[25] the issue of including digital currency in the bankruptcy estate alongside with the related issue of its recognition as a subject of bankruptcy offences should be resolved positively.

According to the prevailing judicial practice, transactions with the debtor's property, which make it impossible to use it in settlements with creditors, are a method of malicious evasion from repayment of accounts payable (Article 177 of the Criminal Code).

As part of enforcement proceedings for the recovery of accounts payable on the basis of Federal Law No. 229-FZ 02 October 2007 "On Enforcement Proceedings" it is allowed to foreclose, *inter alia*, on digital currency (Part 4, Article 68), electronic money (Part 12, Article 70) and property rights (Articles 75 and 76).

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[23] Ruling of the Arbitration Court of Moscow 05 March 2018 in case No. A-40-124668/17-71-160F. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

[24] Ruling of the Arbitration Court of the Altai Territory 15 November 2021 in case No. A03-3048/2021; Ruling of the Arbitration Court of the Perm Territory 24 December 2021 in case No. A50-6372/2018; Ruling of the Ninth Arbitration Appeal Court 18 April 2019 № 09AP-17044/2019; ruling of the Ninth Arbitration Appeal Court from 04 February 2020 № 09AP-76537/2019; ruling of the Ninth Arbitration Appeal Court from 15 May 2018 № 09AP-16416/2018. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

[25] Digital currency is also recognised as property for the purposes of application of Federal Law dated 26 October 2002 No. 127-FZ "On Insolvency (Bankruptcy)" (Part 2, Article 2) // Corpus of Laws of the Russian Federation. 2002. No. 43. Art. 4190.

If, in the presence of an enforceable judicial act ordering the debtor to pay accounts payable, the debtor performs transactions or financial operations with the said property in order to prevent it from being used to pay accounts payable, such actions of the debtor, if there are grounds, may be classified under Article 177 of the Criminal Code.

Concealment of money or property of an organisation or individual entrepreneur using which tax arrears should be recovered (Article 199.2 of the Criminal Code) also implies transactions and other financial operations that lead to the impossibility to recover money or other property of an organisation or individual entrepreneur in payment of tax arrears, fees, insurance contributions.

However, this criminal prohibition applies to concealment of property rights only in the form of non-cash money and uncertificated securities due to the restriction provided by paragraph 2, Article 38 of the Tax Code.

At the same time, there is a rather contradictory law enforcement practice, when concealment within the meaning of Article 199.2 of the Criminal Code was recognised as the disposal of the property right to claim receivables[26].

With the above limitation in mind, the subject of the tax offence in question may be financial assets in the form of electronic money, digital rouble and digital financial assets (tokens) related to securities, while other types of digital rights and digital currencies are outside the scope of its objective side.

4. Defining Dimensional Attributes of Financial Assets in Digital Form

In recognizing digital financial assets as an indicator of relevant offences, one cannot ignore the issue of determining their value, which determines the mandatory dimensional characteristics of the offence.

As is clear, electronic cash and the digital rouble are themselves equivalents of value, and the dimensional characteristics of the offence are determined by their face value.

The value of digital rights that are based on an underlying asset (e.g., a stock, bond or physical commodity) is determined by reference to the

[26] Verdict of the Sosnogorsk City Court of the Komi Republic 28 December 2011 in case No. 1-298/2011; verdict of the Novovyatsky District Court of Kirov 30 May 2011 in case No. 1-64/2011; verdict of the Drozhanovsky District Court of the Republic of Tatarstan 26 October 2011 in case No. 1-33/2011. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

market value of that asset. Digital financial assets that record the rights to participate in the capital of a non-public joint-stock company (so-called "digital shares") or cash claims have an independent market value[27].

Determining the value of decentralised digital currencies, including cryptocurrencies, which are not backed by real assets and whose market value is determined by speculative demand poses a serious challenge indeed[28].

The legal literature has repeatedly drawn attention to the difficulties in determining the value of cryptocurrencies due to the high volatility of their rate, the lack of an official source of information about it and the organised cryptocurrency market itself [Nemova M.I., 2019; Yani P.C., 2018].

The market value of digital currencies may be determined using federal valuation standards developed and adopted in accordance with Federal Law No. 135-FZ "On Valuation Activities in the Russian Federation" 29 July 1998.

These standards are also applied when conducting forensic cost (valuation) examinations to the extent that they do not contradict the criminal procedural legislation and Federal Law No. 73-FZ "On State Forensic Expert Activity in the Russian Federation" 31 May 2001. In the state system of forensic expert institutions, such examinations are carried out by the Forensic Expert Centre of the Investigative Committee.[29]

E.g., it is proposed to use the income approach (discounted cash flow method) and the comparative approach (method of analogues) envisaged by Federal Appraisal Standard 5[30] when valuing digital assets [Loseva O.V., Kosorukova I.V. et al., 2022: 25].

Some specialists propose to determine the market price of cryptocurrency through its weighted average rate based on information obtained from cryptocurrency exchanges [Nemova M. I., 2020: 90–91].

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[27] Development of digital asset market in the Russian Federation / Bank of Russia. Report for public- 2022. P. 13. Available at: URL: https://cbr.ru/Content/Document/File/141991/Consultation_Paper_07112022.pdf (accessed: 25.07.2023)

[28] Cryptocurrencies: trends, risks, measures / Bank of Russia. Report for public-2022. P. 10. Available at. URL: https://cbr.ru/Content/Document/File/132241/Consultation_Paper_20012022.pdf (accessed: 25.07.2023)

[29] The Investigative Committee of the Russian Federation Order No 77 24 July 2020 "On Procedure for Determining and Reviewing the Level of Qualification and Certification of Experts of the Federal State Institution "Forensic Expert Centre of the Investigative Committee" for the Right to Independently Produce Forensic Expertise." // Consultant Plus Legal Reference System (in Russian)

[30] Ministry of Economic Development Order No. 200 14 April 2022 On Approval of the Federal Valuation Standard "Valuation Approaches and Methods (FAS 5)" // Ibid.

In judicial practice in cases of offences involving cryptocurrency, its value was usually determined by the amount of money used to purchase cryptocurrency or received from its sale (agreed to be received)[31], and in some cases by the exchange rate of the cryptocurrency exchange[32].

Conclusion

Financial assets in digital form are an object of increased criminal interest and are actively used in economic and corruption offences. The emergence of new and expanding circulation of already known financial assets in digital form requires timely and full-fledged regulation, including the necessary protective mechanisms, among them criminal law protection.

Unfortunately, domestic legislation so far lags behind and cannot offer adequate regulatory material in response to the rapid expansion of digital assets into public life.

However, even the outlines of legal regulation of digital asset circulation that have been created to date are encouraging and make it possible to determine the vector of normative and law enforcement solutions. In such conditions the law enforcer justifiably assumes initiative and tries to adapt the "inconvenient" legal concepts to the rapidly changing realities.

Pending final clarity in the legal framework, the supreme judicial authority could well support this initiative by explicitly clarifying the qualification of offences committed with respect to or using digital rights and digital currencies.

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[31] Verdict of the Ryazan Regional Court 17 June 2022 in case No. 2-6/2022; verdict of the Sovetsky District Court of Ivanovo 01 April 2019 in case No. 1-70/2019; verdict of the Surgut City Court of the Khanty-Mansiysk Autonomous Okrug — Yugra 13 November 2017 in case No. 1-762/2017; verdict of the Supreme Court of the Komi Republic 15 May 2017 in case No. 2-5/2017. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

[32] Verdict of the Kirovsky District Court of Kazan 25 April 2019 in case No. 1-37/2019; Appellate determination of the Supreme Court of Tatarstan 18 October 2019 in case No. 22-7705/2019. Available at: URL: https://sudrf.ru (accessed: 23.07.2023)

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Chasing Yesterday: Struggle for Digitalization in Serial Violent Crimes Investigation in Russia

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Abstract

Mirroring the public administration digitalization trend, most Russian law enforcement agencies have either started or intensified digitalisation of their governance, criminal procedure, and operational-investigative activities. However, while setting certain rather ambitious goals, the agents of such changes at times lack, on the one hand, technical and scholar methodological issues and, on the other hand, do not pay the necessary attention to hiring skilled personnel for the divisions concerned. Those issues are especially relevant as Russian science and practice are falling behind already rather obsolete technical means in the field of quantitative analysis of data on serial violent crimes, prevention and countering of which have long been a 'sore point' of Russian law enforcement agencies. The author uses phenomenological approaches to the analysis of developmental patterns and digitalization of serial violent crimes investigation. Besides, the historical method and systemic approach to the analysis of regulatory acts, as well as specialised sources containing valuable information about the progress of quantitative research methodology in Russia and abroad, are used. Criminal anthropology approaches to the assessment of relevant behavioural characteristics of serial violent offenders, essential for the dataset creation process, were followed during the analysis of the methodological aspects of data collection and analysis. The records of interviews with attorneys, investigators, and employees of law enforcement higher educational institutions, conducted by the author, were also assessed. Methodological deficiency of databases containing criminological significant information about serial violent crimes, as well as the issue of the divisions responsible for detecting such crimes being under-equipped, were examined in detail in the article. The author is convinced that the system of

criminal statistics in Russia is incapable of collecting and analysing quantitative data about crimes. Under such circumstances, it is justifiably questionable whether the introduction of not only artificial intelligence but also quantitative data analysis as a whole in the system of the Ministry of Internal Affairs, Public Prosecutor's Office, and Investigative Committee of Russia will be productive.

Keywords

artificial intelligence; machine learning; serial violent crimes; ViCAP; ViCLAS; data analysis; criminal statistics; databases; state information systems.

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Introduction

For almost five recent years, Russia has been implementing the program "Digital Economy of the Russian Federation"[1], that includes, among other things, improvement and expansion of the use of digital technology in the activities of law enforcement agencies competent to investigate serious violent crimes. The investigation of such crimes falls within the authority of the Ministry of Internal Affairs (MIA), the Investigative Committee (IC), as well as the Public Prosecutor's Offices of the Russian Federation, with the latter being charged with overseeing the activities of the former two.

In coordinating solution of violent crimes, including serial ones, these bodies involved in the digitalisation of their activities have to apply advanced methods of analysing crime data, including ones based on artificial intelligence (AI) technology. Moreover, the MIA, that has already adopted the Concept of Research Support for the Activities of the Internal Affairs Bodies of the Russian Federation till the Year 2030[2] (CRSA), was significantly ahead of the IC in this regard, that does not have either a similar concept or its own network and computing resources.

[1] Charter of the National Project National Programme 'Digital Economy of the Russian Federation. Approved by the Presidium of Council on Strategic Development and National Projects under the President of the Russian Federation. 04.06.2019 // SPS Consultant Plus.

[2] Concept of Research Support for Activities of the Internal Affairs Bodies of the Russian Federation till 2030, approved by Order No. 767 of the Ministry of the Interior 13.11.2020 // SPS Consultant Plus.

Meanwhile, the CRSA itself is not without 'infantile diseases' of the Russian law enforcement system, largely concentrated in the field of (non) application of advanced academic and technical solutions and methodology, that, in author's opinion, is most clearly manifested in the investigation and prevention of serial violent crimes (SVC). In this regard, it seems necessary to analyse critically and systematically the needs and prospects for the introduction of digital technology, including that based on AI, in relation to those activities. At the same time, we believe it is exceedingly important to pay attention to the experiences of countries that went much earlier than us through the main stages of digitalisation and automation of preventive and investigative work.

It is worth noting the noticeable lag of Russian law enforcement agencies in creating not only data analysis systems using AI technologies but also, in general, automated information retrieval systems (AIRS) that make it possible to link violent crimes. It is especially evident in the duration of the investigation of this type of crime, which sometimes lasts for up to 30 years[3], when the initial episodes cannot be linked into a single series for a long time. And this problem became evident already in the 1980s during the investigation of the case of A. Chykatylo, who committed murders in various regions of the USSR, but the members of the investigative group could not identify their commonality due to a lack of communication among police departments or unified records of crimes as to their modus operandi [Vod'ko N.P., 1996: 65].

In this regard, it is necessary to thoroughly review the current challenges in digitalization (as well as automation) of the Russian law enforcement agencies' activities in serial crime prevention (including internal intelligence) and investigation and consider the possibilities of their development with the introduction of technical solutions based on quantitative data analysis, including AI.

1. Historic Basis and Current Relevance

According to the Group for Forensic Science Support of Serial Crime Investigations under the Main Forensic Science Directorate (Criminal

[3] A Siberian Monster: Maniac Terrorised A Miners' Town for Thirty Years. Available at: https://iz.ru/1025196/ivan-petrov/sibirskii-izverg-maniak-pochti-30-let-terrorizirovval-shakhterskii-gorodok (accessed: 21.10.2023); Rapist Assaulted Women for 27 Years in Moscow Sentenced to Eighteen Years in Prison. Available at: https://tass.ru/proisshestviya/3699067 (accessed: 21.10.2023)

Centre) of the Russian Investigative Committee, the number of strings of murders has lately been stable in Russia, at about twenty per year (including both solved and newly detected ones). That accounts for 0.17–0.18% of the total number of murders[4] registered in Russia between 2019 and 2022. It stands out sharply against the global statistics on that kind of crime — for all the country differences in the classification of homicide. Thus, in the United Kingdom, Australia, Finland and other Western countries, the figure varied between 0.7% and 2.8% of the total number of murders in the recent decades [Beauregard E., Martineau M., 2016: 80–94]; [Sturup J., 2018: 75–89]. Moreover, according to the US. National Institute of Justice, serial killings might account for up to 15% of the total number of the murders committed in that country, for many of the corpses found and missing persons are also presumed to be victims of serial killers [Martin E. et al., 2020: 29–44].

That data, when contextualized, are hardly indicative of a more favourable crime situation in Russia. Rather, the difference seems to result from considerable weaknesses in the prevention and classification of SVCs, caused particularly by a lack of methodological approaches to the investigation of that sort of crimes, and by deficiencies in both professional analysis of data on these and in its supporting digital platforms.

The complexity of this situation largely stems from a lack of interoperable databases containing criminal and criminological information, particularly centralised registration of violent criminals including their *modus operandi*. Thus, while in the U.S. such records have been kept since the 1930s in analogue (card file) form under the Uniform Crime Report programme [Rosen L., 1995: 215–238], and since early 1980s, in the Violent Criminal Apprehension Program (ViCAP) system [Howlett J. et al., 1986: 14–22], directly intended to detect signs of seriality, in Russia such systems do exist but lag considerably behind in terms of the quality and quantity of the data they contain.

The Soviet and then Russian criminal justice systems have a long history of automation and computerisation efforts. First and foremost, it is

[4] Meaning homicide in the sense of criminal sense. The count includes premeditated and attempted murders (Articles 30(3) and 105 of the Criminal Code of Russian Federation (CC RF) — attempted homicide and homicide, Article 106 — infanticide, Article 107 — killing in the heat of passion), and also part 4 of the CC RF article 111 — an assault occasioning grievous bodily harm with intent which resulted in an involuntary manslaughter (according to 4-EGS statistical form). Data analysis took into account the comparability of crime classification in various jurisdictions.

necessary to mention a contribution of Yu. M. Antonyan and Yu. D. Bluvstein into the exploration of quantitative methods of studying criminal personalities [Antonyan Yu. M., Bluvstein Yu. D., 1974], and works of G.G. Zuikov, who summarised Russian and international experience in building databases that reflect the criminals' specific methods (*modus operandi*) [Zuikov G.G., 1970]. However, until the 1990s, that groundwork remained in low demand and difficult to apply due to a lack of general understanding of the issue of criminal behaviour owing to ideological reasons.

Thus, the mainstream studies of violent offenders' personalities were artificially transferred from criminology to criminalistics, a vaguely defined subject [Terekhovich V.N., Nimande E.V., 2012: 9] aggregating forensic science, forensic psychology, investigative techniques, and the "theory" of criminalistics based on Marxism and dialectical materialism [Sokol V. Yu., 2017: 8, 38–39].

In the meantime, 'criminalistics' was being dominated by lawyers and judicial experts who had no idea of behavioural science or, logically, of quantitative methods for analysing criminals' personality and conduct they admitted in some form [Ishchenko Ye. P., 2016: 10–12]. On the other hand, criminalistics, that was being developed by a number of scholars as a science rooted in criminal trial — which certainly has nothing to do with reality [Aleksandrov A.S., 2011: 277–280] — mainly used a formal legal methodology to address proof-related tasks in criminal cases. As criminal science and practice relied on dialectical materialistic gnosiology that focuses all investigation on physical traces of crimes, they would overlook the behavioural factors giving clues to the perpetrator's personality. That was due in no small part to the authority of R.S. Belkin, one of the major ideologists of Marxism applied to criminalistics, whose status meant [Sokol V.Yu., 2017: 17] that '… our forensic experts would almost never examine mental reflectivity patterns' [Tolstolutsky V. Yu., 2008: 204] important for analysing a criminal's behaviour.

So it was not until the solution of the string of murders committed by A. Chykatylo that databases indicating the specifics of criminal conduct were assembled and the theoretical and methodological justification of their relevance and usability was finalised. Only in the mid-1990s the Ministry of Internal Affairs made an attempt to further assess the possibility of recording crimes in terms of the methods they used [Milovidova M.A., 1994: 12–33] and to create systems for centralised collection of information about violent criminals, namely Monster AIRS with its Violence and Record subsystems [Netsvetova N.V., Usanov I.V., 2009: 22–23]. However,

those systems proved less than efficient later on [Isyutin-Fedotkov D.V., 2018: 144], so now there are other software packages and databases in place to help identify links between crimes with a view to detecting seriality — to be discussed below.

2. Technological (Un)preparedness Level

Today, the most detailed information systems, or, more precisely, electronic card files on serial violent crimes are the Glukhar[5] centralized record-keeping system and a separate database system of the Serial Crime Investigation Group ("SCIG") Nezabudka (Forget-me-not flower). Both are used by the Headquarters of the Investigative Committee. Concurrent use of two record-keeping systems is mainly due to the fact that the former lacks detailed headings or a user-friendly retrieval interface that meets today's requirements on relational databases; see e.g.: [Date C., 2019: 47–54].[6] The latter database, developed by the SCIG, contains more information on some modus operandi features identified in analysing mainly unsolved criminal cases of rape and sexually motivated murder; however, it does not work in automatic mode, either.

Generally, both systems are fraught with deficiencies, the principal ones being their organisation in card file form, with primitive retrieval functions, and manual updating for lack of connection to a protected network. In particular, the card file data are not integrated into a unified digital space similar to the Unified Information and Analytical Support System (IASS) of the Russian MIA or into a hyper-converged infrastructure[7] that would support interactive retrieval of information on crimes from terri-

[5] The system is operated according to the Russian IC Order No.123 'On Centralised Registration of Unsolved Homicide and other Grave and Especially Grave Crimes against the Person in the System of the Investigative Committee of the Russian Federation' 11.08.2011. 'Glukhar' means 'wood grouse' in Russian, literally 'deaf [bird]', which stands for 'cold case' in Russian police lingo.

[6] The author drew this conclusion from own professional experience in comparing the system with its foreign counterparts and, more generally, from the structural requirements on this kind of databases. Besides, those features were noted by the experts polled from among IC investigators.

[7] A software-oriented architecture uniting storage, computation and visualisation resources in one system that can run on standard server equipment. The system's advantage is the saving of resources needed for data processing and using a network of data stores that supports analysis and collation of the data contained in each of them. Available at: https://www.suse.com/suse-defines/definition/hyper-converged-architecture/ (accessed: 21.10.2023)

torial units and collection and analysis of data on persons to be checked from various sources in online stores. Importantly, virtually none of the IC territorial units have direct access to other authorities' State Information Systems (SISs) containing information that may be important for tracking down criminals. This is a considerable hindrance to investigations and intelligence surveillance and increases the time costs of legal proceedings as 'paper' queries have to be mailed.

The latter problem is also typical of the information systems of the Ministry of Internal are similarly not yet integrated with the SISs containing information of criminal relevance.

Similar technical difficulties are faced by the Public Prosecutor's offices. Thus, since 2013 the General Public Prosecutor's Office and those of federal subjects (regions) started pilot operation of a State Information System of Legal Statistics (SIS LS) [8], but its full-fledged deployment is still pending.[9]

To collect information about the efficiency of the SIS LS and other information systems run by the law enforcement agencies and used to analyse crime data, the author interviewed fifteen officers at the headquarters and regional units of the Russian Public Prosecutor's Office (N=9), IC (N=4) and MIA (N=2) in Moscow, St. Petersburg, the Astrakhan, Kaluga and Saratov Regions, and the Altay Territory.

The interviewed employees' professional duties are directly related or have recently been related to statistical and information retrieval systems for the analysis of criminological data. The respondent experts' work particularly included:

monitoring the prompt and correct filling of databases;

development of measures to counter crime in a specific region, based on the data available;

engagement with superior authorities regarding the operation of those systems;

training law enforcement personnel in crime data analysis.

[8] Order No. 39 by the General Prosecutor 'On Pilot Operation of the State Automated System for Legal Statistics' 31.01.2013 // SPS Consultant Plus.

[9] According to Article 9 (3) of the Federal Law No. 487-FZ (as amended 28.12.2022) 'On Amending Individual Legislative Acts of the Russian Federation Concerning Unified State Statistical Accounting of Data on Crime Situation and on Crime Reports, Investigative Proceedings, Preliminary Inquiry, and Oversight by Public Prosecutors' 27.12.2019, the provisions of Article 51(5) of the Federal Law 'On the Public Prosecutor's Office of the Russian Federation' regarding the deployment of the State Automated System for Legal Statistics will apply after 01.01.2024 // SPS Consultant Plus.

After the expert poll we should note that most of the SIS LS users questioned by the author at the Public Prosecutor's Office and IC (seven out of nine and two out of four, respectively) pointed out that the system used imperfect software that was constantly hanging up and generally non-interactive. On the other hand, Public Prosecutor's Office employees from Moscow and Saint Petersburg made no such comments but mentioned that their offices were equipped with better hardware.

A senior official at a Public Prosecutor's office in Moscow specially noted that it was difficult to search on narrow groups of attributes (*modus operandi features*) that could only be entered in the general case summary.

On the positive side, our informants noted that the SIS LS, like the IASS, was integrated into a single information network that provided online access to data on crimes and their specific features.

However, the main drawback of the SIS LS is that the system is essentially designed to process statistical forms (cards) approved by the Order on Unified Registration of Crimes[10] and contains no built-in data analysis modules similar at least to statistical software like IBM SPSS Statistics® that might automatically detect patterns in crime modalities or geography, let alone finding relationships among variables using AI technology, for the use of such methods requires training and validation samples that would support the training and adjustment of a software algorithm analysing information about crimes.

The author believes those facts to be at variance with the purposes of the Concept of the Digital Transformation of Public Prosecutor's Office Bodies and Organisations till 2025,[11] that envisaged equipping the SIS LS with an 'information and analytical data processing subsystem using artificial intelligence and Big Data technology'[12] back in 2018 to 2020. Some sources reported plans to include a 'soft AI' module among the system's components [Yatsutsenko V.V., 2021: 187–193]; however, none of the law enforcement officers polled were aware of the mere existence of such software features in the SIS LS.

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[10] Orders: No. 39 of the General Prosecutor's Office; No. 1070 of the Ministry of Internal; No. 1021 of the Ministry for Emergency Situations; No. 253 of the Ministry of Justice; No. 780 of the Federal Security Service; No. 353 of the Ministry of Economic Development; and No. 399 of the Drug Control Service 'On Unified Registration of Crimes' 29.12.2005 // SPS Consultant Plus.

[11] Order No. 627 of the General Prosecutor's Office 'On Approving the Concept of the Digital Transformation of Public Prosecutor's Office Bodies and Organisations till 2025 // SPS Consultant Plus.

[12] Ibid.

Unfortunately, in respect of the SIS LS deployment time one should note that a fairly similar system (at least in the light of the message in the Concept) developed in the USA, the ViCAP, was developed and generally put into operation back in 1983–1986 while being far more sophisticated in terms of filling methodology [Howlett J. et al., 1986: 14–18]. From the outset, that software complex featured automated analysis of crime method data with a view to detecting signs of seriality and is being successfully operated and improved until now.

3. Terms, Definitions, and Research Basis

The difficulties encountered by the IC in building record-keeping systems and databases are largely technical; on the contrary, the MIA and the Public Prosecutor's Office face methodological problems. These mainly consist in a deficient classification and less than informative crime modality attributes (variables) to be entered in the statistical cards.

Thus, e.g. the Manual No. 12, developed by the Main Information and Analytical Centre of the Russian MIA to facilitate completion of statistical forms pursuant to the Order on Unified Registration of Crimes and containing an exhaustive list of such variables, excludes headings duly reflecting the details of the crime commission method and pointing to possible seriality. Specified instead (in respect of homicide) are death infliction methods only — according to the International Classification of Diseases adapted for Russia (like Code 108 'Hanging, strangulation and suffocation' or Code 123 'Sexual assault by bodily force'), which is technically not intended for criminological use and fails to reflect all the material details of a crime.

The death infliction method is similarly encoded in a later Order No. 746 of the Russian General Prosecutor's Office 09.09.2022[13] (hereinafter referred to as 'Order 746'). However, as compared to the Order on Unified Registration of Crimes, it contains a significant innovation: an extended definition of a serial crime.[14].

[13] Order No. 746 of the General Prosecutor's Office 'On Unified State Statistical Accounting of Data on Crime Situation and on Crime Reports, Investigative Proceedings, Preliminary Inquiry, and Oversight by Prosecutors' 09.09.2022 // SPS Consultant Plus.

[14] Ibid. The Procedural Guide for filling out a statistical card for a crime (Form No. 1-GP) defines serial crimes as "... two or more homogeneous, wilful crimes not covered by one intent, committed for a similar (common) motive by the same person(s), as well as acts, forensic information about which objectively indicates the similarity of the characteristics of a group of crimes, e.g. the place and time of crime commission, the specific features

The definition purports to regard quantity (two or more instances) as the primary attribute of seriality, while disregarding other (qualitative) ones. Put differently, it overlooks the existence of behaviour patterns that point to possible repetition (formation of a series) of even a single crime [Yaksic E. et al., 2021: 428–449], like signs of compulsion and sadism (binding, torture and strangulation as the death infliction method).

Besides, the test of similar/uniform motivation in a series seems obscure and groundless: we believe it to exclusively rely on the legal (criminal procedure) component of SVC examination while neglecting the need for a psychological methodology of assessing the nature of motivation.

Legal science and law enforcement term 'crime motive' what forensic psychology regards as the purpose. And the purpose is actually different from the set of the perpetrator's internal motives [Canter D., 2014: 5–6] but remains a formal legal ground for crime classification. It falls short of describing the criminal's true mental state that shapes both the crime itself and its method. The 'purpose' motives visible to the investigating lawyers may not be identical to the true motives or remain hidden altogether, as was the case with A. Pichushkin, the 'Bitsa maniac'.

As for the test of no common intent, in the case of SVCs, intent for a new episode may really form not immediately after the previous one but gradually, as passion builds up during the 'cooling-off period' [Douglas J. et al., 1986: 409]. However, this approach to the emergence of intent is not exhaustive. Thus, A. Pichushkin was 'planning to kill as many people as possible and decided to kill within the South-Western Administrative District of Moscow', i.e. had a common intent. Yet, under these circumstances, according to Order 746 he is not a serial criminal…

So Order 746, short of making statistical records on SVCs any clearer or more systematic, exacerbated some discrepancies that sometimes lead practitioners to be sceptical about the value of such statistical records on crimes.

Importantly, the issue of the classification and material signs of serial crimes is neither new nor clear to the academic community, either. It was occasionally raised in papers by V.N. Isayenko, O.A. Logunova, V.A. Obraztsov, A.A. Protasevich, A.L. Protopopov, I.V. Usanov and other specialists, but no consensus has been reached, as vividly indicated particularly by

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of the traces detected during crime scene examination, as well as other data suggesting the commission of several crimes by the same person(s)".

the content of a specialised research conference on serial crimes held at the IC Moscow Academy in 2017. Some speakers even considered crimes in the fields of land and property relations [Prorvich V.A., 2012: 361–366], public and municipal procurement [Zemskova Ye. N., 2012: 210–218], computer information [Rossinskaya Ye. R., 2012: 28–33], etc., as serial ones, which departs from the current international understanding of this category of crimes [Reid S., 2017: 290–301] and is not based on empirical studies.

We believe such 'diversity' of approaches to result, again, from SVCs being viewed through the lens of legal science only [Isayenko B.H., 2005: 7–14]; [Netsvetova N.V., Usanov I.V., 2009: 4–7], while the criminological / psychological and behavioural components, essential for the collection and statistical analysis of information about the crime, are omitted.

Let me believe the above analysis to suggest that the problems described are of a systemic nature, rooted both in practice and research theory. The existence of such difficulties is confirmed by the MIA itself, whose CRSA expressly states that thesis studies being done at its captive institutions 'are often of an abstract nature and devoid of practical value'[15], and 'the research entities of the Russian Ministry of Internal weakly adapt to the current requirements and lack sufficient personnel and logistical resources to conduct research based on new information and innovative technology, including mathematical simulation and forecasting of social processes, analysis of big data arrays and 'artificial intelligence' technology'[16] (*emphasis added. — E.D.*).

It has a sense also to note a discrepancy between the problems (to be solved by 2030) described in the above extracts from the MIA CRSA and the plans described in the Departmental Programme of Digital Transformation of the Russian Ministry of Interior for the 2022–2024.[17] In particular, the Programme expects a development programme 'Creation of an Information System for Detecting Signs of Similarity among Certain Categories of Crimes' to yield practical results in 2023. Yet, as noted above, the MIA and the General Prosecutor's Office still fail to collect sufficiently detailed data that could objectively determine crimes' serial nature — at

[15] Para 13.1 and 13.2 of the Concept of Research Support for the Activities of the Interior Affairs Bodies of the Russian Federation till 2030, approved by Order No. 767 of the Ministry of the Interior 13.11.2020 // SPS Consultant Plus.

[16] Ibid.

[17] Approved by Executive Order No. 1/37 of the Interior Ministry 11.01.2022 (as amended 30.06.2022) On Approving Departmental Programme of Digital Transformation of the Ministry for the 2022 to 2024 // SPS Consultant Plus.

least in terms of their qualitative profile. On the other hand, it is evident that our research community also disregards international groundwork on conceptualisation and nosology of serial crime that focuses on its etiological factors [Reid S., 2017: 292]. In particular, publicly available templates in the form of ViCAP checklists, developed on the basis of the FBI Crime Classification Manual [Douglas J. et al., 1992], are actually being ignored.

To sum up, in such a situation we can surely say that, as they discuss or announce the introduction of AI technology or advanced quantitative data analysis methods in the investigation of serial crimes, the MIA and other Russian law enforcement agencies have no idea which specific criminal offences they mean and what information they need to examine them.

4. Methodological and Technological Issues

When using AI and Big Data technology to analyse information about a crime being investigated, one should, first and foremost, define the set of variables or attributes that shape the structure of the data set in the training sample. In other words, to be able to analyse newly entered data using machine learning (hereinafter referred to as 'ML'), the mathematical AI algorithm needs a benchmark to guide pattern detection. That largely applies to the processing of quantitative indicators generally, for these require structuring and mark-up in a certain environment (R, Python et al.). Consequently, the question arises: how are the Russian law enforcement agencies going to introduce AI for automated analysis of data from SISs in the virtual absence of a science-based methodology? Besides, the raw statistic data available leave much to be desired as to their completeness, as was discussed below, to say nothing of their poor credibility — due to incorrect entry or distortion of information about the offence and/or perpetrator.

A tentative roadmap for addressing the above problems when using data from departmental information systems is outlined in an article by A.A. Bessonov [Bessonov A.A., 2021: 45–53], the most quoted publication on *e-library.ru* about the gradient boosting method in the last three years.

In our opinion, this publication reflects virtually all the sore points of Russian criminal methodology, particularly those associated with Belkinian approaches[18] to understanding the crime investigation mechanism.

[18] The author understands them to mean positivist (dialectical and materialistic) views of the investigation process that ignore the reflection of the person's higher mental func-

Firstly, the article examines criminals but not the crimes they have committed as differentiated by their typological features. They are not logically classified. Thus, the author states that his study's empirical database comprises 1068 sexually motivated serial crimes committed by 186 perpetrators, 26% (N=278) of these being serial killings. These data logically suggest that the rest, 74% (N=790), are other crimes, also termed serial in the article. In this connection, given the vagueness of the official criterion of 'seriality' illustrated above and limitations on its use, the list of offences included in the data set might be expanded to the entire Criminal Code. And if we assume the author to generally mean violent sexual crimes, that approach is also contrary to the qualitative criteria for forming statistical samples based on the FBI Crime Classification Manual [Douglas J. et al., 1992: 72–105] that clearly specifies the criminological and criminalistic distinctions among SVCs and is used in most research papers of this kind [Sorochinski M., Salfati C., 2017: 74–75].

Besides, in the context of the deficient completeness and reliability of the data set used by A.A. Bessonov in his article, we should emphasise that the use of data sets for ML that only reflect a certain part of the general totality[19] may distort the predictions returned by the algorithm on the basis of such a training sample [Nicora G. et al., 2022: 103996]. Such an algorithm requires constant adjustment and patching. Failure to comply with the above requirements concerning adequate classification of components [Van Giffen B. et al., 2022: 101–102] and fine-tuning of the training sample may lead to serious errors, including inaccurate definition of the scope of persons to be checked.

The author of present article thus used an unbalanced and non-representative sample and failed to take that into account in the design of his study. Should the methods proposed in the article, particularly regression analysis, be used, that approach will obviously lead to errors [Boslaugh S., 2012: 437] in the calculations and data interpretation. On the other hand, the study says nothing about the use of test samples to check the efficiency of the models built, which, in conjunction with a very limited size of the general sample, raises doubts whether those models have been tested at all…

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tions (and disorders thereof) in the crime pattern but focuses instead, quite formally, on traces and what is called the 'criminal profile', while ignoring essential criminological components of the criminal conduct in question..

[19] Generally, our law enforcement agencies are using such incomplete data, on the one hand, due to less than detailed descriptions of the crime setting in the statistical forms, and, on the other hand, because some violent crimes (including rape) may remain highly latent.

Secondly, the author does not explain the methods he used. For example, the article contains no information on how logical regression and gradient boosting were used and how the variables were distributed within those algorithms; step-by-step operationalizing is not provided, nor are the code layouts described.

Besides, A.A. Bessonov uses a circular model of the distance from the perpetrator's home to the crime scene. This completely ignores other geoprofiling approaches and empirical techniques that simulate the probability distribution of crime scenes based on the person's typical locations (home↔workplace↔outing destinations), the routine activity model, pattern theory, real possibilities and cognitive perceptions of space [Brantingham P., Brantingham P., Andersen M., 2016: 101–102]. On the other hand, the sample uses data on the murders committed by A. Chykatylo, some of which occurred in parts of the USSR quite distant from where he lived. So the exclusive use of the circular model does not seem well-founded, especially in the absence of data on the geographical dimensions of the settlements where the crimes included in the training sample were committed.

In the practice, geographic profiling and spatial analysis must take into account the specifics of the region, locality and settlement and the elevation differences that influence the decisions taken by the criminal who understands the lay of the land. Otherwise we shall get a ballpark estimate.

This situation gives rise to well-founded fears that A.A. Bessonov, like the whole IC of Russia, was caught in the same methodological trap as was L.G. Vidonov who used similar approaches, in terms of qualitative methodology, to figuring out the geography of a criminal's place of residence while overlooking considerable regional differences, that affected the applicability of his methods outside a single area of Russia (the Gorky region [Ishchenko Ye. P., 2016: 10]. It is also important to mention that mathematical/statistical and criminal analysis of SVC spatial patterns should use many more variables, which is also possible without using AI technology, as clearly shown in the Rigel system developed by D. Rossmo and Environmental Criminology Research Inc. (ECRI).

The software analyses in particular:
physical traces at the crime scene;
description of the criminal; and
data on the perpetrator's behaviour (spatial and temporal data, *modus operandi*, signature) [Rossmo D., Rombouts S., 2016: 166, 168].

It should remember that working with any information, especially quantitative one, requires the use of mathematical and statistical methodology for its analysis, to be chosen on the basis of the structure and qualitative characteristics of the training sample and study sample. And impartial analysis of such qualitative indicators should be based on an empirical understanding of the essence of the phenomena being studied and the boundaries separating one object from another [Hegel G., 2017: 106]. With respect to profiling the criminal's personality, such boundaries should be determined in the light of criminal anthropology knowledge that helps reconstruct the pattern of the event being studied in the light of both conscious and unconscious elements of mental reflectivity. What is primarily needed is a philosophical and methodological basis that is adequate to the object of study and helps ask the right research question and interpret the values obtained in the calculations.

Neglect of the above principles, especially regarding the methodology of building data sets for AI, leads to the formation of erroneous statistical conclusions: ML practice abounds in cases of incorrect or disputable ML use which confirms again that the results, like the processing itself, need a cautious approach. For example, the use of ML algorithms to figure out potentially terrorist activity in Pakistan led to decisions to deal missile strikes on crowds of people who had nothing to do with terrorists.[20] It is easy to imagine what AI use in law enforcement may lead to if these preconditions are ignored.

The 'machine' will calculate the data in any event, but it is not responsible for their truthfulness and interpretability.\

5. People Make Almost All the Difference

An additional set of impediments to the digitalisation of SVC investigations results from a lack of skilled personnel in the law enforcement agencies. A.A. Bessonov was quite right in pointing to a very small number of criminalists skilled in analysing both quantitative data as such and violent crimes and, conversely, computer experts with basic criminal knowledge [Bessonov A.A., 2021: 52]. However, the lack of such personnel results, on

[20] The NSA's SKYNET program may be killing thousands of innocent people. Available at: https://arstechnica.com/information-technology/2016/02/the-nsas-skynet-program-may-be-killing-thousands-of-innocent-people/ (accessed: 21.10.2023)

the one hand, from a weak training system and, on the other hand, from the competent units being understaffed.

Firstly, the actual absence of a methodology for training experts on the crime category under review is attributable to the fact that never since the Treeline Case[21] was investigated has Russia developed really strong schools of thought, relying on innovative methodologies of analysing serial criminals' behaviour — like those at the Simon Fraser University (Vancouver, Canada), John Jay College of Criminal Justice (New York, US.) of the FBI Academy at Quantico (Virginia, US.).

On the other hand, to investigate SVCs even without using advanced computer technology, investigation agency officers must possess not only special criminalistic competences but also those in criminological psychology and legal statistics. Unfortunately, the State educational standards and university and police academy curricula provide for little or no teaching of those disciplines.

It is worth noting that some of the demand for such personnel may be covered by higher schools of the Ministry of the Interior that train experts in the specialities Nos. 10.05.03 'Information Security of Automated Systems' and 10.05.05 'Information Technology Security in Law Enforcement'. However, the MIA and Public Prosecutor's Office experts (N=3) interviewed by the author noted that, given the small flows of students of analytical specialities under those programmes, they found it low-probable that the shortage of the required personnel would be filled.

The teaching of quantitative analytical methods at civilian law schools gives little ground for optimism, too. Referring to 'market needs', they are constantly trying to commercialise the educational process by getting rid of unprofitable courses. A graphic example is the National Research University Higher School of Economics that shut down courses in legal psychology and statistics over the last few years despite their solid research and practical basis.

Secondly, as regards the staffing of the specialised units that detect and investigate SVCs, we should note that the IC Headquarters employs some five forensic investigators working on the subject (in the SCIG) and not more than ten psychologists for whom criminal profiling is not a core professional duty. Just as few officers (five or so) are working in the serial

[21] Concerning the string of murders committed by A.R. Chykatylo.

crimes unit of the Main Directorate for Criminal Investigation of the Ministry of Internal.

It should be noted that the police possess far greater resources than the IC to train personnel with data analysis skills, namely the staff of the Special Technical Activities Bureau of the Russian MIA and the institutions (Centres) of its system. On the other hand, their employees will hardly be competent to analyse data on violent crimes due to their mainly technical education.

In view of the foregoing, it is not quite clear what resources the Ministry of the Interior will use to implement the above-mentioned development programme 'Creation of an Information System for Detecting Signs of Similarity among Certain Categories of Crimes'. If it is going to be self-sufficient, from where will it recruit so many skilled personnel with double competences in criminology/forensic science and data analysis? Should it use outside contractors (or any outsourcing format), it is also unclear how the Ministry will accept the work done in the absence of experts in serial crimes and with their definition being vague as it is.

If the Russian law enforcement agencies do intend to intensify quantitative studies of SVC data with a view to preventing and investigating such offences, their senior staff must be aware that, at the initial stage of the formation of databases on such crimes, a lot of experts (who will have to be trained/re-trained) will necessarily engage in purely technical work that still requires extensive knowledge in criminology and legal statistics: re-entering information from the notorious cards into the databases and checking that against the criminal case files in the archives.

6. Problems of Tomorrow

After discussing outlooks of AI technologies in law enforcement in Russia it is critical to realise that we are lagging behind.

E.g., the US. began to form the basic research and technology basis for the use of AI and predictive policing in the late 1970s and early 1980s by accumulating data on crime and criminals [Wilson D., 2018: 108, 111]. This was also when research into the spatial behaviour of offenders was largely completed, leading to the finalisation of Pattern Theory [Brantingham P., Brantingham P., 1984]; This appears to have laid the foundation for the ViCAP system.

It is worth noting that G.G. Zuikov described the main methodological issues of the functioning of such systems abroad as early as in 1970. However, for some reason the conclusions were not implemented in practice, not even within as part of classified surveys [Protopopov A.L., 2001: 101].

Taking into account the existing infrastructure, we believe that the most rational option for the creation of SVC prevention and detection systems in Russia based on AI technologies is, first of all, creation of an AIRS, which integrates data on the modus operandi and patterns of the criminals who have committed serious and especially serious crimes against the person involving violence. The roadmap for the development of future domestic AI-based SVC warning systems looks as follows:

to develop an unambiguous and academically justified definition of which offences can be considered serial and on the basis of which characteristics;

to select offences in databanks that fit such characteristics and use this selection to generate datasets that are based on modern crime science.

to conduct preliminary research of such datasets to determine the characteristics of serial offences specific to the territory of Russia;

to develop AIRS capable of automatically detecting signs of serial offences and integrating data from SISs;

to create a separate ML-based subsystem capable of building a profile of the unidentified offender based on the predictive models that are developed with test samples, which are reliable and as complete as possible.

In doing so, one should take into account the mistakes made when the list of variables in foreign systems like ViCLAS (a more widespread and useful analogue of ViCAP) was developed. E.g., ViCLAS may sometimes fail to link offences within a series, as the conclusion about their connection is made based on automated detection of coincidences of a certain number of features. However, the variables that encode them are too detailed: they may not always be present in the offender's pattern in crime and therefore cannot always be assessed by the system[22]. Again, such shortcomings are caused by methodological omissions in the formation of the database; these can be easily corrected if the developers rely on high-quality scientific methodology, which Russia undoubtedly has [Obraztsov V.A., 2007: 15–19].

[22] Allez Savoir // Quand un gouffre sépare les données du ViCLAS des sondages parmi les criminels. Available at: https://wp.unil.ch/allezsavoir/quand-un-gouffre-separe-les-donnees-du-viclas-des-sondages-parmi-les-criminels/ (accessed: 21.10.2023)

Also, attention should be paid not only to the proper characteristics and data parameters used in prospective AI datasets, but also to their timely enrichment and updating so as to avoid incidents and false responses. The Internet platform's algorithms did not identify the danger of such content[23], as the data sets that would allow the AI (computer vision algorithm) to identify what was happening and block the broadcast has not been uploaded to the training sample. Overall, algorithm-based functioning has many possible drawbacks, which, on the one hand, should be foreseen at the design stage, and on the other hand, identified by means human operator control over the machine's decisions. One example is identification of AI objects in general. E.g., researchers from the University of Leuven in Belgium have found a convenient way to deceive the computer vision system by attaching a photograph with brightly coloured objects to a person[24]. Thus, if one knows the basic principles of AI (in this case, computer vision), one can disrupt or reduce the effectiveness of its mechanisms.

As for the methodology of collecting information from "civilian" SISs and its application in investigations and police intelligence, we believe it is advisable to place a special focus on studying the information related to the environment and time of the crime committed, and not only in terms of checking persons with a criminal record, but also to search for witnesses.

Another promising area for improving methods of working with information relevant to crime science is the use of AI technologies in assessing the possibility of repeat offending. However, despite the significant advances made by crime scientists in the West in this area, we must remember the dependence between the predictive value of the ML algorithms used and the quality of the data used therein. At present, this aspect of crime science leads to extensive discussions in the foreign academic environment [Slobogin C., 2021: 37–45]. This demands a balanced approach that does not allow for excesses and truly "automatic" solutions based on blind adherence to mathematical calculations [Dressel J., Farid H., 2018: 5580].

[23] Artificial Intelligence and Counterterrorism: Possibilities and Limitations. Available at: https://www.congress.gov/event/116th-congress/house-event/LC64673/text?s=1&r=1 (accessed: 21.10.2023)

[24] KU Leuven researchers make themselves invisible to AI cameras. Available at: https://nieuws.kuleuven.be/en/content/2019/ku-leuven-researchers-make-themselves-invisible-to-ai-cameras (accessed: 21.10.2023)

Conclusion

The collection of information on criminals and crime is undoubtedly of paramount importance for competent and adequate prevention of possible crimes and timely investigation of already committed SVCs.

The use of AI technologies in analysing information on such cases is of great practical value owing to their predictive capabilities and analytical potential, which allow, through the application of self-learning statistical models, to obtain new data on the criminal events under investigation.

In the case of SVCs the availability of such software packages is also important because, in the case of, for example, sexual killings, it has been reliably established that the likelihood of the next crime increases in proportion to the time interval between the first episode and the apprehension of the offender [DeLisi M., 2014: 420–424].

Unfortunately, the Russian Federation law enforcement bodies have to this day failed to develop not only any AI-based crime and crime analysis systems, but also a simple AIRS that would timely detect the seriality of violent crimes with the help of more or less simple statistical algorithms.

Under such circumstances, it should be stated that Russian law enforcement agencies are more than 40 years behind Western law enforcement agencies in the field of information and analytical support for SVC investigations, since the mathematical and statistical apparatus necessary for the creation of AIRS designed to detect seriality (modus operandi) had been developed abroad by the end of the 1970s. Publications with the first details of the development of AI-based systems for analysing SVC data appeared in 1986 [Icove D., 1986: 27–30].

The Prosecutor's Office, Ministry of Internal and Investigative Committee of Russia are de facto *catching up with yesterday*, trying to reproduce software systems that were created in the USA and Canada before the collapse of the USSR. In doing so, they have no research and methodological basis, and probably no specialists with knowledge of English who could copy at least the out-of-dated rubrics for ViCAP.

At the moment, given the level of development of IT and the technologies for analysing data relevant for crime science, departmental and academic researchers should devote their energy and resources to developing criminological sound classifications of SVCs and a list of statistically significant signs of seriality in Russia, rather than adapting to modern

realities the out-of-dated and quantitatively unverifiable theories of the "heavyweights". At the same time, the training system for law enforcement agencies must be significantly expanded and modified to address the need for analysts competent in both crime science and data analysis techniques.

Only after this preparatory work has been completed will it be possible to create full-fledged AI systems including predictive analytics modules.

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Producing and/or Distributing Intimate Images of a Person without its Consent

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Abstract

Modern times have created different types of new crimes unknowable to the criminal law doctrine before. One of these new crimes is unlawful distribution of intimate images of person in public without its consent, including distribution in Internet. In the world practice this action usually named as “nonconsensual porn”. Nowadays this type of unlawful actions is actively studied in foreign law systems, some of these recently criminalized it; however in the Russian law “nonconsensual porn” is not popular theme for researching in doctrine and also in practice, although the act itself exists. Dispositions of a number of articles of Chapters 19 and 25 of Special part of the Criminal Code of Russian Federation only partially cover the act mentioned; therefore, the need to change the law is already brewing due to the need of modernization of criminal legislation in connection with various ways of committing such a crime. Focusing on the ways of committing the researched act, authors identify and explore three ways of creating “nonconsensual porn”: its production by secret shooting, the production of intimate images of a person with the consent of the person himself and the production of “nonconsensual porn” by using computer technologies. Authors also made an attempt to differentiate the studied act with the already existing crimes of the Special Part of the Criminal Code (Articles 128.1, 137, 242, etc.). The subject of that research is “nonconsensual porn” as an unlawful act. The aim of the research is creating the complex model of offence of “nonconsensual porn” in Russian criminal law system and explanation of necessity of criminalization this act as an

independent crime. The need of protection of people's rights from "nonconsensual porn" especially by criminal law because of the danger of that act, differentiation "nonconsensual porn" from other crimes and need of criminalization of that act in the Russian criminal law is proving by authors. Present research provides significant thesis for developing of study of criminal law and formulate drafts in the Russian Criminal Code, what gives the practical meaning to the work.

Keywords

"nonconsensual porn"; privacy; violation of privacy; "nonconsensual distribution"; deepfakes; crimes in Internet .

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Introduction

Digitalization has become ubiquitous and has penetrated absolutely every sphere of human existence. Persons can broadcast their daily lives on the Internet in real time and can stay online 24 hours a day, showing their audiences their sports activities, shopping, cooking and eating, walking, meeting friends, etc. etc. etc. There are no taboo topics online anymore, and a number of people have been making their sex lives public for a long time. For example, in the last few years, the sex industry has been completely transformed by the Only Fans website that has become a major platform for people to display intimate material of themselves and monetise that display[1]. In the present case, where a person voluntarily and of their own free will produces and publishes their own pornographic material, there is no question of harm caused by such production in terms of their individual rights and freedoms, whereas from the point of view of public law this act should be unambiguously classified under Article 242 of the Criminal Code of the Russian Federation (hereinafter — the Criminal Code)[2]. In the case when such materials are published without the consent of the person depicted in them and against their will, the offence requires a different qualification.

[1] Only Fans is the site where porn is more intimate than ever. Available at: URL: https://www.dazeddigital.com/science-tech/article/38717/1/onlyfans-is-the-site-where-porn-is-more-intimate-than-ever (accessed: 07.12.2022)

[2] See: Criminal Code of the Russian Federation. 13.06.1996 No. 63-FZ // Corpus of Legislation of the Russian Federation. 17.06. 1996. No. 25. P. 2954.

1. Non-consensual Porn as a New Legal Category in Domestic Criminal Law

The phenomenon in question, when intimate materials are published without the consent of the person depicted in them, has received in doctrine the established name of "revenge porn" [Waldman A., 2017]; However, such pornographic material is not always disseminated out of a desire for revenge, hence in general we should speak not so much of a form of revenge but rather of a violation of privacy[3], that gives rise to a more precise term — "non-consensual porn". It should be noted that it is not always pornographic material that is to be disseminated, as the title with the word "porn" may imply: the main parameter is that the material must have a sexual context [Crofts T., 2020: 509].

In Russia, as opposed to a number of foreign countries, this topic does not have a special legal regulation. Thus, the topic in question is particularly relevant in the United States, where between 2013 and 2017 the number of states that criminalised the dissemination of intimate images of a person without their consent rose from three to thirty-four [4] [5]. An initiative to introduce a federal law criminalising the act in question is being discussed at a governmental level[6]; and lawyers specialising in sexual privacy have emerged in the legal profession[7]. A new chapter in the development of the topic is being written in the United Kingdom where in July 2022 the Law Commission made recommendations for improving the law to protect victims of sexual abuse in the form of the use of intimate images, including a recommendation to criminalise such acts, and in November 2022 the United Kingdom Government announced the approval of that recommendations[8].

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[3] Available at: URL: https://www.huffpost.com/entry/how-to-defeat-revenge-porn_b_7624900 (accessed: 07.12.2022)

[4] Ibid.

[5] It's Time For Congress To Protect Intimate Privacy / Available at: URL: https://www.huffpost.com/entry/revenge-porn-intimate-privacy-protection-act_b_11034998 (accessed: 07.12.2022)

[6] Available at: URL: https://speier.house.gov/press-releases?ID=FB99CA92-BFA3-4E6A-AA97-56AE155C46E3 (accessed: 12.12.2022)

[7] The Attorney Fighting Revenge Porn / Available at: URL: https://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn (accessed: 07.12.2022)

[8] Available at: URL: https://www.lawcom.gov.uk/law-commission-responds-to-government-reforms-to-protect-victims-of-intimate-image-abuse/ (accessed: 12.12.2022]

There have been many cases of "non-consensual" porn in Russia[9], and some of them have even been brought to the attention of the European Court of Human Rights[10], but for some reason neither the rather significant judicial practice, nor international experience leads the legislator to the conclusion that this phenomenon needs some attention — although such attention, in our opinion, is necessary due to the lack of an appropriate norm and the imperfection of legal components currently applied to such criminal cases. Thus, courts qualify such cases under Article 137 of the Criminal Code[11] (sometimes with additional qualification under its Article 242[12]), and in our opinion this is not quite correct. The act described in question deserves a separate legal qualification in criminal law due to its specificity.

"Non-consensual porn" can justifiably be considered the spawn of the age of digitalisation. Relations in the sphere under consideration deserve criminal law protection due to the specificity of the act: Firstly, the widespread use of various gadgets and the ubiquitous use of the Internet make such images publicly available without any barrier to access and instantly disseminate them to an audience of many millions, and secondly, once on the Internet, information cannot be deleted afterwards[13], as it may continue to be transmitted by copying, and "non-consensual porn" posted online could surface at any time in the future [Santiago A., 2020: 1274–1275], with the possibility of making the victim's life worse again.

The fact that the affected person is psychologically traumatised, driven to a depressed mood with possible suicidal thoughts [Said I., McNealey R.,

[9] See, e.g.: Revenge porn and surveillance: how cheating and breakups are punished in Russia / Available at: URL: https://www.bbc.com/russian/features-48720689; Woman from Nizhny Novgorod unwillingly becomes a porn actress: her partner secretly filmed their meetings and uploaded them to a porn site / URL: https://www.youtube.com/watch?v=cb-JGnWCIVJA&t=62s (accessed: 07.12.2022)

[10] See: Case of Volodina v. Russia No. 2 / Available at: URL: https://hudoc.echr.coe.int/eng#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-211794%22]} (accessed: 07.12.2022)

[11] See, e.g.: Verdict of Judicial Precinct No. 7 of Rybinsk judicial district, Yaroslavl region, 15.01.2016 in case No. 1-5/2016 / Available at: URL: https://sudact.ru/magistrate/doc/CxHDPh9YVNYq/?ysclid=lbl30k1yft258956749 (accessed: 12.12.2022)

[12] See, e.g.: Cassation Ruling of the Supreme Court of the Russian Federation No. 18-UDP20-36-K4. 10.06.2020 / Available at: URL: http://vsrf.ru/stor_pdf.php?id=1893716 (accessed: 12.12.2022)

[13] See: Experts: Deleted online information never actually goes away /Available at: URL: https://www.chicagotribune.com/business/blue-sky/chi-deleted-online-information-never-goes-away-20150821-story.html (accessed: 11.12.2022)

2022] and deprived of the ability to trust people is significant, taking into account that trust is an important resource of human capital and its undermining hinders normal existence in society, and the building and maintenance of new relationships [Bates S., 2022: 23]. In many cases, "non-consensual porn" forces a person to make drastic life changes, changing not only their place of work and residence, but sometimes their name as well [Waldman A., 2017: 715–719]. Also, this act can be considered especially dangerous when, besides the images themselves, the perpetrator publishes data that can be used to identify the person depicted in the images: name, sometimes contact details, phone number, and social media profiles. In this case, the affected person may face an immediate risk to life and health, which includes both the real risks of harassment and rape and other risks of harm to the affected person due to "trampled public morals."

It should also be pointed out that it is illegal to use a citizen's image to create "non-consensual porn." However, protection of such images is provided in the Russia exclusively in the Civil Code[14], namely in the Article 152.1. Hence, currently a victim of "non-consensual porn" can hold the perpetrator civilly liable for illegal use of the person's image without consent. In addition, scholars note that tort law is one of the ways to combat "non-consensual porn" [Levendowski A., 2014: 433–437]. But: would all of this be truly fair to the victim of the act under consideration? The fact that the law protects the images of citizens confirms the importance of such protection, but in the context of the topic under review, civil liability alone, given the close relationship of the act with the violated privacy of private life, cannot be sufficient. Moreover, since "non-consensual porn" was created without the knowledge of the person whose image is being disseminated, the consequences of this dissemination (public reprobation and, as a result, loss of reputation, for an action that is completely human and natural) would be unjustified, since the creation of such materials occurred without the consent and without the knowledge of this person, which only increases the gravity of the act committed by the disseminator.

Thus, based on the fact that "non-consensual porn" features the signs of a crime (a socially dangerous act that infringes on the honour and dignity of a person), we do not think it is sufficient to ensure the protection of a citizen only by means of civil law.

[14] Civil Code of the Russian Federation (Part One) // Rossiyskaya Gazeta. 08.12.1994.

All this demonstrates that "non-consensual porn" is undoubtedly a serious illegal act, which needs attention in Russian law. To this end, we consider it possible to propose introducing a corresponding article in the Criminal Code. Author's suggestions on the formulation of the new norm are contained in the results of the study.

Speaking of acts related to the dissemination of intimate materials depicting a person without the latter's consent, we believe it would be correct to distinguish between cases in which the perpetrator created and disseminated such materials without the victim's consent or only disseminated them without such consent. It is also worth highlighting the purpose of the act: whether it was done for the purpose of making money and selling such material, or only for the purpose of revenge and/or reputational damage to the person affected by the act. The act can be classified in different ways depending on its purposes.

2. Ways of Making "Non-consensual Porn"

In our opinion, it is critically important to draw a line between making "non-consensual porn" and disseminating it. There are several reasons for it.

First, a mandatory element for the formulation of our proposed new offence is the dissemination of intimate photographic and/or video materials without the consent of the person depicted in them. These materials may be created either by the person who disseminates them or by the person depicted therein themselves, but it is the dissemination without consent that is the act directly violating the victim's rights. If a file with an intimate image of a person (no matter how the file was created) is stored on the user's devices for purely personal use, even if the file was created without the consent of the person depicted in the image, such an act cannot be considered an offence (similar to the case when downloading and storing a pornographic video on one's personal computer cannot be considered an offence under Article 242 of the Criminal Code, since they do not in themselves indicate an intent to disseminate it).[15]

Second, a photographic or video material that could later become "non-consensual porn" can be created either without the victim's consent or with

[15] See: Ruling of the Supreme Court of Russia No. 127-УД22-12-К4. 04.08.2022 /Available at: URL: https://www.vsrf.ru/stor_pdf.php?id=2146402&ysclid=ldknh18yzu284374747 (accessed: 31.01.2023)

the victim's consent. In this case, it must be taken into account that the victim was aware that the disseminating person has such materials, and the accused cannot be guilty of illegal creation of such materials, since the creation of photo or video materials of an intimate nature was carried out with the consent and knowledge of the victim.

In our opinion, we can distinguish three ways of creating "non-consensual porn": making it by secret filming, making intimate images of a person with the person's consent, and making "non-consensual porn" with the help of computer technology. We will reveal the specifics of each of these methods below.

2.1. Making "Non-consensual Porn" by Secret Filming

Secretly filming a person is the first way to make "non-consensual porn". We would like to point out from the outset that In this article we will not consider secret filming of the victim by an unauthorised person in the course of, for example, voyeurism, as this act may well be covered by the Criminal Code norms (Article 137), although even in this case there may be disputes about the need to criminalise voyeurism) [Sheveleva S.V., Teneneva I.V., 2021: 209-210]. We are interested in filming conducted directly by a person with whom the victim has a relationship of trust (a partner and/or a person under whom the actions depicted in the images may take place), or such a relationship is implied, as an illegal act, which, in the author's opinion, is not fully described by Article 137 of the Criminal Code. It is necessary to consider an example.

A. and B. have a close relationship. Some time after their breakup, A. receives an web-link in an electronic messenger, following which she discovers a pornographic video depicting her. In this way, A. finds out that during their intimate meetings B. secretly recorded their sexual intercourse or other actions of a sexual nature without notifying A.

Can this act be fully covered by the disposition of Article 137 of the Criminal Code as a breach of privacy? We don't think so.

As per Article 137, it is an offence to illegally collect or disseminate information about a person's private life that constitutes their personal or family secret without their consent, or to disseminate such information in a public speech, publicly displayed work or mass media. It should be noted here that the wording of the disposition of this article contains an such

evaluation category as "the private life of a person, which constitutes their personal or family secret." This wording requires additional interpretation.

The Russian Federation Supreme Court does not provide a definition of what may constitute such a secret, but at the same time it states that the accused person's intent to keep "information about the private life of a citizen ... secret" is a mandatory constructive feature of the Article 137.[16]

If a person is in intimate contact with the victim of "non-consensual porn", then this person automatically "receives access" to the secret in question, and their "intrusion" into the victim's private life is legal. This is the key difference between the act in question and the above-mentioned voyeurism, where the intrusion into the private space of a person is not authorised and, therefore, illegal; it constitutes a violation of a citizen's constitutional freedom and right to privacy; and such an act can be fully qualified under Article 137. However, it is the act of illegal penetration "inside" personal space, and possible collection of information about a person at an intimate moment of their life that can be qualified under this article rather than subsequent dissemination of the photo or video materials collected.

It is also important to point out that according to the disposition of Part 1 of Article 137, it is an offence to collect information about the private life of a person, which is understood as "intentional actions consisting in obtaining this information by any means, such as personal observation, eavesdropping, questioning of other persons, including with the recording of information by audio, video, photographic means, copying of documented information, as well as by stealing or otherwise acquiring it" (Item 3 of Ruling No. 46). However, the perpetrator who collects information about a person's private life has quite a concrete intent, namely to violate constitutional rights, that is not the case with the creation of "non-consensual porn."

According to the Dictionary of the Russian language, "information" can be understood as news, reports about something, knowledge in a certain field, awareness of something[17]. So, logical question would be to ask if a video record or a photograph is information? Confidential information?

16 Ruling of the Plenum of the Supreme Court of 25.12.2018 N 46 "On Issues of Judicial Practice in Cases of Offences against Constitutional Rights and Freedoms of Man and Citizen (Articles 137, 138, 138.1, 139, 144.1, 145, 145.1 of the Criminal Code; hereinafter Ruling No. 46) //Rossiyskaya Gazeta. No. 1.09. 01.2019.

17 See: Dictionary of the Russian Language. 4th ed. Moscow, 1999. Vol. 4. Pp. 38–39.

Or would it be more correct to say that the action recorded in such materials is confidential?

An intimate activity takes place between A. and B.; the intimate relationship between them is known information to both of them. In exceptional cases, A. may conceal the fact of their relationship and sexual intercourse with B. (stretching the situation in question, we can say that Romeo could be convicted under Article 137 of the Criminal Code if, being well aware that Juliette kept their intimate relationship secret due to "the feud between two equally respected families", he nevertheless disseminated this information); but in most cases, people do not hide the fact of relationships between them from society, and the existence of intimate relations between these people is implied without being stated openly only due to certain ethical principles.

Nor is the constitution of the female or male body a secret: only the display of a particular person's body is criminalised.

Ruling No. 46 permits the recording information constituting a personal or family secret by video and photographic means, but in the case of "non-consensual porn", the acts captured in photographs and videos are not secret (with few exceptions: e.g., the information that A. has intimate relations with B., or that A. has a tattoo in a place usually covered by clothing, or that the windows of A.'s room where the sexual intercourse took place overlook a recognisable object, which may indicate A.'s place of residence, etc., etc.). The key, however, is not the collection of any information, but the recording of a particular person in these materials (for personal use or further dissemination).

Neither do we consider the secret production of "non-consensual porn" by a person who participates in an intimate act (directly or as an authorised observer) to be a criminal offence if this material is created for personal purposes and the person did not disseminate them subsequently. There are two reasons for this: one, this act has no socially dangerous consequences, and two, the latency of this act is high, since the recorded material does not leave the hands of one person and does not come into "public domain."

Thus, Article 137 of the Criminal Code may apply to the production of "non-consensual porn" in secret from the person depicted in it, but only in the case of voyeurism and until the moment of dissemination, after which the classification of the offence should be based on the legal components of the crime that we proposed in the results of the study.

2.2. Creation of Intimate Pictures of a Person on the Person's Consent

The second way to obtain intimate images of a person that it seems right to highlight, is the obtaining of such images with the consent of the person themselves, and here it can be both the partner who makes the recording based on a voluntary consent, and the person in question who makes it themselves and sends these materials to the partner.

In the former case, we are talking about the same shooting conducted by the victim's partner themselves, but this time conducted openly, with the consent and voluntary participation of the person. At the same time, the person depicted in the materials does not give their consent to disseminate these materials. In these circumstances, it would be more appropriate to be talking of "non-consensual dissemination" as a component of non-consensual porn rather than non-consensual porn proper [Said I., McNealey R., 2022: 5430–5451]. In other words, in this case, as we classify the offence we can insist that the photographic and/or video materials were made in a legal manner, and only disseminating these materials will be a culpable act. Hence, this act cannot be fully classified under Article 137 of the Criminal Code, both on the grounds that we have outlined above in the case of secretly filming a partner and for other reasons, namely: the person filming is now committing an act that could be mistaken for the collection of personal information, but this collection is perfectly legal as the creator has the right to the material (but only for personal use). In such a case, only dissemination should be punished, although even here it would be absolutely logical to raise the question whether visual materials themselves are information within the meaning of Article 137 and whether this article can apply in view of the above arguments.

It can also be the person depicted on intimate images who creates such images. At present, 'sexting', or sending one's intimate photographs and videos to one's partner, has become popular. E.g., according to the latest reports, almost half of the population have been involved in sexting at least once [Greer & others, 2022: 1433]. During the COVID-19[18] pandemic, the number of people sending their intimate images to their partner grew significantly, so it would be quite safe to say this practice is widespread.

[18] Sexting: women reveal how they really feel and share their best sexts / Available at: URL: https://www.stylist.co.uk/relationships/dating-love/women-sexting/500263 (accessed: 15.12.2022)

Interestingly, under-age persons also practice sexting. E.g., about 14.8 per cent of 12 to 17 year olds have ever sent intimate images of themselves to a partner, and 27.4 per cent have received such images [Mori C. et al., 2020: 1103]. In some countries, there are restrictions on sexting. E.g., in the United Kingdom, it is illegal for anyone under 18 to take "nude selfies" unless they do not intend to share them with anyone and intend to keep them only on their phone [Rogers V., 2016: 23].

The legal system in the Russian Federation does not assess sexting process, which, in the author's opinion, is quite justified: firstly, otherwise the state would interfere in the intimate life of its citizens, which it should not do, and, secondly , it would be difficult to control the implementation of such a legislative ban since it is impossible to prohibit people from sexting.

At the same time, one can and should regulate negative consequences of this phenomenon and create legal conditions for preventing such consequences.

Where a person voluntarily sends their intimate images of themselves to a partner, it is as if they are giving the partner the right to use the images for as they like, but they are generally not consenting to the publication or other dissemination of the materials. These photo and/or video materials must be in the possession of only the person to whom they were sent. Otherwise, dissemination of such materials is prosecuted by law and should be qualified as an act of dissemination of "non-consensual porn", and we have given above the arguments about the inapplicability of Article 137 to such offences.

Moreover, in addition to violating the criminal law, the dissemination of sexting photos and/or videos also involves another interesting legal aspect, namely copyright law, because the offender actually publishes materials which, within the meaning of Article 1259 of the Civil Code, are the object of this law and, accordingly, the author of such materials is entitled to all copyright rights provided for in its Article 1255, including the exclusive right to the work (Subpara 1, Para 2, Article 1255) and right to inviolability of the work (Subpara 4, Para 2, Article 1255).

Clearly, while the consequences of copyright infringement in the case of "non-consensual porn" are not as bad compared to the above-described damaged reputation and possible threats to life and health, still this aspect should be taken into account because, firstly, under such an approach, the act in question may become a separate offence under Article 146 of the Crimi-

nal Code (for these purposes, "non-consensual porn" must become an item of commerce and there must be an intent on the part of the person to sell such material), and, secondly, this is a way of combating the spread of "non-consensual porn" on the Internet. In general, copyright law, in cases where there is no specific legal regulation to fully and effectively protect victims of "non-consensual porn", is a kind of "magic wand" that can protect them.

In the absence of specific criminal law regulation, including the absence of liability for the provider publishing such content and the absence of appropriate penalties for the dissemination of "non-consensual porn", copyright law is the only way to combat this phenomenon [Levendowski A., 2014: 425–426]. This is currently the most effective tool for victims to combat "non-consensual porn" [Lee H., 2019: 102] which allows one to proceed, if not against the offender, then against the web site or ISP that has posted pornographic material involving the victim without their consent. This allows action to be taken at least to remove the illegal content, but only if the victim proves that he/she owns the rights to the content in question and his/her exclusive right has been violated by the publication (which is easy enough when trying to remove sexting material, which is usually selfies). Let us point out here that the successful practice of such a struggle does exist[19], but, again, in the West.

Thus, the victim of such "non-consensual porn" is more protected by the law when they independently create intimate materials with their participation that subsequently enter the public domain.

2.3. Making "Non-consensual Porn"

Digitalization, development of computer software and availability of new technologies to consumers enables a wide range of individuals to commit crimes using information technologies. Some technologies that once seemed either sci-fi or that were only available to specialists in narrow fields of application, such as special effects in the cinema, are now part of our everyday lives. Deepfake technology is one of them.

Deepfake is a technology that produces "realistic face and voice replacement through the use of generative-adversarial neural networks" [Kiselev A., 2021: 56–57]. With its help, AI can replace one face with the

[19] See: Chrissy Chambers wins 'revenge porn' settlement / Available at: URL: https://www.5rb.com/news/chrissy-chambers-wins-revenge-porn-settlement/ (accessed: 07.03.2023)

face of another person in the images. That is, in fact, if there is a necessary photo or video fragment with the participation of one person, whom we will call the "recipient", and a photo of a person, whom we will call here the "donor", the face of the "recipient" in the photo can be replaced with the face of the "donor", thus making it look like the "donor" is present in the original materials. Deepfake is in fact a technology of creating fake information, which the perpetrators attempt to pass off as reality by ascribing a person functions that are not actually characteristic of him/her. E.g., such technology was used for political purposes in the election campaign of an Indian politician when deepfakes were used to create videos of him speaking in different languages to attract voters [Ivanov V.G., Ignatovsky Y.R., 2020: 379], that is a perfect example of its possible application.

The emergence and active dissemination of deepfake technology has led to its wide use. This has risen a great number of questions in the legal community: whether it is necessary to create a legal framework for the use of this technology, whether it should be banned at all, who should control its use, and whether copyright issues can arise?

One of the first uses of deepfakes was to create pornographic videos using the faces of celebrities [Meskys E. et al., 2020: 24, 27]; (Scarlett Johansson became one of the first and 'most popular' deepfake stars)[20]. A number of media outlets have highlighted the new problem, pointing out that anyone can be affected[21], and, e.g., state of Virginia has amended its "revenge porn" legislation to include the possibility of committing the act using the deepfake technology[22]. The possibility of making pornographic videos with any person using deepfakes has caused a wave of discussion and public reaction, but again in the West, while in Russia this fact is still not getting any attention — while "pornographic deepfakes" can be very well compared to real "non-consensual porn".

[20] Scarlett Johansson on fake AI-generated sex videos: 'Nothing can stop someone from cutting and pasting my image'/ Available at: URL: https://www.washingtonpost.com/technology/2018/12/31/scarlett-johansson-fake-ai-generated-sex-videos-nothing-can-stop-someone-cutting-pasting-my-image/ (accessed: 16.12.2022)

[21] See: Fake-porn videos are being weaponized to harass and humiliate women: 'Everybody is a potential target' / Available at: URL: https://www.washingtonpost.com/technology/2018/12/30/fake-porn-videos-are-being-weaponized-harass-humiliate-women-everybody-is-potential-target/ (accessed: 16.12.2022)

[22] See: Virginia's 'revenge porn' laws now officially cover deepfakes /Available at: URL: https://www.theverge.com/2019/7/1/20677800/virginia-revenge-porn-deepfakes-nonconsensual-photos-videos-ban-goes-into-effect (accessed: 16.12.2022)

Indeed, with new technologies, both a person who has been involved at some time in the creation of intimate images with their participation and a person who has never been involved in this can become a victim of "non-consensual porn" [Delfino, 2019: 896, 898]. This makes this way of committing a crime quite special: it is not covered by the norms of the Special Part of the Criminal Code, and therefore we can be talking about the need to give special legal protection to the victims of such criminal acts.

It should be noted that, similar to the production of "non-consensual porn", only the dissemination of "porn deepfakes" may be considered criminal, for the same reasons: the absence of public danger in the production without dissemination, and the high probability of latency of such an offence.

Also it is useful to point out the civil law aspect of "porn deepfake" related to copyright infringement. Here, in addition to a possible infringement of the copyright to the photograph of the victim used (unless the photograph was taken by the perpetrator himself, but then it is worth paying attention to the consent of the victim to receive such photographs), the copyright to the pornographic material used is infringed. When a perpetrator uses deepfake technology to place somebody else's fact in a pornographic photograph or video, this:

A) infringes the rights of the copyright holder to this material; and

B) infringes the rights of the person depicted in the original pornographic materials (violation of Article 1315).

Production of pornography is a criminally punishable act in the Russian Federation, so copyright protection of these materials is called into question; still, it makes sense to discuss the existence of such an offence from the proposed perspective as an exercise in theory. However, we still believe that the issue of copyright infringement in this case is only a "Plan B" in case there is no special regulation of the creation of "non-consensual porn" by means of deepfake technology, and that only for the purpose of restoring the victim's infringed rights.

Considering that it is often very difficult to distinguish between fake "non-consensual porn" and the real one, all of the consequences that follow the creation and dissemination of "non-consensual porn" as such also fully apply to the creation of pornographic material using the deepfake technology. Also, we should bear in mind that the committed act is no less serious and needs the corresponding legal assessment due to its great public danger. Thus, the influence and use of modern technologies in committing a

criminal act of creating and/or disseminating "non-consensual porn" must be taken into account separately in forming the elements of the offence.

3. Distinguishing Dissemination of "Non-consensual Porn" from other Offences Entrenched in the Criminal Code

The illegal act that, in author's opinion, should be punished under criminal law is the dissemination of "non-consensual porn", and the above-mentioned ways of obtaining such materials are qualifying factors.

In that part of study, we will provide arguments in favour of our argument that there is no norm in modern domestic criminal law that covers the act in question, and will distinguish it from the existing criminal corpus delicti. We believe it would be correct to distinguish them according to the subjective aspect of the offence, basing our position on the special intent of the subject of the offence.

Usually, "non-consensual porn" in domestic judicial practice is qualified on the basis of a combination of offences under Articles 137 and 242 of the Criminal Code or under its Articles 137 and 242.1.[23]

In our opinion, dissemination of "non-consensual porn" cannot be qualified under Article 137 in all cases. The arguments for our position are partially similar to the above arguments, which explain the impossibility of qualifying the creation of "non-consensual porn" under this Article. However, a different argument would be more valid.

To begin with, it is necessary to define the purposes of disseminating "non-consensual porn". There are two: one, "revenge porn" itself, i.e. the wish to harm the person depicted in intimate images, to cause them mental, moral and reputational damage, and, two, a wish to obtain material gain. In both cases, the intent in disseminating "non-consensual porn" is at the end directed at the reputation of the offence victim. Since the perpetrator pursues this very aim, the act of disseminating "non-consensual porn" is aimed at denigrating the honour and dignity of the person depicted there.

[23] See, e.g.: Verdict of the Motovilikhinsky District Court of Perm of 16.05.2019 in case No. 1-240/2019. Available at: URL: https://sudact.ru/regular/doc/q4zx5H5U0yxJ/?page=2&regular-court=&regular-date_from=&regular-case_doc=&regular-lawchunkinfo=Статья+137.+Нарушение+неприкосновенности+частной+жизни%28УК+РФ%29&regular-workflow_stage=&regular-date_to=&regular-area=&regular-txt=ст.+242+УК+РФ&_=1671196027884&regular-judge=&snippet_pos=172#snippet (accessed: 16.12.2022)

Then by its legal components, the act in question cannot be included in the chapter on crimes against constitutional rights and freedoms of citizens, because, based on the object of the crime, "non-consensual porn" should be included in Chapter 17 of the Criminal Code "Crimes against freedom, honour and dignity of a person."

Besides, in the case of dissemination of "non-consensual porn" created artificially with the use of deepfake technology, Article 137 cannot be applied to qualify the offence since the private life of the person has not been violated and all the disseminated materials are fake.

Furthermore, we do not consider it possible to qualify "non-consensual porn" separately under Article 242 or Article 242.1 of the Criminal Code. These norms protect public morality from the production and dissemination of pornography, but for some reason do not take into account that these pornographic materials may be created without the consent of the person depicted in them. In other words, the rights of a particular person are not protected in this area. At the same time, again based on the interpretation of Article 242, if pornographic materials can pose a public danger in the form of "grossly naturalistic and cynical depiction of sexual intercourse scenes contrary to the norms of morality"[24], and "the mental health of the population"[25] is an optional object in the dissemination of pornographic materials, then it would be logical to assume that the dissemination of such materials contrary to the desire and will of the person depicted therein can cause a separate mental and other harm to this person, from which this person must be protected. In this case, the relations under attack relate to the honour and dignity of a person as protected elements, but at the same time, alongside with their protection, public interest is also protected. If "non-consensual porn" is qualified under an independent criminal norm, competition of norms (Article 242 or Article 242.1 and the proposed components) will occur. Consequently, the proposed article would in fact be a special norm that "absorbs" simple illegal dissemination of pornography.

The existence of a concrete victim will also be an important element of "non-consensual porn", which distinguishes this act from the simple illegal dissemination of pornography.

Suppose, X. runs a website or a social media group specialising in the publication of pornographic content. Each time he meets a girl, X., with or

[24] Commentary to the Criminal Code of the Russian Federation in 4 vols. Vol. 3. Special part. Section IX. Moscow, 2023. P. 188.

[25] Ibid.

without her consent, creates intimate images with her participation, and subsequently constantly publishes this content on his resource. It does not matter whether X. meets girls exclusively for the purpose of obtaining these materials or not. In any case, obtaining these materials for the purpose of further publication may indicate that V. had a direct intent to produce and disseminate pornographic materials as a separate criminal act, even though the girl depicted in them did not give her consent to such publication — which also results in the need for a separate qualification of the act under the article providing for liability for "non-consensual porn." Such a case occurred in the USA, only in the owner of the web-site that specialised on "revenge porn" specifically hired hackers to break into the victim's personal Internet accounts [Sales J., Magaldi J., 2020: 1505-1506]. Although the dissemination of "non-consensual porn" occurs here for commercial purposes, the interests of a specific individual are violated, and the qualification of such a violation as a criminal offence covers the act of illegal production and dissemination of pornography.

Similarly, we do not consider it possible to classify "non-consensual porn" under Article 128.1 of the Criminal Code as calumny for the following reasons.

First, there is actually no constructive sign of calumny: calumny implies the dissemination of knowingly false information denigrating the honour and dignity of another person or undermining their reputation. In the case of "non-consensual porn", there is dissemination of information denigrating the honour and dignity of a person, but this information is not knowingly false, because what is happening in the photos or videos is a real action that has indeed occurred. Secondly, calumny implies the dissemination of information denigrating the honour and dignity of a person, i.e. the disseminated information itself must contain defamation of honour and dignity. In this case, although the actions of disseminating "non-consensual porn" imply denigrating the honour and dignity of a person, the disseminated materials themselves do not directly contain defamatory information, but the attitude (usually, negative) towards a person due to the disseminated information appears in the mind of the person receiving this information. So in effect, the person who disseminates "non-consensual porn" is not engaging in calumny per se.

Qualifying "pornographic deepfakes" under Article 128.1 will also be a controversial act. Although the information disseminated in this case is knowingly false and aimed at defaming the honour and dignity of a person,

its dissemination is not a direct evidence of a negative assessment of the person whose image is used in the creation of "non-consensual porn", and the attitude towards the depicted person together with possible defamation of their honour and dignity take place within the mental process of the person perceiving this information.

As for the possible combination of the article proposed for introduction into the Criminal Code with existing elements of the criminal offence, it can be applied, for example, in the case of dissemination of "non-consensual porn" for commercial purposes in the case of extortion.

Conclusions

At present victims of "non-consensual porn" in the Russian Federation are not protected sufficiently and the current components of criminal law do not cover this criminal act in full. This is a shortcoming of Russian law, given that such illegal acts are not unique, and, in the context of mass digitalisation, they are getting increasingly dangerous to society.

Upon attempting to give a legal assessment of the different ways of committing the illegal act of making and disseminating "non-consensual porn", we can propose changes to the Criminal Code. We deem it possible to consider the act of creating and disseminating "non-consensual porn" a special form of insult.

Insult as an independent criminal act was removed from the Criminal Code in 2011 and is now considered only an administrative offence (Article 5.61 of the Russian Federation Code of Administrative Offences). At the same time the Criminal Code currently includes four offences (Articles 148, 297, 319, 336) involving special forms of insult (e.g. insulting court or religious feelings of believers). In our opinion, the act of creating and disseminating "non-consensual porn" contains positive features of insult as an illegal act: there is humiliation of honour and dignity of another person expressed in an obscene or other form, which contradicts generally accepted norms of morality and ethics, and, furthermore, the form of committing the act in question can be called special due to its nature.

The above arguments suggest the need for a new norm. We propose to formulate its wording as follows:

Article 130.1. Creation and dissemination of intimate and (or) pornographic materials without the consent of the person depicted therein.

Dissemination of visual materials of intimate and/or pornographic nature without the consent of the person depicted in these visual materials.

Shall be punished by a penalty of up to five hundred thousand roubles or in the amount of the wages or other income of the convicted person over a period of up to 24 months, or an arrest for a term of up to six months, or penal custody for a term of up to two years with deprivation of the right to hold the certain posts or to engage in certain activities for a term of up to two years.

The same act, if the said visual materials of an intimate and/or pornographic nature have been created secretly from the person depicted therein and without their consent.

Shall be punished by a penalty of up to one million roubles or in the amount of the wages or other income of the convicted person over a period from 24 up to 30 months, or compulsory labour for up to five years with deprivation of the right to engage in certain activities for a term of up to six years or without such deprivation, or an arrest for the term of up to six months, or penal custody for a term of up to four years with deprivation of the right to hold the certain posts or to engage in certain activities for a term of up to four years.

The act provided for in para 1 of this Article, if the visual materials of an intimate and/or pornographic nature have been artificially created by means of computer technology.

Shall be punished by a penalty of up to one million roubles or in the amount of wages or other income of the convicted person over a period of up to 24 months, or compulsory labour for up to three years with deprivation of the right to hold certain posts or engage in certain activities for a term of up to four years or without such deprivation, or an arrest for a term of up to six months, or penal custody for a term of up to three years and six months with deprivation of the right to hold the certain posts or to engage in certain activities for a term of up to four years.

Acts provided for in para 1-3 of this Article committed against a minor.

Shall be punished by penal custody for a term from three up to eight years with deprivation of the right to hold the certain posts or to engage in certain activities for a term of up to fifteen years or without such deprivation.

Acts provided for in para 1-3 of this Article committed against a person under16 years of age.

Shall be punished by penal custody for a term from three up to 11 years with deprivation of the right to hold the certain posts or to engage in certain activities for a term of up to 15 years or without such deprivation, and with penal custody of for a term of up to two years or without such deprivation.

Dissemination of information about a person depicted in visual materials of intimate and/or pornographic nature, through which it is possible to identify this person, their personal, contact and other data, carried out in course of committing the acts provided for in para 1-5 of this Article.

Shall be punished by a penalty of up to one million roubles or in the amount of the wages or other income of the convicted person over a period of from 18 up to 30 months, or compulsory labour for up to 480 hours, or correctional labour for up to two years, with deprivation of the right to hold certain posts or engage in certain activities for a term of up to three years or without such deprivation, or an arrest for a term of up to four months, or penal custody for a term of up to two years with deprivation of the right to hold the certain posts or to engage in certain activities for a term of up to three years.

We also consider it correct to apply this article to persons who have reached the age of criminal responsibility of 16 years. We believe also it would be correct to classify Parts 1-3 and 6 of the proposed Article as cases of private-public prosecution (Part 3 of Article 20 of the Code of Criminal Procedure), and Parts 4 and 5 as cases of public prosecution, as they affect the rights of minors. The proposed regulation should fall under the jurisdiction of the Russian Federation Investigative Committee.

That regulation will be capable in the best possible way to protect victims of "non-consensual porn" with the help of criminal law, which we believe is quite fair and proportionate. In this case attempts to criminalise the dissemination of "non-consensual porn" are not just copying the experience of foreign legal systems, but a truly necessary measure that needs to be introduced into the Russian legal system. It will allow, on the one hand, to simultaneously protect the basic rights of citizens, as there is no proper legal protection of the rights in question in domestic legal regulation, and, on the other hand, to continue the modernisation of the Criminal Code with account of the challenges and threats of the new times.

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Implementing Rule of Law Concept in the Digital Sphere: China's Experience

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Abstract

The paper provides a discussion of the policies pursued by the Chinese government in implementing the concept of the rule of law through the use of digital technologies. China's recent achievements in creating the digital infrastructure and developing the digital economy are discussed. The paper explains how the Chinese government use the Internet, big data, artificial intelligence and other technologies to promote legal governance and achieve a synthesis of information technologies and the rule of law in public governance in terms of process and method. Since China is a country with an extensive territory and large population where improving the access to and quality of justice is problematic, policies are pursued to actively introduce modern digital technologies to digitize justice. Judicial institutions across the country also have a varying degree of experience of promoting smart justice. In 2021 and 2022, the Supreme People's Court of China published one by one the following three major rules for online activities of courts: Rules for Online Justice; Rules for Online Mediation; Rules for Online Operation, to make online judicial operations across the board well-regimented. Guided by these three rules, Chinese courts have made certain progress in recent years to make their operations digital and smart. Since promoting the digital rule of law means the cultivation of talent, an enabling political environment was created to improve legal skills and cultivate specialists with competencies in the area of artificial intelligence, big data or cloud computing. The problems faced by China in promoting digital justice are currently experienced by many countries worldwide. The author aim is to explain the Chinese regulatory model to share this experience with other countries.

Keywords

rule of law; Chinese law; digital technology; digital economy; artificial intelligence; digitalization of justice; legal education.

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Background

Building a system of the socialist rule of law specific to China and a socialist state governed by the rule of law are the key objectives for the comprehensive promotion of rights-based governance mentioned for the first time at Central Committee of Chinese Communist Party fourth plenary meeting at the 18th session. Later these objectives were reaffirmed in Xi Jinping's report to the All-China CPC Congress in 2017. Building the rule of law in contemporary social context is inseparable from modern technologies; similarly, digital technologies cannot rapidly develop without legal guarantees. On 07.12.2020 Central Committee of Communist Party has published Guidelines for the Development of Law-Governed Society in the form of a five-year plan (2020–2025)[1] which mentioned "a need for extending the social governance from real society to cyberspace, creating a reliable and comprehensive cyber-governance system, strengthening the law-based governance of and access to the Internet, comprehensively promoting the rule-of-law principle in the cyberspace to make it pure and limpid". On 10.01.2021 the CC CPC has issued a Plan for Building the Rule of Law in China (2020–2025)[2] for systematic and consistent unfolding of the ways to advance the rule of law in the new age, with the following steps envisaged by Part VI of the Plan: "Fully use big data, cloud computing, artificial intelligence and other modern technologies for comprehensive smart governance in the legal sphere, and promote the rule of law in China through the use of data, networks and intellect". The development of law has a history of its own; it is

[1] Available at: https://baijiahao.baidu.com/s?id=1685418013912273009&wfr=spider&for=pc (accessed: 23.07.2023)

[2] Available at: https://www.gov.cn/xinwen/2021-03/13/content_5592681.htm (accessed: 04.08.2023)

constantly perfected and developed in line with socioeconomic development and changes to production methods and ways of life. The emerging technologies such as the Internet, artificial intelligence, big data and cloud computing are being integrated into all aspects of the rule of law at an unprecedented pace. It is necessary to overview in detail the implementation of the concept of the *rule of law* in the digital sphere in China.

1. The Overall Description of Digital Infrastructure and Digital Economy in China

It has a sense to overview major policies and recent data as the starting point to explore China's experience in the sphere under study.

On 13.03.2021 the Chinese government has published the Main Provisions of the 14th Five-Year Plan of China's Economic and Social Development and Prospective Goals until 2035[3] proposing to "lay down and build new types of infrastructure for data, convergence, innovation etc. with a focus on supporting digital change, smart upgrade, convergence and innovation. We will create a high-speed interconnected, safe and efficient data infrastructure, and expand the potential for data collection, transfer, storage and computation. We will accelerate the deployment of 5G networks on a large scale, promote the modernization of gigabyte fiber optic networks and prospective planning for facilities to support 6G networks". The government has indeed made enormous effort to create its data infrastructure, with the following results being achieved:

According to the 2022 Digital China Development Report published on 23.05.2023, a total of 2,312,000 5G base stations were build and made available by late 2022, with 5G users reaching 561 million or over 60% on the global scale, and 110 cities across the country achieving the standard of urban fiber optic networks[4].

On 12.12.2021 the State Council of China has issued the 14th Five-Year Plan for the Development of Digital Economy[5] proposing the following devel-

[3] Available at: https://www.gov.cn/xinwen/2021-03/13/content_5592681.htm (accessed: 04.08.2023)

[4] Available at: http://www.100ec.cn/Public/Upload/file/20230524/1684892315684 384.pdf (accessed: 07.08.2023)

[5] Available at: https://www.gov.cn/zhengce/zhengceku/2022-01/12/content_5667817.htm?eqid=c4ae80350001561d000000026458635b (accessed: 06.08.2023)

opment objective: "By 2025, the digital economy will be in expansion across the board, with the added value of its core branches at 10% GDP". According to the researcher Z. Zhou, "digitization is based on data. As the world ushers the era of Internet, the generation, receipt, storage and use of data will become increasingly widespread while their role in social life more important. Data becomes a major production and market factor, with the data potential becoming the national development potential and faster digital development an obvious choice for promoting socioeconomic development and the new competitive advantages of the country" [Zhou Z., 2023:14].

Over the last few years the Chinese government has accelerated the development of data, with data production in China at 8.1 ZB in 2022, a 22.7% growth over the previous year. By late 2022, the amount of data stored in China reached 724.5 EB, a 21.1% growth over the previous year. In 2022, China's big data industry was worth CNY 1.57 trillion adding 18% against the previous year[6].

The digital economy has become a major driver of the national transformation along with the rapid development of data resources. As reported in the White Paper on China's Digital Economy Development published by the China Academy of Information and Communication Technology in April 2023, the digital economy's added value grew from CNY 2.616.1 trillion in 2005 to 50.2 trillion in 2022 while its share of GDP was 41.5% to equal that of the processing industry[7]. In particular, the data industry generated CNY 15.4 trillion in revenues in 2022 or 5.5% more than over the previous year; revenues from IT services were CNY 701.28 billion (plus 11.7% over the previous year); revenues from cloud computing and big data were CNY 1042.7 billion (plus 8,7% over the previous year); revenues from the development of integrated circuits were CNY 279.7 billion (plus 12.0% over the previous year); and revenues from technical services for e-commerce platforms were CNY 110.44 billion (plus 18.5% over the previous year). Retail sales via the Internet reached CNY 13.79 trillion, a 4% growth over the previous year. The number of those using online offices, online trip booking and online medicine reached 540 million, 420 million and 360 million, respectively, with growth rates of 15.1%, 6.5% and 21.7%, respectively[8].

[6] Available at: http://www.100ec.cn/Public/Upload/file/20230524/1684892315684384.pdf (accessed: 07.08.2023)

[7] Available at: http://www.caict.ac.cn/kxyj/qwfb/bps/202304/P020230427572038320317.pdf (accessed: 05.08.2023)

[8] Available at: http://www.100ec.cn/Public/Upload/file/20230524/1684892315684384.pdf (accessed: 07.08.2023)

It is worth noting, that, despite these success stories, implementing digital rule of law in China is still at an early stage marked by both breakthrough achievements and numerous challenges. Thus, the State Council of China's digital economy development report of 28.10.2022[9] noted main problems at the moment: "The system of rules adapted to the development of digital economy as well as the data framework are still under development; there is a need to improve the governance of platform economy, so that it is able to encourage activities and guarantee security; it is also necessary to further expand the extent of participation in the international governance of digital economy".

2. Promoting E-Governance in China

The e-government reform has been accelerating in China since 2015 as reflected in the government's annual work reports.

In the 2015 report[10] it was proposed to "promote e-government and online administrative services". In the 2016 report[11] a focus was made on "actively introducing the Internet + government services, implementing inter-agency data sharing and reducing the number of queries filed by individuals and companies to different administrative authorities on one and the same problem, with good quality and barrier-free online service to be ensured". The 2017 report[12] contained the proposal to "speed up the pooling of data systems maintained by the State Council and local authorities to make up a nationwide public services platform". The 2018 report[13] required to provide more online services and to achieve the objective of "single platform processing of applications" and "inter-province online service provision". Where a physical visit is required, the objective should be to provide "one-stop offline services to settle all issues once". The 2019 report[14] proposed

[9] Available at: https://www.gov.cn/xinwen/2022-11/28/content_5729249.htm?eqid=83731da900019c5f0000000564643bf1 (accessed: 06.08.2023)

[10] Available at: https://www.gov.cn/guowuyuan/2015-03/16/content_2835101.htm (accessed: 04.08.2023)

[11] Available at: https://www.gov.cn/guowuyuan/2016-03/05/content_5049372.htm (accessed: 06.08.2023)

[12] Available at: https://www.gov.cn/guowuyuan/2017zfgzbg.htm (accessed: 08.08.2023)

[13] Available at: https://www.gov.cn/zhuanti/2018lh/2018zfgzbg/zfgzbg.htm (accessed: 03.08.2023)

[14] Available at: https://www.gov.cn/zhuanti/2019qglh/2019lhzfgzbg/index.htm (accessed: 27.07.2023)

to "create a single national online public services platform and introduce a quality assurance system for public services".

The 2020 report[15] proposed "to expand service delivery via a single platform, with all work addressing company problems to be performed online". The 2021 report[16] focused on the need to "reinforce the building of e-government, create a reliable mechanism for coordinated government data sharing, promote the use of e-certificates, national compatibility and mutual acceptance, and to provide for more government services to be delivered online using a smart phone".

The concept of e-government was mentioned for the first time in the 2021 government work report, with the government further publishing the Main Provisions of the 14th Five-Year Plan of China's Socioeconomic Development and prospective objectives for 2035[17] to specify the task of building e-government in a special chapter entitled "Enhancing the level of building e-government" which formulated clear requirements to "wide use of digital technologies in public governance to simplify the relevant processes and streamline the regimes for more evidence-based decision- making and more efficient service delivery". The E-Government Program (2021–2025)[18] launched in August 2021 has identified clearly the objective and goal of "building comprehensive e-government" and required "to insist on the use of Internet, big data, artificial intelligence and other technologies for promoting law-compliant public governance, strive towards a synthesis of digitization and rule of law, streamline and update governance processes and methods, actively enhance the level of digitization in building e-government". Moreover, the Program explicitly calls "to rely on the single public services platform and other channels to adequately implement the principle "do it now, do it online, do it next door, do it all at once, do it to help yourself and do it across the country" in the delivery of administrative services".

According to one researcher, "the new mechanism of e-government platform has made of the government as a platform and citizens as users a

[15] Available at: http://www.jl.gov.cn/zw/yw/jlyw/202005/t20200531_7246213.html (accessed: 01.08.2023)

[16] Available at: http://www.jl.gov.cn/zw/yw/jlyw/202103/t20210313_7966172.html (accessed: 07.08.2023)

[17] Available at: https://www.gov.cn/xinwen/2021-03/13/content_5592681.htm (accessed: 02.08.2023)

[18] Available at: https://www.gov.cn/gongbao/content/2021/content_5633446.htm (accessed: 03.08.2023)

triple intersecting mechanism for cooperation between public authorities, private power and individual rights rather than a simple point of exchange between the government and individuals" [Ma C., 2022: 20]. Moreover, with the emergence of "digital space government" and digital rule-of-law mechanisms, comprehensive public services have dramatically improved in efficiency [Chen X., Pan Y., 2021: 97–106].

On 06.06.2022 the State Council has issued the Guidelines to enhance e-government[19] "by significantly improving the extent of digitization and functional intelligence by 2025, achieving major progress in evidence-based governmental decision-making, accuracy of social governance and efficiency of public services, with e-government playing a major role in supporting the key party and public strategies, promoting high-quality economic and social development, and building a government to satisfy people's needs". At the same time, in building a comprehensive rights-based e-government, it is necessary to "promote the use of technologies, streamline the processes and institutional innovations in accordance with law and regulations, remove technological discrimination, ensure privacy and protect the interests of market players and the public".

From 2012 to 2022 China, according to statistics, has improved its position in the international e-government development index rising from 78th to 43rd place as one of the fastest growing countries. The national e-government has achieved full outreach at the level of cities and districts covering 96.1 percent of populated areas. The universal national public services platform (http://gjzwfw.www.gov.cn) has registered more than 1 billion users with real names and standardized services for more than 10 thousand popular applications, with a large number of the most frequent queries to public services now available for "inter-province consulting" to effectively address the issues of administrative complexity and slowness for market players and the public. The digital information platform of the All-China Assembly of People's Representatives has been officially launched, with "smart courts" and "digital prosecutor's offices" widely used to increase the functional purpose of public authorities[20].

In drafting the 20th Party Congress Report the relevant departments of the Central Government held online consultations to receive more than

[19] Available at: https://www.gov.cn/zhengce/zhengceku/2022-06/23/content_5697299.htm (accessed: 05.08.2023)

[20] Available at: http://www.100ec.cn/Public/Upload/file/20230524/1684892315684384.pdf (accessed: 07.08.2023)

8,542,000 messages. Drafting of Civil Code involved 10 sessions held online, with 1,02 million comments and proposals sent by 425 thousand people, of which 114,574 comments were received from 13,718 citizens over the period from 28.12.2019 to 26.01.2020 alone[21]. As could be seen, technological innovations open up the opportunities for socialized governance, shape a new e-government model of collective design and use, and improve the subjective willingness of the people to participate in building e-government.

Electronic, digital and smart technologies permeate all spheres of public production and life across the board. While people generally enjoy the conveniences of the emerging "smart technologies", their unfriendly aspects start to be felt as well. As artificial intelligence is introduced into public governance, the technological change and ethics should become increasingly interrelated, with ethical duties embedded in technologies to be integrated into the overall system of governance values. Apart from supporting the general values of order, efficiency and justice, public governance should also address the issues of security, confidentiality, openness, transparency and responsibility brought about by the use of technologies [Wang Z., Yan J., 2020:3]. Over the last few years, the National Professional Committee on Next Generation AI Governance issued a number of regulations on AI and ethics, such as the Governance Principles of Next Generation AI — Promoting Responsible AI of 17.06.2019[22] which underlined that "AI development should be directed at improving the overall wellbeing of humankind; should support human values and ethics, promote the harmony between man and computer and serve the progress of human civilization; should be based on the premise of ensuring public safety, respecting the rights and interests of humankind, and prohibit abuse and illegitimate practices". In the Ethical Regulations for Next Generation AI of 25 September 2021[23] it was noted that "these Regulations purport to embed ethics into the whole AI lifecycle, promote fairness, justice, harmony and security, and also avoid problems such as prejudice, discrimination, violation of privacy and information leakage". Later on 20.03.2022, the State Council's General Office has published the Opinions for Better Ethical Governance of Science and

[21] Available at: https://m.thepaper.cn/baijiahao_12718052 (last accessed on: 08.08.2023)

[22] Available at: http://cn.chinadaily.com.cn/a/201906/17/WS5d07441ea3108375f8f2afac.html (accessed: 05.08.2023)

[23] Available at: https://www.most.gov.cn/kjbgz/202109/t20210926_177063.html (accessed: 25.07.2023)

Technology[24] stated that "R&D activities should adopt an objective and balanced approach to assessing the uncertainty and risks resulting from the use of technology, attempt to avoid and prevent the risks likely to arise, prevent abuse and illegitimate practices in using R&D achievements, and avoid threats to public order, biological and environmental safety". The said provisions are important reference points valuable for building the digital rule-of-law, and serve as baseline standards and scale of values for robust, correct and reasonable technological change.

A digital rule-of-law state should be built with a view to shaping the digital civilization ecosystem for society as a whole and support common human values, respect human rights and fundamental interests, and also promote fair, equitable, controllable and reliable, open and transparent governance.

3. Digitization of Justice in China

The introduction of modern technologies is the best way to improve the access to and quality of justice.

The National Digitized Development Strategy published by the State Council's General Office on 27.07.2016[25] has made of "building smart courts" a strategy for China's digitized development. In July 2017 the State Council's General Office has published the Development Plan for Next Generation AI[26] again stressing importance of "building smart courts". In February 2019 the Supreme People's Court has issued the 5th Five-Year Court Reform Program (2019–2023)[27] with an objective of "building unique socialist and advanced smart courts in China as well as systems for their use", something that has paved a clear way for digitizing justice.

On 18.05.2021 the Supreme People's Court has issued the Rules for Online Justice[28], with Article 1 establishing legal status and validity of online proceedings: "People's courts, parties to proceedings and other participants

[24] Available at: https://www.gov.cn/zhengce/2022-03/20/content_5680105.htm (accessed: 02.08.2023)

[25] Available at: https://www.gov.cn/zhengce/2016-07/27/content_5095336.htm (accessed: 03.08.2023)

[26] Available at: http://www.gov.cn/zhengce/content/2017-07/20/content_5211996.htm (accessed: 09.08.2023)

[27] Available at: https://www.court.gov.cn/zixun-xiangqing-144202.html (accessed: 01.08.2023)

[28] Available at: http://www.njgl.gov.cn/ztzl47815/yhyshjzc/fy/202107/P020210729626098661614.pdf?eqid=ce969ab5000e87600000000364286c8e (accessed: 04.08.2023)

can use the e-justice platform to complete the proceedings, in whole or in part, online via the Internet or dedicated network, for instance, to lodge a lawsuit, mediate, exchange the evidence, hold an interrogation or court session, deliver service of process, etc. Online legal proceedings are as valid as those held offline. In fact, the Rules detail the principles to be followed and the distinctive features of online proceedings.

On 27.12.2021 the Supreme People's Court also has issued the Rules for Online Mediation[29] to specify the scope of mediation. It covers "civil and administrative disputes, enforcement proceedings, and private prosecution and civil claims arising from criminal proceedings where the defendant (delinquent) is not in custody and which can be mediated or settled under the law". Due to case specifics, the Rules also envisage that "disputes can be mediated online in whole or in part, with the will of the parties to be observed in full. The people's court should seek the parties' consent to online mediation taking into account the circumstances of the case and technical requirements. The parties may jointly appoint an entity and staff for mediation, as well as apply to replace the entity and staff in the course of mediation". As for procedure for online mediation, the Rules apply to the relevant guidelines, appointment of an entity and staff for mediation and exceptions, use of audio and video mediation, drafting of mediated agreements, examination of failed mediation cases, period of online mediation, completion of online mediation etc., to fill the gaps in prior online mediation procedures. The Rules also provide ethical guidelines for entities and staff involved in online mediation, and propose to create a national register of mediators for promoting the exchange of online mediation resources.

On 26.01.2022 the Supreme People's Court has issued the Rules for Online Proceedings[30] comprising 5 parts and 45 articles defining online platform and its operating mode — how to register and manage users online, access the system through personal identification, mediate, pay duties, download documents, simultaneously create case files, check, give and examine evidence, read and archive files, litigate online, execute judgments, etc.

The above three main online rules for courts allow to regulate and standardize all online proceedings across the board reflecting the creation of a system of basic online justice rules specific to China.

[29] Available at: https://www.court.gov.cn/fabu-xiangqing-339521.html (accessed: 04.08.2023)

[30] Available at: https://www.court.gov.cn/xinshidai-xiangqing-346471.html (accessed: 25.07.2023)

As a giant country with large population, China has a highly complex system of judicial information. All across the country the courts guided by a number of national strategies and policies actively master the regime of smart justice adopting a number of key technologies characterizing the judicial AI. On 01.03.2022 the Supreme People's Court has transformed and upgraded the original China Mobile Micro Court system into the People's Court Online Service. The new service is a mini app allowing users to lodge a suit by opening We Chat. In 2022 a total of 10,718,000 lawsuits were filed via the mobile version of the People's Court Online Service, or 30.6 percent more than in the previous year, with 61 lawsuits filed each minute on average[31]. The People's Court Online Service brings together and consolidates the nationwide functions of the general judicial service such as mediation, lodging of lawsuits, maintenance of evidence, legal enquiry findings etc., helping people to make queries for and settle legal, mediation and other issues at courts across the country to achieve the goal of "one network to have things done" and to do away with the earlier online system of multiple access points to courts of all levels that involved complex choices.

Judicial authorities across the country also have different experience of exploring the usage of online judicial services of various forms and characteristics [Xu J. et al., 2021:59], such as Project 206 launched in 2017 by Shanghai political and judicial bodies. Today courts in Shanghai have a fully established online system for lodging lawsuits. Once there is network connection, people can have access to judicial services anywhere anytime through the website, official WeChat account and mini apps that considerably reduce the past inconveniences of long trips and long queues to get admitted and registered. According to statistics, while before 2020 the annual number of online court sessions and online proceedings in Shanghai was, respectively 26 and 48, these two indicators reached 918 and 365 thousands respectively as of January 2023 (over the whole of 2022)[32]. Moreover, "asynchronous proceedings", a new term coined in 2022, is becoming increasingly popular to considerably change the past image of court sessions. If the parties and the judge assist a session at the same time but at different points in space, it can be called model online proceedings, that is, an online court session. If the parties and the judge assist a session at different places

[31] Available at: https://baijiahao.baidu.com/s?id=1758034255248159680&wfr=spider&for=pc (accessed: 01.08.2023)

[32] Available at: https://baijiahao.baidu.com/s?id=1757046295669938835&wfr=spider&for=pc (accessed: 01.08.2023)

and even at different times, it is called asynchronous online court. Asynchronous proceedings are accessible via a micro-court platform developed by the Shanghai courts. In terms of its exterior and functions, the platform resembles WeChat but has the same validity as offline legal proceedings. Upon mutual consent, the parties can access the platform's relevant interface and, once their IDs are validated, assist the court session in the form of a web conference. The judge may restrict the group chat's by term maximum to 20 days. Following access to micro-court, a party can load e-evidence, with the other parties having ample time to access the evidence and express their opinion over the effective term during interrogation, with texts, photos, scans, audio and video files uploaded in the process. Judges and litigating parties can have timely access to uploaded documents and presentations which are fully monitored and can be directly archived. According to N. Zhang, deputy director of the litigation management office at the Shanghai Supreme Court, "previously many people had to wait for court sessions because the court schedule was often congested. In 2022, asynchronous proceedings were widely used, with 155 thousand cases handled in the asynchronous mode by the end of December to make 42.5 percent of all online sessions"[33].

In enforcement a system of comprehensive asset search and control used by Shanghai courts allows with a mouse click to request all registration data on bank accounts, stocks and network funds of the person in question within three days. This procedure used by bailiffs in Shanghai implements an automatic host-level enforcement proceedings reminder and automatically generates blank documents and even blocks the delinquent's accounts, travel cards, etc.[34]

As regards precedent selection, the Jinhua court (Zhejiang province) has developed a big data analytics platform to identify similar judgments which allows to typify party behavior, nature and outcomes of disputes, as well as provisions applicable to similar judgments. An analysis of the situation across the country suggests that a search for similar judgments was supported in 2020 by 3,276 courts in terms of the legal and actual circumstances of the original case, 3,250 courts in terms of the applicable provisions, and 3,210 courts in terms of full elements of matching cases [Chen S., Tian H., 2021:40].

[33] Available at: https://baijiahao.baidu.com/s?id=1757046295669938835&wfr=spider&for=pc (accessed: 07.08.2023)

[34] Available at: http://www.e-gov.org.cn/article-161969.html (accessed: 05.08.2023)

As regards smart assistance to qualify crimes and render judgments, the Supreme Court of Shanghai, in view of a large number of cases to be handled, has conducted a profound study based on comparison of actual case circumstances using an AI-assisted semantic analysis technology, and created a neural network to assist judges in rendering judgments. The Hainan Court has developed a smart system for crime qualification which, through comprehensive analysis of charges, statements and other process documents, segregates and classifies the facts through the use of AI to generate automatic crime qualification advice to judges based on big data. A comprehensive assessment has found that big data based advice to set penalties and qualify crimes was available to 2,556 courts [Chen S., Tian H., 2021:36].

With regard to divergence warning, the Jiangsu Court has developed the same case different judgment early warning platform that can be based on the principle "identical judgments for identical cases". Where a judgment deviates from the set parameter values, the system will generate a manual review reminder. The system is designed to regulate judicial discretion, encourage similar judgments for identical cases and help the court president to exercise monitoring and administrative powers. At the Guizhou Court, a similar system "big data judicial mirror" has analyzed 93,558 cases across the country to prevent the divergence of judgments rendered by AI, with significant deviations found in 3,078 cases. This system uses a comparative indicator of standard values to prevent major deviations from standard values and generate reminders to judges that can also be checked by the court president [Ye F., 2019: 372].

Voice recognition systems to create audio minutes of court sessions are currently used across all provinces with an overcall accuracy of voice recognition at more than 90 percent, case hearing time down by 20-30 percent, and minutes completion rate at 100 percent. An assessment has found that in 2020 a total of 3,258 courts in China had voice recognition systems for court proceedings [Chen S., Tian H., 2021:37].

Collective efforts by courts of all levels have largely increased the digitization of justice across the country. With 11,439,000 online hearings in 2021, more than 20 million sessions were broadcasted live via the open proceedings website (http://tingshen.court.gov.cn) as of September 2022 with more than 50 billion visits. Court orders were published in China's website for court judgments (https://wenshu.court.gov.cn) more than 130 million times and visited more than 90 billion times to implement in full the right of individuals to information and control for higher pres-

tige of judicial authorities[35]. According to a study, "China's justice digitization system provides one of the most extensive judicial services networks worldwide" [Sun X., 2021:123–144].

4. China's Model for Training Specialists in Digital Justice

According to a study, "legal training is a major branch of higher education with a strong practical focus and comprehensive knowledge system, unique place and function to provide talent for building a state based on the rule of law. However, due to its long history it is subject to obsolete and persistent problems with strong traditional legacy invariably calling for reform. The digital age has put legal training in the face of serious tasks" [Ma C., 2023:101].

With the joint Declaration to create new humanities adopted by the universities concerned at the New Humanities Workshop[36] in November 2020, a discussion of "new jurisprudence" was launched. Professor Xu X. believes that "new humanitarian science should advocate a new idea, identify a new mission, build a new content and use new methods. This will inevitably result in new jurisprudence" [Xu X., 2021:13].

What is new jurisprudence? Professor Ma C. is more specific: "With digital life and digital age open to humankind, the next stage to transform and upgrade modern jurisprudence will be digital jurisprudence with a historical mission of radical change and innovative development based on the legacy of today's jurisprudence" [Ma C., 2023: 9].

Other authors advocate the "computational jurisprudence" concept arguing that "it serves to embed computational thinking into the study of legal problems, apply computational techniques to big data analysis, and bring together computational technologies to study legal science and technology in recognizing the differences between objects, methods and computational capabilities which result in legal problems and associated technical issues" [Shen W., Liu Y., 2020:3].

It is believing that concept of "digital jurisprudence" in the digital age is more adapted to modern development requirements and more often used in certain regulations. It is useful to discuss the point in details.

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[35] Available at: https://www.chinacourt.org/article/detail/2023/03/id/7199082.shtml (accessed: 05.08.2023)

[36] Available at: https://www.eol.cn/news/yaowen/202011/t20201103_2029763.shtml (accessed: 03.08.2023)

The development of digital jurisprudence will eventually translate into training of specialists, with a favorable political environment long in existence in China. On 20.07.2017 the State Council published the Development Plan for Next Generation AI[37] for cultivation of composite talent with the knowledge of "AI + Law". In September 2018 the Ministry of Education jointly with the Central Political and Legal Affairs Commission issued their Opinions on the implementation of education program and training of legal talent 2.0[38] which proposed the learning concept "Internet + law".

Moreover, in February 2020 Ministry of Education, National Development & Reform Commission and Ministry of Finance have issued their Opinions on further integration of disciplines and acceleration of AI master and postgraduate training at double first class colleges and universities[39] proposing to create a skill development system equally focused at fundamental theoretical skills and comprehensive AI+X skills, and also to promote the cross-fertilization between AI and allied disciplines such as law and other philosophical and social sciences.

In February 2023 the General Office of the CC CPC and that of the State Council published their Opinions on strengthening legal training and legal theory studies in the new age[40] explicitly proposed to "speed up the development of new disciplines such as digital jurisprudence".

The emergence of digital economy, e-government and e-society has prompted many universities to offer training in new legal disciplines or cross-disciplinary subjects such as Internet law, information law, data and law, computational law etc., and to establish the Institute for Future Rule of Law (People's University of China, 2017), Institute for Smart Rule of Law (Tsinghua University, 2018), Institute for AI Law (South West University of Political Science and Law, 2017; Shanghai University of Political Science and Law, 2019), Institute for the Rule of Law in the Internet (East China University of Political Science and Law, 2019), Institute for the Digital Rule of Law (East China University of Political Science and Law, 2020; Zhejiang University, 2021), Institute for Data

[37] Available at: https://www.gov.cn/zhengce/content/2017-07/20/content_5211996.htm (accessed: 04.08.2023)

[38] Available at: https://www.gov.cn/zhengce/zhengceku/2018-12/31/content_5443534.htm (accessed: 02.08.2023)

[39] Available at: https://www.gov.cn/zhengce/zhengceku/2020-03/03/content_5486326.htm (accessed: 28.07.2023)

[40] Available at: https://www.gov.cn/xinwen/2023-02/26/content_5743383.htm (accessed: 30.07.2023)

and the Rule of Law (China University of Political Science and Law, 2021) and many other research institutes or organizations.

Building a comprehensive and systematized system of disciplines for digital jurisprudence is one the main issues to be addressed by major law schools. What competencies should experts in digital jurisprudence have: to interpret laws and analyze cases or to program and process data? In our view, the main purpose of training in digital jurisprudence is to bring together the knowledge of law and technology, comprehensively integrate humanities and natural sciences, and to train law students into digital lawyers on the basis of fundamental digital knowledge to master basic computing and programming skills and be able to analyze big data and algorithms. It has a sense to look at what is practiced by China's major universities.

In May 2019 Shanghai University of Political Science and Law established the Institute for AI Law[41] by merging then computer training department and the Shanghai Justice Institute. In 2019 students were officially enrolled for bachelor degree in law" (AI and law). The purpose of training available in the Institute's website was as follows: "training of specialists meeting the requirements of the socialist rule-of-law state and of the national AI development strategy, possessing the fundamental theoretical knowledge of artificial intelligence and law, spirit of the rule of law, innovative thinking, global vision and practical skills, capable of conducting AI-related research and using legal applications, laws, regulations, ethical standards and political systems at national judicial bodies, administrative offices, enterprises, public agencies and research institutions and other departments". The main courses are: theory of state and law, constitutional law, civil law, criminal law, administrative law and administrative litigation, business law, intellectual property law, civil law of procedure, criminal law of procedure, international law; AI basics, Python programming, statistics and data analysis, knowledge discovery and data production, introduction to network and information security, e-evidence and blockchain, legal data management system, legal analysis of big data, AI application to law; introduction to AI jurisprudence, introduction to AI ethics, regulation of AI etc.

The Institute for the Digital Rule of Law[42] was established at the Zhejiang University on 27.03.2021 upon the common initiative of the Univer-

[41] Available at: https://www.shupl.edu.cn/rgznfxy/1809/list.htm (accessed: 29.07.2023)

[42] Available at: https://www.zju.edu.cn/2021/0328/c41532a2272002/page.htm (accessed: 06.08.2023)

sity and Supreme Court of Zhejiang. The Law Department of the Zhejiang University makes part of the Humanities Faculty while the Institute for the Digital Rule of Law is university-level platform for cross- disciplinary research. The Institute is managed by the Law Department, with a well-known professor of computer science department invited as Vice-Director and a number of teachers from the same department are involved actively in its work. The Zhejiang University is advocating a new model of practical training in digital jurisprudence by proposing talented first-year students to join the Digital Jurisprudence Team since 2022. Starting from the bachelor degree, the Zhejiang University provides students with academic and practical tutors on the basis of 1+1 system. Qualified and talented students can pass on to a master and postgraduate course without exams. Students are proposed basic courses in law such as the history of law in China, general criminal law, general civil and constitutional law and computer courses including C programming, introduction to natural language processing, artificial intelligence and machine learning, as well as introduction to cyberspace security, basic AI programming, computational text analytics, AI ethics and security, database operating principles, deep learning, blockchain and digital currencies etc.

To produce learning materials, C. Ma, professor at the East China University of Political Science and Law, has organized a team of writers with the knowledge in allied sciences, with the first domestic manual "A General Study of Digital Nomocracy" printed in April 2022. The manual has four sections and 16 chapters covering the issues arising in China in the digital age, and the relevant case studies [Ma C., 2022: 504]. In July 2023 the "Digital Legal Theory" was published. This systematic study of digital law disciplines has four parts — main theory of digital law, e-law, law and data, AI law — that give an idea of the advanced aspects and main theories of digital law [Jiang W., Long W., 2023: 559].

According to statistics, a total of 1.59 million students in Internet and communication-related subjects or 15 percent of all graduate students will complete their studies in 2022[43]. In the future, a combination of digital technologies and jurisprudence will provide graduates with multi- discipline skills. However, it should be borne in mind that jurisprudence in China is focused at cultivating comprehensive knowledge and lifelong education while a vast majority of researchers received a bachelor, master or PhD de-

[43] Available at: http://www.100ec.cn/Public/Upload/file/20230524/1684892315684384.pdf (accessed: 07.08.2023)

gree as part of the legacy of traditional training in law without opportunity for multi-disciplinary vocational training [Yuan Z., 2023: 120–121]. Modern legal training should also start with comprehensive theoretical training of teaching staff, for instance, by encouraging university teachers from law departments to master computer skills and earn the relevant computer class certificates.

Conclusion

The digital age has seen the digitization of many social relationships, with traditional social governance facing numerous tasks. In the context of digital economy, e-government and a number of strategic *digital plus* concepts, the combination of digital technologies and law becomes ever important, with future governments to invariably become e-governments. The efforts to build e-government are inseparable from improving digital infrastructure and promoting digital economy while the development of digital infrastructure and digital economy is inseparable from the efforts to digitize justice, with the development of digital law to be supported by a training model to produce legal specialists with the knowledge of digital technologies. Large country with enormous population, China differs from many Western countries, with the support and opposition to reform always existing in the process of digitization of justice. In this context, no achievement can be made without the Communist Party and Government of China developing a number of useful policies although these policies only serve to inform and guide public officials and enterprises in their efforts. With this guidance making more than one billion people in China work in the right direction, the collective force of such number of people should not be underestimated. As Xi Jinping, General Secretary of the Communist Party of China, would often say, "our core advantage is that China's socialist system is capable of concentrating our efforts to achieve great things. This is an important and wonderful weapon to guarantee our success".

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Legal Issues in the **DIGITAL AGE**

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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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4/2023

ЕЖЕКВАРТАЛЬНЫЙ НАУЧНО-АНАЛИТИЧЕСКИЙ ЖУРНАЛ ТОМ 4

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Научная статья

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МОДЕЛИ ПРАВОВОГО РЕГУЛИРОВАНИЯ КИБЕРСПОРТА

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Аннотация

В статье анализируются модели правового регулирования киберспорта. Целью исследования является выявление проблем правового регулирования и анализ способов их преодоления. Методологическую базу работы составляют общефилософские, общенаучные (анализ, синтез, логический, системный методы), частно-научные и специальные юридические методы познания (включая метод формально-юридического анализа). Исследование включает два этапа: во-первых, изучение проблем правового регулирования киберспорта с точки зрения доктрины, во-вторых, анализ практических ситуаций, возникающих в ходе и (или) в связи с проведением киберспортивных состязаний и вызывающих правоприменительные проблемы правового регулирования. Среди доктринальных проблем авторами выделены следующие: характер соотношения понятий «компьютерный спорт» и «киберспорт», а равно иных смежных понятий, связанных с осуществлением спортивной деятельности с применением виртуальной реальности; разграничение публичной и частной сфер правового регулирования киберспортивных отношений; целесообразность оформления киберспортивного права как комплексной отрасли спортивного и цифрового права; оформление двух подходов (моделей) правового регулирования: саморегулирование киберспорта посредством утверждения внутриигровых правил, кодексов игрового поведения и т.д., а также модель регулирования киберспорта извне посредством применения существующих правовых институтов и норм права для разрешения споров, находящихся на стыке виртуальной и реальной действительности; правила и способы применения реального права к виртуальной реальности; пределы применения спортивных норм и правил к киберспортивным правоотношениям. Среди правоприменительных проблем регулирования авторами выделены: правовой статус киберспортсмена с точки зрения трудового и гражданско-правового законодательства;

налогообложение дохода, полученного в ходе или в связи с проведением киберспортивного мероприятия; правовой статус компьютерной игры как объекта гражданского права; правовое регулирование игрового стриминга; правовое положение букмекеров на киберспортивном рынке. Авторы статьи приходят к выводу о том, что вследствие стремительного роста мирового рынка компьютерных игр киберспортивные правоотношения настоятельно нуждаются в детальной правовой регламентации.

Ключевые слова

киберспорт; компьютерный спорт; компьютерные игры; киберспортсмен; киберспортивные отношения; правовое регулирование.

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СРАВНИТЕЛЬНЫЙ АНАЛИЗ ОПЫТА ВВЕДЕНИЯ НАЛОГА НА ЦИФРОВЫЕ УСЛУГИ В ЗАРУБЕЖНЫХ СТРАНАХ

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Аннотация

Необходимость обеспечения соблюдения фискальных интересов государства требует трансформации сущностных подходов к нормативному регулированию налоговых отношений в контексте регулирования налогооблагаемой базы в России. Нет сомнения в том что проблемы, возникающие при налогообложении деятельности цифровых компаний за рубежом, актуальны и для нашей страны. Актуальность исследования обусловлена тем, что цифровизация позволила компаниям получить доступ к большому количеству клиентов по всему миру без физического присутствия в странах, где эти клиенты находятся. Таким образом, наблюдается несоответствие между уровнем физического и экономического присутствия в стране. В настоящее время международная налоговая координация уже не может быть отождествлена только с традиционными соглашениями об избегании двойного налогообложения. При отсутствии консенсуса многие юрисдикции начали формулировать односторонние правила налогообложения цифровой экономики. Несогласованность этих правил, скорее всего, увеличит налоговое бремя ряда транснациональных корпораций, поскольку каждое государство стремится защитить собственные интересы. Автор рассматривает национальные цифровые налоги, введенные в странах ОЭСР. Предлагается разделить эти налоги на три группы: на прибыль, на потребление (НДС на электронные услуги) и гибридные налоги. На основе сравнительно-правового анализа законодательства государств, в которых взимаются цифровые налоги, разработаны возможные сценарии налогового регулирования в России. Сделан вывод, что введение цифрового налога в России нецелесообразно. Кроме того, в условиях введения различных льгот для IT-компаний увеличение налоговой нагрузки в данной сфере за счет введения нового налога не выглядит логичным.

Ключевые слова

налоговое право; безопасность; новые вызовы; национальная фискальная база; международное налогообложение; цифровая экономика; цифровые бизнес-модели; глобальная прибыль; налог на цифровые услуги.

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ФИНАНСОВЫЕ АКТИВЫ В ЦИФРОВОЙ ФОРМЕ И ИХ ВЛИЯНИЕ НА КВАЛИФИКАЦИЮ ПРЕСТУПЛЕНИЙ

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Аннотация

Принятие новых законодательных актов, регулирующих оборот финансовых активов в цифровой форме, в том числе цифровых прав, цифровых валют и цифрового рубля, создает почву переосмысления их правового статуса и влияния на сферу уголовного правоприменения. Цель исследования состоит в выявлении юридической природы финансовых активов в цифровой форме в парадигме современного состояния правового регулирования их оборота, в оценке сложившихся подходов и выработке рекомендаций по квалификации преступлений, в которых предметом или средством их совершения являются цифровые права, цифровая валюта, цифровой рубль или электронные денежные средства. В этом ракурсе рассматриваются вопросы квалификации преступлений против собственности, наркопреступлений, коррупционных преступлений, легализации (отмывания) денежных средств или иного имущества, приобретенных преступным путем, банкротных преступлений, злостного уклонения от погашения кредиторской задолженности, сокрытия денежных средств либо имущества от взыскания налогов, сборов, страховых взносов. Общий вывод исследования состоит в том, что финансовые активы в цифровой форме, представляющие собою имущественные права, необходимо рассматривать как признак указанных преступлений, кроме случаев, когда их фактическое задействование выходит за рамки состава преступления. В целях определения размерных характеристик соответствующих преступлений рассматриваются также вопросы оценки стоимости цифровых прав и цифровых валют.

Ключевые слова

криптовалюта; квалификация преступлений; цифровые права; цифровые финансовые активы; утилитарные цифровые права; цифровая валюта; цифровой рубль; электронные денежные средства .

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ДОГОНЯЯ ВЧЕРАШНИЙ ДЕНЬ: ПРОБЛЕМЫ ЦИФРОВИЗАЦИИ РАССЛЕДОВАНИЯ СЕРИЙНЫХ НАСИЛЬСТВЕННЫХ ПРЕСТУПЛЕНИЙ В РОССИИ

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Аннотация

Находясь последние несколько лет в фарватере общего тренда на цифровизацию в сфере государственного управления, большинство российских правоохранительных органов начали либо активизировали процессы цифровизации административно-управленческого, уголовно-процессуального и оперативно-розыскного направлений своей деятельности. Однако при постановке некоторых весьма амбициозных задач сторонники таких преобразований подчас упускают из виду, с одной стороны, проблемы технического и научно-методологического характера, а с другой — вопросы комплектования ответственных подразделений квалифицированными кадрами. Особую актуальность этой проблематике придаёт описываемое в данной работе отставание отечественной науки и практики даже от уже весьма не новых технических разработок в области анализа количественных данных о серийной насильственной преступности, профилактика и противодействие которой уже давно является «болевой точкой» компетентных органов. В работе использованы феноменологические подходы к анализу закономерностей развития и внедрения цифровых технологий в практику расследования серийных насильственных преступлений, применен исторический метод и системный подход к анализу нормативных правовых актов, а также специализированных источников, содержащих широкий объём сведений о развитии методологии количественных исследований в России и за рубежом. При анализе криминолого-методологических аспектов сбора и анализа информации применены криминально-антропологические подходы к выделению релевантных свойств поведения серийных насильственных преступников, значимых при формировании наборов данных. Также использованы результаты проведённого автором интервьюирования прокурорских и следственных работников, сотрудников ведомственных высших учебных заведений. Детально обосновывается вывод о методологической дефектности баз данных, содержащих криминологически значимую инфор-

мацию о серийных насильственных преступлениях, а также о недостаточной технической оснащённости подразделений, ответственных за выявление такого рода деяний. Автор убеждён, что при существующей системе криминально-статистического учёта невозможно собирать, анализировать и осмысливать собираемые количественные данные как о рассматриваемой категории преступлений, так и о преступности в целом. При таких обстоятельствах имеются основания для обоснованного скепсиса относительно эффективности внедрения в системе МВД, Прокуратуры и Следственном Комитете России не только технологий на базе искусственного интеллекта, но и в целом количественного анализа данных.

Ключевые слова

искусственный интеллект; машинное обучение; серийные насильственные преступления; ViCAP; ViCLAS; анализ данных; криминальная статистика; базы данных, государственные информационные системы .

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СОЗДАНИЕ И/ИЛИ РАСПРОСТРАНЕНИЕ ИЗОБРАЖЕНИЙ ИНТИМНОГО ХАРАКТЕРА БЕЗ СОГЛАСИЯ ИЗОБРАЖЕННОГО НА НИХ ЛИЦА: ПРАВОВАЯ ОЦЕНКА

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Аннотация

Век цифровизации породил целый ряд новых преступлений, не известных классическому уголовному праву. К одному из таких деяний можно отнести распространение в публичных пространствах, в том числе в Интернете, интимных изображений лица без согласия такого лица. В мировой практике данное явление приобрело устойчивое название “nonconsensual porn”, то есть «порно без согласия». На данный момент пристальное внимание к этому явлению проявляется за рубежом, все в большем количестве стран это деяние криминализируется, но в Российской Федерации ему не уделяется внимания ни в науке, ни в практике. Диспозиции ряда статей глав 19 и 25 Особенной части Уголовного кодекса Российской Федерации лишь отчасти охватывают исследуемое деяние, поэтому уже сейчас назревает необходимость своевременной модернизации уголовного законодательства в связи с разнообразными способами совершения такого преступления. Акцентируя внимание на способах совершения рассматриваемого деяния, авторы выделяют и исследуют три способа создания «порно без согласия»: его изготовление путем тайной съемки, изготовление интимных изображений лица с согласия самого лица и изготовление «порно без согласия» при помощи компьютерных технологий. Авторами также предпринята попытка разграничить исследуемое ими деяние с составами Особенной части Уголовного кодекса (ст. 128.1, 137, 242 и др.). Предметом исследования является «порно без согласия» как противоправное деяние. Цель исследования: создание комплексной модели «порно без согласия» как самостоятельного состава в системе российского уголовного права и обоснование необходимости криминализации данного деяния. Авторы обосновывают необходимость именно уголовно-правовой защиты граждан от исследуемого явления ввиду его опасности, приводят доводы в пользу необходимости криминализации данного деяния в отечественном уголовном праве и указывают на необходимость разграничения данного деяния и иных преступлений. Исследование позволяет сформулировать возможные способы совершения преступления, что может иметь интерес для доктрины уголовного права, и предлагает внести изменения в российское уголовное законодательство, что имеет несомненную практическую ценность.

Ключевые слова

«порно без согласия»; приватность; нарушение неприкосновенности частной жизни; «распространение без согласия»; дипфейки; преступления в Интернет е.

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РЕАЛИЗАЦИЯ КОНЦЕПЦИИ ПОСТРОЕНИЯ ПРАВОВОГО ГОСУДАРСТВА В ЦИФРОВОЙ СФЕРЕ: КИТАЙСКИЙ ОПЫТ

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Аннотация

Статья посвящена исследованию особенностей проводимой китайским правительством юридической политики при реализации концепции «построения правового государства» с использованием цифровых технологий. Отмечаются достижения Китайской Народной Республики в создании цифровой инфраструктуры и в развитии цифровой экономики за последние годы. Объясняется процесс и способ использования правительством Интернета, больших данных, искусственного интеллекта и других технологических средств для продвижения правового управления, достижения глубокой интеграции информационных технологий и верховенства закона в государственном управлении. Поскольку Китай является крупной страной с огромной территорией и большим населением, трудности повышения доступности и качества правосудия велики, и КНР активно применяет ряд мер по внедрению современных цифровых технологий для цифровизации правосудия. Судебные органы страны имеют также разнообразный опыт построения «умного» правосудия. В 2021 и 2022 годах Верховный народный суд КНР последовательно издал три основных Правила деятельности народных судов в Интернете: Правила онлайн-судопроизводства в народных судах; Правила онлайн-медиации народных судов и Правила работы народных судов в режиме онлайн, чтобы все виды судебной деятельности в Интернете были регламентированы. И руководствуясь этими тремя правилами, китайские народные суды за последние годы добились успехов в области цифровизации и интеллектуализации их деятельности. Развитие цифрового правового государства в конечном итоге будет сводиться к выращиванию специалистов. В Китае создана благоприятная политическая среда для совершенствования юридического образования и выращивания юридических специалистов со знанием искусственного интеллекта, больших данных либо облачных вычислений. Проблемы, с которыми сталкивается Китай в развитии цифровых и правовых процессов, испытывают в наши дни многие страны мира, и в настоящей статье автор надеется объяснить китайскую модель нормативно-правового регулирования, чтобы передать накопленный опыт другим странам.

Ключевые слова

правовое государство; китайское законодательство; цифровые технологии; цифровая экономика; искусственный интеллект; цифровизации правосудия; юридическое образование.

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