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Legal Issues in the **DIGITAL AGE**

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Key Issues of Private Law Transformation under Influence of Behavioural Economics and Data Science

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Abstract

Corporations are now increasingly embracing the advances of Data Science and behavioural economics. This will undoubtedly have far-reaching implications for many areas of legal regulation and practice. The author believes that private law aimed at regulating relations between business and consumers will be the first to deal with the transformation. This article outlines the main issues lawyers will face in the next five to ten years as the ideas of behavioural economy and Data Science spread to private law, and offers some thoughts on addressing these issues. To begin with, the author briefly reviews the progress of behavioural economy and how its achievements help to attain the aims of legal regulation. In particular, the author surveys private law tools such as default rules and information disclosures for "nudging" individuals to more rational behaviour. The author then analyses how the current level of Big Data collection and processing can affect the default rules and information disclosures in corporate contracts with consumers, including the possibility of private law "personalisation" based on the individual features of the parties to the transactions. Furthermore, the article attempts to answer the key question: What regulatory environment should be in place to enable behaviourally informed personalisation of private law by using Big Data? In responding to this question, the author analyses three related problems arising at the intersection of law, Data Science, psychology, and economics: 1) How do we ensure freedom of choice and autonomy of will of individuals while using digital and behavioural innovations? 2) How much information should customers be provided with in order to make optimal decisions? 3) How do we find a balance between private law "personalisation" and personal data protection? In conclusion, the author summarises the results of the study and concludes that there

are no universal rules and algorithms for private law personalisation, and that the introduction of Data Science and behavioural economics into private law is still taking place on a case by case basis.

Keywords
private law; behavioural economics; Data Science; cognitive bias; nudges; personalisation of private law; personal data protection.

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Introduction. Behavioural Economics and its Impact on Private Law

The traditional school of economics is based on the concept of man as a "rational maximiser of utility", which implies that people (1) act rationally and analyse all information available to them on the market; (2) aim to maximise their utility; and (3) have a stable set of preferences [Becker G., 1976]. However, by about the 1950's, researchers had accumulated a fair amount of reliable experimental and empirical evidence showing that human economic behaviour often contradicts the assumptions of rational choice theory [Elster J., 1990] and that such behaviour is not an anomaly or random error, but part of the human evolutionary heritage [Gowdy J., 2008]. It has led to the emergence of a new academic field—behavioural economics, which attempts to improve economic theory by drawing primarily on psychological or behavioural insights into how real, rather than perfectly rational, people make decisions [Mullainathan S., Thaler R., 2001].

Above all, behavioural economics abandons the concept of man as a "rational maximiser" in favour of concepts about man's "bounded rationality," "bounded willpower" and "bounded self-interest" [Posner R., 1998]. The most developed of these concepts is the "concept of bounded rationality", which was first introduced by Herbert Simon in the 1950's. It argues that human cognitive abilities in computation, prediction, and decision-making are not unlimited [Simon H., 1955]. Such systemic (rather than random) deviations in the economic behaviour of a real person from the person's "classical model" later became known as "cognitive biases" [Jolls C., Sunstein C., Thaler R., 1997: 1477]. Further research in behavioural economics has developed generally along two main lines: (1) expanding the list of cognitive biases observed in experimental and field settings; and (2) explor-

ing how these biases may affect different areas of human economic activity [Wright J., Ginsburg D., 2012: 1038].

The development of behavioural economics triggered the emergence of a separate field within the economic analysis of law—behavioural economic analysis of law. Unlike the "classical" trend of Law & Economics, which considers legal actors from the point of view of rational choice theory, behavioural analysis considers legal actors to be prone to making repeated errors in their judgements and decisions [Mitchell G., 2002: 69]. Behavioural economic analysis of law is extensively used in various areas of private law such as contract law, corporate law, tort law, etc. Consumer protection is currently the most popular area of practical application of this research area. Here, various behavioural techniques are used to protect consumers from irrational actions that are harmful to their life, health, or welfare.

The best-known regulatory technique within behavioural analysis of law, called "nudge," was introduced by Cass Sunstein and Richard Thaler. The term denotes any aspect of choice architecture that changes people's behaviour in a predictable way, while neither prohibiting anything nor significantly altering economic incentives [Thaler R., Sunstein C., 2008]. This approach, aptly referred to in the literature as "libertarian paternalism," preserves freedom of choice on the one hand, and allows both private and public institutions to steer people in a direction that promotes their well-being on the other [Thaler R., Sunstein C., 2003]. It is commonly accepted that carefully elaborated and designed nudging leads to more rational decision-making and thus contributes to the well-being of both individuals and society in general. The "nudging" technique comprises a wide range of tools (including legal tools) united by the idea of "gently nudging" a person to perform an action through a stimulus that this person can easily understand and appreciate [Cominelly L., 2018: 293]. In private law, "nudging" usually manifests itself as default rules and information disclosures.

Default rules are the basis of regulatory "nudges" that are ubiquitous in private law [Schlag P., 2010: 915]. The assumption behind this tool is that instead of teaching people to overcome their irrational behaviour, the legislator can use it in a positive way and set default rules or options that will promote individual well-being and the well-being of society[1]. An important advantage of setting default rules is that they reduce transaction costs by allowing the parties to focus on the core issues of the transaction [Cooter R.,

[1] Behavioural traits that distinguish a real person from a "rational maximiser" and are used in the development of default rules include conformism, passivity, lack of specific preferences, endowment effect, tendency to procrastinate, status quo effect, authority bias, and many others.

Ulen T., 2014: 293]. For the legislator, default rules are low-cost too, because they are relatively cheap to change [Cartwright E., 2014: 524]. In addition, default rules tend to crystallize long-standing transaction practices and therefore the interests of the majority of transacting parties [Cserne P., 2012].

Mandatory rules are used in private law only when market failures and irrational behaviour of the consumer cannot be addressed by establishing default rules alone. The regulator's task in this case is to find the optimal balance between the degree of severity of the cognitive bias being addressed and the intensity of the specific means of paternalistic intervention. In this regard, the law usually distinguishes between subgroups deemed to be eligible to different degrees of protection, e.g., securities market law differentiates fundamentally between retail and professional investors [Hacker P., 2017: 658].

The purpose of information disclosure is to draw the consumer's attention to the possible harmful consequences of an action or transaction, mainly by means of warnings (e.g., "read the terms and conditions of the contract carefully before signing") or mandatory disclosure rules [Karampatzos A., 2020: 35]. The mandatory disclosure paradigm originated in the early 20th century in the United States and has gradually spread from securities regulation to virtually all other markets with asymmetric information, especially to areas where businesses enter into contracts with consumers [Ben-Shahar O., Schneider C., 2014].

In general, the range of "nudges" that the legislator can use is unlimited; it is not a formula based on a strict concept, but a flexible regulatory tool capable of responding to various cognitive errors of individuals.

1. Data Science Development as a Catalyst for Further Changes in Private Law

The term "Big Data" does not have a universally accepted definition in the literature. The most common form of defining the phenomenon of Big Data is the "concept of the three V's"—large volume (Volume), variety (Variety), and high rate of change (Velocity) of data [Laney D., 2001]. In practice, Big Data is understood as any legitimately obtained information about consumers and their preferences. This includes information from social networks, blogs and online messages, online activity data (including user search queries, data on websites visited), traditional business process information (data on transactions, purchases, orders, payments, customer registration, banking, etc.), government data (administrative data, including customs, tax and other data, medical data), data from mobile and other

devices (geolocation data, traffic data, data from home automation systems, CCTV cameras, sensors, trackers, etc.)[2].

Collection, processing and the use of big data have in recent years evolved from being an auxiliary tool for assessing customer preferences into an integral feature of any more or less large business, a key production factor and a key competitive advantage. This process is particularly widespread in B2C, financial and healthcare sales, where Big Data can help tailor the customer experience, personalise product and service offerings, reduce costs, and operate more efficiently. In particular, banks can use Big Data analysis to manage their loan portfolios more efficiently, assess risks more accurately, improve compliance procedures and the quality of services in general; insurance companies can calculate the probability of an insured event more correctly and determine the amount of insurance premiums; and medical companies can customise treatment for each client.

As Big Data and AI grow rapidly, and corporations have access to large amounts of Big Data on customers, many areas of law will also undergo far-reaching change. The author believes that private law institutions will take the lead here: Both default rules and disclosures in corporations' contracts with consumers can, through the "collaboration" of behavioural economics and Data Science, be "personalised" based on a consumer's past behaviour, online search history, social media data, credit activity, transaction history, and other personal preferences and characteristics. In some cases, default rules in contracts can be tailored to personal characteristics such as age, income level, degree of rationality or willpower, etc. An example of "behavioural" personalisation of the contract could be default rules for people prone to certain cognitive biases (e.g., over-optimism in assessing risks) which are calibrated differently from rules for those who behave as more rational consumers.

Ideas on how private law can be transformed in the process of adapting its regulatory framework to the needs of individual legal actors together with the corresponding term "private law personalisation" appeared in Western literature about 10 years ago[3]. Over time, these ideas have evolved into an independent field, suggesting changes in the interpretation and application of private law, with due regard to the personal characteristics of the

[2] For details see Big Data in the Financial Sector and Financial Stability Risks. Report for Public Consultation. Central Bank of the Russian Federation, 2021. Available at: https://cbr.ru/Content/Document/File/131359/Consultation_Paper_10122021.pdf (accessed: 16.04.2022)

[3] An article by A. Porat and L. Strahilevitz written in 2014 is usually cited as a "trailbreaker" in this field (Porat A., Strahilevitz L. 2014).

parties to transactions and relationships [Ben-Shahar O., Porat A., 2016[; [Busch C., 2016]; [Hacker P., 2017]; [Karampatzos A., 2020]. In particular, proponents of "personalised" law note that the previous paradigm of regulation based on the division of legal actors into groups with equal legal status within the group (usually on a binary principle, such as "consumer vs entrepreneur" or "professional investor vs unprofessional investor", etc.) no longer meets the needs of the times as it does not take into account the heterogeneity of the members of each group [Hacker P., 2017: 658]. In the Russian legal doctrine, that concept has not yet been widely accepted. At any rate, the author has only been able to find one paper on the topic. Its author, having studied this phenomenon, describes personalised law as a system of norms adopted or recognised by the state and individualised on the basis of the analysis of data about a person (including information on their physiological and mental characteristics, cultural features, interests and preferences), mainly through algorithmic data processing subject to measures aimed at respecting the rights and freedoms of the individual [Misostishkhov T. Z., 2020: 71].

2. Issues of Private Law Transformation under Influence of Behavioural Economics and Data Science

The key question that developments in behavioural economics and Data Science pose to private law may be formulated as follows: What regulatory environment should be in place to enable behaviourally informed personalisation of private law by using Big Data? It is impossible to answer this question without investigating at least three related questions arising at the intersection of law, Data Science, psychology and economics.

2.1. How can law ensure freedom of choice and autonomy of will of individuals as they use information and behavioural innovations?

Some scholars believe that the use of "nudges" represents a form (albeit not too explicit) of manipulation of individual choice that reflects the wishes and expectations of the legislator [Bovens L., 2009]. From this perspective, "nudges" usurp the autonomy of people's will rather than teach people to actively think and choose [Hansen P., Jespersen A., 2013]; [Sunstein C., 2015] thus essentially functioning as peremptory, due to the low level of digression from the "default rule" caused by a number of inherent human cognitive biases the author discussed above. Academic literature refers to this problem as the "implicit mandate" or "paternalism in disguise" [Cominelly L., 2018: 297]. From this perspective, even information disclosure

may, in certain circumstances, be regarded as paternalistic interference and undermine individual autonomy or freedom of choice. Firstly, from a behavioural point of view, the way (or even the context) in which information is presented and displayed greatly influences people's preferences and final decisions (the so-called "frame effect"). Secondly, there are moral considerations to be taken into account when disclosing information, because in many cases the information would not be neutral and the party providing the information is practically giving advice. The problem is complicated by the fact that the legislators or officials who need to determine the best way to inform people are themselves not perfectly rational and are subject to various cognitive biases [Lodge M., Wegrich K., 2016].

Opponents of this view argue that, on the contrary, personalisation of norms and contractual terms encourages individual freedom and autonomy because it is more likely to correspond to the specific characteristics and preferences of the individual. Moreover, an individual can always reject the proposed choice architecture and "restore" their autonomy of will [Moller A., Ryan R., Deci E., 2006]. Also, they consider it a fallacy to claim that "nudging" is always based on the exploitation of human irrationality, since people may "not choose" deliberately if the costs of not choosing are higher than the benefits of choosing (in psychology, this strategy is termed "rational apathy"). In other words, from their point of view, default rules function under the potestative condition of an individual rejecting them and choosing another option [Johnson E., Goldstein D., 2003:1338].

As practice shows, regulators in the overwhelming majority of jurisdictions are more likely to take the second position and use "nudges" and other behavioural tools as a mechanism for increasing the rationality of individuals[4]. It is obvious that it is impossible to give a universal answer to the question "Where is the line between paternalism and freedom of choice?" Each case of "behavioural intervention" requires an individual approach. There are two fundamental principles that guide the choice made by foreign regulators [Karampatzos A., 2020].

The proportionality principle suggests that "nudges" are only used if there is a very high likelihood that the cognitive bias will harm a citizen's well-being[5]. In practical terms, this means that there is sufficient re-

[4] This is confirmed by the existence of special regulatory units dedicated to behavioural analysis in dozens of countries around the world (Behavioral Insights Teams/Nudge Units) (e.g., see UK Behavioral Insights Team. Available at: https://www.gov.uk/government/organisations/behavioural-insights-team/about (accessed: 20.04.2022)

[5] The approach has been known since the Roman law under the name of "De minimis non curat lex" ("The law doesn't care about little things").

search-based evidence of: (a) a high probability of a cognitive bias in a particular situation; and (b) its negative impact on the life, health and financial well-being of individual or third parties.

The transparency principle implies that the individual's choice should be as well informed as possible and the individual should always have the ability to promptly change it (the ability to opt out). This implies providing the individual with complete and accessible information to make a decision, ensuring clarity, openness and understandability of contracts, the obligation of the better informed party to act in good faith when providing information, including informing them about the possible risks and negative consequences of the transaction. Below the author looks at the challenges of informing and disclosing information that occur when using "nudges".

The use of Big Data to shape "personal" default rules and disclosures takes the debate about the boundaries of paternalism and freedom of choice to a new level and raises new questions. The main question is whether "personalisation" of contract terms is a form of discrimination and, as a consequence, a violation of the principle of equality of citizens before the law. Because, in essence, in the case of "personalisation" of terms, two consumers can buy the same product at the same price, but receive *ex post* a different set of contractual rights. In addition, the mere fact that different contract terms are offered on the basis of unchangeable characteristics such as sex, age or ethnicity may a priori be regarded as discrimination. Another issue is how to rule out an individual's "strategic behaviour", i.e. their attempts to deliberately influence the data collected about them (e.g. characteristics such as online search history, social media composition, geolocation data, etc.) in order to obtain more favourable "personalised" contractual terms or a more favourable "personalised" legal regime. In addition, the academic literature argues that Big Data characterises only the external aspects of human behaviour, its empirically recognisable preferences, while an individual's real preferences and personality characteristics may either not be recognisable, or change, or contradict each other [Elkin-Koren N., Gal M., 2019]. The author believes that the latter two problems can be solved over time by improving data collection mechanisms, data processing algorithms, and the use of artificial intelligence.

2.2. What amount of information should be provided to the legal actors in order to make the optimal decision?

As noted above, compliance with the transparency principle is an important condition for guaranteeing the freedom of choice and autonomy of the individual's will when using "nudges." However, the problem is the

ideas of behavioural economics compel us to rethink the very principle of transparency in its traditional sense.

The "traditional" concept of disclosure assumes that the better informed party (or the party whose information is clearly easier to collect and disclose from an economic point of view) [De Geest G., Kovac M., 2009: 113–132][6] is obliged to bring it to the knowledge of the counterparty or to the public at large to the maximum extent possible. The duty of the "strong party" to disclose information lies at the heart of corporate law, banking law, contract law, securities market law, consumer protection, etc. The "traditional" concept of information disclosure is based on the above-mentioned "rational consumer" model, which assumes that the consumer is able not only to perceive, process, and evaluate the entire amount of information offered, but also to make a rational decision on this basis. As some authors point out, such a "standardised" concept is a product of industrial mass society and does not consider the heterogeneity of post-industrial society [Busch C., 2016]. In addition, numerous studies in the field of behavioural economics show that this model fails to provide the desired transparency in real life: the average consumer either does not read information brochures at all, or is unable to process and assess the information offered due to its large volume, complexity, lack of time, etc. According to behavioural scientists, the "classical" information disclosure regime leads to information overload (the information overload problem) rather than ensuring that people are adequately informed [Hacker P., 2017: 667].

Combining developments in behavioural economics with Data Science allows society to rethink the institution of information disclosure and adapt it to the needs of the real rather than the "perfectly rational" individual. By owning more data, corporations or government can provide individuals or consumers with information tailored to their individual characteristics, demographics and cognitive abilities, instead of standardised "impersonal" information. In other words, disclosure can be transformed so that only the information that may be relevant to the individual is disclosed and the information may be irrelevant to the individual is omitted [Porat A., Strahilevitz L., 2014]. As an example, by "personalising" corporate disclosures, companies can tailor the importance and complexity of certain information to the individual investor, reducing the risk of information overload. This concept is also referred to as "smart disclosure" or "behaviourally informed disclosure" [Sibony A., Helleringer G., 2015].

In practical terms, this may be implemented in the form of information disclosure in a multi-level format, where the complexity of each level in-

[6] The principle is referred to as Least Cost Information Gatherer Principle.

creases. In other words, the company does not provide the investor with a multi-page prospectus that contains as much information as possible, but with a choice of at least three different documents of varying degrees of complexity. Using Big Data, companies can take this a step further and determine the optimal level of disclosure sophistication for a particular investor. However, it is clear that, similar to the default rules, the investor should always be able to change the option offered and request more disclosure, so that their autonomy of will is not compromised.

In a similar way, the state can "personalise" the public information communicated to individuals by targeting information to those individuals or groups of individuals (pensioners, car owners, pregnant women, students, etc.) who may actually need it. As an example, if a pregnant woman purchases medication and the instructions state in small print that it may have certain side effects for pregnant women, this information will be highlighted and brought to her attention as being the most relevant to her [Misostishkhov T. Z., 2020: 63]. However, in the case of both corporations and the state, this regime will only work if citizens voluntarily share this information, which raises the following legal problem.

2.3 How does society find a balance between private law "personalisation" and personal data protection?

It is clear that the idea of the "personalisation" of private law, based on the collection and processing of a large amount of personal data and consumer profiling, conflicts with the need to protect citizens' personal data. Although the amount of data disclosed and posted online by individuals and simultaneously collected and processed by large corporations (like Meta, Google or Amazon) has grown to unprecedented levels and is a kind of "new oil", strict legislative and methodological standards for handling such data are still lacking in many countries.

The main document regulating the protection of personal data of citizens at the international level is the Council of Europe Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data[7] approved in 1981. Based on this Convention, most Euro-

[7] "Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data" (Concluded in Strasbourg on 28 January 1981) (together with the Amendments to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CDPS No. 108) that allow accession of the European Communities, adopted by the Committee of Ministers in Strasbourg on 15 June 1999). Available at: https://rm.coe.int/1680078c46 (accessed: 16.04.2023)

pean countries have adopted national laws on personal data protection. In Russia, it is Federal Law No. 152-FZ of 27 July 2006 "On Personal Data" (hereinafter the "Personal Data Law"). The fundamental principles of personal data protection and processing enshrined in Art. 5 of the Law provide, in particular, for the following: Personal data processing shall be limited to predetermined purposes; An informed consent of the owner of personal data shall be required to process the data; Databases containing personal data processed for incompatible purposes shall not be merged; and Personal data shall be stored for a term no longer than the term required by the purposes of personal data processing, and shall be subsequently deleted or anonymised etc.

As researchers note, the possibilities created by Data Science and current practices of collecting and using Big Data are in direct contradiction with these principles, thus questioning the adequacy and effectiveness of personal data laws in their current form in relation to the latest technology developments [Saveliev A.I., 2015]; [Lane J., Stodden V. et al., 2014: 70]. Essentially, companies around the world today are required to choose between compliance with personal data legislation and the use of Big Data, as the technologies for collecting, processing and using Big Data are in direct conflict with the provisions of the law as they were laid down back in the 1981 Convention.[8]

It is obvious the dilemma between data privacy and the personalisation of relations with consumers does not and cannot have an unambiguous answer. It is always a compromise, where one is sacrificed for the sake of the other, just as in solving other dilemmas of this kind such as "data privacy vs security", "data privacy vs development of innovations", etc. Each state independently chooses its priorities in a particular period of time, balancing these categories in different proportions.

In the author's opinion, the most obvious way is to give individuals the right to choose between data privacy and a personalised relationship with a

[8] E.g., as A.I. Savelyev notes [Saveliev A.I., 2015; 54-61], in order for the consent of the personal data owner to be called informed and conscious, this person must be provided with detailed information on how their personal data will be used: The purposes of use, the composition of the processed personal data, and the ways of their processing (Para 4, Art. 9, and Para 7, Art. 14 of the Federal Law "On Personal Data"). Clearly, it takes a lot more time to study this kind of document in the process of making a regular purchase through a web-store than to actually make the purchase, and it is the ability to save time that is one of the most attractive features of e-commerce. Consequently, the concept of informed consent to the processing of personal data comes into conflict with the main value provided by modern information technologies—the promptness of the transactions in question.

company based on the collection and processing of their data. In a liberal approach, such consent may be presumed (and the individual can withdraw it at any time); in contrast, in a conservative approach all individuals may be deemed to have consented to the collection and processing of their data by default, and the corporation must obtain such consent from each consumer. Another option for finding a compromise could be a restriction in law on the collection and use of certain types of data of a particularly sensitive nature.

To increase the number of consumers who agree to a "personalised" relationship with a company, they can be informed about the potential benefits of personalisation (i.e. application of the above-mentioned transparency principle). With full information about the potential benefits, a rational consumer will be able to approach the privacy vs personalisation dilemma in a pragmatic way and consent to the collection and processing of personal information if the personal benefits of personalisation are greater than the costs.

Conclusion

Private law institutions will be personalised under the influence of behavioural economics and Data Science in the very near future. The author has examined both the undeniable benefits of such a transition, as well as the obstacles and challenges that legal professionals will face during such a transformation. It is clear that currently there are no universal rules and algorithms for personalisation, even at the level of large corporations: The transition to "personalised" customer relations is performed on a case by case basis subject to the principles of proportionality and transparency discussed above, rather than strict rules.

In the author's opinion, the state should act in a similar manner and promote personalisation using Big Data, at least in areas where it is clear that the objectives of the law can be better achieved through personalised rules, and where their application would not entail high transaction costs and risks to the rights of individuals (e.g., in the areas of personalisation of mandatory disclosure or default rules in contract law).

"Personalisation" of legal relationships with customers will be economically justified for a business when the benefits to the business exceed the costs. This parity can be changed by using legal institutions to reduce the transaction costs of business during such a transition, by creating incentives for such legal innovations, by finding a balance between the interests of different groups, and between concepts such as privacy and personalisation, paternalism and freedom of choice, efficiency and fairness.

Last but not least, it is clear that the "personalisation" of private law calls for a new type of legal professional who is equipped with knowledge of the law, computer science, basic programming, and algorithms, all at the same time. Without training specialists with these competences and involving them in the process of developing "personalised" norms, there is a high risk that personalisation based on hidden algorithms will lead to violations of human rights and the basic principles of private law.

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Acceptance of Goods and Services under the Contractual System: Regulation and Digitization Issues

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Abstract

It is relatively recently that the way goods and services (GS) are accepted in the contractual system has become a focal point of research. It was prompted by the changes to the contractual system law introduced mandatory e-certification since 1 January 2022. However, while the process of e-certification as enshrined now in the law on contractual relationships was in the limelight, the concept of e-acceptance, definitions of actual and documentary acceptance and other issues were largely left out. A study of how acceptance is regulated under the national law shows a lack of systemic approach to the e-certification procedure in the law on contractual relationships, a need to put in place an acceptance procedure and to ensure public and municipal customers' satisfaction with the quality of goods and services they purchase. The paper provides an overview of research on specific aspects of GS acceptance in the contractual system and identifies its place in the process of contractual performance. It is proposed to have a special terminology in the effective contractual relationships law for defining GS acceptance based on its purpose and identifying structural elements. A new approach to contract execution regulating actual and documentary acceptance as part of e-certification needs to be adopted. With regard to digital solutions required for e-certification, technological aspects are discussed with a view to possible regulation. It is equally proposed to formalize e-certification in the contractual system as a possible model for applying the block chain technology for the public (municipal) procurement system. An analysis of digital processes that support e-certification in the contractual system suggests a need to provide a link between technological and legal aspects of e-certification.

The author also proposes a number of block chain related issues to be discussed with relation to the e-certification system.

Keywords

acceptance of goods; e-certification; digital contract execution; digital solutions: contractual system; block chain for e-certification.

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Background: State of Knowledge

The acceptance of goods and services is governed by civil law provisions, with Article 513 of the Civil Code of Russia (hereinafter referred to as CCR) defining the procedure for acceptance of goods by the buyer who is required to do whatever is necessary to accept the goods under a supply contract.[1] The contents of this article require the buyer (recipient) to check the quantity and quality of shipment and, in case of any discrepancy/defect, advise the supplier accordingly. Moreover, pursuant to part 2, Article 513 of CCR, all terms for acceptance are established by laws, other regulations, or business customs.

Civil law regulation of the acceptance procedure following adoption of the Civil Code was relatively straightforward with little room for legal discussion. In studying the concept and meaning of "acceptance" as legal category, N. Tkacheva notes with good reason that studies of this subject are rare, with doctrinal works dating back to the Soviet times and dealing mostly with procedural not theoretical aspects [Tkacheva N.G., 2009: 386]. A review of the studies of legal aspects of GS acceptance at the current stage of legislative development shows that, on the one hand, the relevant issues were raised in respect of acceptance under private transactions or regarding performance under special agreements. Complex issues of regulating acceptance of goods and services for public procurement were also identified in the context of overall approaches to understanding essential features [Ilyushina M.N., Chelyshev M.Yu., Sitdikova R.I., 2022] or legal nature of contract [Veshnyakova N.A., 2004]. M.V. Shmeleva observes that contract execution is not a simple act but a complex interrelated system, and argues with good reason in favor of e-document exchange to be introduced to the procurement process at the stage of contract execution

[1] Collected Laws of Russia, 1996. № 5, Article 410 // SPS Consultant Plus.

[Shmeleva M.V., 2020: 26]. P.S. Tarabaev has explicitly raised acceptance issues, only to conclude that while acceptance is a distinct civil law transaction, its absence in the contract does not void the contract [Tarabaev P.S., 2011: 150]. E.E. Stepanova argues acceptance is not a distinct transaction but a process for the buyer to perform an obligation [Stepanova E.E., 2018: 16]. One has to agree with F.A. Tasalov who identifies a causal link between acceptance and the customer's payment for contractual performance, only to directly affect the legal outcome of obligations — to be terminated following due performance or default by a party — as well as the legal outcome of the security that the supplier previously made available to the customer. This author also notes that, despite the importance of acceptance, the national legislator has failed to establish a legal regime which, once followed, would allow to address multiple issues arising at this stage [Tasalov F.A., 2023: 278]. While it is true that this attitude to regulating acceptance followed from Federal Law No. 94-FZ of 21 July 2005 "On Placing Orders for the Procurement of Goods and Services for Public and Municipal Needs"[2], the current contractual system did nothing to change it. F.A. Tasalov concludes with good reason that in defining the contractual performance stage, the legislator stated a regulatory dualism at the acceptance stage based on provisions of the Civil Code and requirements of Law No. 44-FZ, with the next attempt to define the provisions for acceptance under procurement contracts in Law 44-FZ having failed as well [Tasalov F.A., 2023: 279]. This conclusion needs to be supported in order to change the approaches to regulating GS acceptance in the contractual system.

In discussing current approaches to acceptance one will inevitably observe that studies almost ignore the approaches to public/municipal customer satisfaction with the quality of goods and services as well as those to quality inspection at the acceptance stage. Meanwhile, the issues of quality and satisfaction with contractual performance as well as of the whole procurement process should govern customer action at the stage of acceptance, otherwise the public procurement system will be devoid of its main purpose which is quite weakly formulated by current regulation of the contractual relationship system. Thus Yu. A. Kuznetsova defines quality as a prerequisite of adequate performance of the contract's subject matter, with proper performance of obligations to be ensured by adequate acceptance of goods, defect detection, claim and penalty procedures [Kuznetsova Yu.A., 2014: 116].

Current approaches to legal analysis of essential features of GS acceptance in the public procurement system are even more limited and only fol-

[2] Collected Laws of Russia. 2005. No. 30 (part 1). Article 3105 // SPS Consultant Plus.

low the latest changes to the contractual relationship system in force since 2022.[3] With regard to enforcement, the changes introduce the terms "e-certification" and "e-acceptance", both of which are often used synonymously. Meanwhile, Federal Law No. 44-FZ "On System for Procurement of Goods and Services for Public and Municipal Needs" of 05 April 2013 (Law 44-FZ on the contractual system) does not define these concepts.[4] A number of authors analyzing the emerging terminology have identified some e-certification related issues. Thus, O. A. Beliayeva identifies e-certification as partial automation of smart contracts, a technology introduced for procurement purposes in the Moscow area [Beliayeva O.A., 2021].[5] D. Kazantsev rightly observed the intuitive simplicity of the e-certification process and its capability to improve the procurement system's transparency [Kazantsev D.A., 2021: 61]. In a belief that e-certification problems are temporary, some authors propose to train specialists in digital platform skills [Tirskaya N.B. et al., 2022: 117]. M.S. Port in analyzing e-acceptance in a description of the UIS functional flow chart under the contractual system praises the advantages of e-acceptance for customers and other parties to avoid human error [Port M.S., 2021: 104-108]. In point of view of author of the article presented, it is necessary to, firstly, introduce "acceptance" and "e-certification" as categories in the regulation of contractual relationships, secondly, identify legal and technological links of e-acceptance, and, thirdly, describe the mechanism for introducing e-acceptance into the digital contractual system. Such regulation of the acceptance stage could determine possible ways for increasing the contractual system's efficiency.

1. Legal Approaches to Regulating Acceptance of Goods in the Contractual System

In defining the regulation of GS acceptance, it is necessary to underline that it makes up the final stage for due performance of obligations under the terms of a public (municipal) contract. While legislation is almost silent about regulation of acceptance, it is worth noting that its mechanism has long been provided for by the relevant instructions, with acceptance of goods and services thus largely relying on the procedure established by the Instruction on quantitative acceptance of capital and consumer goods/ser-

[3] Federal Law No. 360-FZ "On Amending Specific Regulations of the Russian Federations" of 02 July 2021. Collected Laws of Russia. 2021. No. 27. Article 5188 // SPS Consultant Plus.

[4] Collected Laws of Russia, 2013. No. 14. Article 165 // SPS Consultant Plus .

[5] Beliayeva O.A. Smart contracts and its use for procurement. Legal support of digital state and municipal procurement, unification and harmonization of law regulation. Papers of the International Research Forum. Saratov, 2021.

vices approved by Resolution No. P-6 [6] of the Arbitration Court under the USSR Council of Ministers on 15 June 1965 as well as by the Instruction on qualitative acceptance of capital and consumer goods/services No. P-7[7] approved by the same body on 25 April 1966. The said instructions, despite being voided, can apply under para 14 of the Higher Arbitration Court (HAC) Plenum Resolution No. 18 of 22 October 1997[8] as long as the shipment contract contains a reference to them. For decades the goods acceptance procedure prescribed by the instructions played a decisive role and was most frequently used for performance control. While the acceptance of goods/services and regulation of its procedure have remained part of well formulated contractual obligations by tradition, its applied nature prevented them from being discussed in practice except through the lens of the business law [Puginsky B.I., 2009]; [Andreyeva L.V., 2012].

When the mechanisms of government order and then of contractual system are introduced throughout the country, the issues of acceptance virtually failed to be settled despite being repeatedly raised. Thus, while Law 94-FZ [9] does not contain specific provisions on acceptance as part of performance of obligations, it was mentioned in Article 9 in respect of amendment and execution of the contract. Overall, Article 9 was the only article of that Law to govern the concept of contract and to establish some general provisions on concluding and amending the terms of contract. In practical terms, that Law was to ensure acceptance as part of contractual performance with reliance on what was provided for in the Civil Code. Customers would either refer to the procedure described in the Instructions or would themselves define one in the relevant provisions annexed to the outstanding public (municipal) contract.

Moreover, while Law 94-FZ was in force (2006–2013), acceptance as part of contractual performance was not specifically regulated. On the contrary, the performance enforcement practice emerging in this period showed that the most complex problems in the public procurement system would arise just at the stage of acceptance and its documentation. Despite being widely discussed in both legal and economic studies, procurement efficiency sheds surprisingly little light on the acceptance process as a stage of the customer's efforts to ensure that only quality goods/services are accepted. As L.V. Andreeva wrote back in 2010, the government did not pay adequate attention to the quality of manufactured goods or encourage busi-

[6] Bulletin of Regulations by Ministries and Departments of the USSR. 1975. No. 2 // SPS Consultant Plus

[7] Ibid.

[8] HAC Newsletter. 1998. No. 3 // SPS Consultant Plus

[9] SPS Consultant Plus.

nesses to improve their quality [Andreeva L.V., 2010: 9]. Today's reform of technical regulation to introduce the digital traceability mechanisms and markings of specific product groups is adding urgency to the quality problem including in the public procurement system. Moreover, the problems of correlation between acceptance and operating efficiency of public and municipal customers as well as those of people's satisfaction with the delivery of goods and services have not been adequately explored. Only a handful of authors underline a need in new approaches for establishing procurement efficiency criteria and a need to define the principles of such efficiency [Shmeleva M.V., 2019]; [Gorokhova D.V., 2020].

Thus, while generally outlined in the legislation, the acceptance procedure in the contractual system was to be governed by customers' bylaws. Acceptance was essentially assumed to be of such general knowledge as make formal regulation in the contractual system excessive. Meanwhile, a lack of the relevant mechanism formalizing the acceptance procedure and reliance on bylaws have shown that it is the stage of acceptance that resulted in negative implications affecting the quality of counterparty performance. In fact, the acceptance process has left unregulated such issues as checking the shipment for adequate quality (understood differently by customers and suppliers); acceptance by installments or parts; acceptance at unit price; methods of acceptance (complete/selective); legal regulation of warehouse operations and of document formalization following acceptance. The same issues were identified for acceptance of services.

Thus, the system of government orders in the formative years was primarily focused at regulating the procedural stage of procurement and at formalizing the basic principles of anti-trust legislation in the contractual system while ignoring the stage of contract execution regarding GS acceptance. This situation is explainable not so much by the problems of emerging procurement system as by the focus on legal provisions determining the stage of planning and organizing the procurement process, and on regulating the budget relationships with regard to procurement.

With the approving of Law 44-FZ, the contract execution procedure with regard to acceptance was finally enshrined in its Article 94. In the original wording of the law, contract execution was defined as a course of action to be taken after the contract date to meet the purpose of procurement through coordination between the customer and the supplier (subcontractor, provider) including GS acceptance and payment, and through coordination related to the contract's execution, amendment and termination. Introduced for contract execution as Law 44-FZ was taking effect, this terminology allowed to at least get off with contract execution from the perspective of legal regulation. Despite conceptually defining acceptance as

part of contractual performance, the law did not establish what was meant by acceptance. Meanwhile, job descriptions regulating procedures to be followed by procurement managers and other procurement service staff with regard to GS acceptance started to be designed in the procurement document management system. Besides, Article 94 of Law 44-FZ had a wording allowing goods and services to be accepted by a commission. Such a commission of at least five members could be set up by the customer to accept the delivery of goods/services and results of a specific phase of contract execution. While acceptance algorithms were assumed to be prescribed by the relevant provisions, the effective law did not define either the template of such provisions or the need for their adoption. The text of part 6, Article 94 of the Law thus implied that at the acceptance stage the customer could have the delivery of goods/services accepted by either a responsible officer or a commission. In order to be organized, the acceptance procedure required to prescribe the steps to be taken by counterparties under the contract (agreement). For the commission to function, the relevant provision was to be adopted as a bylaw to regulate its proceedings. As regards procurement document flow for acceptance of goods/services at the stage of contract execution, it was assumed that the relevant acceptance algorithms (in-house instructions) would be designed as either annexes to outstanding contracts or as bylaws governing the operations of public/municipal customers. Law 44-FZ thus defined the contract execution process in general terms, with the acceptance procedure and process to be regulated by provisions of the effective civil law and described either in the customer's bylaws in the form of specific provisions or in the text of contracts (agreements).

The process of implementing Law mentioned in respect of contract execution gradually resulted in the approaches that defined GS acceptance mechanisms. Over the first period of roughly 2014–2020, the contract execution practices related to acceptance increasingly started to rely on provisions to be annexed to outstanding contracts. At the second stage (2022 until now) when the contractual system was changed to implement the "result-oriented e-procurement" departmental project,[10] the system switched to e-certification with regard to acceptance of goods/services at the contract execution stage.

2. E-Certification Introduced into the Contractual System: Current Issues

A determinant reference point towards transition to e-certification arguably was President Instruction No. Pr-2472 of 04 December 2019 that

[10] Available at: https://minfin.gov.ru/ru/perfomance/projects/egovernment_procurement?ysclid=lsc271nbok229405250 (accessed: 20.04.2023)

required from 01 July of 2020 to introduce an e-document for acceptance of goods/services into the document flow between customers and suppliers endorsed with enhanced qualified e-signature by persons acting on their behalf through the use of the UIS. The FT and the FTS later explained this transition and its outlines in joint Letter No. 14-00-06/27476, AS-4-15/26126@ of 18 December 2019.[11] A lack of regulatory support of such transition was left out at that time due to a need to get the process going as soon as possible. Over the later period (2020 till the first half of 2021) while the e-certification mechanism was taking shape, these processes were not formalized in regulations either. Moreover, the issues related to e-certification were fairly discussed by both Finance Ministry and Federal Treasury in relevant letters.[12] Such regulatory penury can be explained by the fact that this concept was not adequately refined in legal terms, with no technological norms for e-certification mechanism formalized in the instructions available at the UIS portal. Such a position, questionable from the regulatory perspective, is typical for the digitization process, in particular, of introducing new digital solutions into the contractual system.

It was not before adopting a set of optimization amendments that acceptance was formalized via a process approach. Thus, Article 94 in the wording of Law 360-FZ [13] defined the acceptance of goods/services as the supplier's action to issue and post to the unified information system an endorsed acceptance certificate to be signed or dismissed with good cause by the customer or acceptance commission members. Despite this procedure prescribed by provisions of Law 94-FZ to be followed by suppliers and customers, the article itself does not define either the concept of acceptance or the conditions to call the final acceptance document an e-certificate. Therefore, in describing the process of certification, this construct only defines the algorithm for a certificate to circulate between the supplier and the customer via the unified information system. That this process is to be interpreted as "e-certification" one can only guess, with the term becoming current only with the Federal Treasury bodies' active support to present it.[14]

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[11] Available at: https://www.garant.ru/products/ipo/prime/doc/73275257/?ysclid=lfozy9hty6818597547 (accessed: 20.04.2023)

[12] Federal Treasury Letter No. 95-09-11/10-640 of 28.12.2021 On introducing e-certification from 01 December 2022. Federal Treasury Letter No. 14-00-05/2543 of 08 February 2022 // SPS Consultant Plus.

[13] Federal Law No. 360-FZ On Amending Specific Regulations of Russia 02 July 2021. Collected Laws of Russia. 2021. No. 27. Article 5188 // SPS Consultant Plus.

[14] Available at: https://zakupki.gov.ru/epz/main/public/document/view.html?searchString=&sectionId=1410&strictEqual=false; https://goszakupki73.ru/wpcontent/uploads/2022/03/%D0%AD%D0%BB%D0%B5%D0%BA%D1%82%D1%80%D0%BE%D0%BD%D0%BD%D0%BE%D0%B5_%D0%B0%D0%BA%D1%82%D0%B8%D

In noting the importance of e-certification as part of the contractual system, A. Katamadze, deputy head of the Federal Treasury, has pointed out that e-certification contributes to make public procurement less bureaucratic, with contract execution becoming more transparent and traceable through audit trails. In stressing the importance of digital contract execution mechanisms, he underlined the role of joint work by the FT and the FTS to recognize e-certificate as legitimate document linked to payment [Katamadze A.T., 2020: 11].

Thus, the e-certificate mechanism introduced at the contract execution stage underlines, on the one hand, this stage's absolute importance while, on the other hand, the legislator fails to adequately regulate either the concept or legal aspects of the formalized document and only describes the course of action by the supplier and the customer to result in a formal acceptance certificate.

In furtherance of this subject and despite that e-certification was in process of being introduced at public and municipal customers since early 2022, it was not before mid-2022 that this mechanism, including further stages of its development, was formalized in the Federal Treasury's documents. Thus, the Federal Treasury strategic map of 10 June 2022 that outlined the strategic objectives for the period until 2030 defined the e-acceptance functionality of electronic certificates to be issued following the outcome of e-procurement.[15]

The whole mechanism to introduce e-certification at the contract execution stage by both suppliers and customers has raised many questions, the most typical being the correlation between the concepts of e-certification and e-acceptance, the legal difference between documentary and actual acceptance from the perspective of terms and rules of procedure, a lack of formal responsibility of those who sign acceptance documents etc. Questions brought forth by the practice largely concern not only understanding the course of action and legally defined rules of procedure but also the mechanisms of responsibility of specialists involved in e-certification. This situation has resulted from impossibility to correlate provisions of Law 44-FZ with the digital solutions adopted when e-certification was introduced. In fact, the whole e-certification mechanism to be used for formalization pur-

1%80%D0%BE%D0%B2%D0%B0%D0%BD%D0%B8%D0%B5_%D0%B2_%D0%95%D0%98%D0%A1_%D0%A1%D1%82%D1%80%D0%BE%D0%B8%D1%82%D0%B5%D0%BB%D1%8C%D1%81%D1%82%D0%B2%D0%BE.pdf?ysclid=ley1h8mhad918466738// (accessed: 02.06.2023)

[15] Available at: https://www.garant.ru/products/ipo/prime/doc/404755067/?ysclid=lfoz8w4plg209104965 (accessed: 15.03.2023)

poses at the contract execution stage has received only digital technological solutions to the maximum extent, with legal regulation only possible in correlation with relevant regulation of the contract execution stage as a whole. Introducing acceptance mechanisms to result in e-certificate has raised the question of stages and methods of such acceptance and of formalizing the relevant algorithms under the effective law.

With the whole process of contract conclusion and execution made digital as part of the structured document flow, there is an absolute urgency to define legal regulation of this whole stage and to introduce a special chapter formalizing this transition.

3. Author's Definitions of Acceptance Usable at the Stage of Performance of Obligations under State (Municipal) Contract

The need to formalize concept of acceptance in the system of contractual relationships suggests that it should be correlated with the contract execution stage, with acceptance to become part of contract performance. There is therefore a need for Law 44-FZ to provide for a concept of acceptance made formal as part of e-document flow using those digital solutions that the customer and the supplier rely upon at the contract execution stage. The concept of acceptance, once defined, requires that its elements are formalized in the structure of public contract. As for the terms of acceptance, they can be treated, according to A. Kirpichev, as those of counterparty protection due to specific nature of contracting parties. The said terms (including those of acceptance) are specific in that they relate to the specific contracting parties since the contract is entered on behalf of a public entity and should not be against public interest [Kirpichev A.E., 2012: 208]. This position, while acceptable, should be, in our opinion, supported — apart from definitions that will follow — by the detailed terms of acceptance of both goods and services to be introduced into regulation of the current contractual system.

The following definitions are proposed: contract execution is the customer's action regulated by federal laws and standards to ensure actual and documentary acceptance of goods and services, with data under the given contract (agreement) to be entered into the relevant information systems. In the contractual system, the acceptance covers both factual and documentary acceptance to result in a formal document (e-certificate). The factual acceptance of goods/services is the customer's (acceptance commission's) action to accept goods/services as described in a public contract and terms of reference as part of the effective accounting for such goods and services

finalized by documentary acceptance. Documentary acceptance ends up with an e-certificate to be issued under the rules of electronic document flow. The action to issue an e-certificate as part of the structured electronic document flow includes generation of data input produced by the customer and the parties to the UIS and regional/municipal information systems. The course of action by the customer and the parties as part of the structured electronic document flow in executing the contract is defined by the standards established by the Federal Treasury bodies. As for the terms of acceptance of goods/services in the contractual system, they can be follows:

parties involved in the acceptance process;

items subject to acceptance as per description of procurement;

defining methods to check the quality of delivered goods/services based on specific items of procurement and in accordance with its description;

criteria of the customer's satisfaction with the quality of goods/services based on specific items of procurement and strong regulation;

provision on e-certificate and its structure;

provision on determining the quantity of goods/services to be delivered;

rules of procedure for cooperation in the process of accepting goods and services.

In identifying possible elements of acceptance in the contractual system, it is necessary to identify their variability, something that can be done only at the stage of developing contractual terms while at the stage of factual acceptance the terms of acceptance will be binding.

The proposed definitions of acceptance to be distinguished as factual and documentary will thus provide legal certainty to the relevant terminology used in the contractual system. With factual acceptance proceeding in accordance with its identified and formalized elements, the issuance of e-certificate to document the completion of acceptance will provide evidence of the performance of obligations by the supplier/(sub) contractor as a specific feature of electronic document flow in process of such acceptance.

4. Digital Solutions for Acceptance of Goods and Services and Issuance of E-certificates in Contractual System

Defining the mechanisms for introducing e-certified acceptance leaves out the issues of formalizing these digital solutions in the legislation. Designing digital solutions for public contracts to be concluded and executed makes part of a large-scale reform envisaged by the Federal Treasury bodies as a single chain of action extending from standard contractual terms established in the structured, machine-readable form to result in a machine-

readable text. Once such machine-readable contract is signed electronically by the customer and other parties, the system will transfer blocks of information from the relevant data registry to that of contracts, to be later used as blocks of information at the e-certification stage. When the system issues an e-certificate, all information will be posted to the relevant registries for instant digital payment. Such payment, once effected, will terminate the contract's execution from the perspective of legal obligations of all counterparties, and will define the course of action to complete the whole procurement chain as part of the relevant needs. The whole system to control these actions will take place at various stages of the technological chain to ensure an absolutely clear and technologically refined pattern. The technological action to issue an e-certificate as the final step to formalize actual acceptance raises the problem of describing this formalization in the effective regulatory framework governing the contractual system. In describing the possibilities to complete the course of actions both technically and actually, one will want to define possible legal solutions to formalize it. We support the doubts of L.Yu. Vasilevskaya, E.B. Poduzova and F.A. Tasalov as to whether digital solutions can be formalized by the civil law terminology. These authors argue that a study of the digital solutions exclusively from the standpoint of economic analysis of law while ignoring Russia's legal system will amount to rocking the system's "framework" out of balance. Meanwhile, they propose an analysis of new objects and links that will determine enforcement and that the legal profession has not dealt with before [Vasilevskaya L.Yu., Poduzova E.B., Tasalov F.A., 2022: 10–39].

In defining contract conclusion and execution approaches in the contractual system, one has to deal with the problem of calling block chain those solutions that are practiced by public and municipal customers at the acceptance stage as part of the technology allowing to formulate the contract's terms and ensure execution via signing an e-certificate [Shmeleva M.V., Rodionova O.M., 2020: 25]. As for new digital solutions at the contract execution stage, it is only possible to speak of the likelihood of using the block chain technology. According to L. Yu. Vasilevskaya and her collaborators, if we call a consistent and continuous sequence of any data blocks defined by specific rules a block chain, we have to admit a lack of legal provisions describing this concepts and other ones [Vasilevskaya L.Yu. et al., 2022]. Moreover, the issues of defining and using block chain in the public administration system have been repeatedly raised in both literature and studies including on public procurement [Talapina E.V. et al. 2021]; [Kosyan N.G., Milkina I.V., 2019: 33-41]; [Izutova O.V., 2018: 44–47]. One can accept the position of those who note the ambiguity and legal risks inherent in the use of block chain in the public administration system and for legal regulation of procurement. While some explorers see in the

introduction of block chain into the procurement system a positive thing [Shmeleva M.V., 2019: 15–22], others note its complexity and underlying risks [Truntsevsky Yu.B., 2019: 42–48]. Meanwhile, there are numerous example of how block chain is used in the public administration system and of the problems it entails[16]. A promising use of block chain in the public administration system suggests it can be extended to procurement, in particular, at the stage of contract's conclusion and execution. While a review of studies on this technology is beyond the scope of this paper, one can assume that block chain can be used for transition to smart contracts in the procurement system as part of e-certification. Given the specifics of electronic document flow at the stage of e-acceptance and e-certification, there is a need to use, firstly, a protected chain of information blocks authenticated by e-signatures and, secondly, a confirmation of post-acceptance actions with a view to digital payment. Block chain at this stage will automate action by counterparties, improve control over contract execution and security of electronic document flow and, following the e-certification stage, finally enable decentralized customers to make digital payments. Where used at the e-certification stage to finalize contract execution, the block chain technology will ensure payment for performance of obligations in accordance with the terms as confirmed by electronic documents for acceptance of goods/services. A.E. Brom and Z.S. Terentyeva argue that block chain as decentralized transaction ledger embedded into a wider computing infrastructure should support the functions of file storage, communication, service and archiving. The block chain technology is a sequence of interrelated blocks, each containing specific information [Brom A.E., Terentyeva Z.S., 2018: 121]. According to A. M. Kolosov, the technology can be used to conclude smart contracts with counterparties and control contract performance procedures. In discussing possible uses of this technology to ensure the execution of business contracts, this analytic stresses its potential to support the conclusion of smart contracts between counterparties as well as to control contract execution procedures [Kolosov A.M., 2018: 35]. V.A. Bondar notes that block chain can be successfully used as part of e-document flow systems in a number of ways: record management in the document signing and verification system; token-based settlements; logistical chain tracking; and using smart contracts for a variety of transactions. This scope can broaden, once the regulatory framework is improved and technical aspects and other constraints are addressed to ensure fast, reliable and safe e-transactions [Bondar V.A., 2019: 289]. Other specialists, while

[16] Bauer V.P. et al. The potential of using distributed ledger (blockchain) technology in the public administration system. Fundamentalnye issledovaniya, no. 12, pp. 248–249.

sharing this view, express some concerns. A.V. Urzhumov, while advocating promising uses and potential advantages of blockchain for the public procurement system, is concerned about regulation [Urzhumov A.V., 2019: 39–47]. Thus, the block chain technology in a wider sense is unlikely to be made part of the current procurement law, unless it is adequately documented and formalized in legal terms. However, one should discuss possible use of this technology for e-certification and payment at the final stage of smart contract execution under the contractual system. One of the core principles of block chain — that of decentralized ledger — correlates with each party and customer data in the single system and is guaranteed by automatic control of financial authorities. Moreover, the technology envisaged to function primarily via decentralized systems could be implemented for smart contracts via a centralized system as demonstrated by the contractual system at this development stage. In this regard, one should accept the view proposed by E.V. Zainutdinova who argues that a transaction-focused regulatory model for smart contracts under the Russian law is sufficient to give rise to legal effects desired by the parties without requiring other confirmation or evidence. This author notes that the transaction-focused regulatory model for smart contracts, in accounting for their technological nature, identifies them as binding instruments to be entered and executed in a specific information system (block chain) [Zainutdinova E.V., 2021: 126–147]. With regard to challenges for the use of smart contracts revealed by analysis of various areas, M. Vakhabava has proposed to develop a universal formal (written) language for correlation of contracts that should be easily interpretable and computer executable [Vakhabava M., 2021: 29]. Thus, in allowing for possible use of smart contracts at the stage of conclusion of public contracts, we should reasonably deal with legal regulation and e-acceptance as the final stage of execution using the technological capabilities already implemented in e-certification. Electronically certified e-acceptance as the final stage of public contract execution (currently embodied in the smart contract technology) can be acknowledged as a model for the use of smart contracts in the contractual system based on the blockchain technology. This approach proposed by different researchers [Shmeleva M.V., 2019]; [Karantova L.G., Kulev A.Yu., 2020: 22– 31]; [Terentyev V.N., 2020: 101–105]; [Truntsevsky Yu.V., Sevalnev V.V., 2020: 118 –147] even before e-certification was introduced is now likely to be realized in practice. Smart contracts in the contractual system could become self-executable, once the Federal Treasury bodies further develop this technology and implement instant digital payments (“cornerstone project”) to digitize public and municipal procurement. With the whole documentary support process implementable on the UIS platform at the stage of contract conclusion and execution, there is a need to discuss how certain legal rela-

tionships will be reflected in the relevant platform solutions. In this regard, N.E. Savenko is arguably right in proposing to establish the provisions of "platform law" for regulating economic activities. She also sees a promise in the development of machine-readable law with prior stock-taking and adaptation of the terminology [Savenko N.E., 2023: 162]. In sharing this idea in principle, we believe it is necessary to identify the development opportunities for the contractual system including the introduction of digital solutions for acceptance of goods and services.

Conclusion

Regulation and adequate procedure of acceptance in the contractual system are thus a quality and performance criteria for both customers and suppliers across the whole procurement chain. In identifying regulatory gaps in respect of acceptance of goods/services and admitting that acceptance is not adequately regulated in the effective law and contractual system, it is necessary to formalize a new approach to contract execution in view of the evolution of contractual system law. In defining e-certification as part of GS acceptance in contractual relationships law, one should distinguish the concepts of actual and documentary acceptance and formalize legal algorithm for e-certificates to determine the data input process for customers and other parties to the UIS and regional (municipal) systems.

While generally accepting the local nature of formalizing the GS acceptance procedure as the completion of contract execution, it is necessary to determine its elements and to provide quality criteria for goods/services based on the customer's satisfaction with procurement in accordance with the description of the relevant items as defined by the terms of performance.

In formalizing the e-acceptance process via legal provisions of technological nature, it is necessary to provide for the relevant rules of procedure. In identifying the e-certification process as a course of action to be taken by customers and other parties to contractual relationships via building the relevant data, it is necessary to focus on the technological nature of such action without applying legal liability for passing the stages of electronic document flow. As regards digital solutions for e-certification, they need to rely on adequate information support, with the stage of e-certification identified as possible final stage of smart contracts in the contractual system. The research community needs to further discuss the use of block chain in the public and municipal administration system, possible formalization of the terms such as centralized and decentralized data ledger, and correlation of such ledgers' legal mechanisms with provisions of the contractual system law in accounting for implementation of the e-certification stage. Digitization of

acceptance through the issuance of electronic certificate can be defined as an element introducing digital solutions into the contractual system. E-certification, smart contracts and instant digital payments can be considered one of the main elements of transition towards digital procurement.

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Artificial Intelligence in the French Law of 2024

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Abstract

The use of artificial intelligence in France is growing and intensifying in many areas, particularly in the field of justice. French President Macron has made it one of his government's priorities to build on these assets and make France a world leader in AI. In parallel, the French government has deployed some efforts towards anticipating the regulatory challenges related to AI, the "National Strategy for Artificial Intelligence" launched as part of «France 2030». As an illustration of the developments in artificial intelligence and its specific regulation, the French parliament passed a law to ensure the proper conduct of the 2024 Olympic and Paralympic Games (Law N° 2023-380 of 19.05.2023). The law permits the use of the experimental "augmented video-protection" technology, which uses cameras equipped with AI systems to detect and report specific events in real time. French regulations begin already now in the area of justice and must continue in the fields of AI liability and intellectual property. AI is a source of fears, particularly for the respect of human rights, and requires a very elaborate legal and ethical environment that is flexible enough to avoid slowing down the development of AI. The AI Liability EU Directive complements the Artificial Intelligence Act by introducing a new liability regime that ensures legal certainty, enhances consumer trust in AI, and assists consumers' liability claims for damage caused by AI-enabled products and services. But the new European AI Act does not resolve all issues that therefore need to be addressed nationally.

Keywords

digital law; AI Act; predictive justice; liability; intellectual property; automated processing of personal data; machine learning; generative AI; DataJust; foundation models; GDPR; Justice Reform Act.

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Introduction

France, like other countries, has embarked on the path of AI and the COVID-19 pandemic has accelerated the intellectual reflection and use of AI in many areas [Heinlein M., Kaplan A., 2019: 5–14]. The French President Macron has made it one of his government's priorities to build on these assets and make France a world leader in AI. In parallel, the French government has deployed some efforts towards anticipating the regulatory challenges related to AI [Villani J., 2018: 5–25].

The French AI strategy was launched in 2017, the year in which the first Macron Government began to reflect on its development. Named National Strategy for Artificial Intelligence, it was launched as part of «France 2030». This economic support plan has a budget of €100 billion, of which €40 billion will be partly financed by the European plan, divided into two phases between 2018 and 2025. The strategy aims to preserve and consolidate the country's economic, technological and political sovereignty in the field of AI. As part of «France 2030", the strategy is endowed with €1.5 billion for the development of a national policy in this area.[1]

In 2024 France has ambitions in terms of artificial intelligence. Indeed, the country launched the French Generative Artificial Intelligence Committee on September 19, 2023, demonstrating its commitment to the development and exploration of AI. In addition, the French Minister of Culture has formed a specific group of experts composed of professors specializing in intellectual property, digital law, and economic growth and innovation, as well as authors, artists, and entrepreneurs, to study the impact of AI in the cultural sector. These experts will examine various aspects, including the potential of AI in enhancing creativity and access to culture, the evolution of the legal framework to protect copyright, the promotion of French and Francophone cultural works and content, as well as the impact of AI on creative professions and education. Besides, in 2024, France will host at the next Summit on the Security of Artificial Intelligence (AI Safety Summit) that testifies to its active involvement in the regulation and security of AI.

Additionally, the French government has been experimenting with using AI for certain aspects of governance. In particular, the Courts of Appeals of Rennes and Douai tested predictive justice software on various appeals cases in 2017. The results were not encouraging[2] [Benesty M., 2017].

[1] Vignaud M. (2021) France 2030: grandes ambitions, petits effets? *Le Point*, 18 octobre.

[2] Coustet T. L'utilisation de l'outil Predictice déçoit la cour d'appel de Rennes. Dalloz actualité, 2017, 16 oct.; Prevost S., Sirinelli P. Madame Irma, Magistrat. Dalloz IP/IT : droit de la propriété intellectuelle et du numérique, N° 11, 2017, p. 557.

France, however, has not yet approved full legislation on AI and algorithms because, like all other European Union states, it was waiting for the new European AI regulation framework, since AI is one of the three major priorities for the EU which wants to become a reference and a world power in this strategic area of AI [Bensamoun A., 2018: 122].

On 8 December 2023, the European Parliament and the Council of the European Union have reached an agreement on the text that will be the first law on artificial intelligence (AI Act) in the world. The objectives of this proposed regulatory framework are to:

ensure that AI systems placed on the market are safe and comply with existing fundamental rights legislation, EU values, the rule of law and environmental sustainability;

ensure legal certainty to facilitate investment and innovation in the field of AI;

strengthen the governance and enforcement of existing legislation on security requirements for AI and fundamental rights systems;

facilitate the development of a single market for legal and safe AI applications and prevent market fragmentation.

More specifically, the proposed regulation establishes: prohibition of some practices; specific requirements for high-risk AI systems; harmonized transparency rules applicable; AI systems designed to interact with people; emotion recognition and biometric categorization systems; generative AI systems used to generate or manipulate images or audio or video content.

Consistency is ensured with the European Union Charter of Fundamental Rights, but also with European Union secondary legislation on data protection (GDPR), consumer protection**,** non-discrimination and gender equality. The proposal complements existing non-discrimination law by providing requirements that aim to minimize the risk of algorithmic discrimination, with obligations for testing, risk management, documentation and human monitoring throughout the lifecycle of AI systems [Mush S., Borelli M., 2023].

This very flawed text (AI Act) is the result of a compromise between those European states that want a strict regulation of AI and some other countries such as France, Germany and Italy intending to protect very successful European start-ups like Mistral AI and Aleph Alpha [Bensamoun A., Loiseau G., 2019: 38–53]. Therefore, the text only concerns high-risk AI systems.[3]

[3] Bertuzzi L. Spanish presidency pitches obligations for foundation models in EU's AI law. Euractiv, 2023, 7 novembre.

As an illustration of the developments in artificial intelligence and its specific regulation the French National Assembly has passed a law to ensure the proper conduct of the 2024 Olympic and Paralympic Games (Law N° 2023-380 on 19.05.2023). This law permits the use of the experimental "augmented video-protection" technology, which uses cameras equipped with AI systems to detect and report specific events in real time.[4]

The modalities and safeguards of this system have been further specified by a French decree published in August 2023, that states that augmented cameras may only be used to record predetermined events in real time, and that such recordings may only be viewed by authorized agents. The decree therefore provides for:

a restrictive list of predetermined events, for example abandoned objects, use of weapons, failure to respect the common direction of traffic, crossing a sensitive or forbidden area, crowd movements, excessive density of people, starting fires;

a ban on the use of biometric identification systems;

a description of how processing will be carried out during the design and operation phases;

cooperation of the French national cybersecurity agency (ANSSI), which must be "involved in the choice of processing to ensure compliance with cyber-security requirements".

It is noteworthy that augmented cameras are one of the CNIL's priority control themes for 2023, which may lead to investigation into the practices of companies specializing in this field.[5]

The risks arising from the use of this technology are numerous: Algorithmic surveillance is therefore a technology that will be used "during the period of the Olympic and Paralympic Games" for more security and to detect in real time events that present security risks. But the use of this technology has been strongly criticized by several international organizations and associations for the defense of rights in digital spaces. Despite the government's claims that it will not use biometric data to identify people, the algorithms will still assess people's behaviours in public spaces, using body data that is part of personal data. There would therefore be an undeniable risk to the right to privacy.[6] The CNIL (The French Data Protection Authority) has

[4] Lequesne G. La fin de l'anonymat : reconnaissance faciale et droit à la vie privé. Dalloz IP/IT, 2021, p. 309.

[5] Commission Nationale Informatique et les Libertes. Comment permettre à l'Homme de garder la main. Rapport sur les enjeux éthiques des algorithmes et de l'intelligence artificielle, 2017, 15 déc., pp. 16–19.

[6] Seramour C. L'Assemblée nationale adopte la vidéosurveillance algorithmique aux JO 2024. Le Monde, 2023, 24 mars.

recognized that France was experiencing a turning point with the arrival of artificial intelligence in the processing of images related to law enforcement and security. In addition, the use of algorithmic video surveillance refers to a more secure state, by giving more powers to the police. We can also fear a certain lack of responsibility on the part of the State in the event of a false arrest, for example, by putting the blame on the algorithm because it is a system of action detection in an autonomous way without prior human intervention. In addition to the risk of misidentification of a person, the use of these processes also generates a risk of discrimination. The problem has already been noted in the United States, in cases where algorithms were wrong between African Americans and Asians.

In addition, the Law of 19 May 2023 is not limited to the Olympic and Paralympic Games planned at Paris in 2024. These will be excuses to implement these technologies, because the period of use of algorithmic video surveillance is supposed to extend until 2025, that is one year after the end of the Olympic Games. According to the decree of October 11, 2023, a committee will be responsible for issuing a report specifying the advantages and disadvantages of this experience.

Despite this search for balance, algorithmic video surveillance remains suspect for organizations that defend rights in digital spaces. It could make it possible to reduce and detect crowd movements, which from a legal point of view can also infringe on the right to freedom of assembly and association in public spaces.

For such reasons, the National Assembly is already discussing an ethical Charter on AI that could be incorporated into the Preamble to the French Constitution and thus have a value greater than the law, of equal value to the Universal Declaration of Human Rights.

The proposal is to enshrine in constitutional law that an AI cannot have a legal personality. The notion of artificial intelligence is understood in the charter as “an algorithm that evolves in its structure and learns beyond its initial programming”. It sets out principles that AI must respect (such as respecting human orders) and includes requirements for audits and monitoring the evolution of AI towards decision-making autonomy. However, the proposal has not been incorporated into the Constitution and no longer seems to be under consideration.

Considering that the protection of personal data is a major challenge for the design and use of these tools, the CNIL publishes its action plan on artificial intelligence; its aims are—among other things—to frame the development of generative AI.

Faced with challenges related to the protection of freedoms, the acceleration of AI and news related to generative AI, the regulation of artificial intelligence is a main focus of the CNIL's action.

The action plan (2023–2024) is structured around four objectives: understanding the functioning of AI systems and their impact on citizens; promoting and regulating the development of privacy-friendly AI that respects personal data, among others the application of the GDPR to AI; especially for the training of generative AI; supporting and collaborating with innovative actors in the AI ecosystem in France and Europe, auditing and controlling AI systems to protect individuals.

Man's priority over AI must be found in the field of intellectual property of AI systems and their results.

French regulations begin already now in the area of justice (I) and must continue in the fields of AI liability (II) and intellectual property (III).

1. French Justice and AI

France has just adopted a digital transformation plan that aims to develop a fully functional digital public justice service by 2022, enabling (among other things) users to follow cases online. But it is the citizen who is well and truly at the heart of the project: the transformation is a supplementary means of access to justice. It is not a substitute for traditional modes of referring cases to courts [Goodman J., 2016].

Digital availability of judicial decisions will also enable deployment of artificial intelligence. The project is an opportunity both for citizens and law professionals, who will have easier access to case-law, as well as for judges, as artificial intelligence will act as a decision support tool without depriving them of their role [Garapon A., 2018: 22–57].

These goals must be implemented in full respect of private life as guaranteed by Article 8 of the European Convention on Human Rights. In decisions that are published online, any content that might enable identification of the individuals concerned will have to be deleted. Many other principles that will have to guide the development of artificial intelligence, identified by the European Commission for the Efficiency of Justice in its Ethical Charter, include respect of fundamental rights, non-discrimination, neutrality, transparency, user control, hosting security and controlled use of predictive justice [Ferrié S., 2018: 502].

A fundamental debate is needed to critically assess what role, if any, AI tools should play in our justice systems. Increasing access to justice by re-

ducing the cost of judicial proceedings through the use of AI tools may sound like a desirable outcome, but there is little value in increasing access to justice if the quality of justice is undermined in doing so. Therefore, AI tools must be properly adapted to the justice environment, taking into account the principles and procedural architecture underpinning judicial proceedings [Christian B., 2020].

To this end, the following main issues should be considered by Courts: possibility for all parties involved to identify the use of AI in a case; the possibility to identify the use of AI; all parties involved in a judicial process should always be able to identify, within a judicial decision, the elements resulting from the implementation of an AI tool. There should be a strict separation between data or results from the operation of an AI system and other data in the dispute.

Non-delegation of the judge's decision-making power: the role of AI tools should be defined in such a way that the use of the tools does not interfere with the judge's decision-making power. Under no circumstances should the judge delegate all or part of his/her decision-making power to an AI tool. AI tools should neither limit nor regulate the judge's decision-making power, for example in the context of the making of an automated decision. When the judge's decision is partially based on the elements resulting from the implementation of an AI tool, it should be properly justified and explained in the judgement.

Possibility to verify the data input and reasoning of the AI tool: in cases where the decision is likely to be based, in whole or in part, on the data of the outcomes it provides. As a result, "Learning software" should only be used to the extent that it would still be possible to verify how the machine achieved the proposed result and to distinguish the elements resulting from the use of AI from the judge's personal reflection.[7]

The possibility of discussing and contesting AI outcomes: the parties of the litigation should have the opportunity to discuss the data and conclusions deriving from an automated system. Therefore, the deployment of AI should always be carried out outside the deliberation phase and with a reasonable time for discussion by the parties.

In a startling intervention that seeks to limit the emerging litigation analytics and prediction sector, the French Government has banned the publication of statistical information about judges' decisions — with a five-year prison sentence set as the maximum punishment for anyone who breaks the new law.[8]

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[7] Ortega P., Maini V. Deep mind safety team. 2018. Medium, 27 September. Available at: https://medium.com/ (accessed: 12.04.2022)

[8] Articles 226-18, 226-24 et 226-31 of the Code Penal.

The new Law of 23 March 2019, or the Justice Reform Act, is aimed at preventing anyone — but especially LegalTech companies focused on litigation prediction and analytics — from publicly revealing the pattern of judges' behaviours in relation to court decisions.

A key passage of the new law states: Article 33 of the Justice Reform Act now provides that: 'The identity data of magistrates and members of the judiciary cannot be reused with the purpose or effect of evaluating, analyzing, comparing or predicting their actual or alleged professional practices.'

This is the first example of such a ban anywhere in the world. It is therefore forbidden to use the identity of the judges to model how certain judges behave in relation to particular types of legal matter or argument, or how they compare to other judges.

A study for example showed that judgements handed down in the morning were more favourable to the accused person. With AI, it can be possible to know what type of evidence or arguments is better for this or that judge. Another study (carried out within the framework of the Toulouse School of Economics) showed that in the criminal field, the sentences handed down were less severe if the judgement was handed down on the day of the defendant's birthday. The "anniversary rebate" amounts to between 1 and 3% in the decisions of the French criminal courts. It can be as high as 15% in the United States, among Louisiana state judges. It is at its maximum when the accused appears in person and is not tried in his or her absence. These examples show that the analysis of court data by AI programmes is likely to reveal ignored elements, the knowledge of which could be used to improve the functioning of justice. Indeed, in the above case, the strong difference between French and American judges is probably explained by the fact that Louisiana judges are not professional magistrates and that they have not received training to neutralize or counterbalance cognitive biases and affect [Chen V., Philippe A., 2022].

This possibility is forbidden now in France. This law has been criticized and called a complete shame for French democracy. But the legality of the prohibition has yet to be discussed. As the criminalization of judicial behaviour research is clearly an interference with free speech, the question is whether it is also in violation of human rights law. If we take as a departure point the right to freedom of expression in Article 10 in the European Convention on Human Rights, France must demonstrate that the prohibition has a legitimate aim, is necessary, and balanced in its impact. We are highly doubtful that the law meets these standard requirements in a proportionality test.

By providing a legal framework for the anonymization of magistrates, the law clearly runs counter to the position of the first president of the Court

of Cassation and the first presidents of the courts of appeal, who claim that this anonymization is contrary to the principle that the judge dispenses justice in the name of the French people, and that the assessment of a risk to the safety of judges was too delicate to carry out and justify.

But AI in Justice came about by a decree of 27 March 2020 concerning the automated processing of personal data, called the Datajust decree, in order to respond to the claims of the many victims of the COVID-19 who might want to seek responsibility for health services or administrators in the mismanagement of the consequences of this pandemic.[9] This decree is intended to provide the courts, and administrations with a scale of compensation and documentation to reach judgements as well as to assess through the analysis of the AI the impact of the laws on these amounts of compensation in order to consider, if necessary, reforms of the laws.[10] This data processing is made possible by the law for a digital republic of 7 October 2016, which authorizes the publication of anonymized court decisions in open data [Prévost S., 2016: 2–9].

Today and since 2022, this project has been abandoned by the Ministry of Justice. This failure is partly due to the specific form of court decisions that, while they do not suffer from ambiguity when read by a human, have a form and syntax that are too particular for the usual algorithms to be able to derive the relevant information. A decision-making tool would therefore first require that court decisions know rules that would make it possible to standardize the essential data (process of the decision; terms used) to allow the software to detect them without risk of error and to learn from their detection.

This project also met with significant criticism from judges, lawyers and victims' associations who feared that compensation would be too standardized to the detriment of complex individual situations.

In France, entrusting the Court of Cassation with the development of its own algorithm allows the State to retain its prerogatives. Chantal Arens, first President of the Court of Cassation, says that the Court of Cassation will be attentive to the implementation of control mechanisms and to "the support of judges". It assures that "the risks of errors are well identified", following the recommendations of the Cadiet report.[11]

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[9] Prevost S. Justice prédictive et dommage corporel: perspectives critiques. Gaz. Pal. 2018. 30 janvier, N° 312 b3, pp. 43–45.

[10] Dufour O. Qui a peur du décret «DataJust»? Actualités juridiques, 2020. Available at: https://www.actu-juridique.fr/sante-droit-medical/qui-a-peur-du-decret-data-just/ (accessed : 16.04.2023)

[11] L. Cadiet (dir.) L'Open data des décisions de justice. Rapport au Garde des sceaux. 2018. La documentation française, pp. 3–19.

It is essential that AI does not deliver court decisions, it must only provide solutions. This technology is "a remedy for the slowness of justice" and promotes access to justice and information. However, it should not be given a "performative use" that would push judges to make the same decisions over and over again and call into question the independence of the judge. It is up to the State to guarantee the impartiality of the algorithms used. The role of public authorities is to control LegalTech that can affect our values.

In this respect, the creation of a public and independent authority to regulate the use of algorithms to prevent any excesses of "predictive" justice would be an additional and essential guarantee.

To illustrate a successful French AI project, we can mention the creation of the digital labour code (code du travail numérique).

Announced by Article 1 of Ordinance No. 2017-1387 of 22 September 2017 on the predictability and security of employment relations, the purpose of the Digital Labour Code is, according to the law, to allow, "in response to a request from an employer or an employee on his or her legal situation, access to legislative and regulatory provisions as well as to contractual stipulations, in particular of branch, undertaking and establishment, subject to their publication, which are applicable to it".

The tool is intended directly for the public, and not for legal professionals, to enable them to know their labour rights in an easily accessible and simple to understand way.

The easy French query tool, on the other hand, is genuinely based on AI techniques, since it involves applying a set of legal texts (if possible limited) relating to a situation described in free language. It is therefore not a system of querying by keyword, as the user is not supposed to have a precise command of the legal vocabulary.

This experience is therefore an example of the successful use of AI in legal matters. It is not a question of providing the decision (and even less of predicting it) but, more modestly, of giving all litigants access to the texts applicable to their situation. An important feature of this tool is that it has legal value in itself. Users can avail themselves of the answers provided by this engine to the legal authorities to which their case could subsequently be presented. In concrete terms, if the answer given by the Digital Labour Code is incorrect, the user in good faith can oppose it to his interlocutor — between private persons or between private persons and the administration — which gives this answer a greater force than that of a simple legal information. The State therefore assumes its own responsibility in the event of incorrect answers.

Since its creation on 1 January 2020, the Digital Labour Code has had a very positive record: more than 22 million visits; more than 2 million searches; but also, more than 18,000 referenced contents.

There are therefore areas of justice that can naturally be entrusted to AI, because they require simple automation, and it would be a shame to deprive ourselves of the effectiveness of AI in this area in order to put it at the service of the judge so that he or she can properly perform his or her function, or even, so that certain functions are simply carried out. In order for AI to enter these areas, it is essential, upstream, that a simple and circumscribed objective, an adapted AI methodology, be determined. The open data project is a particularly successful example of this. To ensure the public availability of court decisions that have been requested for many years by professionals, and to do so in a transparent manner, respectful of individual rights, and free of charge, it was necessary to succeed in effectively anonymized decisions.

A second field for the AI regulation is the question of liability.

2. Liability and AI

From a legal point of view, the new problems that are emerging with AI are of the same nature as in the past [Gautrais V., Moyse P., 2017: 3–39]. Whether the decision is taken by a machine or whether the machine is a decision-making aid of the nominally competent person, the question of liability and its attribution arises. In both cases, it is the result of the process, legal act or legal fact, that the legal system seizes. In both cases, tensions arise between law and technology, between legal informatics, IT law and liability law [Borghetti J.-S., 2019: 9–11].

France, a member state of the EU, must implement European principles in the field.

The European Parliament believes that "there is no need for a complete revision of (...) liability regimes" but only for "specific and coordinated adjustments".

The European Union suggests the responsibility in principle of the AI system operator (both the frontend operator and the backend operator). For "high-risk autonomous AI-systems", they believe it is "reasonable to set up a common strict liability regime" (no-fault liability). This is the meaning adopted by the AI Liability Directive in complement of the Artificial Intelligence Act by introducing a new liability regime that ensures legal certainty, enhances consumer trust in AI, and assists consumers' liability claims for damage caused by AI-enabled products and services.

It applies to AI systems that are available on the EU market or operating within the EU market [Bensoussan A., Bensoussan J., 2022: 97].

In fact, the European Commission has on the one hand updated the existing 1985 Defective Products Directive and on the other hand created the new AI Liability Directive. These 2 directives complement each other.

The new redaction of the Defective Products Directive takes in consideration AI.

The proposal for a revised Directive reinforces the current rules, which have been well established for almost 40 years (since Council Directive 85/374/EEC of 25 July 1985), which provide for no-fault liability of manufacturers and compensation for personal injury, damage to property or loss of data caused by defective products. It ensures fair and predictable rules for both businesses and consumers.

The proposed new Defective Products Directive modernizes product liability rules in the digital age, allowing for damage to be repaired when products such as "robots, drones or smart home systems are made unsafe by software updates, AI or digital services necessary for the operation of the product, as well as when manufacturers fail to remediate cybersecurity vulnerabilities." The text provides for a reduction in the burden of proof for victims in complex cases, "such as those involving pharmaceuticals, smart products or products using AI".

The contribution of the new AI Liability Directive completes the arsenal of protection for AI users. While the AI Regulation aims to prevent harm, the AI Liability Directive "establishes a safety net to obtain redress in the event of harm."

The objective of the AI Accountability Directive is threefold:

establish uniform rules for access to information and reduction of the burden of proof regarding damage caused by AI systems;

introduce broader protection for victims (whether individuals or businesses) and promote the AI sector by strengthening safeguards.

It will harmonize certain rules for claims for damages outside the scope of the Defective Product Liability Directive, in cases where damage is caused by wrongful conduct (breaches of privacy, damage caused by safety issues, etc.).

More specifically, the AI Liability Directive complements the European civil liability framework, introducing specific rules for damage caused by AI systems, based on two main measures:

access to evidence held by companies or suppliers, when they use "high-risk" AI, as defined in the AI Regulation (Article 3);

the "presumption of causation", which will relieve victims of the obligation to explain in detail how the damage was caused by a specific fault or omission (Article 4).

Indeed, based on the observation that AI systems can be complex, opaque, making it difficult, if not impossible, for the victim to discharge the burden of proof, the European legislator considered that the liability regime must allow effective access to justice, resulting in access to reparation for the victim, in accordance with the Charter of Fundamental Rights of the European Union.

According to the European Commission, the new Directive is also in the interests of companies, which will be better able to anticipate how the existing liability rules will be applied and thus assess and ensure their exposure to liability risks. "This is particularly the case for companies operating cross-border, especially small and medium-sized enterprises (SMEs), which are among the most active in the AI sector."

The objective of the AI Liability Directive is to establish uniform rules for access to information and to reduce the burden of proof regarding damage caused by AI systems, to provide broader protection for victims (whether individuals or businesses) and to favour the AI sector by strengthening safeguards. It will harmonize certain rules for claims for damages outside the scope of the Product Liability Directive, in cases where damage is caused by wrongful conduct. This concerns, for example, privacy breaches or damage caused by security issues. The new rules will, for example, make it easier to obtain redress if a person has been discriminated against during a recruitment process using AI technology.

The AI Liability Directive simplifies the legal process for victims when it comes to proving that a person's fault has caused damage, by introducing two main elements. First, in circumstances where relevant fault has been established and a causal link to the performance of AI seems reasonably likely, the 'presumption of causation' will address the difficulties faced by victims when they have to explain in detail how harm was caused by a particular fault or omission, which can be particularly difficult when it comes to understanding and navigating complex AI systems. Secondly, victims will have more tools to seek redress in court, thanks to the introduction of a right of access to evidence from companies and suppliers, when high-risk AI systems are used.

The liability would cover "violations of the important legally protected rights" to life, health, physical integrity, and property. It should also set out the amounts and extent of compensation, as well as the limitation period.

Artificial intelligence can also be a threat to democratic debate, one example being the propagation of fake news during election periods [Marique

E., Strowel A., 2019: 383–398]. The integrity of electoral processes, election campaigns and polling has been undermined in France as it has elsewhere, leading to the opening of criminal investigations in a number of countries. We must therefore remain extremely vigilant regarding opinion manipulation through propagation of fake news, often by automated means. It is not a question of attacking freedom of expression but rather of preserving freedom of opinion. This being so, France enacted a law against manipulation of information on 22 December 2018[12] . Online platforms now have obligations of transparency with regard to content containing sponsored information and identity of sponsors where significant remuneration (100 euros) is involved. Platforms must also appoint a legal representative on French territory and make their algorithms public. Only the biggest platforms are concerned, i.e. those with over 5 million single visitors a month. The law also institutes an emergency judicial procedure, known as "référé anti-infox", an interim ruling to eliminate deliberate dissemination of information seeking to undermine the fairness of an election.

When the matter is referred to him or her, the judge hearing the application for interim relief must assess, within 48 hours, whether this false information is disseminated "artificially or automatically" and "massively".

In its decision of 20 December 2018, the Constitutional Council has specified that the judge could only stop the dissemination of information if the inaccurate or misleading nature of the information was manifest and the risk of altering the sincerity of the vote was also manifest.

The French political system is built on many elections (municipal, regional, national) not to mention in addition to the European elections like in 2024, so that France is almost permanently in an electoral period allowing the use of this law. And last but not the least is the question of intellectual property of AI.

3. Intellectual Property and AI

A specific priority over AI must be found in the field of intellectual property of AI systems and their results [Larrieu J., 2013: 125–133].

The attribution of copyright protection to artificial intelligence raises questions. Consistently, the work protected by copyright is a so-called "original" work, which is a fundamental criterion for protection. It is also said that the work must reflect the imprint of the author's personality. Originality is defined in copyright law as the expression, however minimal, of

[12] Law N°2018-1201.

the human spirit. It is therefore not the best place to grant legal protection over the literary or artistic production of robots, regardless of the degree of intelligence, which is artificial.

This is the principle adopted by the French Intellectual Property Code in its Article L 111-1: "The author of a work of the mind enjoys, by the mere fact of its creation, an exclusive intangible property right over that work, enforceable against all..."

It is clear that only the natural or legal person behind the creation of the algorithms could hold intellectual property rights and the AI system being not a legal person would be deprived of this right in an absolute and definitive way.[13]

In addition to creations resulting from artificial intelligence processing, two types of "AI creations" could be considered schematically. The former, computer-aided creations are independent of the software used, with artificial intelligence acting only as a tool in the creative process supervised by a human being. The second, creations generated spontaneously by artificial intelligence, are the result of software, without decisive human intervention to the point that some believe that in this case it is essentially the programmer and the machine that will generate the final work, or even consider that artificial intelligence contains its own creative process.

In the case of AI-assisted creations where AI is used as a simple tool, it is possible to consider that the mark of the author's personal intervention remains essential. The creation could thus attain the status of a work and be protected by copyright for the benefit of the natural person at the origin of that work [Larrieu J., 2014: 11–43].

With regard to creations spontaneously generated by AI, those in favour of their protection by copyright are divided between those who believe that it is still possible to distinguish in these creations the mark of the subjectivity of the various stakeholders and those who argue for the adoption of an objective conception of the key concepts of copyright, and more particularly the notions of intellectual work and originality to bring these creations under copyright.

In these two cases, the characterization of originality will require a specific analysis of the said creations, taking into account, depending on the chosen design, the AI method used, the scope of its intervention as well as the latitude left to the user or to the one who, for example, selected the

[13] Enser N. L'entrée dans le "Paradis" du droit d'auteur: pas sans un être humain à l'origine de la création! Dalloz actualité, 2023, 18 septembre.

"input" data, proceeded with processing settings or intervened in post-production.

As for intellectual property rights, the EU Parliament stressed the importance of having an effective system to further develop AI, including patents and new creative processes. Among the outstanding issues are the problems of determining who owns the intellectual property of something developed entirely by AI.

Accordingly, they suggest that this assessment focuses on the impact and implications of AI "under the current system" of patent law, trade mark and design protection, copyright and related rights, including the applicability of the legal protection of databases and computer programmes, and the protection of undisclosed know-how and business information ('trade secrets') against their unlawful acquisition, use and disclosure.

Moreover, considering the development of AI, it is important "to distinguish between AI-assisted human creations and creations autonomously generated by AI". In this connection, "works autonomously produced by artificial agents and robots might not be eligible for copyright protection, in order to observe the principle of originality" with the human creative spirit and with respect and reward for the expression of human creativity.

On 12 September 2023 eight members of the National Assembly introduced a proposal (the Proposed Legislation No. 1630), to amend the first book of the French Intellectual Property Code with respect to copyright. This legislative change has been proposed to address issues such as the use of copyright works in the development and operation of AI systems and the approach to authorship and copyright ownership of works generated by AI systems. Key aspects of this proposal include:

requiring the authorization of authors or right-holders of intellectual works protected by copyright for the incorporation and exploitation of their works by AI systems;

ensuring that, in cases where a work was generated by AI without direct human intervention, the only right-holders of such work are the author(s) or right-holders of the works that enabled its conception;

allowing certain collective copyright management organizations or other collective management organizations to represent right-holders and to collect fees relating to the exploitation of copyright work by AI systems;

requiring all AI-generated works to include the reference "work generated by AI" and the names of the authors of the works that enabled their creation;

imposing a tax on the operators of an AI system, where a piece of work was created by the AI system, but the initial work cannot be determined.

This tax is intended to increase the value of creation and is paid to the organization responsible for collective management.

However, the draft seems to lack nuance and understanding of the complexities inherent in generative AI.

The proposal, by requiring authors' permission for the integration of their works into AI systems, seems to ignore the technical reality of machine learning algorithms. These algorithms, especially deep neural networks, require large amounts of data to train. The requirement to obtain authorization for each integrated work could not only hinder technological development, but also pose insurmountable logistical challenges. In addition, this provision could be in contradiction with existing copyright exceptions, such as fair use or use for research purposes, provided for in the articles of the Intellectual Property Code.

Taxation attempts to provide a source of income for creators but is ill-suited to the complexity of AI technology. Taxation, for example, could be seen as a barrier to innovation and could deter companies from pursuing AI projects. In addition, the transparency required by this proposed law could be at odds with the trade secrets and intellectual property rights of the companies developing these technologies.

The new European legislation of the AI Act addresses the subject of copyright by establishing the principle of respect for copyright and the identification of artificial content. The issue of copyright in the AI Act has been the subject of many discussions between European countries and has led to a compromise. The stakes are high because it was necessary to find a balance that was difficult to achieve: to promote innovation and the use of artificial intelligence in Europe while preserving citizens' fundamental rights, in particular copyright.

Generative AIs must now ensure data compliance and copyright compliance, with clear identification of artificial content.

Creators of generative artificial intelligence models will have to comply with several obligations: first, and this is probably the most important although the wording is vague, "make public a sufficiently detailed summary" of the content they use to train their algorithms.

This transparency will then allow for a right to remuneration." In other words, authors, screenwriters, writers, media, artists whose works have been used to train generative AI models could enter into negotiations to be paid.

Another cause for celebration for copyright holders is the obligation for AI companies to respect the European copyright law. This may seem trivial, but it was not necessarily self-evident for companies located outside the

EU. In particular, AI systems will have to comply with opt-out clauses, a right to object to the use of data by AI systems. The rule already existed, but it was not necessarily respected, this is a way of reaffirming it. We will now have to define common standards and it will not be easy.

However, these formulas contained in this text are too imprecise to guarantee the effective implementation of the protection of intellectual property rights.

Conclusion

Will robots replace judges? The fear of an automatic and dehumanized justice system often comes up in criticisms of artificial intelligence in France.

Foreign experiments are already using software to deliver justice, thereby relieving congestion in the courts and reducing costs. In the Canadian province Ontario, a "virtual court" is responsible for settling disputes between neighbours or between employees and employers. In another Canadian province, Quebec, software is also used to settle small commercial disputes. In Estonia, a robot should soon establish a person's guilt for "minor" disputes (less than 7,000 euros).

The risk of a "Netflix of law" is of concern. The common law lends itself particularly well to the promises of algorithmic justice but, transposed to France, it could lead to a considerable impoverishment of the French legal culture and a less "room for manoeuvres of legal professionals". [14]

Ethical questions about the opacity of algorithms and possible biases in their analysis remain unanswered. In North America lawyers are already denouncing racial bias in algorithms that penalize ethnic minorities.

However, the use of AI in justice can bring considerable benefits. Lawyers must adapt and ensure that ethical rules are respected. The subject matter is by nature evolving, it is at the heart of practice to continually adjust the rule to the concrete realities of the time.

Three issues now seem to guide the future of French justice when it relies on algorithms. First of all, legal certainty, which requires that digital tools be sufficiently reliable to form the basis for predictable decisions without undermining citizens' legitimate trust in public authorities. Secondly, there is the question of compensation for any damage caused by algorithms, through judicial review and appropriate compensation principles. Finally,

[14] Harroch J. Déployer une IA éthique sera l'enjeu du siècle qui vient. Le Monde, 2022, 30 decembre.

the degree to which the control of the judge, who is traditionally reluctant to enter into considerations of expertise or morality, is being deepened at the very moment when a regulatory conception is developing, through preventive ethics, which, in its arrangements, does not give digital law the superior value that it should have in order to frame all legal and judicial activity and constitute an essential guarantee of the effectiveness of democracy.

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Copyright Protection for Characters in Transmedia Environment

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Abstract

The proposed article provides an analysis of the legal regime for characters as impacted by the current content creation and dissemination trends with a focus on characters placed in trans media environment and on the impact of trans media storytelling on creative work. The author argues current global changes in creative work and different media make it relevant to return to discussions of the main premises of copyright regime for characters. In particular, the author explores a possibility to recognize independent exclusive rights to characters appear in different works of art as well as to those not described in any one of them, and looks into legal importance of characters not described in traditional works of art and literature. The paper raises the issue of exclusive right to characters in complex objects such as audiovisuals or computer games, as well as of the authorship and exclusive ownership of team-created and transmedia characters. The cases of joint authorship of (script) writers and artists as well as implications of creating images of characters existing in literary form as commissioned or allowed by the copyright holder are discussed. The legally important components of characters are explored as well as copyright transferability in the context of media production needs. The paper argues for a need to avoid mixing characters with other copyright objects, first of all works of visual arts including cartoon character sketches.

Keywords

character; transmedia creative work; transmedia storytelling; copyright for characters; copyright to a part of work; exclusive right; intellectual property right; copyright infringement.

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Introduction

A characteristic feature of the digital age (equally called information age) is not only the predominance of technologies described as "digital" but also overall changes to the composition and dissemination of information (content) as well as changes to the nature of creative work itself. These trends are exemplified by the problem of copyright protection for characters.

Under para 7 of Article 1259 of the Civil Code of Russia (hereinafter referred to as CCR), copyright applies to a part of work, its title and characters as long as they can be recognized by virtue of their nature a standalone creative product described in any objective form.

The copyright regime for characters is traditionally premised on the following statements:

character — a piece of work where it is described and protected as part thereof;

character is inextricably linked to the form (literary, animation etc.) it is described in;

character is authored by the author of the work describing it.

These premises should be subject to careful scrutiny in discussing characters in today's media and creative work in transmedia environment.

In the United States, popular comics and cartoon characters were used in civil law transactions for production of goods and services separately from the artwork since the mid 20th century [Kopylov A.Yu., 2021: 3]. It was only in 1930 after the case of Nichols v. Universal Pictures[1] that characters were recognized independent from the story they were described in. This case was about copyright infringement for copying dramatic work in a film. The court noted that protection of literature cannot be limited to the exact text but did not establish a violation since the copied characters were recognized universal concepts and stock characters (prototypes). In Russia, the practice of using characters separately from original work has emerged only belatedly, with the growth of new entertainment industries (comics, computer games, animation films, etc.) giving rise to a phenomenon of character "migration" beyond the works where they were originally described.

[1] Nichols v. Universal Pictures Corporation, 45 F.2d 119 (2d Cir. 1930).

1. The Concept of Character

While originally not a legal term, the character has a content to be defined by relevant knowledge fields (literary and art studies), with the law to identify the properties and criteria relevant for its copyright protection.

E.V. Lozinskaya believes the character to be a complex category if regarded from the perspective of literary theory: on the one hand, characters are very closely integrated into the general structure of a work while, on the other hand, they are quasi autonomous and easily dissociable from the work and its media substrate [Lozinskaya E.V., 2013: 81]. In literature and arts, a character is human being or other hero of a story or narrative. The narrative may be associated with literature (novels, stories, plays) and arts (movies, TV series, audio theatricals, video games). These works come from different media. M. Freeman argues that characters are imaginary beings constructed from certain physical and psychological components and environmental features [Freeman M., 2017: 23]. In other studies, characters are defined as textual or media figures — either human or human-like — in a story world [Jannidis F., 2014: 30]. This interrelation of characters and story world is crucial as it ensures the association of characters with specific work (s). Under an extreme approach to the said relationship dating back to Aristotle's Poetics, characters are a kind of "functions" subordinated to and determined by narrative.

From the perspective of literary and art studies, defining a character requires both to describe it (not necessarily from exterior since description as a technique can also tell about personality and inner self) and to analyze its behavior including with all other characters of the work. Creating a character involves things such as appearance, dialogues, interactions with other characters, background, psychology (the set of techniques to be used may vary depending on the genre and style).

The legal doctrine abounds with character definitions. Thus, A.Yu. Kopylov overemphasizes the importance of character description (image) by proposing to define a "character in literature and arts" as a visualized description of imaginary person in the form of an objective image (series of images), 3D model or hologram representing an intellectual product usable in civil law transactions separately from the main work, of which the character is a detachable part [Kopylov A. Yu., 2021: 12–13]. I.A. Bliznets and V.S. Vitko argue in contrast that a protagonist can be recognized character as long as it represents an idea creatively expounded in a certain form of narrative behind the idea of the story's hero — a character. That is, they believe that characters are protagonists created by the author to express certain idea

(thought, feeling). For example, Don Quixote is the idea of knighthood in the service of Beauty; Raskolnikov is that of the right of strong person to rise above the world and "break what needs to be broken once and for all" [Bliznets I.A., Vitko V.C., 2022].

A.E. Sukhareva and R.E. Turkin argue that a character can be understood in a wide and narrow way. In the first case, a character is defined through the name, image and appearance of the story's heroes, with copyright protection focused on the image inextricably related to the name and appearance. This practice is typical of the United States and other countries governed by the Anglo-American legal tradition. In the second case, the legal focus is exclusively on the description and graphic image, only to ignore how the character is represented by readers/viewers [Sukhareva A.E., Turkin R.E., 2017].

The Russian legal practice tends to overemphasize the character's image with a vast majority of disputes dealing with illegal copying of audiovisual (animation) characters. The Supreme Court of Russia's opinion is that a character should be understood as a set of descriptions and/or images of a protagonist in the form(s) proper of the given work of art: written, oral, visual, audio or video recording, 3D, etc.[2] In stressing the character's description (image), the Supreme Court of Russia has advanced a refutable presumption that protagonists are subject to protection if proved to have distinctive features.

Today it is apparently urgent to shift the emphasis in the legal discussion of characters given that it is not only (and not so much) their image that should be protected but the entire set of features including personal traits, relations with other characters, speech patterns, names, nicknames, etc. Thus A.A. Nikiforov argues that in Germany a character's appearance as such is not recognized as an adequate basis for copyright protection which is available only if there is a set of accurately described individual actions and traits embodied in a single character [Nikiforov A.A., 2020: 187]. A case brought in the U.K. makes a good example of accounting for personal and other distinctive traits not related to the character's appearance in deciding whether it is protectable.[3] The case was about infringement of the right to Del Boy from the BBC's *Only Fools and Horses* comic series broadcasted over ten years from 1981 to 1991. The defendants used the character in the *Only Fools The Dining Experience* interactive show. To assess the fact of

[2] Supreme Court of the Russian Federation Plenum Resolution No. 10 On Applying Part Four of the Civil Code of Russia 23.04.2019, para 82 // SPS Consultant Plus.

[3] Shazam Productions v. Only Fools The Dining Experience. 2022. EWHC 1379 IPEC.

copying, the court used the BBC's TV series scripts and established, in particular, the following Del Boy distinctive traits the defendants had copied: a) use of unique phrases the Oxford Dictionary attributed to this character; b) use of French in an attempt to create an exquisite atmosphere; c) perennial optimism; d) involvement in sham deals; e) self-sacrifice for the sake of another character, Rodney. In hearing the case, the court had to decide to what extent the appearance and representation of the actor playing Del Boy in the TV series (that is, the character's representation) could be separated from the one created by the script's author. To be able to decide, the judge watched three episodes script in hand, only to conclude that Del Boy's traits referred to by the claimant as making up his traits were accurately and objectively visible in the script. This case is remarkable as the issue of illegal copying is dealt with, firstly, on the sole basis of the character's traits, image and relations with other characters without reference to its appearance, and, secondly, the fact of infringement through indirect copying is recognized (the dining show authors apparently did not read the scripts describing the original character when they copied the character reproduced by the actor in the TV series).

2. Transmedia Nature of Content

Today's creative work is characteristically transmedia focused. The so-called transmedia storytelling is about stories that unfold in a number of platforms, each contributing to our understanding of the world. While a book is prequel to film, TV series is its sequel and computer game a spinoff. Each new work will expand the original storyline, with the character allowing to place books, films and other works together in a single context. A look at the multitude of imaginary worlds — Marvel, Star Wars, Pirates of the Caribbean, etc. — makes it obvious that characters appearing in a comic strip can march on into a full-length movie and then across TV series, books etc. Media companies such as Marvel, Disney, etc. have been making their products based on a single timeline with the same characters for quite a while. Transmedia storytelling should not be confused with cross-media — posting the same content to different media — where, unlike transmedia, it is used in a different media environment but not expanded in terms of its plot or storyline. From the legal perspective, while the original work needs to be adapted both for cross-media content and transmedia storytelling, the former does not assume a considerable expansion of the storyline.

The expansion of transmedia storytelling calls for a special analysis of the so-called transmedia characters. Since the said characters exist as part of transmedia narrative, each media where the story unfolds will further

develop them. The role of characters in transmedia creative work is to be underlined since a host of stories can be interrelated and grow specifically at the expense of characters, in particular, through multiple sequels and prequels [Freeman M., 2017: 21, 23]. The main feature of transmedia characters is that they extend well beyond the particular work (and even beyond a particular form of expression), their existence challenging the idea of inextricable link between the character and the form expressing it.

In justifying the existence of transmedia characters, the discussion should be firstly focused on the competing approach to recognize the same protagonists of different works expressed in different objective forms as different characters. Thus, E.P. Gavrilov believes that a character is always inextricably linked to an objective form of its expression. In other words, a literary character makes up a work of art different from that of a visual character even if the latter has the same name and embodies the same ideas, concepts and facts [Gavrilov E.P., 2011]. To demonstrate his view, E.P. Gavrilov refers to *Cheburashka* as literary character created by E.N. Uspensky, its visual counterpart created by L.A. Schwartzman, and *Cheburashka* as animation character owned by Soyuzmultfilm (Federal Animation Films) Studios. This opinion is shared by A.E. Sukhareva and R.E. Turkin, who underline the character as a single concept does not exist — it will be always inextricably linked to an objective form of its expression [Sukhareva A.E., Turkin R.E., 2017].

E.P. Gavrilov's interpretation of *Cheburashka* as an example is arguable. Its visual representation contained in Uspensky's books differs from the character's "canonic" cartoon image. Uspensky never mentioned large ears as the character's key feature. Meanwhile, the sketch created by Leonid Schwartzman became the character's image thanks to the story imagined by Eduard Uspensky and cartoons produced by Roman Kachanov. By the way, the cartoon scripts were co-authored by Uspensky and Kachanov. The sketch created by Leonid Schwartzman would not visualize *Cheburashka* if it were rejected by cartoon authors: a different image would have been chosen. In this case, this sketch would just become another work of graphic art. The story of *Cheburashka* in Uspensky's books and cartoons is the same. Its personal traits, relations with other characters do not change. Thus, it will be fair to say that *Cheburashka* is a classic example of transmedia character. As regards the famous disputes about the rights to this character, they were normally related to the use of cartoon image on souvenirs and other items (toothpaste tubes, USB storage) and can be reduced to disputes about the right to copy the character's cartoon image or — which is the same — about the copyright to artwork, sketch created by Leonid Schwartzman. It can also be argued that *Cheburashka* appearing in the full-length movie of 2022

embodies the same character. This is proved by the character's visual similarity and relations with other characters played by actors (Sergey Garmash as *Ghena the Crocodile*, Elena Yakovleva as *Chapeau claque*, and Dmitry Lysenkov as *Lariska the Rat*).

As such, transmedia characters need to be regarded in light of what makes them different from the so-called characters *per se*. This term is used to designate complex cultural constructs that extend considerably beyond the represented entities with intentional inner life in narrated worlds. Such characters would include, for instance, serial characters resulting from repetitions, reviews, reboots of their storylines. The terms proposed to distinguish characters per se from those of artwork are "transmedia figure" or "cultural icon". It is also proposed to introduce another term — "an established character template". Such transmedia character template would cover the physical, mental and social qualities of a recognized transmedia figure that are proper of any character with a name but not necessarily manifested in a specific character named after the relevant transmedia figure [Thon J.-N., 2019: 179, 181,184].

The terms "transmedia figure" and "cultural icon" are required to adequately respond to the situation where certain character names (such as Sherlock Holmes, Batman, etc.) come to designate different characters as a result of a long record in a variety of works. The Norwegian researcher Jan-Noël Thon finds an example of such transmedia figure in Sherlock Holmes, arguing with good reason that Sherlock Holmes, Victorian classic master detective appearing in Arthur Conan Doyle's stories and novels released from 1892 to 1927, the 19th century Sherlock Holmes in the BBC's *Sherlock* TV series (2010-2017), Sherlock Holmes the immigrant and former drug addict paired with Joan Ginny Watson in the CBS's *Elementary* TV series (2012-2019), the 21st century Afro-American Holmes in comics series by Boller, Leonardi and Stroman, the dog handler and detective of the Italian-Japanese anime series *Sherlock Hound* (1984–1985) or the master detective fighting rodents in the Walt Disney animated film the *Great Mouse Detective* (1986) do not (and are unlikely to be designed to) fit into one and the same transmedia character [Thon J.-N., 2019: 188]. In fact, these examples do not share a story unfolding in different works and even different media: they offer different stories with the characters constructed on the basis of archetypal private detective (and thus devoid of character features).

3. Specialization of Creative Work

Like other types of human activities, creative work becomes more complex with time. Ideally, the author will create a work of art himself from

start to finish. However, already Alexander Dumas Père would often employ "ghost writers". The specialization of writers and other authors allows creative work to be scaled up: the main author will develop the storyline, characters and the world they exist in while his "day workers" will do dialogues or important parts of the work. Such genres as TV series scripts would not survive without specialization, with different people almost invariably responsible for the storyline and dialogues. The current problem of specialization of creative work goes hand in hand with that of its collectivity as modern authors get inspiration from an enormous reservoir of the funded cultural knowledge [Nikiforov A.A., 2020: 175–176]. Both specialization and collectivity of creative work diminish the inextricable link between authors and their products, only to impose a different view on the copyright mechanisms.

Due to complication of creative work (because of its stream-like nature) some authors have to design characters separately from the story (for example, to make a creative "universe") while lawyers have to invent ways to correctly register the copyright to characters and other intermediate creative inputs before they become part of the finished work (prosaic or dramatic one). For instance, one author describes the main traits of the principal and secondary characters, events, relations between them while others, based on these descriptions, produce literary or other works of different genres (prosaic, screenplays, etc.). By the way, such a specific genre as character sketch has existed in literature for relatively long time. A character sketch is a written piece normally shorter than a short story with a limited storyline (if any) since it purports only to portray the character as it is. This genre associated with journalism has currently gained much importance. In particular, the above practice raises the issue of relationship between the character and the form it is expressed in.

4. Alienation of Characters from Works of Art

The emergence of transmedia characters and specialization of creative work tend to "alienate" characters from works of art, only to impose on the law the task of protecting such "alienated" characters.

While the copyright for characters has been long confined to protection from illegal copying in merchandizing, the "migration" of characters beyond the works of their origin, explosive growth of such phenomena as fan creation (including the writing of "fanfics" — amateur works themed on popular books), and expansion of popular imaginary worlds by third-party authors (for example, that of *Metro 2033* has been described in more than 110 books) make it important to control the use of characters elsewhere.

Creative work in imaginary worlds under a strict copyright control where the author of the next Spiderman comic strip is unlikely to depart from the established canon also allows to assert the fact of employing characters as a single creative product in a variety of works.

Faced with the situation of the same character appearing in a number of works of different forms (books, comics, films, cartoons, computer games), the question should be whether these are the same or different copyright objects (especially in the context of identifying the so-called transmedia characters)? A.A. Nikiforov brings this question even further in arguing that one can imagine characters that are not part of any work. He refers to the example of the Dungeons and Dragons role game where players act for imaginary characters in an imaginary world and where the created characters are not part of any work but can be objectively expressed in special "character sheets" [Nikiforov A.A., 2020: 193]. This example is similar to the above case of characters developed by the author for a work yet to be created. In this case, the character also exists exclusively in the form of description.

The question of whether a character has been alienated from the work it was originally part of requires to analyze it conceptually as "part of the work".

The issue of protecting a part of the work is raised by the contents of para 7 of Article 1259 of the CCR whereby copyright will apply to a part of the work, its name and characters as long as they can be recognized by virtue of their nature a standalone creative product described in any objective form. A character is thus traditionally understood as part of the work. At the same time, a protectable character should be itself recognized a work of art. Recognizing a character a standalone work is thus crucial as it paves the way to transferability of copyright to the character, allows to dispose of the copyright to the character separately from the work. Transactions of this kind are currently widespread.

The concept of "part of the work" is a contradiction in itself. Is a "part of the work" a work in its own right? If yes, how does it differ from the larger work; if not, it is to be admitted that copyright applies not only to the work but also its part. A.A. Nikiforov believes that the problem of the character's independence from the work is solvable in either of the three ways: an independent character becomes a separate work of art fully covered by copyright, a character is recognized part of the work exempt from specific provisions applicable to the work of art as a whole; a character is self-sustained intellectual property independent from the original work but essentially different from traditional copyrighted objects and thus in need of specific provisions to be developed [Nikiforov A.A., 2020: 190]. The author of the quoted study supports the last option.

I.A. Bliznets and V.S. Vitko argue that the concept of "part of the work" is devoid of specific criteria and characterized by the same legal qualifications as that of "work". Therefore, the protection of the whole work and its constitutive parts, in order to be meaningful, should follow one and the same rule [Bliznets I.A., Vitko V.S., 2022]. E.P. Gavrilov previously suggested that part of the work makes up a work [Gavrilov E.P., 2020]. On the contrary, V.O. Kalyatin argues that a character cannot amount to standalone work as copyright to independent work is premised on objective form. A character, like imagery, is devoid of objective form which is supplied by the work where it appears. No character can be protected on its own since copyright is attached to the work.[4] The CIPR has adopted a conservative stance and argues that recognizing a character a creative product does not make it an independent object of copyright, so that no independent exclusive copyright will arise in respect of a character.[5] In view of the provisions of para 7 of Article 1259 of the CCR identifying two grounds for copyright to apply to characters (objective form and recognition as an independent creative product), the CIPR has a good reason to stick to the above position that a character cannot have an independent objective form.

Meanwhile, it appears that characters (just like other meaningful parts such as storyline) do have an objective form. It is easiest to reproduce characters from an animated film (hence the number of infringement cases concerning this category of fictional characters). Anyone, having read a novel or having watched a movie, can reproduce a character by creating its description. The reproducibility appears to be an indication of objective form. Such reconstruction of a character could be done in multiple ways, for example, by creating its description. Describing a character is often part of creative process to produce a work of art. A description could be quite detailed and contain dozens of pages. Media giants use descriptions to develop the so-called "canonic" characters widely used for franchising.[6] A.A. Nikiforov refers to the party game Dungeons and Dragons where characters, while not part of any work at the time of their creation, are objectively expressed in specific "character sheets". This author suggests to regard this kind of

[4] Collected minutes of the Board of Academic Advisors under the Court for Intellectual Property Rights / Journal of the Court for Intellectual Property Rights. Annex to anniversary issue. No. 2, June 2023.

[5] Brief on the issues arising from application of para 7 of Article 1259 of the Civil Code of Russia (part of the work of art) approved by CIPR Presidium Resolution No. SP-21/33 of 28.12.2022. Journal of the Court for Intellectual Property Rights, 2023, no. 1, pp. 12–13.

[6] See, for example, the description of Peter Parker, a character of the Spiderman franchise. Available at: https://marvels-spider-man.fandom.com/wiki/Peter_Parker (accessed: 12.04.2022)

description both as a literary work fully made of single character description and as objective expression of a character [Nikiforov A.A., 2020: 190]. Another approach is to create a new work (novel, film, game, etc.) with the same character that thus acquires objective form.

One has to agree with E.P. Gavrilov that a character is protected not for being part of a work but on its own account as making itself a work of art [Gavrilov E.P., 2011]. In attempting to remove the contradiction of opposing the work and its part, E.P. Gavrilov concludes that para 7 of Article 1259 of the CCR is only applicable where a part(s) of work is used separately from other parts. Thus, any part of the work can make up a work in its own right once it exhibits all features of artistic work and is used separately. On the contrary, if a part is used jointly with the work as a whole, it is never protected by copyright [Gavrilov E.P., 2021]. With all support for this approach in general, it has to be said that it fails to address specific practical issues, in particular, that of ownership of the exclusive rights to characters of individual works.

5. Ownership of the Exclusive Right to a Character

The question of ownership of the exclusive right to a character does not arise where character and work are authored by the same person. But what about characters of complex objects such as audiovisuals or computer games? Or about characters created through teamwork? Or else transmedia characters which require creative inputs to be realized in different media?

The most frequent example of creative teamwork is where one person creates the traits, story and (optionally) literary description of a character while another the character's visual image or appearance. These are cases of co-authorship of writers and artists, and of creating an image of the character already existing in the literary form as commissioned or permitted by the copyright holder. Strictly speaking, the image may come first: for example, *Misha the Bear*, mascot of the XXII Summer Olympics in Moscow (1980) created by Victor Chizhikov, was subsequently used in a number of cartoons (*Baba-Yaga the Dissenter*, *Olympic Spirit* and even the anime series *Koguma no Misha*. A.A. Nikiforov argues that, apart from co-authorship of several individuals giving rise to joint exclusive rights, there are also other forms of authors' cooperation, only to result in different legal implications in terms of the ownership of exclusive right to character [Nikiforov A.A., 2020: 217–218].

In its ruling on the use of *Cheburashka* and *Matroskin the Cat* for producing USB storage in the form of these characters, the Civil Chamber of the Moscow City Court noted that while the claimant was the author of literary works (and thus of fictional characters) and of cartoon scripts representing

the said characters for the first time, the defendant used them as expressed in the form of images rather than literary form. The latter was an independent copyrighted item exclusively held by the Federal Wholly State-Owned Enterprise "United National Film Registry".[7] This case was specific in that the United National Film Registry claimed its rights under the Civil Code of 1964 whereby an enterprise that produced a film was the holder of the original copyright to it (and thus to the characters as part of the film).

Let's assume that we need to identify the author and copyright holder of an animated film. This can be done in either of the two ways: identifying the range of persons who provided inputs to create the character and studying their relations with the audiovisual production organizer, or assuming that the copyright to the character as part of the audiovisual is held by the persons recognized by law as the authors of the audiovisual since the character is part thereof.

The authors of an audiovisual are the director, script writer, composer and art director of animated film (cartoon) (para 2 of Article 1263 of the CCR). It follows from the concept of "character as part of work" that the producer's rights to the audiovisual character including the image will arise from the rights to the audiovisual itself. An image of the cartoon character may be thus authored by someone not recognized by the film author while the producer's rights to the character will arise from those to the film. This contradiction can be removed only under an agreement between the producer and the author of the character. Such personalized approach fits into the construct of rights to complex objects: organizer/producer of film as a complex object will be entitled to use intellectual items embedded into the complex object under agreements with holders of exclusive rights to the relevant items (para 1 of Article 1240 of the CCR). It thus follows from the personalized approach that in order to have exclusive rights to the character, the producer should envisage the appropriate terms under agreements with the character's authors (let's assume that the relevant provisions regarding the graphical image will be part of the art director's or artist's agreement, and, regarding the traits, of the script writer's agreement).

In computer games, definitely complex object/multimedia products,[8] the issue of copyright for the work (game) and its part (character) is addressed differently.

The question of whether complex objects such as theatrical performances and multimedia products (Article 1240 of the CCR) are covered by an in-

[7] Moscow City Court Ruling on case No. 33-195354. 24.06.2011.

[8] Another fairly widespread approach is to recognize a computer game a software, only to paradoxically make programmers the character's authors and completely ignore individual creative inputs of the real authors.

dependent exclusive right has no straightforward answer. One point of view is that both can be deemed works of art, with an independent exclusive right arising as long as they constitute creative products expressed in an objective form. Under another point of view, no exclusive right to these objects as a whole will ever arise. That they are listed as complex objects in Article 1240 only means a special regime of coexistence and usage of several interrelated intellectual products.

Since the law neither defines the authors of multimedia product nor qualifies it, unlike audiovisuals, as comprehensive copyright object, we are confronted with a curious dilemma of either designating intellectual inputs (of which the character is a part) that make a computer game or recognizing the computer game character a standalone work of art (that is, in this case a character of computer game cannot be that of artistic work).

Leaving aside the technicalities of software operation, a computer game is an interactive audiovisual world where different storylines unfold in a certain setting (gaming environment). Game characters make part of this environment. However, under this approach the characters will be authored by all those who develop the gaming world which is obviously contrary to the principle of individual creative input. Under the principle of individual creative input, it is the artist and the script writer — those who created the character's appearance, story and imagery — that are the authors.

Player characters — heroes of party or computer games with actions (and often appearance) controlled by gamers rather than game rules — are the most specific of all game characters.

As an example of such characters, let's take the already mentioned Dungeons and Dragons game (D&D) where they belong to a race (humans, dwarfs, goblins, gnomes etc.) and class (priests, warriors, brigands, magicians etc.) with parameters prescribed by the rules. The available skills and abilities depend on specific class and race. At the same time, each character has a background describing its origin, activity and location in the D&D world. Characters have names chosen by players as well as descriptions. Importantly, characters have goals and motivation derived from the background imagined by players. They also have an outlook depending on combination of two factors: morals and attitude to society and law and order. Players may also take notes on their personality by describing unique personal traits or details of appearance. Interestingly, characters in D&D are authored both by developers and players. There is yet another party, Wizard, involved in the game as narrator rather than player. The Wizard is responsible for narration, script and setting for the game to unfold, and describes to other players what they perceive in the game's imaginary world and what are the consequences of their actions.

Computer game characters are similar to those of role games. V.V. Arkhipov notes that they are primarily user avatars, that is, virtual representations of users as persons within the limits of a particular game. He doubts that avatars amount to computer game characters since an avatar should make part of the storyline, that is, become a protagonist to be counted as a character [Arkhipov V.V., 2022]. But in computer games (just like in role games) introducing a character into a story is not straightforward: not all games have a storyline or else the storyline is variable and shaped by the gaming process.

6. Transferability of Exclusive Rights to a Character

Recognizing the existence of characters beyond the original work (including multimedia characters) as well as those that are not part of any work (expressed in "character descriptions" and similar documents) requires a look into the issue (fraught with controversy) of transferability of the rights to a character.

It is widely admitted that a character can be used under a licensing agreement setting the relevant limits of use. Moreover, it is generally believed that a character cannot be subject to an exclusive right transfer agreement since it is covered by the exclusive right to the work as a whole.

E.A. Pavlova believes that a licensing agreement may provide for the right to use part of the work such as a certain figure. In this case, it is irrelevant whether it is part or independent work since the holder retains the right to the original work. On the contrary, a right transfer agreement to part of the work is not possible as it will prevent further disposal of the right to the work.[9] This view is shared by E.M. Tilling.[10] The CIPR supported this position by arguing that the possibility to use a character separately from the work as a whole does not amount to recognizing it a work in its own right. Such usage is available to the author or other person under a licensing agreement setting the relevant limits. No character can be subject to an exclusive right transfer agreement since it is covered by the exclusive right to the work as a whole.[11] However, the CIPR allows for independent rights to character's artwork later embedded into an audiovisual, something that assumes transferability of the rights to such artwork including possible disposal.

[9] Ibid. P. 417.

[10] Ibid. P. 419.

[11] Brief on the issues arising from application of para 7, Article 1259 of the Civil Code of Russia (part of the work of art) approved by CIPR Presidium Resolution No. SP-21/33 of 28.12.2022. Journal of the Court for Intellectual Property Rights, 2023, no. 1, pp.12–13.

A transaction for disposal of the exclusive right to a character seems possible in principle, provided that the parties remove a restriction on using the character in the work it makes part of, for example, by signing a counter licensing agreement or (paradoxically but possible in theory) by excluding the character from the work. Suppose an author working in a universe created by another author (such as *Metro 2033* or *Patrols*) writes a novel containing a new secondary character of interest. Can another author purchase the exclusive right of disposal to this character with a view to using it in another work as the main hero? It should be equally possible to dispose of the exclusive right to a character (not just its artwork as allowed by the CIPR) created for a complex object (cartoon or computer game) and embodied in objective form such as description of personal traits, appearance, interactions etc. (for example, a new character for the *Masha and Bear* animated series not included into new episodes yet).

The point that "a character cannot be subject to an exclusive right agreement as it is covered by the exclusive right to the work as a whole" needs to be further checked for cases of characters appearing in multiple works. For instance, the *Iron Man* of Marvel's cinematic universe appears, apart from the solo film of 2008, in the *Iron Man 2*, *Iron Man 3*, *Incredible Hulk*, *Avengers*, *Avengers: Age of Ultron*, *Captain America: Civil War*, *Spider Man: Homecoming*, *Avengers: Infinity War* and *Avengers: Endgame*. If understood as part of a work of art, the character of Iron Man should be covered by exclusive rights to all of the said films, something that would be strange. This conflict cannot be removed unless the exclusive right to character as an artwork usable separately from the primary work is recognized.

7. Defining the Character's Legally Important Components and External Borders

There is a need to define legally important elements and external borders of a character as standalone work of art before making it a major copyright object and addressing infringement disputes related to its illegal copying or adaptation.

This task is especially important in respect of transmedia characters and also those outside "traditional" literary or artistic works. In migrating from one work to another, transmedia characters inevitably change (modify) their appearance. It is an impending consequence of cross media existence where each medium (literature, cinema, animation, computer graphics) has pictorial means of its own, only to vary the character's appearance this way or another.

The Supreme Court of Russia has noted the importance of a character's specific traits to recognize the fact of its use. In particular, the Supreme

Court has explained that copying involves production of not only duplicates using, for example, a text with the character's description or specific image (such as animation frame) but also of any material using the character's traits (representative recognizable details of its image, character and/or appearance). In the latter case, a character is deemed to be copied even where specific traits do not fully coincide or insignificant details vary as long as such character is recognizable as part of the specific work (such as where it is still recognizable despite a difference in clothes).[12]

A character's main components normally include its name and image (if any) as well as personal traits.

A character's name functions as its identity normally bringing the memories of everything known about it. For example, when we hear the name of Spider Man we understand that it means Peter Parker, New York resident, orphan and "friendly neighbor" endowed with superforce after a bite of radioactive spider, whom we can associate with a hero of hundreds of comic books, dozens of films, cartoons and computer games.

Can a character's name (designation) be acknowledged part of an artwork that is independent intellectual product and thus subject to protection in its own right (just like the name of the work itself)?

This issue should be apparently addressed on a case-by-case basis. Fictional designations proper of comic strips (*Spider Man*, *Iron Man*, *Captain America,* etc.), just like imaginary names such as *Aelita*, *Ariel*, *Ichtiandr* (Amphibious Man), *Captain Nemo*, *Athos*, *Porthos*, *Aramis* and *D'Artagnan* are extremely original and indicative of specific characters. The FAC for the Moscow Circuit explicitly noted that the name *Winnie* from a book by Boris Zakhoder (*Winnie the Pooh and What Not*) well-known throughout Russia belongs to a character different from Milne's. The name *Winnie* with a double "n" was introduced to the Russian vocabulary by Zakhoder as original translation. The FAC for the Moscow Circuit thus concluded that Zakhoder has exclusive copyright to the work and designation Winnie.[13]

Characters with ordinary names is a more complex story. Can everyone recall which of the two — Alexander Ivanovich Luzhin or Pyotr Petrovich Luzhin — is the character of Nabokov's novel "Luzhin's Defense" and protagonist of Dostoevsky's novel "Crime and Punishment"? The matters are still worse for characters named after historical personalities. Thus, Napoleon as portrayed in Tolstoy's novel "War and Peace" is not a great man

[12] Para 82, Supreme Court of the Russian Federation Plenum Resolution No. 10 "On Applying Part Four of the Civil Code of Russia". 23.04.2019.

[13] FAC for the Moscow Circuit Ruling No. KA-A40/9754-05-P of 12.10.2005.

but a base defective "butcher of nations" in contrast to a romantic image described in many other works. Unexpectedly, the name of Abraham Lincoln may belong to a vampire hunter of the American Civil War era (film by T. Bekmambetov) while Grigori Rasputin and Felix Yusupov may turn into vampires (*Karamora*, a TV series by D. Kozlovsky in the genre of alternative history).

The above examples demonstrate that while in some cases a character's name may constitute a copyright object and individualizing trait, in other cases, on the contrary, it may denote several characters rather than one, thus failing to provide a link to specific work.

A character's image is its another important (but not mandatory) component. The situation here is not straightforward either. In case of characters from animated films or computer games, the hero's created image will undoubtedly constitute a standalone artwork (object). The costumes of superheroes in feature films might be considered a work of design. On the other hand, a literary (verbal) description of appearance is unlikely to be separated from the character and does not amount to protectable image.

As for the difference between a character's verbal description and image from the perspective of protection options, it is worth noting that possible infringements of copyright will vary since the description and image are used differently outside the original work. A.A. Nikiforov even argues for a distinction to be made between a character's static use as only one element/part and its static use as protagonist in another work) [Nikiforov A.A., 2020: 200]. With this distinction in mind, it is only natural to conclude that while static use of an image (mostly of cartoon artwork) separately from the original work is widespread, separate static use of description (appearance) is nothing but conceivable assumption. This is why a vast majority of illegal copying claims concern the infringement of copyright to the character's image.

In discussing the character's image, one should distinguish between the image as such and the appearance, the latter often providing recognizable traits (such as the spectacles, the scar and the stick for *Harry Porter*; the red hair, the freckled face and the streaky stockings for *Pippi Long stocking,* etc.). Large segments of popular culture such as cosplay (costume play) and carnivals rely on the use of meaningful elements of appearance, unique costumes and attributes. Thus, copyright for image should not apply to the character's appearance since it will unreasonably expand its scope. A.A. Nikiforov refers to an example from German legal practice where the High Court of Cologne recognized that the use of a literary character's appearance (designing and marketing *Pippi Long stocking* costumes) did not violate exclusive rights and should not be restricted [Nikiforov A.A., 2020: 187].

Finally, one has to analyze whether a character's traits can be recognized as its part. Let's compare those of *Pinocchio* and *Buratino*. The principal difference between the two characters lies in their arcs (paths). Created as a wooden puppet, *Pinocchio* passes through trying times to change his inner self. In reward, a fairy transforms him into a real boy. Meanwhile, *Burattino* does not change: in the end he is still a puppet though with a spark of value for friendship. Different arcs underpinning the two characters exhibit a seemingly minor external difference: Pinocchio's long nose becomes even longer when he lies (as a manifestation of moralizing approach by Carlo Collodi, *Pinocchio's* author) while *Burattino's* long nose is his permanent feature: any attempts to shorten it were to no avail. Inspired by Collodi's character, A.N. Tolstoy ended up with a creature of his own albeit derivative from Pinocchio.

Case law adopted by U.S. courts allows to extend copyright to components of character's identity, one of the most interesting cases being the extension of legal regime for characters to inanimate objects. A textbook example is believed to be the Court of Appeal for the Ninth Circuit's ruling to provide legal protection to the Batmobile.[14] The court applied a three-part test for detailed assessment, with the results leading the court to conclude that this kind of character can be protected by copyright. The court determined that the Batmobile had certain physical as well as conceptual qualities, a distinctive graphical image in comics, motion pictures and television series, and, since the Batmobile maintained its "physical and conceptual qualities" after it had appeared for the first time, it could be concluded that it was "sufficiently delineated" to be recognizable as the same character whenever it appeared. The court also established that the Batmobile contained unique elements of expression. In another case the plaintiffs, New Line Cinema and New Line Productions, claimed that toy gloves with plastic knife-like razors marketed by the defendant Russ Berrie & Company violated and undermined New Line intellectual property rights related to a series of films "Nightmare on Elm Street", in particular the glove belonging to the film's main hero Freddy Krueger. The plaintiffs also made trademark infringement claims.[15] The court concluded that Freddy's glove was entitled to copyright protection by referring to a prior case whereby "copyright protection is extended to the component part of the character which significantly aids in identifying the character".

In assessing the legal practice recognizing inanimate objects as characters, it has to be said that the argument of providing protection to the character rather than a work of design is not sufficiently founded. Thus, in DC Comics

[14] DC Comics v. Mark Towle. 802 F.3d 1012 (9th Circ. 2015)

[15] New Line Cinema v. Russ Berrie, 161 F. Supp. 2d 293, 302 (S.D.N.Y. 2001).

v. Mark Towle the defendant produced exact copies of the Batmobile marketed at USD 90,000. In New Line v. Russ Berrie the defendant produced goods very similar to Freddy's glove. Both, the Batmobile and Freddy's glove, are standalone intellectual products and works of design which, in order to be copyright protected, do not need to be qualified as part of the character as a more complex intellectual product. It would have been necessary to refer to the character if the alleged infringement involved the reproduction of its agreed identifying traits, not producing a copy (exact or modified). The fact of such traits allowed U.S. courts to assert, in particular, that *James Bond* played by eight actors in 25 full-length films from 1962 to 2021 was the same character since it maintained permanent attributes. An attempt to qualify these objects as characters may be due to the fact that copyright protection does not extend to design of functional components in the United States but can be extended in exceptional cases to artistic components that do not affect the functional aspects of products usable on their own.

Conclusion

In summary, it should be said that challenges of today's media are receiving (or should receive) responses from copyright. The example of character can lead to certain conclusions that the current creative practices and business environments in creative industries require to review the principle of inextricable link between the character and the work, as well as between exclusive rights to the character and the work.

The concept of "character" as used in copyright should be interpreted on the basis of how it is understood in other sciences. It is important to avoid mixing characters with other copyright objects, primarily, works of graphic arts including cartoon character sketches.

Viewed from the perspective of law, the character is above all an agreed set of individualizing traits. This copyright object is valuable because it allows to provide protection not only from exact reproduction of image but also from illegal copying or other borrowing of individualizing traits that allow to place the character in this or another context (literary work or "universe").

In widespread division of creative labor it is quite realistic that a character of literary, audiovisual or other work may be created by someone who did not author the work as a whole. The more complex the object (intellectual product), the more likely is this course of events. Artists behind computer game characters are rarely the authors of the game itself while those creating cartoon characters and cartoon itself may be different individuals, etc.

Transmedia content production brings to existence transmedia characters that appear in different works. The characters swarming the "worlds"

of the Star Wars, Marvel, DC, *Harry Potter* refute the traditional idea of inextricable link between the character and the form of its expression. Along with existence of transmedia characters we are forced to admit those that could be barely qualified as part of any specific work. For example, there are characters of computer games which, being multimedia products and complex objects, do not possess the qualities of a single work. To identify the copyright holder in complicated cases, one has to apply the principle of personal creative input and identify individuals whose creative efforts resulted in a particular character.

The demands of current business environment call for a search of methods to make copyright for characters transactable. While licensing of such copyright does not raise issues, the construct for disposal of exclusive rights to characters under the Russian law separately from those to the original work need to be refined. Moreover, in view of media business needs one has to admit the unquestionable possibility to dispose of the rights to a work containing exhaustive description of the character (appearance, personal traits, interactions with other characters, role in the storyline and/or in the development of creative "universe") before the character in question appears in the work it belongs to. Such (descriptive) work will endow characters with an objective form, create an opportunity to reproduce and introduce them into other works, and finally allow to assert an exclusive right to characters.

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Comments

Review
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Key Issues in the Intellectual Property Court's Presidium Rulings

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Abstract

The comment reviews key positions in the rulings of the Presidium of the Russian Intellectual Property Court (IPC) issued between July and September of 2023. The Chamber hears cassation appeals against the decisions of the IPC first instance and deals primarily, but not only, with matters of registration and validity of industrial property rights. Therefore, the review predominantly covers substantive requirements for patent and trademark protection, as well as procedural issues both in the administrative adjudicating mechanism at the Patent office (Rospatent) and at the IPC itself. The current review encompasses a variety of topics related to trademark law, patent law and various procedural matters.

Keywords

trademarks; grounds for invalidity; legitimate expectations; revocation for non-use; patents; utility models; registered design.

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1. What Is Kazan, a Cooking Utensil or a City? The IPC Presidium Takes Context into Account

IPC Presidium Resolution of 17 July 2023 in Case No. SIP-974/2022

When assessing the perception of a verbal sign by a consumer target group for the purpose of Para 1, Article 1483 of the Civil Code, the context should be taken into account: what products / services does the sign and combination of words in the sign describe

Rospatent has refused to register the trademark "KazanExpress" and to satisfy the subsequent appeal to this decision because it believes that consumers perceive this sign as the words "Kazan" and "Express", and that the sign indicates the place of rendering the services and their properties for the claimed services of ICGS Classes 35, 38, and 39.

The first instance court has overturned the decision of Rospatent, but the IPC Presidium did not agree with the court's conclusions and ordered a new examination of the case with the following comment.

The first instance court proceeded from the fact the word "kazan" has an independent meaning (a cooking utensil) in the Russian language, so it is not self-evident to Russian-speaking consumers that the sign "KazanExpress" contains the name of the city of Kazan.

At the same time, it should be taken into account that the assessment of a sign for compliance with the provisions of Para 1, Article 1483 of the Civil Code is based on the perception of this sign by recipients of services of ICGS Classes 35, 38, and 39. Therefore, the nature of this type of services related to the provision of e-commerce online shops was to be established.

The documents submitted by the applicant together with the objection were aimed at confirming the fact that the purpose of the sign "KazanExpress" is to identify a marketplace operating in the Republic of Tatarstan and a number of other constituent entities of the Russian Federation.

Consumers of the services of the respective electronic trading platforms are, on the one hand, buyers of various goods, and on the other hand, sellers using the relevant Internet services to sell their goods.

Thus, neither the services claimed for registration nor the range of their consumers are directly related to cooking and cooking utensils, including the kazan.

Also, the text of the appealed judicial act does not contain any conclusions as to why the above group of service consumers will perceive the sign applied for registration as a cooking utensil.

Moreover, in this case the signs applied for registration are not two independent signs, one of which is the sign "Kazan", and the other is the sign "Express." In this case, one sign is applied for registration, "KazanExpress", consisting of two verbal elements.

In such a situation, the way Russian consumers perceive certain words (in particular, polysemantic word, such as "kazan" in the case under review) depends on the context: on the one hand, for what services the words are used, and on the other hand, how the words used relate to each other.

However, the first instance court assessed the verbal elements "Kazan" and "Express" in isolation, without considering the context.

The IPC Presidium also recalled the following positions previously reflected in other cases.

Each of the grounds in Para 1 of Article 1483 of the Civil Code is legally independent, and each of them in itself may serve as a ground to refuse registration of a trademark. At the same time, there may be an overlap between them: the same sign may be recognised, e.g., as both non-distinctive, on the one hand, and characteristic of goods, on the other hand.

The corresponding restrictions have been established primarily in the public interest in order to prevent the granting to one person of an exclusive right to a sign that is not capable of fulfilling the main (individualising) function of trademarks (to individualise specific goods in the eyes of consumers) and/or should be free for use by others, because it can reasonably be assumed that it can be used in relation to certain goods (name them, characterise them, define their shape, etc.).

Moreover the IPC Presidium underlined that the purpose of judicial review in this case is to check the legality of Rospatent's decision with respect to each claimed good or service among those listed in the application filed with the court.

The IPC Presidium does not rule out the possibility of making aggregated conclusions for certain groups of goods or services (rather than for each product or service individually), or for market sectors, but only if the reasons for grouping the goods or services together are properly motivated in order to assess the likely perception of the disputed designation by targeted groups of consumers of those goods.

2. Three Letters Can Have a Distinctive Character. Under Certain Circumstances.

IPC Presidium Resolution of 17 July 2023 in Case No. SIP-651/2022

In Deciding on the Distinctive Character of a Sign Applied for Registration, the Evidence that Confirms the Use of the Sign in a Modified Form Should Also be Assessed.

The IPC Presidium emphasised: the fact that a particular sign is known may also be based on its previous use in a different form, if it is proved that the consumer has transferred the awareness of the previously used sign to the new one, including, e.g., in the case of minor differences that do not attract the attention of consumers.

When assessing if the sign "  " acquired a distinctive character, Rospatent did not take into account the evidence supporting the use of the verbal element "RCF" and signs "  ", and "  ." The IPC ruled that this view was erroneous.

The circumstances for establishing the acquired distinctiveness depend on which of the grounds of Para 1 Article 1483 of the Civil Code the sign did not meet originally (Subpara 1, Para 1, or Subparagraphs 1, 2, 3 or 4 Para 1 of Article 1483).

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

In this case, the public interests are unaffected, because the target group of consumers begins to associate a particular sign with a particular subject.

When examining an application, the subject of examination is whether it is possible to register the disputed sign in relation to each claimed good (among the goods specified in the application). When considering an appeal, the subject of consideration is to verify the legality of the expert panel's decision in relation to each claimed good (from among those specified in the appeal, taking into account the applicant's specification of the list of goods for which legal protection of the disputed trade mark is claimed). When the court examines the case, the purpose of the examination is to check the legality of Rospatent's decision with respect to each claimed good among those mentioned in the application filed with the court.

3. Can Lice Combs and Beer Mats Violate Moral Principles?

IPC Presidium Resolution of 13 July 2023 in Case No. SIP-891/2022

When refusing to register a sign on the basis of Subpara 2 Para. 3 Art. 1483 of the Civil Code, in case the disputed sign does not fit into the categories specified in Para 37 of Rules No. 482, Rospatent should cite specific public interests it protects, or specific principles of humanity, or specific moral principles. In doing so, Rospatent should assess the influence on public interest, humanity or morals of the sign itself (albeit in relation to the good) rather than the good proper.

Rospatent refused to register the sign "SHKOLASAD" in relation to an extensive list of goods and services. Following the claimant's appeal, the disputed sign was registered in respect of a part of the goods and services on the list, while in respect of the rest of them, the sign was recognised as either descriptive, or false, or capable of misleading as to the type and purpose of the goods, or involving moral aspects, since the semantics of the sign is related to children's educational and training institutions. The verbal sign "SHKOLASAD" is indeed composed of "shkola" (a school) and "sad" (a kindergarden), the addition of which does not create a word.

The first instance court recognised the decision of the administrative body as invalid, pointing out that the decision did not comply with the provisions of Para 1 of Article 1483 of the Civil Code, and ordered Rospatent to reconsider the appeal. The IPC Presidium ruled to reverse the decision of the first instance court and ordered a new examination of the case.

In doing so, the IPC Presidium pointed first of all to the inconsistency between the motivation part of the court decision, which gave a critical assessment of Rospatent's application of Subparagraphs 1 and 2, Para 3 of Article 1483 of Civil Code, and the operative part, which did not assess the inconsistency of the decision with these provisions. The IPC Presidium considered that such a court decision prevented Rospatent from understanding in what part the applicant's objection needed to be re-examined.

Taking into account Rospatent's arguments, the IPC Presidium also explained to the first instance court the methodology of checking Rospatent's decisions for compliance with the requirements of Subparagraphs 1 and 2, Para 3, and Subpara 3, Para 1 of Article 1483 of the Civil Code, with account for the Recommendations on Certain Issues of Examination of Claimed Signs approved by order of the Russian Agency for Patents and Trademarks No. 39 of 23 March 2001.

Concerning the assessment of conformity of the sign to Subpara 1, Para 3 of Article 1483 of the Civil Code (signs or elements of signs that are

false or capable of misleading the consumer with regards to the goods, the producer or the place of production), the IPC Presidium pointed out that falsity must be obvious, while the ability of the elements of the sign to mislead the consumer has, on the contrary, a probabilistic character. It should be noted that signs indicating a certain property which is not inherent in the goods and which cannot be perceived as plausible by the average consumer are not false or capable of misleading in the sense of Subpara 1, Para 3 of Article 1483 of the Civil Code.

With regard to the assessment of compliance of Rospatent's decision with Subpara 2, Para 3 of Article 1483 of the Civil Code (principles of public interests, principles of humanity and morals), the IPC Presidium reminded that Para 37 of the Rules for the Compilation, Filing and Consideration of Documents that are the Basis for Legally Significant Actions for the State Registration of Trademarks, Service Marks and Collective Marks approved by order of the Ministry of Economic Development 20 July 2015 No. 482 (in the applicable wording; hereinafter referred to as Rules No. 482) provides a non-exhaustive list of cases when the registration of a trademark contradicts public interests, principles of humanity or moral principles. For the cases listed above, the court only checks whether the sign is correctly assigned to one of these categories. In cases not listed in Para 37 of Rules No. 482, the court checks whether Rospatent's decision in respect of a particular mark when applying it to specific goods (services) contains an indication of specific public interests or principles of humanity or moral principles, which are harmed in connection with the proposed granting of legal protection to this sign.

In doing so, the IPC Presidium reminded that it is the influence on public interest, humanity or morals of the sign itself (albeit in relation to the good) that should be assessed rather than the good proper. Thus, a negative attitude to the existence of certain goods (e.g., the lice combs mentioned by Rospatent in this case) cannot be taken into account: if the goods are present on the market and can be in civil turnover legally, trademarks can be registered for them.

With regard to the verification of the application of Subpara 3, Para 1 of Article 1483 of the Civil Code (descriptive signs), the IPC Presidium reminded that it is necessary to distinguish descriptive signs from signs that evoke in the consumer's mind an idea of the goods produced through associations, since the latter ones may be granted legal protection. The IPC Presidium suggests using the following questions in assessing the descriptive nature: Is the meaning of the element clear to the average consumer without additional reasoning and speculation? Does the average consumer perceive the element as directly (and not through association) describing the type and characteristics of the product, the information about the manufacturer? If the answer to these questions is yes, the sign is descriptive, but

if for the target consumer group the meaning of the sign requires conjecturing, it is not recognised as descriptive.

As a general rule, when examining an appeal Rospatent is obliged to check the legality of refusal of registration of the claimed sign in relation to each good or service indicated in the appeal, but it is allowed to combine the latter into groups and assess the probable perception of the disputed sign by target consumer groups. In such a case, when checking the legality of the decision of the administrative body, the court should analyse the correctness of combining the disputed goods (services) in these groups, and then assess the conclusions about the characteristic of the disputed verbal elements of goods and services in relation to each group. In this case, the IPC Presidium noted that the first instance court found that there was no proper motivation to include certain goods and services into groups, which shows that Rospatent's decision was unlawful with regard to the application of the provisions of Subpara 3 Para 1 of Article 1483 of the Civil Code.

4. The Legitimate Expectations Principle: Recognize Not Refuse

IPC Presidium Resolution of 21 July 2023 in Case No. SIP-939/2022

It follows from the principle of legitimate expectations that there is a need to ensure predictability of Rospatent's decisions. This implies the same assessment of the same factual circumstances. Where the same person registers other trademarks, Rospatent is bound by its conclusions drawn in respect of identical trademark elements. E.g., where an administrative body has recognised certain elements as distinctive, if there are no objections from third parties, Rospatent must recognise them as having the same distinctive character for applications filed by the same person.

Rospatent has refused to extend legal protection in Russia for the service mark "PPF" registered under the Madrid System. In its appeal, the applicant cited that the combination of elements that form the sign give them a distinctive nature, noting that previously Rospatent had granted it protection for a range of international service marks:

"PPF", "PPF", "PPF", and "PPF."

Rospatent has refused to satisfy the appeal due to the lack of the sign's distinctive character. In particular, the agency established material differences: firstly, there is a rectangle of a different colour in the lower part or the sign series, whereas the disputed sign features a combination of letters that are not perceived as a word, and a simple geometric figure.

The first instance court has recognized the decision of Rospatent invalid because it did not comply with the provisions of Para 1 of Article 1483 of the Civil Code, and ordered Rospatent to register the disputed trademark.

The IPC Presidium upheld this ruling, noting that the first instance court applied the norms of Para 1 and Subpara 2, Para 1^1 of Article 1483 of the Civil Code proceeding from the legitimate expectations principle. The IPC Presidium gave the following explanation as to why this principle must be applied.

In accordance with Para 17 of the Resolution of the Plenum of the Supreme Court 28 June 2022 No. 21 "On some issues of application by the courts of the provisions of Chapter 22 of the Code of Administrative Proceedings and Chapter 24 of the Code of Commercial Procedure", when checking decisions or actions (inaction), the courts should proceed from the fact that in their exercise of state or other public powers, bodies and persons having such powers are bound by the law (principle of legality) and are obliged to maintain the confidence of citizens and their associations in law and actions of the state.

In its ruling of 28 December 2022 No. 59-P, the Constitutional Court has stated: The principles of legal certainty and maintaining confidence in the law and in the actions of the state guarantee citizens that decisions are taken by state-authorised bodies on the basis of strict compliance with legislative prescriptions, as well as careful and responsible assessment of the actual circumstances to which the law relates the emergence, change, and termination of rights (ruling of the Constitutional Court 14 January 2016 No. 1-P). At the same time, within the meaning of the legal position expressed by the Constitutional Court in its ruling of 22 June 2017 No. 16-P, in a democratic state governed by the rule of law, that is the Russian Federation, neglect of the requirements of reasonableness and prudence on the part of a public-law entity represented by competent authorities should not affect the property and non-property rights of citizens.

Thus, the IPC Presidium stated that government authorities must execute their functions with account for the legitimate expectations principle. That principle follows from Article 45 of the Constitution. Predictability of the behaviour of a government body is one of the factors that restrain the arbitrary behaviour of the authorities, create conditions for the realisation of the legitimate expectations principle and help persons that do not belong to authorities grow trust in the law and the actions of the state.

It follows from the principle of legitimate expectations that there is a need to ensure predictability of Rospatent's decisions. This implies the same assessment of the same factual circumstances.

Where the same person registers other trademarks, Rospatent is bound by its conclusions drawn in respect of identical trade mark elements. E.g.,

where Rospatent has recognised certain elements as distinctive, if there are no objections from third parties, Rospatent must recognise them as having the same distinctive character for applications filed by the same person.

Since the PPF element occurs in all earlier service marks and the element "rectangle coloured blue" occurs in two of them, proceeding from the principle of legitimate expectations, the fact that Rospatent recognised the distinctive nature of the two elements of the service mark series should bring to the conclusion that the same elements of the disputed service mark have a distinctive nature.

The court has dismissed Rospatent's argument based on the fact that the signs differ from each other (there is a second triangle) and that the service marks had been registered as a combination of unprotected elements that had a distinctive nature (Subpara 2, Para 1.1 of Art. 1483 of the Civil Code), while the disputed sign consists of two simple elements that have no distinctive nature both individually and in combination.

The IPC Presidium has noted that, if no disclaimer had been lodged with respect to the disputed elements, they are entitled to protection, and the provisions of Subpara 2, Para 1[1] Art. 1483 of the Civil Code do not apply.

The IPC Presidium then emphasised that in this case the violation of the legitimate expectations principle was not caused by the fact that the unprotected element combination in the disputed service mark was the same as in the above-mentioned elements (which, in the opinion of the Presidium is clearly incorrect); the reason was that the elements recognised by Rospatent as protected in respect of the previous elements, were recognised by the same as unprotected in the disputed service mark.

5. Venire Contra Factum. IPC Presidium Revisits Legitimate Expectations

IPC Presidium Resolution of 27 July 2023 in Case No. SIP-6/2023

Rospatent must evaluate the same factual circumstances in the same way, i.e., semantic perception of the same words by the same target consumer group in relation to identical word elements must be the same.

In 2021, the MEKO company has filed an objection with Rospatent against the granting of legal protection to the trademarks " 

" and " 

" registered in respect of ICGS Class 25 goods (apparel, footwear, hattery) that belonged to Best Price company.

MEKO cited incompliance of the said signs with the provisions of Subpara 3, Para. 1 of Art. 1483 of the Civil Code (signs characterising goods).

Rospatent found MEKO's position convincing. Arguing that consumers would perceive the verbal element "Lady collection" used in both trademarks as "women's collection", Rospatent excluded the verbal element "Lady Collection" from the legal protection of the said trademarks in respect of all ICGS Class 25.

In 2022, Best Price filed a similar objection against the granting of legal protection to the trademark " 

" registered in respect of ICGS Class 25 goods that belonged to MEKO.

Rospatent noted the sequence of the words, different fonts, multiple meanings and the dominant position of the word "LADY", and concluded that this trademark does not contain a direct indication to any specific properties and characteristics of ICGS Class 25 goods. In view of this, Rospatent refused to satisfy objection of Best Price.

In considering Best Price's application to recognise Rospatent's decision invalid, the IPC Presidium paid special attention to the legal expectations principle.

The IPC noted that when assessing the perception of the verbal element "Lady Collection", Rospatent considered the graphic criterion to be determinative, actually avoiding the need to analyse the semantics of the words "Lady" and "Collection", which, as Rospatent found when examining MEKO's objection, is totally obvious to the average Russian consumer.

In view of the above, the IPC stated that Rospatent's decision to reject the objection of Best Price contradicts the legitimate expectations principle, and therefore obliged Rospatent to reconsider this objection.

6. Do You Know What Psyrtskha is?

IPC Presidium Resolution of 10 August 2023 in Case No. SIP-990/2022

When assessing whether a sign consisting of a geographical name complies with the requirements of Subpara 3, Para 1 of Article 1483 of the Civil Code, it is first of all necessary to establish to what extent the name is known to a reasonably informed target group of Russian consumers.

Rospatent has refused to register the sign "PSYRTSKHA" in respect of a part of ICGS Class 32 goods and all Class 33 goods. Rospatent has decided that this geographical name is perceived as an indication of the place of production of goods and the location of the manufacturer (Subpara 3, Para

1 of Article 1483 of the Civil Code), and that the sign would mislead the consumer as to the natural origin of some of the drinks, because the applicant is registered in the city of Sukhum (Subpara 3, Para 1 of Article 1483).

After the objection was dismissed, the applicant has turned to the IPC. The first instance court upheld the applicant's position and ordered Rospatent to reconsider its objection.

Rospatent emphasised in its cassation appeal that when assessing compliance with the requirements of Subpara 3, Para 1 of Article 1483, the relevant question is whether the consumer could reasonably assume that the goods were produced in the respective locality.

Rospatent concluded that such perception is possible based on the connection of the disputed sign with the village of Psyrtskha (Abkhazia), with the railway stop on the Tskuara-Novy Afon section, and with the old Abkhazian name of the town of Novy Afon.

The IPC Presidium also has pointed out that it was first necessary to establish that the geographical name was known to a reasonably informed target consumer group. Thus, the court described as premature the conclusions of Rospatent on the existence of associative links between the disputed sign and the claimed goods, as well as on the possibility to perceive the disputed sign as the place of origin or production of the said goods in the absence of sufficient evidence that the Russian consumer knows the geographical name Psyrtskha.

The Presidium has emphasised that it considered Rospatent's position to be correct, which is that it is not the familiarity of a geographical object to the consumer as the place of production of goods that should be established, but the possibility to reasonably assume that the name would indicate the place of origin of the disputed goods to a target consumer group. In any case, however, the first step is to establish whether the geographical entity is known as such.

The court also has noted that Rospatent's erroneous conclusion that the toponym "Psyrtskha" was known to the Russian consumer of the goods in question led to an incorrect judgement that the Russian consumer had wrong associations with the place of production of the goods or the location of the manufacturer, which was a violation of the methodology for assessing compliance with the provisions of Subpara 1, Para 3 of Article 1483 of the Civil Code.

7. Of Names, Peculiar and Common

IPC Presidium Resolution of 17 August 2023 in Case No. SIP-75/2023

The name and surname commonly used in the Russian Federation do not have inherent distinctiveness in relation to any goods or services.

Mr. S.A. Abramov has applied to Rospatent for registration of the trade mark "СЕРГЕЙ АБРАМОВ" ("SERGUEY ABRAMOV" in Slavic alphabet).

Rospatent refused to register the said sign due to its non-compliance with the requirements of Para 1 of Article 1483 of the Civil Code (lack of individual character). In doing so, it stated: the claimed sign features a common name and surname, including the name and surname of well-known personalities, therefore, it cannot individualise the goods and services of a single person.

Disagreeing with the decision of Rospatent, S.A. Abramov has appealed to the IPC with a request to declare the said decision invalid.

The first instance court has noted that the broad use of a surname in a sign in the Russian Federation cannot in itself serve as grounds for refusal to register the sign.

At the same time, the first instance court has pointed out that the absence of an exclusive stylistic solution or bright graphic elements of a simple combination of the name and surname of an individual does not contribute to the distinctiveness of the sign as a whole, since the personal name "Sergey" and combination of such name with the surname "Abramov" is quite common in the Russian Federation.

In addition, the first instance court has come to the following conclusion: It has not been proved that the claimed sign has acquired distinctiveness as a result of its prolonged use by the applicant in the course of his commercial activities.

In considering S.A. Abramov's cassation appeal, the IPC Presidium has agreed with the conclusion of the first-instance court that the wide popularity in the Russian Federation of the said name and surname indicates that a sign consisting of such elements is not inherently distinctive in relation to any goods or services.

With regard to the argument presented in the cassation appeal about the popularity of S.A. Abramov among the target consumer group, the IPC Presidium has noted that the documents submitted by the applicant do not constitute evidence confirming the use of the designation as a means of individualisation of goods and services within the meaning of Para. 2 of Article 1484 of the Civil Code.

In addition, the IPC Presidium noted that participation in trainings and conferences or the existence of professional accounts in social networks does not in itself confirm the sale of goods or provision of services to consumers, in relation to the perception of which it is necessary to determine the acquired distinctiveness of the sign applied for registration.

B. Revocation for Non-use

8. The Standard of Interest. Balance of Probabilities, or Beyond Reasonable Doubt?

IPC Presidium Resolution of 10 August 2023 in Case No. SIP-281/2022

Evidence of the production of homogeneous goods, receipt of a claim of trade mark infringement, and the filing of an application for trade mark registration may be insufficient to conclude that the plaintiff is interested in early termination of the trade mark's legal protection.

Parapharm is the owner of the trademarks "ТОЧНО В ЦЕЛЬ" ("Into the target" in Russian) and "**УМНЫЙ КАЛЬЦИЙ — ТОЧНО В ЦЕЛЬ**" ("Intelligent calcium — into the target" in Russian) registered in respect of goods of ICGS Class 5 goods (pharmaceutical and other preparations for medical or veterinary purposes).

Evalar applied to the IPC for early termination of these trademarks.

The plaintiff argued that it was a manufacturer of goods similar to those in respect of which the disputed means of individualisation had been registered. In addition, Evalar referred to the fact that it had received a claim motivated by infringement of rights to the above trademarks and by the filing of an application for registration of a sign similar to the disputed trademarks.

However, the IPC found that Evalar was not interested in early termination of legal protection of the disputed trademarks, and rejected the above arguments, arguing as follows.

With regard to the arguments regarding the existence of an application for registration of the trade mark, the IPC proceeded from the fact that the application for registration of the sign "**НАПРАВЬТЕ КАЛЬЦИЙ ТОЧНО В ЦЕЛЬ**" ("Direct calcium into the Target" in Russian) was filed after the interested party had submitted its proposal to the right holder (whereas interest is determined on the date of submission of the interested party's proposal), and the screenshots from the website: https://shop. evalar.ru/ with information about the dietary supplement "Evalar Natural Vitamin K2" and the information article about it under the heading "Direct calcium into the Target" did not, in the opinion of the IPC, evidence the use (or the intention to use) a sign similar to the disputed trademarks specifically to individualise its own goods.

Thus, the IPC considered that the words and phrases "calcium" and "into the target" do not individualise any goods that Evalar sells.

The IPC has rejected the plaintiff's evidence proving the production of goods homogenous to those for the individualisation of which the disputed trademarks had been registered.

In particular, the IPC concluded that the plaintiff had not provided evidence of an intention to use a sign similar to the disputed trademarks to individualise its own goods.

When considering the arguments about the existence of a claim received by Evalar, the IPC noted that no claim for protection of the right to the disputed trade mark had been filed.

The IPC also pointed out that the arguments in the claim boil down to an infringement of the disputed trade mark by Evalar in an article posted on the Internet. At the same time, the IPC concluded that the words and phrases "calcium" and "into the target" in the article under review do not individualise any goods.

The IPC also noted that the person who had signed the claim to Evalar was not authorised to express the respective position on behalf of the trade mark owner.

On this basis, the IPC found that Evalar had no interest in the early termination of legal protection of the disputed trademarks.

II. Patents

9. Two Against One: the IPC Presidium Looks into the Design of Backpacks

IPC Presidium Resolution of 24 July 2023 in Case No. SIP-999/2022

In order to conclude that a utility model fails to meet the condition of novelty, all of its essential features must be contained in a single means. At the same time, a combination of features of different means from a single source is possible if the combination clearly follows from that document or has been expressly disclosed.

Rospatent has received an objection against the granting of a patent for a utility model (backpack) due to its non-compliance with the Novelty requirement.

Rospatent has dismissed the objection. With respect to one of the opposed sources of information, Rospatent has found that it disclosed several technical solutions which are means for the same purpose as the utility model under the disputed patent. However, none of them contained all the essential features of the disputed utility model: either the feature "...and

the orthopaedic backrest in the middle contains a rigid element...", or the feature "...the backpack contains two detachable fasteners connecting each other from the front..." was missing.

The IPC upheld Rospatent's decision. It argued as follows: It cannot be concluded that a utility model fails to meet the "Novelty" requirement if the inherent features of the utility model are known from a group of technical solutions in the aggregate. To make such a conclusion, such features must be contained in a single means. Different means can be disclosed in a single source of information, and, likewise, one means can be disclosed in different sources of information.

To assess the novelty of a disputed utility model, it is contrasted with means for the same purpose, and not with sources of information. Consequently, each means is contrasted independently: all the essential features of the disputed utility model must be known from a specific independent means for the same purpose.

According to the methodology for testing the novelty of a utility model, it is not permissible to combine individual features belonging to different means described in the same document unless the possibility of such a combination clearly follows from that document or unless such a combination has been expressly disclosed.

Hence, the said combination is possible in exceptional cases: (1) if the combination clearly follows from that document, or (2) if the combination has been expressly disclosed.

10. Inaccurate Information in Mathematics Harms the Public Interest

IPC Presidium Resolution of 21 August 2023 in Case No. SIP-947/2022

A solution for the appearance of a product bearing an inscription with inaccurate information cannot be recognized as an industrial design, because it is contrary to the public interest.

Rospatent has refused to grant a patent for the industrial design "Wooden hypercube on a prefabricated stand with a proof of Fermat's Great Theorem" and confirmed its refusal when examining the applicant's objection. Rospatent based its decision on the fact that the claimed product cannot be an object of patent rights within the meaning of the provisions of Subpara 4, Para 4 of Art. 1349 of the Civil Code. It stated that it was contrary to the public interest to place misleading information on a solution for the appearance protected as an industrial design (in this case, misleading information about the proof of a mathematical theorem).

The IPC upheld Rospatent's decision. It argued as follows: Given the applicant's disagreement with the fact that inaccurate information was printed on one of the faces of the product, the first instance court sent requests on the basis of Part 1^1 of Art. 16 of the Code of Commercial Procedure to several scientific and educational organisations; these responded that from a mathematical point of view the applicant's position is erroneous. These answers, together with other materials of the case, allowed the first instance court to conclude that the contested decision of Rospatent was lawful and justified.

In upholding the judgement of the first instance court, the IPC Presidium proceeded from the content of the provision of Subpara 4, Para 4 of Article 1349 and by-laws, in particular Para 13 of Requirements to the Documents for an Application for a Design Patent (approved by Order of the Ministry of Economic Development No. 695 of 30 September 2015). According to the latter provision, the conclusion that the claimed industrial design is contrary to the public interest, the principles of humanity and morality may be made on the basis of the inscriptions and logos printed on the product.

The IPC Presidium also has rejected the applicant's arguments that when sending court requests on the basis of part 1^1 of Article 16 of the Code of Commercial Procedure, the first instance court violated the principles of openness and publicity of court proceedings, appointing an informal expertise. The IPC Presidium has clarified that Articles 82 and 84 of the Code of Commercial Procedure do not apply to court requests aimed at obtaining clarifications, consultations and professional opinion of academics or specialists in a certain field of knowledge.

III. Procedure

11. Odd One out: Actual Interest is not Sufficient for a Person to Join a Litigation Where a Decision of Rospatent Is Challenged.

IPC Presidium Resolution of 21 July 2023 in Case No. SIP-446/2023

Where a non-regulatory act is challenged in part, it is in that part that the court reviews it.

When reviewing non-regulatory acts, the court is not bound by the grounds and arguments of the objections raised; at the same time, this does not imply the right (and obligation) of the court to review the non-regulatory act in its unchallenged part.

A factory applied to Rospatent for registration of the sign "Marina Lupin" as a trademark. In the course of examination of the application, the co-operative submitted an appeal to Rospatent under Para 1, Article 1493 of the Civil Code, motivated by the fact that it manufactures products labelled with the name identical to that of a French politician. Based on the results of the examination, Rospatent refused registration, motivating its decision by the disputed sign's ability to mislead consumers about the manufacturer of goods (Subpara 1, Para. 3 of Article 1483 of the Civil Code).

Having considered the factory's objection, Rospatent has withdrawn the above-mentioned ground for refusal of registration. At the same time, it pointed out the impossibility to register the designation "Marina Lupin" on new grounds: Non-compliance with the requirements of Subpara 2, Para 3 of Article 1483 of the Civil Code (because the sign claimed contradicts public interests, principles of humanity and morality).

The factory did not agree with Rospatent's conclusions and appealed to the IPC, citing the inconsistency of the decision with the provisions of Subpara 2, Para 3 of Article 1483 of the Civil Code.

In its turn, the co-operative, filed a motion to join the litigation as a third party that is not making independent claims with respect to the subject matter of the dispute.

The IPC has refused the co-operative due to the fact that the decision of Rospatent is challenged under Subpara 2, Para 3 of Article 1483 of the Civil Code, while the request to review Rospatent's decision in respect of application of Subpara 1, Para 3 of Article 1483 of the Civil Code (on the ability of the sign to mislead the consumer as to the manufacturer of goods) was not lodged. The IPC has noted that the condition for joining a case as a third party that is not lodging independent claims with respect to the subject matter of the dispute is when the judgement directly influences its rights and obligations, rather than the existence of any actual interest in the outcome of the case.

The IPC Presidium upheld the first instance court's ruling to refuse the satisfaction of the co-operative's request.

12. Who Can be Reimbursed for Administrative Expenses?

IPC Presidium Resolution of 13 September 2023 in Case No. SIP-639/2019

Only the party that "wins" can recover the costs of the administrative procedure before Rospatent; the patent holder can be recognised as the "win-

ning" party only if the objection to granting legal protection to the patent is rejected in its entirety.

FORES Company filed an opposition to Rospatent's decision to grant legal protection to a patent held by NIKA-PETROTEK Company.

Upon considering the said opposition, Rospatent recognised the disputed patent to be partially invalid and granted a new patent with the wording submitted by the patent holder.

The IPC has considered the application of FORES on the above decision of Rospatent and left it unchanged.

The IPC has partially satisfied the request of NIKA-PETROTEK for distribution of court expenses, recovering a part of court expenses incurred by NIKA-PETROTEK during the examination of the case in the IPC, but completely refused to reimburse the expenses incurred at the stage of examination of the objection in Rospatent.

The Constitutional Court, upon considering the complaint of NIKA-PETROTEK, has recognized that the interrelated provisions of Para 2, Article 1248 of the Civil Code and Article 106 of the Code of Commercial Procedure do not comply with the Constitution in so far as they prevent a person involved in a case challenging a decision of Rospatent from being reimbursed for expenses previously incurred by them in connection with the examination by that agency of an objection to the granting of a patent for an invention; it is worth noting that, in the system of current legal regulation, there is no mechanism for effective protection of the right to reimbursement of such expenses.

After considering NIKA-PETROTEK's petition to reconsider the ruling on the distribution of court costs based upon new circumstances, the court has cancelled the ruling with regard to the costs incurred by NIKA-PETROTEK in connection with the consideration of FORES' objection before Rospatent.

At the same time, having considered the issue of reimbursement of these expenses, the first instance court determined that, contrary to the position of NIKA-PETROTEK, the Constitutional Court did not anticipate the outcome of consideration of the request for recovery of expenses within this particular case, and did not recognize NIKA-PETROTEK as a "winning" party with regard to the outcome of consideration of the administrative case by Rospatent.

In addition, the first instance court has concluded that since Rospatent's decision satisfied the objection of FORES (the patent for the disputed in-

vention was partially invalidated and a new patent was issued), therefore the FORES is not a "losing" party within the meaning of Article 110 of the Code of Commercial Procedure.

Upholding the ruling of the first instance court, IPC Presidium has noted the following: The Constitutional Court linked the right to reimbursement of costs for administrative proceedings to the outcome of the proceedings.

Consequently, with regard to Rospatent's decisions appealed in court, reimbursement shall be paid as follows:

If the court judgment upheld the decision of Rospatent, the reimbursement shall be paid to the person who has "won" the administrative procedure;

If the court judgment recognized Rospatent's decision as invalid and a title decision is passed, the reimbursement shall be paid to the person who is deemed to have "won" the administrative procedure with account of the court judgment;

If the court judgement has invalidated the decision of Rospatent and an objection is sent for a new examination, the reimbursement shall not be paid until the renewed administrative procedure is completed.

The IPC Presidium emphasised that in this case, in considering the merits of the dispute, the court upheld Rospatent's decision. In this light, the first instance court was right to determine in whose favour the decision in the administrative procedure had been taken — namely, who was the "winning" party in the administrative procedure.

In addition, the IPC Presidium has supported the first instance court that NIKA-PETROTEK could not be recognised as the "winning" party because the patent for the disputed invention had been partially invalidated and a new patent had been granted.

The IPC Presidium then criticised NIKA-PETROTEK's arguments that the differences between the new patent and the previously granted patent were immaterial, pointing out that the patent holder was not a "winning" party, even if it was satisfied with the extent to which it had managed to minimise the losses from the objection filed.

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Reviews

Review
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The Russian Legal Researches on Metaverses: a Scholar Review

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Abstract

Over the past few years, the subject of metaverses has become an object of research of scientists from various fields of knowledge. Most specialists believe that in the next 7–10 years the direction of metaverses will be integrated into many spheres of society. The issue does not remain without attention of the state. Today we observe the first stages of formation of the international «metaverses race» in order to strengthen the leading positions of countries in terms of digital transformation of the economy and ensuring their own digital sovereignty. Russia will soon become a participant in the race mentioned. The development of metaverses will inevitably lead to the transformation of many legal institutions. Therefore today Russian scholars are beginning to explore questions about the symbiosis of law and metaverses. Since the interest to the regulation of the metaverses sphere will increase, it seems right to conduct a comprehensive study of the works of Russian explorers devoted to the transformation of legal relations in the conditions of emerging metaverses. The aim of the research presented: to systematize the Russian legal literature on the subject, to identify the most relevant aspects of regulation in the field, to form a general research trend in the development of law in metaverses, as well as to discover the first research conflicts. The selection of academic papers was based on two interrelated methods: substantive and personal. The use of the first method helped to identify only those studies that are devoted exclusively to the subject. On this basis, the review did not include those acadeniic works that only indirectly address the issue of metaverses. Thanks to the second method, it was possible to exclude studies by scholars from related sciences and student papers too. In this regard, attention is paid mainly to the studies of authors who have a scholar degree and/or extensive practical experience. In addition, the methodology is formed by general methods of study: analysis, synthesis, generalization and others. As a result

of the work carried out, its purpose has been fully achieved and the most important key aspects are reflected using graphic illustrations.

Keywords

metaverse; metaverse law; digital law; virtual worlds; scholar review; Internet; public law; private law.

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Introduction

Russian scholars have been interested in the law transformation in the era of rapid development of digital technologies for many years. Over the past five-seven years, Russian researchers have published a great number of research papers in the form of research articles, reviews, textbooks and monographs that explore the synergy between law and such phenomena as, e.g., artificial intelligence, digital currencies, blockchain, Big Data.

Furthermore, several candidate and doctoral dissertations on the legal speciality have been fulfilled [Morhat P.M., 2018]; [Marchenko A.Y., 2022]; [Razdorozhny K.B., 2021]; [Mochalkina I.S., 2022], etc. The main reason for writing paper presented is relatively few studies by Russian scholars published to date that explore the issues of law and meta-universe.

The author of the article has searched for studies using keywords (law in the meta-universe, meta-universe regulation, meta-universe law, digital sovereignty and meta-universe law, meta-universes and legislation) in scholarly databases such as Elibrary.ru, Google Scholar, and Web of Science. As a result, it was found that by the time this paper was written, Russian scholars had published 16 research articles on the convergence of law and meta-universe. Below, the author provides statistical data regarding the time of publications (Figure No. 1) and their topic (Figure No. 2).

Apparently, the excitement in the academic community about the topic of meta-universes began in the autumn of 2021. This was caused by the fact that at that time Mark Zuckerberg has presented the Meta project[1] focused

[1] Meta's operations are prohibited in the Russian Federation.

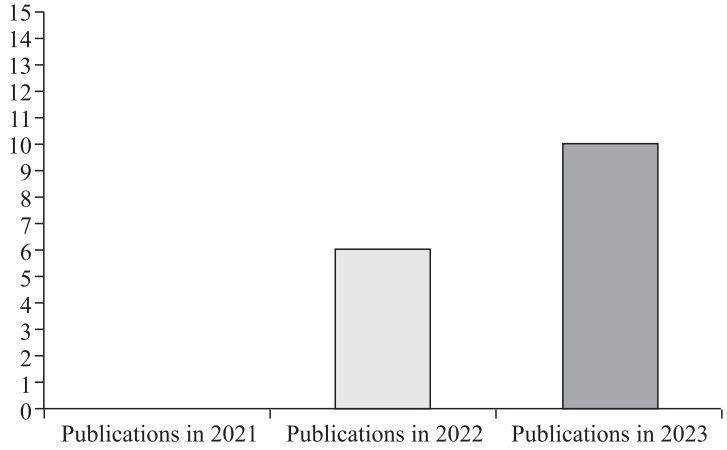

Fig. 1. Number of publications in 2021–2023

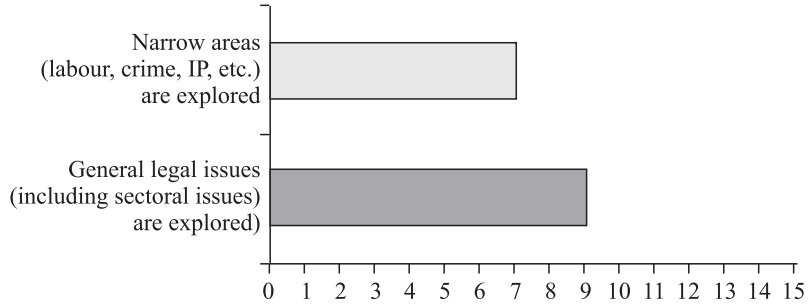

Fig. 2. Publication topics

on the construction of its own meta-universe. In view of this, scholars faced the question of considering the concept of meta-universe from the legal regulation perspective. This process took a considerable amount of time; hence it is not surprising that there were no publications by Russian scholars on the topic of law in 2021. Starting in 2022, the first research papers appear in the publications. During the year 2022, six research papers were published, of which one was indexed in Core RSCI (RSCI 1000), four in VAK,[2] and one in RSCI. Almost twice as many papers—namely ten—were published in 2023, of which one was indexed in Scopus, seven in VAK, one in RSCI, and one in another publication.

A little more than half of the works submitted for review (almost 53%) address general issues of law modification against the background of rapid

[2] The Higher Attestation Commission under Ministry of Science and Education of the Russia.

development of meta-universes. This is quite easy to explain. To date, there is no clear understanding of the future existence of law in the age of meta-universes. It is difficult to conduct research on narrow questions while the world is in search of consensus. However, publications of a highly specialised nature are noteworthy because, as will be shown below, they often raise constructive thoughts.

Studies by Russian Researchers

It is right to start with research by I.A. Filipova "Creation of a Meta-Universe: Consequences for Economy, Society, and Law". Even without going into content of the paper, it is easy to see its obvious merit– it is the application of an interdisciplinary approach. The beginning of the work is marked by a powerful introduction, which, in clear language, formulates the general concept of a meta-universe: "A meta-universe (parallel digital universe) is a virtual world of the future that will exist alongside the physical world 'populated' by digital avatars of real people". The author of article does not think this interpretation of the meta-universe should be taken as the most correct and complete one. The definition provided does not say anything about such aspects as, e.g., the use of virtual and augmented reality technologies, the possibility of the existence of digital avatars in the form of game bots (NPCs), or the form of existence of the meta-universe (decentralised or centralised). Overall, the main idea of the whole introduction boils down to the following: the meta-universe is a new step in the development of the entire Internet, which will inevitably lead to the transformation of economics, sociology, and law.

The main content of the paper falls into four parts. In the first part I.A. Filipova explores the question whether changes are possible in economic processes under the pressure of the development of meta-universes. Her opinion that the meta-universe will be the next stage of existence of the economy, which she calls Industry 5.0, looks quite interesting. Based on the content of individual provisions of the paper, you can say she believes people will inevitably use the meta-universe, which will lead to economic modifications: "Before too long, many people will likely have to spend most of their time in virtual reality: shop in virtual shopping centres, chat in virtual forums, and complete online work tasks". I.A. Filipova then continues to say she believes that the entire existence of mankind will be in direct dependence on the meta-universe. The author partially addresses the issue of the digital divide in relation to the acquisition of virtual and augmented reality technologies to access the meta-universe. She is sure that over time virtual and augmented reality technologies will become as commonplace

for people as smartphones and computers. A separate bullet point in the article discusses forthcoming changes in the labour market. For instance, the author states that the meta-universe will become a workplace and there will be new jobs related to making the meta-universe work. Concluding her consideration of the issue of economic transformation, the researcher points to the change in the marketing sphere, which will allow to collect data on users thus ensuring the commercial component of business entities' activities [Filipova I.A., 2023: 8, 10–13].

I.A. Filipova's futurological views and ideas on the transformation of economic ties in the conditions of meta-universes are difficult to assess in terms of their credibility. This is exclusively her personal opinion, logically based on the study in provisions of Russian and foreign doctrine, and statistical data.

The second part of her paper deals with the issue of human socialisation in the meta-universe. No doubt, the implementation of meta-universes will have an impact on the social sphere. Here she formulates the main social problems: emergence of new social needs related to the acquisition of virtual property, inequality in access to digital gadgets, the level of a person's digital literacy, degradation of moral values, the need to ensure the safety of children and of human health in general, etc. Of all the issues covered in this part of the paper, our attention was drawn to her position on digital inequality in the acquisition of necessary gadgets. It is highly likely that we are talking mainly about virtual and augmented reality headsets. It is possible to assume in the case she contradicts herself, because it was mentioned above that, in her opinion, acquiring the necessary equipment would not be on the list of particularly acute problems in the economic sense. However, it is admissible to think that in reality the explorer wanted to describe something different. Maybe I.A. Filipova recognizes the existence of the problem in the future and, with a certain degree of probability, says that over time (taking into account the development of technologies) the digital divide issue will be solved with respect to acquiring necessary gadgets.

It is hardly likely that anyone will consider the social problems outlined by Professor Filipova to be far-fetched or of little relevance. Indeed, each of the issues outlined requires a specific solution. Apparently, she wants to convey the idea that it is necessary to start thinking about these challenges now. The use of the meta-universe holds great economic opportunities, so the state faces a most important task of ensuring favourable social adaptation of a person within the virtual world.

The third part of the work lays the foundation for legal regulation. In this section, Filipova analyses the possibility/necessity of constitutionalising

new subjective rights arising in connection with the potential functioning of the meta-universe. She notes that in this case the task of constitutional law is to maximise the elimination of the following risks: " discrimination and digital inequality; loss of political rights; reduction of the right to privacy; manipulation of human consciousness". She concludes that to ensure personal security the following list of subjective rights should be elevated to the constitutional level: the right to access the Internet; the right to protection of personal data; a set of neuro-rights (mental inviolability, mental integrity and intellectual self-determination). It is worth noting that in her other work she points to the possibility of changes in the concept of constitutional subjective rights generated by the development of AI technologies [Filipova I.A., 2021].

Filipova's attempt to reflect the need to amend Chapter 2 of the Russian Federation Constitution should be regarded as nothing less than courageous. Far from every scholar would venture to identify "digital" gaps in Chapter 2 of the Constitution. However, it should be noted that such ideas are being expressed. E.g., several analytics [Avakyan S.A., 2023]; [Kleandrov M.I., 2023] think in this direction. If we take into account only the area of the meta-universe, this arises a discussion related to the fact that perhaps the subjective rights formulated by Filipova are not new in their essence. It can be assumed that their content is derived from the constitutional norms in force today: the right to access the Internet goes back to Part 4, Article 29 of the Russian Constitution, the right to protection of personal data is derived from the content of Article 23 of the Constitution, and the exercise of cognitive rights requires the realisation of freedom of thought guaranteed by Part 1 of the Constitution Article 29.

The fourth part of the paper deals with industry regulation. Filipova gives a brief and substantial description of some important aspects that need to be addressed in reforming the law: The security of the digital profile of the meta-universe user; legal regime/legal status of the user's avatar; increase in crime rate; ownership of a physical object projected in the meta-universe; intellectual property rights (copyright infringement and legal regime of objects generated by AI technologies); right to use an image (possibly, a hologram) of a deceased person; possibility of engaging in labour activity; procedural aspects of settling possible disputes [Filipova I.A., 2023: 15, 18, 19–22].

Another her study is "Meta-Universes: How Their Development Will Affect Employees and Employers" dealing with changes in the sphere of labour amid the emerging meta-universes [Filipova I.A., 2023b]. When comparing this paper with the above-mentioned one, it is easy to notice some identical provisions concerning, e.g., the definition of the meta-

universe, the interaction between AI and the meta-universe, the possibility of developing monetisation in the meta-universe, and the problem of digital user profiling. As a result of the study, she agrees with the position of scholars who believe that the development of meta-universes will affect labour relations [Filipova I.A., 2023b: 46, 56–57, 61]. Since her study is focused primarily on the legal sphere, it would be appropriate to formulate the prospects for the development of labour relations in connection with the formation of meta-universes. Although the paper does not propose any specifically formulated problems, Filipova presents a large list of 19 clearly stated questions that need to be answered before proceeding to create new/improve the current labour legislation.

The next paper deserving attention is "Legal Aspects of Digital Enhancement of Meta-Universes". From the first lines of the article we see N.N. Kovalyova's positive attitude to the development of the sphere of meta-universes. She notes that the meta-universe should be seen as the next step in the functioning of the Internet [Kovaleva N.N., 2022: 82]. According to her, the first key issue largely blocks the improvement of the legal framework on meta-universes, is a lack of a legal definition of the term 'meta-universe'. The paper proposes following definition: "A digital space based on the principles of NFT (non-fungible token) and blockchain technologies and other breakthrough technologies, incorporating digital diffusion to combine all elements of the global digital environment and the possibility of seamless user interaction in different parts of the global web space, based on economically sound ways of building business models and tools for the production and interchange of goods". Many scholars will definitely agree with her view on the need to develop a legal definition of the category "meta-universe". However, the interpretation proposed in the paper is likely to meet with resistance, as it is difficult to discern its legal substance. It may be suggested that the said definition should not be positioned as a legal one, as it has a general nature.

N.N. Kovalyova proposes an unusual model of interaction within the Russian model of industrial meta-universe, where the government is to play the leading role in the formation of infrastructure. It will help to bring the country to a new level of economic development. The lack of a unified jurisdiction of the meta-universe deserves attention indeed. According to her opinion, the issue largely complicates the improvement of legislative regulation. After examining her position on reforming intellectual property law, one can say she considers it necessary to revise the criteria of creative labour in relation to objects created with the help of AI technologies and (or) to formulate a special concept of protection of such objects. In this case, we can find similarities between the studies of N.N. Kovalyova and I.A. Fili-

pova regarding the further mutual coexistence of two technologies, AI and meta-universe. In conclusion N.N. Kovalyova presents a list of actions on legal transformation of public relations in the sphere of meta-universes: Develop and adopt an international agreement to regulate relations in meta-universes, develop and adopt a Russian strategy on meta-universes, develop legal terminology, and use the mechanism of regulatory sandboxes and provide various benefits in the field of AI, "create a system of standardisation and quality control of the formation of the environment, create a Technical Committee under the notional name "Meta-Universes in the Structure of Rosstandart" [Kovalyova N.N., 2022: 82–84]. She expressed similar conclusions in another paper presented at the academic conference in Saratov "Public Authority and Artificial Intelligence: Legal Regulation" [Kovalyova N.N., 2022b].

Each point in the paper describes the legal challenges that all of humanity will soon face. The academic community may have questions about the proposed definition (as discussed above) and the development of international co-operation, as it seems almost impossible to come up with a single international instrument in view of the current political climate. We assume that only when there is a real threat will the international community think about the need to adopt an appropriate instrument. At the same time, the issue of developing national meta-universes in individual countries has recently been gaining relevance. In such a case, the problem of international interaction fades into the background.

I.V. Ponkin's study "Cyber-Meta-Universe: a Legal View" looks quite extraordinary one. It is clear from the title of the paper that instead of the standard term "meta-universe", the author explores a different interpretation, although this hardly affects the essence of the term. Probably, the reason for this is that no meta-universe can exist outside of cyberspace. I.V. Ponkin calls the cyber-meta-universe technology a promising technology. However, in his opinion, it is difficult to make any reasonable forecasts of its further development. It is not difficult to notice some complexity related to the conceptual apparatus. For example, I.V. Ponkin understands the cyber universe as "a complex virtual-real (hybrid) homeostatic and persistent digital multi-user meta-space formed and maintained through interoperable dynamic digital modelling and synthesis, and including a set of decentralised and/or intersectional real-virtual multi-scale (and scalable) three-dimensional spatial worlds (eco-systems, universes) of complex-cognitive and holographic-visual orders (augmented or reproduced reality — coherently and consistently with the natural laws of physical existence and human perception, understanding and transformation of the world), with ensuring the interactivity of the users' engagement (participation, in-

teraction, active transformation) through their avatar and with ensuring the immersion of the users' presence in the ontologies of these worlds". Along with the cyber-meta-universe, the author provides definitions of such phenomena as avatar (meaning a user's digital avatar), immersion and persistence as properties of the cyber-meta-universe, and augmented reality, among others.

Turning to legal part of the study, we cannot ignore that, like N.N. Kovalyova, I.V. Ponkin singles out the issue of jurisdiction of the meta-universe. Along with this, he formulates a number of issues related to such points of contact as, e.g., contract law (conclusion and execution of a contract), tort law (peculiarities of its application), property law (existence of ownership of virtual property), criminal law (theft of property, slander, rape of a child avatar, extremist propaganda, etc.), user responsibility (identification of a real person behind the "shell" of an avatar, possible legal personality of an avatar). Of particular interest is I.V. Ponkin's thought concerning "..the factual and legal possibility of assigning an anthropomorphic avatar to a legal entity and giving it a certain legal personality...". This case concerns the use of the avatar of the meta-universe through the lens of a legal entity rather than a physical person. A separate part of his paper focuses on the problem of AI technology functioning in the context of intellectual property law. In considering this issue, he describes cases in the USA related to establishment of the "legal status" of AI as the creator of an object and to the possible infringement of copyright when training neural networks. He suggests it is possible to use the cyber-meta-universe for various types of legal activities. Examples he cites include: conducting an investigative experiment, modelling legally significant processes (apprehension and/or neutralisation of criminals), training students based on real-life situations, and preparing and conducting further training courses for investigators and criminologists [Ponkin I.V., 2023: 119, 122–124].

Upon analysing I.V. Ponkin's paper, we can say that in its essence it has some similarities with I.A. Filipova's studies, since Ponkin, like Filipova, does not make specific proposals, but formulates issues that require a solution. Undoubtedly, most of the issues covered need to be addressed. It is worth noting that I.V. Ponkin's position on the use of avatar as a digital representation of a legal entity looks truly special. We believe scholars will offer their thoughts on this on more than one occasion.

The study by K.S. Evsikov "Meta-Universes as a New Object of Regulation for Information Law" arouses considerable curiosity. Looking ahead a little, we would like to note that his key idea comes down to his own legal definition of the meta-universe: "A meta-universe is an information system that exists in the form of a digital platform and/or a social network and pro-

vides the ability to create and transfer digital rights between users, for access to which an individual can use virtual and/or augmented reality information technologies and project virtual objects into reality". As it is possible to see, he considers the meta-universe to be a special case of an information system. This approach fits very well into the model of Russian law. Based on the definition provided, one can conclude that the meta-universe is only accessed through the use of virtual and/or augmented reality technologies. At the same time, disputes will certainly arise related to the following aspects of his definition:

Description of the meta-universe in the form of a digital platform and/or social network. The fact is that the Russian legislator is not familiar with such categories as digital platform and social network, despite the abundance of legal literature on the subject.

Foreign studies have repeatedly noted the development of meta-universes will affect many aspects of society, including the circulation of digital rights (medicine and health care, sports, education, leisure, etc.). In this regard, it seems questionable to limit the functioning of the meta-universe only to the economic sense in the context of the circulation of digital rights.

K.S. Evsikov's position on regulating the sphere of meta-universes by analogy with social networks through the adoption of relevant legislation rather than a recommendatory regulation looks very interesting one. His view of the future picture of legal regulation shows that, in all probability, the development of meta-universes will at first move towards the creation of individual virtual worlds rather than their system. It is possible that going forward, when high technological capacities are available, the prototypes of meta-universes that exist today or will be developed in the future will gradually merge with each other. He focuses the reader's attention on two interrelated aspects: Protection of users' personal data and manipulation of their consciousness on the basis of the data obtained with the help of technologies "based on information signals not perceived by the consciousness (by analogy with the 25th frame effect)". It is difficult to disagree with him. Indeed, the regulation of the process of information circulation and the use of various information technologies should not be neglected by the state. In this regard, he uses an interesting metaphor: "digital Luddism" [Evsikov K.S., 49, 52, 53–54].

S.P. Fedorenko is interested in the topic of law development in the conditions of meta-universes. In his research "Meta-Universe as a Factor of Transformation of Legal Regulation", S.P. Fedorenko tells about aspects of legal regulating social relations in meta-universes through the prism of AI technologies. He discusses the need for a legal framework and cites the

experience of South Korea, whose authorities are contemplating regulation in meta-universes. South Korea has been without doubt developing legislative and ethical standards. South Korea is an undisputed leader in integrating meta-universes into the country's economic structure, thanks to its own meta-city project 'Metaverse Seoul.' The experience of the country's authorities in creating a legal/ethical framework cited by S.P. Fedorenko can be used to shape the regulation of the meta-universe sphere in other countries, including Russia.

Like some other researchers, S.P. Fedorenko sees main issue of development of legal framework on meta-universes in the framework's transnational nature. Based on this, he identifies other issues in the legal sphere, including, *inter alia*, increase in crime rate (extremism, sexual violence), circulation of information, regime of transactions (possibility of invalidation, payment of taxes, respect for copyrights), development of international co-operation, settlement obligations using crypto currencies, gaming currencies, and smart contract currencies. Summarising all of this, he speaks about the possibility of adapting legal institutions to regulate relations in the emerging meta-universes [Fedorenko S.P., 2023: 58-60]. As we can see, the paper under consideration reflects issues are not raised in other articles by Russian authors. It relates to the issue of settlements in meta-universes. We should also mention his another work dealing with realizing right to education in the meta-universe "The Meta-Universe and the Right to Education: Theoretical and Legal Aspect" [Fedorenko S.P., 2022]. The first part of the paper may be characterised as a description of the significance of the field of education for the socio-economic development of the whole society and the possibility of using distant learning format in the educational process. The second part focuses on the development of the sphere of meta-universes. The final part concludes that the introduction of meta-universes will transform many sectors of society, including the education industry. He notes the main risk of using digital technologies lies in the possible loss of state control in this area. On this basis he suggests that "...today, it is necessary to work constantly to improve the strategy for the development of the education system in the Russian Federation, in accordance with which national interests will be protected and the rights of teachers as the basis of classical education will be prioritised" [Fedorenko S.P., 2022: 62, 63, 65].

It is difficult to overestimate the relevance of the topic of education in the context of meta-universes. This is confirmed, in particular, by studies of foreign researchers, e.g. [Inceoglu M.M., Ciloglugil B., 2022]; [Zhang X. et al., 2022]. S.P. Fedorenko is the first Russian scholar who undertook to study the issue in the context of law. While the paper is somewhat abstract in its nature due to excessive focus on the description of the importance

of education and the meta-universe, its content will be useful for future writings on this topic because it will help to more closely investigate such issues as, e.g., guarantees of exercising the constitutional right to education, peculiarities of realisation of the process of education in the meta-universe, provision of participants of the process of education with necessary equipment, possible specifics of temporary use of the meta-universe to reduce the probability of threat to the psychological health of students and teachers, use of AI in the process of education and others.

The next paper is by V.I. Fathi "Meta-Universes: Legal Regulation Issues". From overall idea of the study, according to him, the state should promote the development of meta-universe technology because it affects security interests of society as a whole. E.g., the author notes that China has established a separate state committee on meta-universes. The rudiments of government attention to meta-universes are emerging in Russia (speech by the President of the Russian Federation at the AI Journey 2022 conference [3]; 2022 discussion of legal risks and opportunities of meta-universes in the Federation Council [4]). Throughout the article, V.I. Fathi tries to find an answer to the question of how to regulate the sphere of meta-universes. The author's interesting thoughts revolve around two options: use user agreements as a basis for regulation, and develop international co-operation to build a new "meta-jurisdiction".

Speaking of user agreements, the author presumes that each meta-universe has its own owner, which, in all likelihood, should be presented as a global corporation. Fathi writes: if the model of user agreements is used, ".... the rights holder turns into a sole representative of virtual power that independently establishes and enforces rules binding on the user, the case may well be classified as an offence in real life". The state cannot allow such a threat to arise, hence a different format for establishing regulation must be chosen. In this regard, Fathi points to possibility of implementing a single "meta-jurisdiction." The main disadvantage of "meta-jurisdiction", according to Fathi, is that "...it may lead to the loss of the status of the state as a monopolist in the sphere of law-making, governance, currency regulation, etc. One should not deny, that in these conditions, the cultural, national and indigenous roots and peculiarities of the system of state governance can be lost".

Regardless of all the merits of the "meta-jurisdiction" concept, one can hardly speak of its potential viability, as discussed above (comments on N.N. Kovalyova's study). At the same time, the final sentence of Fathi's

[3] Available at: 2022/11/24/na-snag-vperedi.html (accessed: 30.11.2023)

[4] Available at: council.gov.ru>events/main themes/13849/ (accessed: 11.01.2024)

study looks very interesting because it makes us think: "...it is the state as a guarantor of the protection of citizen's rights that should give an answer to the question: "Should law adapt to the rules of the virtual universe or should the virtual universe adapt to the existing rules of law?" [Fathi V.I., 2022: 14–15, 16, 17].

It is my duty to mention in the study an article by A.V. Minbaleyev and E.V. Titova "Legal Issues and Risks of Sporting Events in the Meta-Universe". The authors are convinced that in the future, due to the development of the meta-universe, there will be a new way to look at the world of sports industry, including cyber sports. In particular, they point out that it will be possible to organise and host a variety of sporting events in the meta-universe, and the large emerging range of tools will help to attract fans to the immersive environment. Fans will not only have the opportunity to watch live broadcasts of events with full immersive experience, but also to train with athletes as a reward for purchasing a particular NFT. This will have a positive impact on increasing the sports brands' economic flows. At the same time, all geographical and physical boundaries will be erased. This will allow to achieve the following: "Using their avatar and other digital profiles and participation patterns in the meta-universe, the fan has new possibilities, such as walking on the field with the players, watching the sporting event from different locations, receiving all relevant information about the athletes, and interacting with other fans, including using inbuilt foreign language translators". It is difficult to assess to what extent the ideas presented by authors can be implemented. They cite the case of the English Premier League that has entered the meta-universe.

As for definition of meta-universe, the authors use one of the interpretations formulated in foreign academic circles: "The meta-universe is understood as "a computer-generated permanent immersive environment that can include elements of augmented reality and virtual reality. The user, depicted as an avatar, can interact with others, consume goods and travel just as they would in the physical world, which in turn provides opportunities for interaction that were previously impossible".

To organise and host sporting events in the meta-universe, some legal risks need to be resolved. The first area that two authors focus on is the definition of the regime of new digital objects (stadiums, arenas, fan houses, etc.). The second area relates to intellectual property law and requires answers to questions such as, e.g., is it the team's duty to copyright their avatars? Are there any specifics about broadcasting procedures and the use of licence agreements in the meta-universe? The third area focuses on expanding labour law to include persons who will be providing services to sporting events. The fourth area includes the protection of personal data

of fans and athletes, including scraping (person collecting the data, list of data collected, user anonymity, purpose of data collection, etc.). It also can include the fifth area related to counterfeiting (including the use of deepfake technology) of digital profiles / digital avatars of fans and athletes. The sixth area deals with the unlimited use of electronic faces in the context of AI technologies for various purposes (e.g., scoring, social rating). Two authors conclude the study by pointing to the need to strengthen information security and cyber security measures [Minbaleev A.V.,Titova E.V., 2023: 137–140].

Theirs study suggests that the development of meta-universes affects not only long-established branches of law, such as civil law, financial law and administrative law, but also more innovative legal formations, such as sports law. A.V. Minbaleyev and E.V. Titova show how the general issues of meta-universe sphere regulation highlighted by many scholars influence the world of sports. Based on its title, this paper should probably be recognized as the most extravagant one in this review.

It was noted above one of the aspects in development of the law on the meta-universe is caused by the lack of understanding of the legal status of the user's digital avatar. V.V. Sarkisyan and I.V. Fedorova bring some clarity to this issue in research "On Legal Personality of an Avatar in the Meta-Universe". While the paper lacks a definition of meta-universe, it contains constructive thoughts. The article notes that the concept a digital avatar should not ignore the sphere of law, as it (the digital avatar) personifies the user of the meta-universe. There is no provision on digital avatars in the content of the "Persons" subsection of the Russian Federation Civil Code, which raises the need to define the avatar's legal status/legal regime.

They offer three possible options to solve the question raised: the avatar has full legal personality, the avatar has a quasi-subjective nature, and the avatar is viewed as an object of civil rights. When analysing the possibility of recognising a digital avatar as a subject of law, the authors write that "...the identification of humans with avatars, and the granting of rights to the avatars may lead to a significant dilution of the concept of human rights." Along with this, the authors argue that this approach would raise other issues: the avatar's financial liability, ability to be a plaintiff and defendant in court, ability to participate in inheritance procedures, etc. The authors give an interesting description of the quasi-subject avatar model. Based on the intended meaning, if the quasi-subjectivity regime is applied, the avatar should be treated as an electronic person. Co-authors note that a user can only create one avatar, which will need to be registered in a special registry; this will ensure the identification of the user by using a tool that pierces the corporate veil. It will also help to use various options for the

participation of an electronic person in public relations such as insurance of the liability risk, setting a minimum capital requirement etc. Despite the seeming benefits of this solution, the authors reasonably believe that the source code of an electronic person can be modified, which will lead to unwanted legal consequences.

The point of V.V. Sarkisyan and I.V. Fedorova looks logical and reasoned one. In all probability, questions about the possible legal capacity and competence of an avatar are not quite correct, since in such a case, two subjects appear in theory: the user and the avatar. Since the avatar is a digital personification of the user, there is no need to give the avatar a separate legal personality in any form. In this connection, they draw attention to the possibility of qualifying a digital avatar as an object of civil rights. According to the authors, three options are possible in this case: recognize the avatar as a special object of intellectual property, view the digital avatar as a digital right, formulate a model of the digital avatar as a separate (independent) object of civil rights [Sarkisyan V.V., Fedorova I.V., 2023: 115–118]. It is hard to say still, which of the options is the most appropriate. The authors' main conclusion comes down to the fact that the digital avatar should be viewed as an object model.

Scholars working in the field of criminal law science are interested in the topic of meta-universe development. One vivid example is the paper by A.T. Mursalimov "Meta-Universe: a New Space for Committing Fraud in the Field of Credit". A.T. Mursalimov points out in his study that the creation of a meta-universe will aggravate the situation with the lack of control over transactions within this virtual space. It will lead to an increase in fraudulent activities. If a meta-universe is launched in Russia, the amount of uncontrolled investment in meta-universe projects will increase, which may result in large financial losses for investors. At the same time, A.T. Mursalimov believes that there is already a turnover of funds in the meta-universe. He cites the activities of TerraZero, which has entered into the world's first mortgage lending agreement in the meta-universe. The author acknowledges the lack of real cases of fraud in the meta-universe, but focuses his view on a situation involving sexual violence against an avatar. In connection with the emerging risks of offences, A.T. Mursalimov makes a number of proposals regarding the improvement of the legal framework. These include, among others, establishing digital borders of the state, and creating a separate structural unit in the Federal Security Service whose tasks will be ensuring digital borders and extending the current legislation to the sphere of meta-universes [Mursalimov A.T., 2023: 120, 122].

Based on the practical cases, A.T. Mursalimov shows a decent legal regulation of the meta-universe sphere should be developed. Having analysed the whole paper, one can say the main problem that blocks the extension of

criminal law norms to the virtual world lies in the lack of state control. In this connection A.T. Mursalimov probably wants to say that the individual and society need protection and defence from the point of view of criminal law, but it is difficult to discuss prospects in this area, because there is a problem of lacking state control. For this reason A.T. Mursalimov proposes to start with solving this very issue. This step will ensure national security within virtual space.

In continuation of the topic of ensuring national security in meta-universes, we would like to draw attention to the research paper by A.I. Ovchinnikov "Traditional Spiritual and Moral Values, Sovereignty and Legal Regulation of Meta-Universes". The author immediately puts forward a thesis that allows us to understand what this article is about: "This short article deals with the rapidly growing popularity of the digital phenomenon of virtual universes, or meta-universes. A virtual universe, or meta-universe, is a digitally modelled virtual reality alternative to the physical world". The author puts forward a reasonable point of view that it is now correct to speak about two variants of establishing the regulation of meta-universes.

The first option can be described as liberal. It ensures rapid growth of technologies, involvement of billions of users, and unlimited growth outlooks, but abolishes state borders, there is no control on the part of the state, and there are risks of monopolisation by big business. The second option is referred to as conservative-etatist, where national sovereignty and state interests form the cornerstone. In assessing the second approach, the author cites the experience of the People's Republic of China. A.I. Ovchinnikov notes that the meta-universe trend should be developed, and Russia needs its own state concept for meta-universes. The author analyses in general terms numerous issues related to taxation, antitrust regulation, protection of personal data, etc., all of which is clearly important for future socio-economic development. The author therefore concludes: "The meta-universe must depend on a centralised block chain owned and controlled by the state. Crypto currencies within the meta-universe must be prohibited, and only government securities and public finance allowed. All meta-applications, which connect to virtual reality, and all software developers should be under state control and must be checked both by the state and civil society" [Ovchinnikov A.I., 2023: 36-37, 40, 41–42]. In addition to it we have an opportunity to cite one more study: A.I. Ovchinnikov in co-authorship with P.I. Shirinskikh "Meta-Universes and Law: Challenges of New Technologies in the Conditions of Further Development of the Internet". This paper offers very similar conclusions. It says also that an age criterion must be introduced to enter the meta-universe [Ovchinnikov A.I., Shirinskikh P.I., 2023: 32].

Indeed, the current situation is pushing the state to pay attention to meta-universes and ensure control over them. On the one hand, the idea that a state-owned meta-universe must be developed in Russia may be somewhat controversial, as it may negatively affect economic interests of business entities wishing to create their own meta-universes. On the other hand, it is easy to imagine that, in a state-controlled meta-universe, entrepreneurs would integrate their businesses. It would seem to us that the only threat in this case lies in finding the right balance between private and public interests, so as not to come to the materialisation of famous *1984* by George Orwell.

Author of the article must mention the article by B.A. Shakhnazarov "Meta-Universes: Legal Protection of Intellectual Property in Transboundary Virtual Space". He shows a close connection between such phenomena as meta-universe and Web 3.0. He notes that since Web 3.0 is the concept of a decentralised network, it can serve as a basis for building communication channels in the meta-universe. By referring to foreign studies, he gives a general concept of meta-universe: "...a meta-universe is a digital world in which the possibility to interact with three-dimensional objects in virtual reality is realised." The paper clearly reflects that today, thanks to Web 3.0, different kinds of property relations (transactions) arise that enable a monetisation procedure in the form of crypto currency or NFT. Indeed, it is the current state of affairs. This is particularly true for the Decentraland platform.

Further on, B.A. Shakhnazarov singles out the issue of legal regime of objects that are used in transactions. In this case, the dilemma arises between a right in rem and an intellectual property right. In this regard he asks: "Can an intellectual property object expressed in virtual form and represented in an objective form in the meta-universe have an owner from the point of view of property law or related institutions?" On the basis of data from foreign experts (report of the international law firm Reed Smith) he concludes that property rights within the meta-universe are out of the question. In reality, there are always true owners; usually, platform operators. Therefore he inclines to the viewpoint about the circulation of special intellectual property objects in meta-universes. He puts forward the idea that this state of affairs raises a number of questions, e.g., with respect to the licence agreement, scope of rights to existing/projected objects in the meta-universe, their patenting, or identification of the author of the created object in the absence of identification procedure.

Summarising his thoughts, you may see that, in his opinion, taking into account the transboundary nature of meta-universes, it is essential to ensure that state jurisdiction is extended over meta-universes. In other words, states

must establish their own presence in the meta-universe. He cites in this case the experience of the small country of Barbados, which has entered into an agreement with the Decentraland platform to integrate its own embassy in the meta-universe. From the meaning of the paper, that step is necessary for the applying conflict of laws rules [Shakhnazarov B.A., 2022: 18, 19, 22–25].

Certainly, most researchers would agree that ideas of B.A. Shakhnazarov are worth considering. It is difficult to find any significant flaws in his paper. At the same time, we may debate the final conclusion. On the one hand, the solution seems to be well-grounded. On the other hand, some questions may arise regarding information security and state sovereignty, as it can be assumed that, despite the experience of Barbados, world economic leaders would be reluctant to participate in such a process.

In conclusion it has a sense to cite an entertaining article by a person from the world of practice, namely V.A. Zhukov. In his article "Law and Ethics of Meta-Universes", he analyses possible scenarios for the development of legal regulation and ethical norms in the age of meta-universes. It has a sense to focus attention on analysing the legal content of that article.

V.A. Zhukov uses the ideas of the American researcher M. Ball to describe the essence of the meta-universe model. He thinks the meta-universe should be seen as "a scalable and interoperable network of 3D virtual worlds displayed in real time that can be perceived simultaneously and continuously by a virtually unlimited number of users with an individualised sense of presence and data continuity". V.A. Zhukov's reference to the correlation between the meta-universe and online multiplayer games is noteworthy. He notes in this regard that scholars have long explored the legal aspects of online gaming, but that it is difficult to apply such regulation to relations in the meta-universe, as the latter encompasses much broader areas of life, including gaming. According to him, meta-universes will be integrated into the life of society gradually. Transformation of the gaming sector will be the first step in this direction; then, depending on the technology maturity, we can talk possible integration, e.g., of theatres, cinema, and education into the meta-universe.

In his study V.A. Zhukov distinguishes three main vectors of law development in meta-universes:

regulating aimed at encouraging economic progress;
regulating aimed at restricting circulation of information;
regulating related to the functioning of meta-universes.

In the first area he analyses questions concerning two key branches of the civil law sector: intellectual property law, and property law. Concern-

ing intellectual property, V.A. Zhukov concludes that "...a trend will take shape in the regulation aimed at granting the user an exclusive right to the created objects with the transfer of the minimum necessary rights to the platform operator for technological capabilities in the reproduction and transfer of the object". In his opinion, despite the features, legal regime of virtual property should be as close as possible to the most "objectified" one. This will help simplify further civil turnover to the greatest degree possible. At the same time, he notes that for economic development purposes, the circulation of virtual property and ownership of digital assets should be liberalised as much as possible, subject to user identification.

V.A. Zhukov develops a very unusual explanation of issues related to information turnover requirements. He recognises that the issue of personal data protection will play an important role in the development of meta-universes. However, he believes there is no need to restrict the meta-universe developers from collecting information. He writes: "Imposing such a restriction may also not be in line with the user's intention to express consent to the processing of more personal data for a better digital experience". He also presents a possible solutions to the issue of personal data protection: "...introduce time delays on the processing of such data or do not apply them in specific cases." Moreover, in order to regulate the information circulation sphere, rules for recommendation systems must be established as carefully as possible (without significant prohibitions), because in the absence of such rules, digital products offered by businesses will not be of interest to users in the meta-universe. His viewpoint on advertising in the meta-universe is interesting one. Since the current law stipulates special rules for advertising on certain media (print media, radio, etc.), it is very likely that there should be special rules for the meta-universe as well. Maybe ethical standards would be appropriate in this case.

The third area looks particularly special. It covers the issue of mismatching realities that manifests itself in "the difference in objective circumstances perceived by users at the same time". V.A. Zhukov notes when it comes to such spheres as, e.g., medicine and finance, the issue may have a legal nature. He suggests "establishment of technological requirements aimed at eliminating discrepancies in factors perceived by users".

In conclusion V.A. Zhukov points out an interdisciplinary approach between such spheres as law, ethics, medicine, psychology, and engineering must be followed for creating a safe meta-universe infrastructure. Current challenges and potential future challenges should not prohibit the spread of meta-universe technology [Zhukov V.A., 2023: 149-150, 153–154, 156–157, 163].

We don't think anyone can find any significant flaws and/or contradictions in his paper. Indeed, he has expounded every issue in a very detailed

manner that does not raise questions. At the same time there are confrontation between the conclusions of V.A. Zhukov and A.I. Ovchinnikov covering general model of regulation. V.A. Zhukov is sure laws and regulations on meta-universes should be built on the principles of liberalization, while A.I. Ovchinnikov believes regulation should be based primarily on state control.

Conclusions

The meta-universe has gradually acquired the signs of a new scholarly niche alongside/in synergy with the topic of AI, which annually attracts the attention of researchers from various areas. This is driven by economic, political and social reasons and challenges. The legal doctrine is no exception here. The author of this paper believes that further development of meta-universe technology should take place at the same time with law. We can clearly observe an increase in the need for a legal solution to the issues of creation and functioning of meta-universes that would take into account both private and public interests. Our analysis offers a systematised review of research papers by Russian legal scholars according to the following criteria: a list of the most relevant problems (Figure 3) and a summary of the research results (Figure 4).

In eight of papers analysed (50 per cent of total), authors note the most acute legal problem for further development of meta-universes is that virtual space is not bound to the national legislation. In view of this it is almost impossible to ensure a sufficient level of state control. Consequently, the meta-universe could become a “digital oasis” functioning in a chaotic

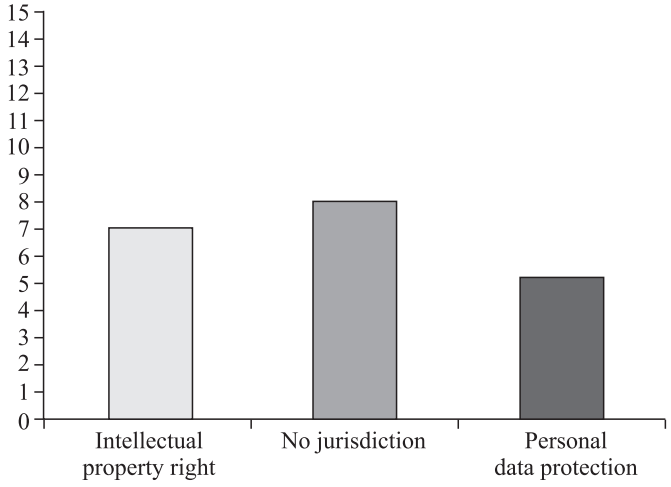

Fig. 3. List of most important issues

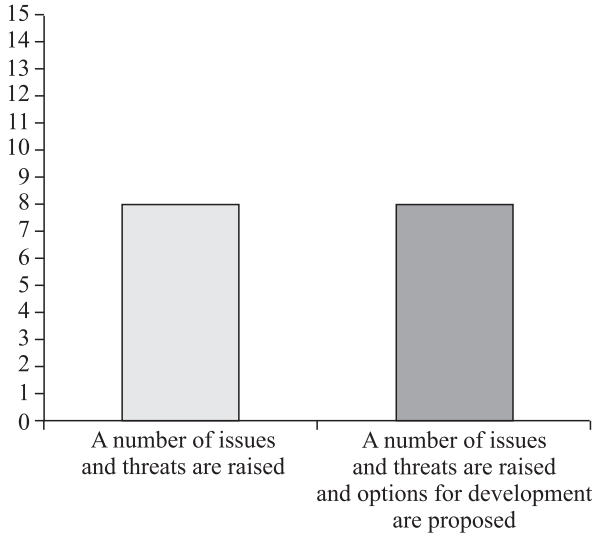

Fig. 4. Summary of the study results

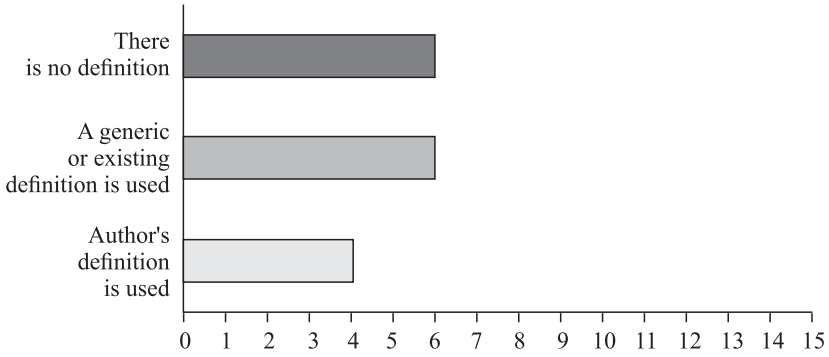

Fig. 5. Meta-Universe definitions occur in paper

manner. Seven papers (about 44 per cent) discuss issues in the field of intellectual property law. They analyse a range of questions related in particular to whether it is possible to qualify a user's digital avatar as an intellectual property object, to extend the copyright to objects created with the help of AI technologies, and to legally project physical objects in the meta-universe. In five papers (about 31 per cent of total), the authors believe that a functioning mechanism (possibly, a system using AI technologies) for data privacy should be provided.

Upon summarising all papers, it can say in one half of them the authors formulate a list of issues and threats that the state will have to deal with in order to build a legal framework for meta-universes. In the other equivalent

half, in addition to describing key challenges, the authors propose various options for further modification of legal regulation. In this case, one should not underestimate the nature of the papers from the first half because they are just as informative as the studies from the second half. At the same time, the author formulated one of the main problems, which is characteristic of scholars dealing with the issue of law transformation in the conditions of rapid development of meta-universes. The essence of the problem manifests itself in the presence/lack of a definition of the meta-universe (Figure 5).

The content of the graph clearly shows that not all the papers contain a definition of meta-universe. The authors develop their own concept of the meta-universe in only four papers (25 per cent). In six papers (37.5 per cent), the authors have used a general description of the meta-universe or borrowed the definition from other scholars and/or specialists. We have to state there is no definition of the meta-universe in the remaining 6 papers (37.5 per cent).

Based on all the said above, it is possible to try to predict the overall trend of further development of the legal science on meta-universes. The innovative nature of the topic will attract a lot of interest from scholars just as it did with the enthusiasm for AI. It will result in a build-up of research materials. In addition to research articles, monographs may well be published. It is also possible to see dissertations addressing this topic.

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Regulating Artificial Intelligence: A Study in the Comparison between South Asia and Other Countries

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Abstract

Any regulation, law, or legal order enforced by the lawful authority of a territory to maintain, control, and regulate the characteristics, development, and public interaction of an artificial entity developed in a digital manner can be called AI legislation. The paper presents a comparative analysis of the regulatory landscape for artificial intelligence in the South Asian countries in relation to other selective countries and organizations globally, in light of the challenges encountered in regulating AI in the region. Furthermore, the study demonstrates that South Asian nations have experienced a significant and persistent legal disparity in comparison to other global regions, which has been both involuntary and inequitable. The paper presents an argument for the regulation of artificial intelligence and offers suggestions for South Asian countries to effectively regulate AI despite challenges related to its design and economic limitations.

Keywords

Artificial Intelligence, AI Legislation, Global AI Regulation, AI Regulatory Challenges, AI Regulation in South Asia, Effective AI Regulatory Strategies, Legal Disparity in AI Regulation.

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Introduction

The field of artificial intelligence pertains to the domain of computer science and engineering, with the objective of developing intelligent agents or systems that can evaluate their surroundings, engage in logical thinking, and execute actions to accomplish their objectives. The definition of artificial intelligence, commonly referred to as AI, is a theme of debate within academic circles. The majority of scholars and experts perceive AI as a comprehensive concept that encompasses various subfields, including machine learning (ML). ML, in turn, synergizes with another subfield called deep learning to emulate human-like decision-making and other cognitive processes [Janiesch C., 2021: 685]. A minority of scholars hold the perspective that modern forms of digital algorithms, programs, and techniques for data analysis and decision-making possess the capacity to operate intentionally as "intelligent software" rather than "artificial intelligence" [Shchitova A.A., 2020: 616]. Whatever the definition may be, the field of AI is experiencing significant growth and integration into various aspects of our daily lives. However, the current laws and regulations designed to govern and manage this technology are inadequate and lagging behind. This is due to the absence of a stable and widely accepted definition or implementation of AI, which poses challenges in developing an effective policy framework [Calo R., 2017: 407].

Governments worldwide are endeavoring to formulate AI-related laws that consider their distinctive perspectives, technological expertise, technological domains, and socioeconomic milieu. With an attempt to answer the question: Is AI creating a legal vacuum in South Asia as opposed to other regions? This paper seeks to compare the laws and regulations pertaining to artificial intelligence in the most populous countries and regions of the world, including those that are currently enacted, under development or in draft form, with the regulations, laws, and any type of legal initiative from the South Asian countries regarding AI. Additionally, it aims to identify the challenges associated with regulating AI in South Asian countries: India, Pakistan, Bangladesh, Afghanistan, Nepal, Sri Lanka, Bhutan, and the Maldives.

In the article's Part II, the author explains why artificial intelligence has to be regulated on a worldwide scale. The significance of this issue spans from the protection of fundamental human rights to the mitigation of monopolistic practices exhibited by large technology corporations on a global scale. The third section of the paper will provide an overview of the rules and regulations pertaining to artificial intelligence that have been implemented, formulated, or suggested by various countries and organizations, including

China, the African Union, the European Union, the United States, Brazil, and Australia. This section will additionally showcase the existent legislation and forthcoming endeavors of South Asian nations, with the aim of regulating artificial intelligence within their respective jurisdictions. Furthermore, this section explores the regulatory frameworks and initiatives pertaining to artificial intelligence established by the Organization for Economic Cooperation and Development (OECD). Building upon Part III, Part IV undertakes a critical analysis to demonstrate the emergence of legal disparities in the South Asian region pertaining to the formulation of adequate regulations for artificial intelligence. This section will also elucidate the key challenges faced by South Asian nations in keeping abreast of the latest advancements in this technology. Based on the issues highlighted in Part IV, Part V proposes measures that these countries can adopt to enable the democratic regulation of artificial intelligence.

1. Why AI Should be Regulated?

Academic discourse has highlighted the remarkable proliferation of artificial intelligence in our quotidian affairs, which has prompted the emergence of regulatory frameworks for AI. This development has arisen from a broad apprehension regarding the potential existential peril that AI poses to humanity, such as the displacement of jobs and the subjugation of humans to machines [Bathaee Y., 2018: 897]. In the event that highly sophisticated and intricate artificial intelligence systems are not subject to regulation and oversight, there exists the possibility that they may veer from desirable conduct and execute tasks in an unethical manner. The regulation of AI has been a significant matter due to the subsequent rationales:

A) Safety and Security

Malfunctioning or inappropriate use of AI systems can result in harmful consequences. Improper design of AI software and testing of autonomous vehicles can result in accidents [Hong J.W., 2020: 36]. AI systems have the potential to be utilized for military applications, including the development of self-governing armaments. Research findings demonstrate that the development of military-grade AI applications presents a range of risks such as ethical risks from humanitarian standpoints due to the reason that machines lack human understandings and operational risks regarding reliability, fragility and security of AI systems themselves [Morgan F., 2020: 118].

B) Public Opinion

In recent times there has been a growing concern among individuals regarding the regulation of AI as it continues to rapidly advance and strengthen

its capabilities. As per reports and surveys, approximately 66% of individuals from Australia and 62% of the British people opine that the AI industry should be subjected to regulation and accountability[1] [Lockey S., 2020: 8]. According to a study conducted by IBM in 2020, a majority of Americans (62%) and Europeans (70%) express a preference for precise regulations on specific technologies, with a similar proportion of Americans (60%) and Europeans (70%) indicating a desire for regulation of artificial intelligence.[2]

C) Public Assurance

The implementation of AI regulation is essential in order to ensure that the government can offer citizens the necessary guarantees of transparency, accountability, and security, thereby ensuring equitable and fair treatment during the utilization of AI.[3] By implementing precise rules and regulations, citizens may have confidence that law enforcement authorities will not be limited to relying only on reinterpreting outdated laws that were not intended to govern contemporary society and advanced technology.

D) Monopolistic Corporations

Regulating AI is deemed necessary due to the existing monopolies on AI technology by major tech companies, including Intel, IBM, Google, Microsoft, Amazon, and Baidu, which collectively account for over 40% of the market share as of 2017.[4]

E) Human Rights and Privacy

Artificial intelligence systems possess the capacity to infringe upon human rights by means of partiality and discrimination, invasion of privacy and surveillance, absence of lucidity and responsibility, employment and job displacement as well as weaponization [Rodrigues R., 2020: 100005]. Algorithmic systems have the potential to compromise not only the fundamental rights of privacy and non-discrimination, but also other essential rights[5]

[1] Available at: https://www.adalovelaceinstitute.org/wp-content/uploads/2023/06/Ada-Lovelace-Institute-The-Alan-Turing-Institute-How-do-people-feel-about-AI.pdf (accessed: 29.12. 2023)

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[Chen Z., 2023: 10]. The issue of freedom of expression and association is also raised by AI systems.[6] For instance, it has been reported that China is implementing AI technology to censor speech regarding anti-lockdown protests, crowd counting and control[7], mass surveillance and ethnic sorting, coercion and inducement of Uyghur community in Xinjiang [Leibold J., 2019: 11–13]; [Qiang X., 2019: 53–67].

Consequently, the institutionalization of AI ethics into legal frameworks is imperative. This measure would facilitate the regulation of AI and its effects for governmental and international entities. It would ensure that all new AI technologies, regardless of their level of complexity, undergo a development process that prioritizes the minimization of non-compliance and failure risks.

2. Findings

2.1. AI Laws and Regulations in China, Africa, Europe, United States, Brazil, and Australia

2.1.1. China

As corporations implement their artificial intelligence technologies and customers utilize them, establishing trust is of utmost significance given the precarious line that separates the appropriate application of AI from its misuse. This is the point at which the Chinese government placed greater emphasis on fostering trust between individuals and corporations within China. The Provisions on the Management of Algorithmic Recommendations for Internet Information Services, a Chinese AI regulation enacted on March 1, 2022, seeks to prevent the abuse and misuse of algorithmic technologies[8]. Its primary objective is to ensure transparency between companies and their consumers by enabling government oversight of the data collected by companies from their customers[9]. Despite the limited impact of the Algorithm Provisions on the Chinese government's internal mass surveillance practices, the enactment of the Chinese AI law has garnered a

[6] Available at: https://www.lawfaremedia.org/article/assessing-impacts-of-ai-on-human-rights-it-s-not-solely-about-privacy-and-nondiscrimination (accessed: 31.03.2023)

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[8] Available at: https://www.chinalawtranslate.com/en/algorithms/ (accessed: 10.10.2023)

[9] Available at: https://www.insideprivacy.com/artificial-intelligence/china-takes-the-lead-on-regulating-novel-technologies-new-regulations-on-algorithmic-recommendations-and-deep-synthesis-technologies/ (accessed: 31.03.2023)

diverse range of global responses. The legislation in question is praiseworthy for being the first instance of its sort to be effectively enforced. However, researchers note that the law lacks guidance on the proper procedure for individual users to report suspected instances of abuse to the relevant authorities, beyond the existing channels offered by technology corporations [Su Z., 2023: 3].

In January 2022 another law, Provisions on the Management of Deep Synthesis in Internet Information Service, was formulated in conjunction with the Algorithm Provisions. This law "includes but is not limited to" text, speech, non-speech, biometric, non-biometric and other virtual contents which aims to combat deep fakes and regulate activities related to the use of deep synthesis technologies, as well as activities that provide technical support to deep synthesis services within Chinese territory, came into force on January 10, 2023[10]. Moreover, the providers are legally obligated to implement precautions that do not hinder users' ability to use the service, while still maintaining appropriate records in compliance with applicable rules[11].

The Interim Measures for the Management of Generative Artificial Intelligence Services (hereinafter Interim Measures*)* were jointly announced by the Cyberspace Administration of China (CAC) and six other Chinese authorities on 13 July 2023 and came into force on 15 August 2023[12]. The newly added Articles 4 and 5 of the Interim Measures aim to promote the establishment of platforms, independent innovation, international interchange, and development of generative AI technology across several domains[13]. These measures also emphasize the need of subjecting AI to acceptable oversight. To achieve a more harmonious alignment between technology advancements and regulatory requirements, Article 21 of the legislation eliminates the rigorous provisions included in the Draft Measures, such as the imposition of penalties and termination of services in cases of noncompliance or violation[14]. Article 20 of the Interim Measures grants the Chinese authorities the authority to regulate the use of foreign

[10] Available at: https://www.loc.gov/item/global-legal-monitor/2023-04-25/china-provisions-on-deep-synthesis-technology-enter-into-effect/#:~:text= The%20deep%20synthesis%20provisions%20set,labeling%2C%20technical%20security%2C%20etc (accessed: 21.09.2023)

[11] Ibid.

[12] Available at: https://www.pwccn.com/en/industries/telecommunications-media-and-technology/publications/interim-measures-for-generative-ai-services-implemented-aug2023.html (accessed: 29.10.2023)

[13] Available at: https://www.chinalawtranslate.com/en/generative-ai-interim/ (accessed: 29.10.2023)

[14] Ibid.

generative AI platforms inside China same as domestic providers. Additionally, Article 23 establishes the structure for foreign investment in the Chinese generative AI industry.

2.1.2. Europe

While China is leading the way on the implementation of artificial intelligence acts, the European Union (hereinafter EU) has been working on more comprehensive and effective laws with the backbone General Data Protection Regulation (hereinafter GDPR). While the GDPR does not explicitly include "artificial intelligence" or other related terminology such as autonomous systems, intelligent systems, automated reasoning and inference, machine learning, or big data, it does encompass certain regulations that pertain to the field of AI[15]:

Article 4(1) on Personal Data and Identifiability of the GDPR presents issues on the use of artificial intelligence in the process of re-personalizing anonymous data that entails the identification of people associated with this data. Artificial intelligence has the capacity to deduce further personal information from existing data, thereby enhancing the potential for identifying individuals within the dataset.

Although the GDPR does not directly refer to AI, it does embrace the processing of personal data that is conducted using AI technology (Article 4(2) on profiling). The practice of profiling, that involves using data to draw conclusions about different facets of an individual, falls within the purview of GDPR compliance.

The GDPR places significant importance on the characteristics of permission, which include being freely provided, precise, informed, and clear (Article 4(11). The idea of "informational self-determination" is integral to conventional data protection frameworks, since it emphasizes the significance of consent in granting people the authority to manage their personal information.

The GDPR in Article 5(1)(b) establishes Purpose Limitation. The idea of purpose restriction creates a correlation between the intended objective of data processing and its legal foundation. AI technologies have the potential to pose a challenge to the purpose restriction requirement by facilitating the use of personal data for novel purposes that deviate from the initial objectives of data acquisition. The evaluation of the validity of repurposing

[15] Available at: https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)641530 (accessed: 01.11.2023)

data entails the examination of the compatibility between the new purpose and the original purpose.

The GDPR in Article 5(1)(d) stipulates that data must adhere to accuracy standards and be subject to frequent updates, accompanied by appropriate actions to address any mistakes. The notion of accuracy is also applicable in cases when AI systems use personal data to make conclusions about the individual, ensuring these inferences are derived from precise and reliable facts.

However, part of academics contends the GDPR may lack efficiency when applied to real AI technologies. They argue that achieving complete compliance from data controllers and processors utilizing such technologies is improbable, especially with regards to the right to information, the general principle of transparency, and the right to erasure [Kesa A., 2020: 68].

The Artificial Intelligence Act, initially proposed by the European Union in April 2021, represents a noteworthy advancement in the realm of AI legislation and governance within Europe[16]. The AI Act represents landmark legislation that establishes regulations for AI on a continental scale with the objective of guaranteeing ethical, transparent, and accountable deployment of AI technology, regarding which the EU Council and EU Parliament landed on a provisional agreement of implementation on December 9, 2023[17]. The act covers various AI applications, including facial recognition and deep learning algorithms. It establishes a thorough framework for assessing, certifying, and monitoring AI systems in the market. It also includes regulations on high-impact general-purpose AI models and requires a prior assessment of their impact on fundamental rights before their deployment. Due to the broad scope of AI implementation and its potential impact, the Act is expected to incur significant costs and apply to any entity that offers a product or service utilizing AI technology[18]. To guide AI and future development of them, EU's AI Act follows risk-based approach, categorizing types of AI systems into 4 risk categories[19]:

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[16] Proposal for a Regulation laying down harmonised rules on artificial intelligen ce. Available at: https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence (accessed: 01.04.2023)

[17] Available at: https://www.consilium.europa.eu/en/press/press-releases/2023/12/09/artificial-intelligence-act-council-and-parliament-strike-a-deal-on-the-first-worldwide-rules-for-ai/ (accessed: 13.12.2023)

[18] Available at: https://www.reuters.com/technology/what-is-european-union-ai-act-2023-03-22/ (accessed: 01.04.2023)

[19] 'Regulatory framework proposal on artificial intelligence-European Comm ission. Available at: https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai (accessed: 02.04.2023)

A) **Unacceptable risk**. Unacceptable risk AI systems are seen as a potential menace to individuals and will be prohibited. The techniques included are: Cognitive behavioral manipulation of individuals or targeted susceptible populations, social scoring, and real-time and remote biometric identification technologies, such as face recognition.

B) **High risk**. Applications concerning transportation, education, employment, and welfare. Companies are required to undergo a preliminary "conformity assessment" and fulfill a comprehensive set of criteria to guarantee the safety of the system.

C) **Limited risk**. AI systems must adhere to basic transparency standards to enable users to make well-informed choices. Upon engaging with the programs, the user may then choose their preference for continued use. This encompasses artificial intelligence systems that produce or alter visual, auditory, or audiovisual material, such as deep fakes.

D) **Minimal risk**. These applications are already extensively implemented and constitute the majority of the artificial intelligence systems we now engage with. Illustrative instances include spam filters, video games enhanced with artificial intelligence, and inventory-management systems.

The classification of AI systems into different risk categories is determined by certain criteria, including the intended purpose of the AI system, based on the level of potential harm associated with the system, its technological qualities, and its possible influence on the health, safety, and basic rights of individuals. These risk categories are designed to guide the level of regulatory scrutiny and oversight applied to different types of AI applications, ensure the responsible development and deployment of AI technologies, guarantee safety and fundamental rights, enable appropriate regulatory oversight, facilitate innovation, and provide legal charity within the EU.

The AI Act has been subject to criticism from certain factions due to its perceived level of prescriptions, which may impede innovation and introduce superfluous bureaucracy. In addition, experts posited that the recently developed AI chat bot, known as Chat GPT, and similar other applications, purportedly contravened the European Union's extensively formulated strategy for managing and overseeing such advanced software[20]. However, advocates of the AI Act contend that its implementation is imperative to safeguarding the fundamental rights of citizens and mitigating the potential misuse of AI systems for detrimental purposes[21].

[20] Available at: https://www.politico.eu/article/eu-plan-regulate-chatgpt-openai-artificial-intelligence-act/ (accessed: 03.04.2023)

[21] Available at: https://www.weforum.org/agenda/2023/03/the-european-union-s-ai-act-explained/ (accessed: 03.04.2023)

2.1.3. Africa

Similar to the European Union, the African Union (AU) has been collaborating with its 55 constituent states to promote governance throughout the African continent. Within the continental framework the AU has successfully established a working group on artificial intelligence, formulated a blueprint specific to Africa for the regulation of AI, ratified Resolution 473, and adopted the Malabo Convention to address the potential impact of AI on human rights and safeguard personal data.

The Malabo Convention, the only binding regional treaty of privacy and personal data protection outside the European continent, came into force in June 2023, nine years later after its approval in 2014[22]. It is a comprehensive convention that aims to establish a set of overarching regulations and principles pertaining to three main areas: the protection of personal data, electronic commerce, and cyber-security and cybercrimes within the continent introducing several fundamental rights for individuals whose data is being processed, including the right to be informed, the right to access their data, the right to object, and the right to have their data erased, as outlined in Articles 9-23 of the Convention. Despite being a pioneering framework for the African continent, scholars contend that the Malabo Convention lacks precision regarding its applicability to data processors or controllers located outside the continent[23]. In contrast, the EU's GDPR addresses such scenarios, specifically when processing activities are connected to: (i) providing goods or services to individuals within the European Union; or (ii) monitoring their behavior within the Union [Ryngaert C., 2020: 114].

Furthermore, African countries have the opportunity to use the Smart Africa Blueprint on Artificial Intelligence in order to formulate and implement their own AI initiatives. The Blueprint is an integral component of the Smart Africa Initiative. It serves as a framework for the establishment of an AI strategy, highlighting essential factors and considerations to be taken into account during its formulation[24]. The Blueprint outlines the significant opportunities and challenges associated with the advancement

[22] African Union Convention on Cyber Security and Personal Data Protection. Available at: https://au.int/en/treaties/african-union-convention-cyber-security-and-personal-data-protection (accessed: 21.09.2023)

[23] Available at: https://www.ejiltalk.org/the-african-unions-malabo-convention-on-cyber-security-and-personal-data-protection-enters-into-force-nearly-after-a-decade-what-does-it-mean-for-data-privacy-in-africa-or-beyond/ (accessed: 07.10.2023)

[24] Available at: https://smartafrica.org/knowledge/artificial-intelligence-for-africa/ (accessed: 10.10.2023)

and utilization of AI in Africa, along with strategies to effectively address them. Furthermore, it provides specific policy recommendations aimed at maximizing the potential benefits of AI while minimizing associated risks in African nations.

Moreover, despite AU's concerted efforts, member states have yet to demonstrate adequate attention to regulating artificial intelligence at the domestic level. A recent study indicates that a mere 2% of AU members have enacted AI legislation to a limited extent, while only 7% have established a national strategy, expert bodies, and national planning for AI [Davis T., 2022: 10].

2.1.4. The United States

Recent developments in AI laws and regulations in the United States seek to strike a balance between the advantages of AI technology and the potential risks to privacy, security, and fairness.

The National AI Initiative Act of 2020 passed on January 1, 2021 represents a noteworthy advancement in AI regulation within the United States. This legislation entails the implementation of a comprehensive initiative throughout the entirety of the federal government with the aim of expediting research and utilization of artificial intelligence for the betterment of the nation's economic well-being and safeguarding its security interests[25]. The National AI Initiative Act established the National AI Initiative, with the aim of enhancing and consolidating AI research, development, demonstration, and education endeavors across all governmental departments and agencies in the United States[26]. While the law lauds the "continued leadership in artificial intelligence research and development" of the United States, its primary goal is not to regulate the research and implications of AI applications.

The AI Risk Management Framework (hereinafter RMF), developed by National Institute for Standards and Technology (hereinafter NIST), authorized by the Congress, is a comprehensive set of risk management procedures specifically designed for AI applications[27]. It aims to gather knowledge and provide direction without imposing strict rules. Even going

[25] Available at: https://www.congress.gov/bill/116th-congress/house-bill/6216/text (accessed: 04.04.2023)

[26] Available at: https://www.orrick.com/en/Insights/2021/11/US-Artificial-Intelligence-Regulation-Takes-Shape (accessed: 06.04.2023)

[27] Available at: https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf (accessed: 18.12.2023)

so far as to suggest that users tailor the RMF to their own requirements and employ just portions of it, NIST makes very clear that the RMF is entirely optional.

The AI in Government Act of 2020 was a legislative proposal presented in the House of Representatives during the 116th Congress. Although the bill was approved by the House on September 14, 2020, it did not get any further and eventually failed to be enacted into law[28]. While the Act did not pass legislation, it initiated significant deliberations on the conscientious advancement and use of AI in the public domain. Certain aspects of it have been integrated into other executive orders and policies.

The primary objective of the Advancing American AI Act of 2022 is to foster the growth and use of AI in a manner that is consistent with core US principles like safeguarding privacy, upholding civil rights, and protecting civil liberties[29]. It was first introduced in the Senate in April 2021 and went through various stages of deliberation before being incorporated into the National Defense Authorization Act for Fiscal Year of 2023, effectively entering into force on December 23, 2022, with a grace period[30]. Nevertheless, similar to any other legal framework, this act has some vulnerabilities, including a deficiency in clearly defining U.S. principles and regulations, a narrow concentration only on public procurement, a restricted reach, and the potential for bureaucratic complexity.

Apart from the federal initiatives, a number of states in the United States have implemented their own regulations pertaining to AI. In October of 2019 the state of California has enacted a comprehensive consumer privacy law known as the California Consumer Protection Act. The legislation was subsequently expanded to the California Privacy Rights Act in 2020 and came into force on January 1, 2023[31]. The state of Virginia has recently enacted the Virginia Consumer Data Protection Act, which has been implemented alongside the CPRA as of January 1, 2023[32]. Both of these legislative measures incorporate provisions pertaining to the utilization of AI and machine learning, as well as the protection of user data associated with

[28] Available at: https://www.congress.gov/bill/116th-congress/house-bill/2575/text (accessed: 19.12.2023)

[29] Available at https://www.congress.gov/bill/117th-congress/senate-bill/1353/text/is (accessed: 20.12.2023)

[30] Available at: https://digitalpolicyalert.org/change/4281-advancing-american-ai-act-s1353 (accessed: 23.12.2023)

[31] Available at: https://cppa.ca.gov/regulations/ (accessed: 23.12.2023)

[32] Available at: https://law.lis.virginia.gov/vacodefull/title59.1/chapter53/ (accessed: 23.12.2023)

these technologies. Several other states, namely Alabama, Colorado, Connecticut, Illinois, Indiana, Kentucky, Massachusetts, Mississippi, New York, and Vermont have enacted laws or regulations associated with different facets of AI, encompassing data privacy, safeguarding consumer interests, and the employment of AI systems by the government[33].

Additionally, the federal government has set up a number of organizations to manage AI research, development and rollout. NIST's approach to risk management in AI systems, for instance, includes recommendations for ensuring high-quality data, clear explanations, and equitable outcomes[34]. The Federal Trade Commission has created a specialized department that is responsible for scrutinizing and implementing policies concerning AI and other nascent technologies with the primary objective of curbing fraudulent and inequitable practices. The Artificial Intelligence Capabilities and Transparency Act that was enacted into law in December 2021, seeks to enhance transparency in the government's AI systems, in accordance with the recommendations of the National Security Commission on AI [35].

Furthermore, both the current and preceding U.S. presidents have issued several executive orders to govern and advance AI. The primary focus of attention has been on these orders, including Executive Order 13859, Executive Order 13960, OMB Memo M-21-06, the Blueprint for an AI Bill of Rights (2022), and Executive Order 14091[36]. Nevertheless, these directives have faced significant criticism from academics who characterize them as yet another instance of an "ineffective" U.S. AI strategy, contending that they are incapable of establishing any official U.S. policy[37].

Apart from the regulations imposed by the federal and state authorities, there exist several industry-specific guidelines and initiatives concerning AI. The Partnership on AI is a collaborative consortium comprising various entities such as corporations, academic institutions, and non-governmental organizations, with the objective of formulating optimal guidelines for artificial intelligence systems that are characterized by ethical, open, and trust-

[33] Available at: https://www.brookings.edu/blog/techtank/2023/03/22/how-california-and-other-states-are-tackling-ai-legislation/ (accessed: 09.04.2023)

[34] Available at: https://www.nist.gov/news-events/news/2023/01/nist-risk-management-framework-aims-improve-trustworthiness-artificial (accessed: 10.04.2023)

[35] Available at: https://www.congress.gov/bill/117th-congress/senate-bill/1705/text?r=82&s=1 (accessed: 23.12.2023)

[36] Available at: https://carnegieendowment.org/2023/05/03/reconciling-u.s.-approach-to-ai-pub-89674 (accessed: 20.12.2023)

[37] Available at: https://www.wired.com/story/bidens-ai-bill-of-rights-is-toothless-against-big-tech/ (accessed: 20.12.2023)

worthy attributes. The IEEE Global Initiative on Ethics of Autonomous and Intelligent Systems is a program that seeks to advance the ethical and responsible development and deployment of AI[38].

2.1.5. Brazil

Brazil's legal framework governing AI encompasses several regulations, including the Civil Framework for the Internet, the Consumer Protection Code, and the Access to Information Law[39]. Furthermore, Brazil has implemented a nationwide AI strategy, Brazilian Strategy for Artificial Intelligence ("EBIA") with the objective of promoting research and innovation in the field while simultaneously ensuring ethical utilization of the technology. The EBIA is derived from the five principles outlined in the OECD AI Principles, which are [Filgueiras F., 2023: 2]: (i) promoting inclusive growth, sustainable development, and well-being; (ii) prioritizing values centered on human beings and equality; (iii) ensuring transparency and explanation; (iv) emphasizing robustness, security, and protection; and (v) enforcing responsibility.

Bill 21/20 marked a significant milestone in Brazil as the first legislation specifically targeting AI. It has introduced a decentralized approach to AI regulation, emphasizing that regulation should be the exception rather than the norm which each economic sector would be responsible for regulating AI applications within its domain[40]. For instance, the federal agency overseeing the healthcare sector would regulate AI applications in that particular field. Although the Act was supported by the private sector and passed by the Brazilian Congress, it was not implemented because the Brazilian Senate decided to form a Commission of Jurists to propose a new bill instead of voting on it. This decision was made due to serious concerns that the act would weaken the legal protections provided in Brazil and have negative impacts on fundamental rights such as data protection, freedom of expression, and equality [Belli L., 2023: 48]. The Act also fails to address the risks associated with artificial intelligence, while allowing for the development, commercialization, and operation of systems that are not reliable and human-centered.

[38] Available at: https://standards.ieee.org/industry-connections/ec/autonomous-systems/ (accessed: 12.04.2023)

[39] Available at: https://www.informationpolicycentre.com/brazil-ai-project.html (accessed: 13.04.2023)

[40] Available at: https://cyberbrics.info/non-official-translation-of-the-brazilian-artificial-intelligence-bill-n-21-2020/ (accessed: 22.12.2023)

This situation puts Brazil at risk of becoming a platform for irresponsible individuals to violate rights and freedoms without facing any consequences. With all these going on, researchers express concern over Brazil's current status in the field of AI, however, the Brazilian Senate has recently released a comprehensive report spanning 900 pages, outlining recommendations for the regulation of AI tools in response to the emergence of the Chat GPT-like AI phenomenon[41].

2.1.6. Australia

In November 2019 the Australian Government has unveiled the AI Ethics Principles, which comprise a framework of directives designed to promote ethical, transparent, and accountable development and implementation of AI technology within the country[42]. In accordance with the AI Standards Roadmap of 2020, Australia endeavors to establish itself as a prominent nation in the advancement and implementation of artificial intelligence, despite the absence of a specialized legislative framework pertaining to AI, Big Data, or any variant of automated decision-making instruments yet today "at the back of the pack" in regulating AI[43].

2.2. Artificial Intelligence Regulations by OECD

The Organization for Economic Cooperation and Development (hereinafter OECD) has formulated a comprehensive Framework for the Classification of AI Systems. This framework serves as a valuable tool for policy makers, regulators, legislators, and other stakeholders to evaluate the potential benefits and drawbacks associated with various categories of AI systems. It also aids in the development of informed AI policies. The OECD Principles on Artificial Intelligence have introduced a novel framework that categorizes AI applications based on their potential impact on individuals, society, and the planet[44]. Additionally, the AI system's lifecycle serves as a complementary structure to comprehend the fundamental technical features of a system[45].

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[41] Available at: https://brazilian.report/tech/2023/03/21/ai-regulation-brazil/ (accessed: 13.04.2023)

[42] Available at: https://www.industry.gov.au/publications/australias-artificial-intelligence-ethics-framework (accessed: 13.04.2023)

[43] Available at: https://www.theguardian.com/australia-news/2023/nov/07/australia-ai-artificial-intelligence-regulations-back-of-pack (accessed: 27.12.2023)

[44] Available at: https://oecd.ai/en/ai-principles (accessed: 27.12.2023)

[45] A First Look at the OECD's Framework for the Classification of AI Systems, Designed to Give Policymakers Clarity. Available at: https://oecd.ai/en/wonk/a-first-

The Classification of AI Systems is founded on a four-fold classification system that partitions AI systems into dimensions, namely Context, Data and Input, AI Model, and Task and Output[46]. Each dimension of an AI system possesses distinct properties and attributes, including sub-dimensions that are pertinent to evaluating policy considerations specific to that system. As per the data for 2022, no less than 60 countries across the globe have implemented certain forms of artificial intelligence policies. It has been made possible, in part, due to the efforts of the OECD, as over 40 countries have adhered to the OECD's framework[47].

3. AI Regulation in South Asian Countries

South Asia comprises eight countries, namely India, Pakistan, Bangladesh, Afghanistan, Nepal, Sri Lanka, Bhutan, and the Maldives situated in the Southern region of the Asian continent. With a population exceeding two billion, South Asia stands as the most densely populated region globally. According to Oxford Insights' *Government AI Readiness Index* of 2022 based on how the three main indicators: (i) Government; (ii) Technology; and (iii) Data & Infrastructure are prepared to adapt AI tools, every South Asian country is below the global average except for India. It has a sense now to examine the measures being taken by South Asian nations to govern the implementation of artificial intelligence within their respective jurisdictions:

3.1 India

Although the Indian government issued various reports and policy documents, such as NITI Aayog's Responsible AI for All delineating the parameters regarding the utilization, accountability, and responsibility of AI-driven technologies, there is currently no codified legislation, statutory regulations, or official governmental directives that specifically govern the use of AI in India[48]. The Digital Personal Data Protection Bill enacted in 2022 may serve as a supplement to the protection of AI data, despite

look-at-the-oecds-framework-for-the-classification-of-ai-systems-for-policymakers (accessed: 14.04.2023)

[46] OECD Framework for the Classification of AI Systems. Available at: https://www.oecd-ilibrary.org/science-and-technology/oecd-framework-for-the-classification-of-ai-systems_cb6d9eca-en (accessed: 14.04.2023)

[47] Ibid.

[48] Available at: https://www.niti.gov.in/sites/default/files/2021-08/Part2-Responsible-AI-12082021.pdf (accessed: 28.12.2023)

receiving mixed reviews domestically and internationally[49]. Furthermore, the Digital Health Laws and Regulations Report of 2023 encompasses a range of subjects, including the exclusive employment of AI and machine learning in the medical industry[50]. On Oxford Insights' AI Readiness Index 2022, India placed 32 out of 181 countries.

3.2 Pakistan

The Pakistani government is focused on using the most recent technologies rather than taking any steps to regulate artificial intelligence. A national task group is established by the Pakistan's Ministry for Planning, Economic and Special Initiatives to create a 10-year framework for accelerating the use of AI in the commercial, economic, government, educational, and healthcare sectors[51]. The Prevention of Electronic Crimes Act of 2016 ("PECA") with the Personal Data Protection Bill of 2021 may partially be enacted in severe odds to regulate AI in Pakistan[52]. Pakistan ranks 90th in the AI Readiness Index for 2022.

3.3 Bangladesh

The ICT Division of Bangladesh has released a revised and updated version of 2020's National Strategy for Artificial Intelligence Bangladesh in 2023, highlighting the potential positive effects of AI on the country's economy, education, agriculture, and trade[53]. Moreover, the paper briefly discusses the urgency of implementing a policy and a legal framework. The nation has not implemented any particular legislation or regulatory measures, nor has it undertaken any proactive steps to regulate the aforementioned technology. Bangladesh occupies the 80th position in Oxford Insights' AI Readiness Index 2022.

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[49] The Digital Personal Data Protection Bill. 2022. Chapter 1. Available at: https://www.meity.gov.in/writereaddata/files/The%20Digital%20Personal%20Data%20Protection%20Bill%2C%202022.pdf (accessed: 28.12.2023)

[50] Available at: https://iclg.com/practice-areas/digital-health-laws-and-regulations/india (accessed: 15.04.2023)

[51] Available at: https://gulfnews.com/world/asia/pakistan/pakistan-forms-task-force-to-accelerate-ai-adoption-drive-economic-growth-1.95143892# (accessed: 16.04.2023)

[52] Available at: https://moitt.gov.pk/SiteImage/Misc/files/25821%20DPA%20Bill%20Consultation%20Draft(1).pdf (accessed: 29.12.2023)

[53] National Strategy for Artificial Intelligence. Bangladesh. Available at: https://ictd.portal.gov.bd/sites/default/files/files/ictd.portal.gov.bd/page/ 6c9773a2_7556_4395_bbec_f132b9d819f0/Draft%20-%20Mastering%20National%20Strategy%20for%20Artificial%20Intellgence%20-%20Bangladesh.pdf (accessed: 29.12.2023)

3.4 Afghanistan

Based on the sources available, it appears that the Afghan government has not implemented any discernible policies, frameworks, or strategies that involve artificial intelligence. Afghanistan's ranking in terms of AI readiness is the lowest globally (181th position).

3.5. Nepal

The Nepali government's Digital Nepal Framework passed in 2019 is a five-year initiative that incorporates the adoption and development of artificial intelligence (AI) in Nepal[54]. However, there has been no indication that the government has taken any legislative measures to regulate AI in Nepal. Nepal is positioned at 139 on the Oxford Insights AI Readiness Index 2022.

3.6. Sri Lanka

In 2019 the Sri Lanka Association of Software and Services Companies ("SLASSCOM") has introduced a national policy framework for AI in Sri Lanka, with the aim of encouraging the implementation and adoption of AI within the country[55]. Currently, there is a dearth of information regarding any efforts to establish regulatory frameworks for AI. Sri Lanka's AI readiness rank is 105.

3.7. Bhutan

Despite the absence of any explicit legislation or regulation dealing with AI in Bhutan, the Information, Communications and Media Act of Bhutan of 2018 encompasses a broad spectrum of subjects, including media ownership and management, content regulation, cyber-security, data protection, and access to information. This legal framework may be employed to govern the deployment of AI within a circumscribed domain in the country[56]. Bhutan is ranked 99 in Oxford Insights' AI Readiness Index 2022.

3.8. The Maldives

Maldives is extensively working on importing and developing AI technologies in the country, but the smallest country in this region lacks any

[54] Available at: https://nepalindata.com/media/resources/items/15/bEN_Digital_Nepal_Framework_V7.2March2019.pdf (accessed: 17.04.2023)

[55] Available at: https://www.ft.lk/Front-Page/SLASSCOM-launches-Sri-Lanka-s-first-AI-policy-framework/44-680805 (accessed: 18.04.2023)

[56] Available at: https://www.bicma.gov.bt/bicmanew/data/publications/act/BICM_Act_2018_English.pdf (accessed: 26.12.2023)

established regulations, policies, or legal frameworks specifically designed to govern and regulate AI. The island nation was ranked 121 in Oxford Insights' AI Readiness Index.

4. Discussion

South Asia is vast. The region is responsible for nearly 11.5% of the global Gross Domestic Product (GDP) and represents 25% of the world's population as of 2022 data. Again, the literacy rate in the South Asian region was recorded at 73.28%, which stands far below the global average of 86.80%, but AI tools are likely to be used on everybody equally, which is very likely to create an abnormal situation because illiterate people are not as aware of safeguarding personal data as literate people.

The potential for religious bias in social media AI algorithms [Ashraf C., 2022: 777] and the likelihood of deep fakes spreading hoaxes are significant concerns in South Asia[57]. Given the sensitivity of the region's population to religious beliefs, historical evidence suggests that such phenomena could have devastating consequences, potentially resulting in the loss of thousands of lives.

Due to the aforementioned reasons, it is imperative that the regulation of artificial intelligence in the South Asian region be given priority. However, there is a noticeable lack of promising efforts by these countries to establish effective laws and regulations for the proper regulation, control, and maintenance of AI. However, it is evident from the legislative review mentioned earlier that developed and economically prosperous nations have formulated laws covering AI and have successfully implemented them.

According to the *Government AI Readiness Index* by Oxford Insights, the 30 highest-ranking countries exhibit a greater GDP per capita compared to those ranked lower, particularly in comparison to countries in South Asia. The countries and organizations taken for comparison in this paper above show the same. In 2022 the European Union members exhibited an average GDP per capita of $38,411, while the Maldives recorded the highest GDP per capita of $15,883 in all the South Asia[58]. Again, none of the South Asian countries are members of the OECD, an intergovernmental organization for economic cooperation among "elite-class" countries. As mentioned

[57] Available at: https://www.scmp.com/week-asia/politics/article/3255388/indias-politics-descends-ai-arms-race-deepfakes-threaten-elections-and-theyre-not-only-ones-risk (accessed: 15.03.2024)

[58] Available at: https://www.cbs.nl/en-gb/news/2023/16/dutch-gdp-per-capita-ranks-fourth-in-the-eu (accessed: 19.04.2023)

above, OECD has proposed a very effective regulatory framework that can work as mainframe for any country's AI regulatory initiative.

As a result, an unwanted and unavoidable legal inequality in South Asia because most of the AI tools are used globally by international tech giants and multinational behemoths, but those tools are not regulated in this region, which may lead to legal discrimination and put billions of people in a grave technological and privacy nightmare. E.g., the current AI phenomenon differs significantly from previous technological revolutions, such as the Internet. Unlike the Internet revolution, which allowed thousands of start-ups to emerge from scratch, the AI revolution requires more capital than creative ideas. During the AI revolution, innovation and successful implementation have become increasingly expensive, leading to a concentration of power among tech giants like Google, Microsoft, Apple, Meta, Amazon, and others[59]. Again, South Asian countries have an enormous potential for developing AI technologies on their own, primarily through already-established domestic tech corporations and start-ups. However, these new AI applications will also need to be controlled.

The lack of successful development of AI laws in South Asian governments can be attributed to various reasons, which have resulted in legislative deficiencies in this region.

4.1. Definition of AI

Similar to the Internet and other comparable technologies, the definition of artificial intelligence exhibits a diverse and relative nature that varies across different regions. The challenge of regulating AI arises from the difficulty that lawmakers face in formulating a universally applicable definition of this technology, even within a given jurisdiction [Shchitova A.A., 2020: 616]. For instance, the definition that is deemed appropriate for Europe or America may not be applicable to other regions of the world, such as the Middle East or South Asia.

4.2. Types of Laws and Regulations Required

The regulation of the rapid and concerning growth of artificial intelligence has revealed current laws are inadequate in governing AI due to their focus on human conduct and behavior, rather than that of intelligent machines. The varying definitions of AI necessitate distinct regulatory and le-

[59] Available at: https://www.politico.com/newsletters/digital-future-daily/2023/03/22/ai-might-have-already-set-the-stage-for-the-next-tech-monopoly-00088382 (accessed: 19.04.2023)

gal frameworks to comprehensively encompass artificial intelligence tools within legislative measures. Furthermore, implementation of artificial intelligence technologies varies across industries and nations, necessitating the development of distinct regulatory frameworks.

4.3. Design of AI Itself

Contemporary AI programs that rely on machine learning algorithms capable of acquiring knowledge from data lie at the highly adaptable spectrum. In contrast to rule-based AI, this type of AI would analyze numerous chess games and dynamically identify patterns to inform its moves. Additionally, it would develop its own scoring algorithm[60]. In the context of this particular AI, there exists a lack of predetermined guidelines pertaining to the resolution of the given problem. Instead, the guidelines solely pertain to the process of acquiring knowledge from data. In contrast to conventional engineering systems, the behavior of AI systems cannot be guaranteed by developers. In contrast to traditional automobiles that were manufactured with a predictable functionality, the emergence of self-driving cars, as well as chatbot Chat GPT and AI image generators such as Midjourney and Dall-E, has introduced a level of uncertainty for developers regarding the performance of their algorithms in various scenarios[61]. And the inability to fully comprehend the complete attributes and anticipate the actions of artificial intelligence has given rise to the concept of the "AI Black Box".

4.4. Insufficient Number of Experts and Infrastructure

A primary factor contributing to inadequate laws and regulations regarding artificial intelligence in South Asia is the insufficient number of experts within legislative bodies who possess a comprehensive understanding of AI's design, characteristics, and societal implications. The complexity of AI programs necessitates a highly sophisticated understanding of their mechanisms, which poses a challenge to the development of effective laws and regulations governing the field.

4.5. Economic Impediments

As it was previously mentioned, South Asian nations exhibit comparatively weaker economic conditions in contrast to their counterparts who have already established legal frameworks and regulations for artificial in-

[60] Available at: https://www.popsci.com/artificial-intelligence-takes-chess-beyond-brute-force/ (accessed: 19.04.2023)

[61] Available at: https://fortune.com/2023/04/03/how-to-regulate-ai-challenges-three-experts/ (accessed: 21.04.2023)

telligence. Consequently, various sectors, such as the judiciary and parliament, are allocated a relatively lower budget compared to other sectors, impeding any innovative endeavors such as the regulation of artificial intelligence.

4.6. Inadequate Research

The manifestation of economic barriers hinders the progression of social research. Research sheds light on contemporary society, individuals, and their perspectives on various topics. The scarcity of research on the impact of artificial intelligence on the populace of this area poses a challenge in comprehending the issue and formulating regulatory frameworks for policymakers.

4.7. Lack of Inter-governmental Cooperation

It is evident that nations with constrained resources, who are affiliated with intergovernmental and regional establishments such as the EU, AU, and OECD, have exhibited greater proficiency in formulating and executing AI regulations in comparison to other countries. The South Asian Association for Regional Cooperation (SAARC), an inter-governmental organization, was established with the aim of promoting regional development through government agreements. South Asian countries could use SAARC to develop an AI governance framework but the persistent conflict between India and Pakistan has hindered SAARC's success, despite its initial promise as a beacon of hope for the region. In the absence of several economic treaties, the states in question lack consensus on matters pertaining to the judiciary, policing, and technology.

In the present complex geopolitical climate, the decision of a nation to pause its development of artificial intelligence may create an opportunity for another nation to advance. However, the South Asian region is currently trailing behind in terms of both AI implementation and regulation. This situation is expected to significantly impede the region's ability to adapt to the fourth industrial revolution, as AI is widely recognized as a crucial driving force in the industry both presently and in the future.

5. Recommendations

The regulation of artificial intelligence is a multifaceted and intricate subject that requires examination of ethical, legal, and technological dimensions, all of which are becoming more stringent due to the aforementioned factors. World leaders and experts are advocating for the self-regulation of

AI technology by their developers. For instance, the Biden administration in the US has granted firms the flexibility to voluntarily enforce safety and security measures, and the South Asian may follow this step in certain sectors where low risk applications are involved. In July 2023, the White House disclosed that a number of AI manufacturers like Amazon, Anthropic, Google, Inflection, Meta, Microsoft, and OpenAI, have committed to implementing self-regulatory measures for their systems[62].

However, self-control alone is insufficient. Limits, such as regulations, need well-rounded, evidence-based advice from governments, academic institutions, and civil society. This leads us to our last option, government-enforced rules and legislation. The Centre for Information Policy Leadership ("CIPL") researchers have put up 10 so far optimal universal recommendations that are also instructive in South Asian nations. The recommendations propose[63] the following provisions.

5.1. Flexible and Adaptable Framework

An elastic and versatile framework had to be established, which would delineate the desired results rather than dictating the specific methods to get them. In order to be efficient, legislation regarding AI must possess the ability to stay up-to-date as technology and applications progress. Rules should be impartial towards technology and should be founded on principles and desired results.

5.2. Risk-based Approach

Implementing a risk-based regulatory strategy for AI that takes into account risks and rewards comprehensively would provide businesses a set of criteria to evaluate the probability and severity of potential damage, as well as the necessary actions to minimize it.

5.3. Building on Legal Framework and Refurbishing Legislations

An AI regime that is flexible and adaptive should be based on current legal frameworks. By depending on these frameworks as much as possible, the possibility of introducing overlapping or contradictory laws is reduced.

[62] Available at: https://www.nytimes.com/2023/07/21/us/politics/ai-regulation-biden.html (accessed: 24.12.2023)

[63] Available at: https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_ten_recommendations_global_ai_regulation_oct2023.pdf (accessed: 24.12.2023)

This, in turn, minimizes legal ambiguity and ensures consistent safeguards. Given the economic and judicial obstacles, South Asian countries have the potential to modify their existing legal systems to include the governance of artificial intelligence. This would eliminate the need of implementing expensive and wholly new laws in each individual country.

5.4. Empowering Individuals through Transparency, Explainability and Mechanism for User Feedback and Redress

The notion of individual empowerment is fundamental to effective privacy legislation, and this principle also applies to AI. The CIPL's recommendation report emphasizes the need for regulations, co-regulatory frameworks, and industry practices to ensure that AI is reliable and beneficial for everyone. To achieve this, developers and deployers of AI should provide transparency that is suitable for the situation and meaningful. This transparency should include information about the inputs and operations of AI systems, while also safeguarding privacy, data protection, security, safety, and trade secrets. Explainability, as a component of transparency, serves as a mechanism to enhance accountability and foster confidence. Developers and deployers must provide comprehensive explanations of the influence of AI systems on decision-making and outcomes that affect humans. They should consider the trade-offs, such as the balance between explanation and security/safety, as well as explanation and accuracy.

5.5. Making Demonstrable Organizational Accountability

Organizations should be able to show that they are using accountability frameworks and governance programs that provide them the means to comply with all applicable laws and other standards in order for regulations to promote accountability in the larger ecosystem.

5.6. Accountability on AI Governance

To ensure AI is held accountable, stakeholders should collaborate with policymakers and regulators to create frameworks and tools. In addition to meeting basic legal and regulatory requirements, businesses should be incentivized to establish accountability frameworks that help them stand out, build confidence in their data practices, and ultimately generate value. Several methods may improve AI governance accountability[64]: First, using

[64] Incentivizing Accountability: How Data Protection Authorities and Law Makers Can Encourage Accountability. Available at: https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_accountability_paper_2__incentivising_accountability__how_data_protection_authorities_and_law_makers_can_encourage_accountability.pdf (accessed: 25.12.2023)

proven or verified accountability to mitigate enforcement actions and determine consequences or fines may encourage responsible conduct. Second, giving responsible organizations a "license to operate" to create and use AI models ethically may promote ethics. Increasing data utilization in AI initiatives for proven socially useful research, subject to thorough risk assessments and accountability program management, may also boost innovation. Buying AI systems accredited to responsible AI standards helps assure ethical deployment. Finally, requiring public procurement projects to show AI responsibility encourages contractors to get responsible AI certification, promoting responsible AI research and deployment.

5.7. Ensuring Liability

Assigning responsibility in the context of AI legislation might be challenging in theory but should primarily go to the entity most directly responsible for causing the damage. Developers, deployers, end users, or a mix of the three might be held liable in certain situations. Systems that have not been adequately vetted for possible hazards or that have given users deceptive indicators about their capabilities may rightfully be held accountable by developers.

5.8. Establishing Unity and Collaboration among Governing Agencies

A new, all-encompassing AI regulator will lead to regulatory overreach, duplication, inconsistency, and a lack of legal clarity; hence, it is not necessary for proper AI governance. The CIPL has called for the establishment of a central government coordination body to help settle these disagreements by establishing broad AI policies and objectives that would apply to all industries and sectors and by easing the process of regulatory alignment, coordination, and joint action among various regulatory agencies. Regulators may find a forum in the coordinating body to debate the relative merits of various policy goals, including topics such as security, privacy, productivity, efficiency, and fairness. It may also make it clear who to ask for advice in certain AI development and deployment scenarios.

5.9. Facilitating Continuous Innovation in Regulations

New kinds of artificial intelligence technologies are developing at a rapid pace, so regulators, regulatory techniques, and tools must also adapt. Regulators must improve their skills, capacities, and operations in a world with competing and multiple interests if they are to stay up. Furthermore, in a society empowered by digital technologies and AI, the conventional meth-

ods of supervision that rely on ex post enforcement may not be enough. Regulators, to be strategic and successful, should adopt a risk-based strategy. To effectively oversee the regulation of emerging technologies like AI, innovative regulatory methods like sandboxes and policy prototyping might be useful[65].

5.10. Aiming for Worldwide Compatibility

It is evident that no country can adequately handle AI policy and regulation on its own, considering the transnational character of AI technology, including the data it utilizes for training, R&D, computer infrastructure, and cross-border applications. The continuous assessment and mitigation of emerging hazards, as well as the reliability of AI for people and societies throughout the world, depend on international cooperation. Nations in South Asia may look to the OECD and the European Union for assistance as well as to China, Japan, and the U.S. for collaboration, as these regions have established strong laws on artificial intelligence. Moreover, it has been observed that initiatives undertaken at the organizational level tend to be more efficient and effective than those at the domestic level as it has been experienced in the case of EU, AU, and OECD, particularly in the development of frameworks and drafts. Government-to-Government (G2G) collaborative agreements, both bilateral and trilateral in nature, may present an additional avenue for resolution given the significant commonalities among South Asian nations. Thus, this article suggests that the south Asian nations, who have not yet enacted any legislation to oversee or regulate artificial intelligence, should leverage their regional organization SAARC to interact with each other in terms of infrastructure, funding, and expert pool.

Though CIPL is an outstanding set of recommendations, the CIPL researchers overlooked a crucial aspect: AI rules should not impede the development and exploration of new AI tools and applications. It is imperative that regulators remember: Despite the need to regulate this remarkable technology, it is essential to continue developing it in order to improve standards and security, and South Asian regulators also need to focus on this crucial aspect.

[65] Regulatory Sandboxes in Data Protection — Constructive Engagement and Innovative Regulation in Practice. Available at: https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_white_paper_on_regulatory_sandboxes_in_data_protectionconstructive_engagement_and_innovative_regulation_in_practice__8_march_2019_.pdf (accessed: 25.12.2023)

Conclusion

The increasing prevalence of AI in our daily lives has raised significant concerns regarding the regulation of its deployment and utilization. This study conducts a comparative analysis of the regulatory landscape governing AI in South Asia vis-à-vis China, the United States, the European Union, Africa, Brazil, and Australia. Although several regions have made strides in the development of regulatory frameworks for artificial intelligence, South Asia remains comparatively underdeveloped in this regard. The South Asian region faces significant challenges arising from inadequate governmental oversight and standardization, which include potential exploitation of artificial intelligence, ethical considerations, and insufficient public trust. With the discussions and studies mentioned above, it is clear that AI has left a legal void in the South Asian region. Therefore, the paper proposes that South Asian nations adopt a cooperative and forward-thinking strategy towards the regulation of artificial intelligence, which could involve establishing partnerships among governmental bodies, commercial enterprises, and non-governmental organizations. Depending on the current situation, more studies must be conducted on the role of the United Nations in drawing up the AI regulatory framework and ensuring that it is followed by member states so that cross-border crimes may be prevented and privacy can be safeguarded in every corner of the planet.

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