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# KAZAN UNIVERSITY LAW REVIEW

ARTICLES



COMMENTARIES



• ПРОСПЕКТ •

# KAZAN UNIVERSITY LAW REVIEW

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**Dear readers,**

I would like to present for your attention the third regular issue of the journal "Kazan University Law Review" in 2020.

The issue you are holding now has articles on vital questions of theory and practice of Russian and foreign law.

The issue starts with the article by Dr. hab. of the Faculty of Law and Administration of the University of Warsaw Robert Jastrzębski «The Significance of the Polish Code of Obligations of 1933 for European history of law». In this article, the author presents the activity of the Polish Codification Commission, paying a special attention to the participation of its members in the drafting of the Polish Code of Obligations of 1933, and to the fact that its authors based their rules on legal decisions concerning the law of obligations in France, Austria and Germany. They also used the French-Italian draft of the law of obligations of 1927 and the Russian draft of 1913.

The issue is continued by the article by three skilled researches from Moscow and Kazan: our colleague from Moscow, Doctor of Legal Science, Professor of the Kutafin Moscow State Law University Aleksei Rarog, and Doctor of Legal Science, Scientific Supervisor of the Faculty of Law, Professor Ildar Tarhanov, Candidate of Legal Science, Associate Professor of the Ramil Gayfutdinov from Kazan (Volga region) Federal University, titled «The main concepts of guilt and the particularities of their representation in Russian criminal law». The author argues that the Guilt is a criminal law concept and therefore has psychological, social and legal (criminal law) content. In Russian Criminal Law, it is usually considered within the framework of its social and psychological interpretation. At the same time, echoes of the other two concepts can be found, for example, in the interpretation of negligence as a form of guilt and criminal responsibility for taking the highest position in the criminal hierarchy due to the fact that certain elements of external assessment (normative concept) and subjective imputation can be seen in the construction of these rules by the legislator.

I am very pleased to introduce the research of Anatoly Levushkin Doctor of Legal Sciences, Professor of the Department of Business and corporate law of the Moscow State Law University: «Civil law regulation and protection of genes and

genomic technologies: problems of theory and practice». The author analyzes some areas of civil regulation of genomic technologies in modern Russia, the qualification of genes and genomes as objects of civil relations, the turnover of genes and genetic structures.

The "Commentaries" section has interesting article: Olga Romanovskaya Doctor of Legal Sciences, Professor, Head of the Department of Legal Disciplines of the Penza State University, titled «On the prospects for the development of Russian economic law». The article examines the issues of interaction between law and economics through the prism of the formation of Russian economic law. The historical aspect is highlighted: the analysis of the pre-revolutionary legal doctrine and scientific sources during the Soviet development of the state.

*With best regards,*
*Editor-in-Chief*
***Damir Valeev***

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ARTICLES

**Robert Jastrzębski**

Dr. hab., Faculty of Law and
Administration, University of Warsaw

# THE SIGNIFICANCE OF THE POLISH CODE OF OBLIGATIONS OF 1933 FOR EUROPEAN HISTORY OF LAW

DOI: 10.31085/2310-8681-2020-5-281-170-178

**Abstract:** The article deals with the codification of the law of obligations after World War I. It presents the activity of the Polish Codification Commission, paying a special attention to the participation of its members in the drafting of the Polish Code of Obligations of 1933, and to the fact that its authors based their rules on legal decisions concerning the law of obligations in France, Austria and Germany. They also used the French-Italian draft of the law of obligations of 1927 and the Russian draft of 1913. The Code of Obligations of the time was an important development in European scholarship. It was therefore widely commented, especially in French scholarship. The legal solutions found in the code were a compromise between individualist and socialist concepts of the law of obligations. The code was divided into two parts: general and detailed. In addition, the following principles appeared in the code: legal correctness, good faith and good customs, the equitable interest of the employer, and the rebus sic stantibus clause. The Code of Obligations was in principle no longer in force with the entry into force of the Polish Civil Code of 1964. However, it should be emphasised that Book III of the Code was directly based on the legal constructions employed in the Code of Obligations.

**Keywords:** Polish Code of Obligations, 1933, Law of Obligations, codification of European law, European systems of obligation law.

**1.** Codification is based on a unified and consciously adopted program for action. It involves a creative and conceptual contribution to the creation of a new

legal regulation. In this respect, it is not only a collection and approximation of existing legislations. Codification systematises a given branch of law, or at least parts of the system it creates. In practice, codification means creation of a systematic single whole of legal provisions in a certain branch of law. A systematic single whole, which entails innovations, simplification, supplementation, and abolition of provisions in force earlier. Codification of law requires from its creators not only knowledge of the sources of local law, but also the actual needs of economic, political, social life, including comparative studies[1].

The Polish interwar state, which emerged after World War I, faced the serious problem of unifying the law that was in force on its territory. This concerned, in particular, civil law, which encompassed five systems of private law, which included the following systems:

1) Polish-French (central Poland);
2) Russian (lands in the eastern part of the country);
3) German (the western part of Poland);
4) Austrian (southern territories);
5) Hungarian (territory of Spisz and Orawa)[2].

First of all, the essential factors in the codification of Polish law included the following reasons:

1) political, concerning the unity, independence and sovereignty of the Polish state;
2) economic, the purpose of which was the economic unification of the Polish lands;
3) sound policy and modern law-making, as far as the norms of the invader countries were based on different political and legal principles;
4) psychological, connected with the legal unity of the state territory[3].

In this connection, the Polish state, according to Zbigniew Radwański, could potentially choose one of three ways:

1) to leave legal particularism and be content with unifying only a part of the system necessary for the functioning of the state;

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[1] *Jastrzębski R.* Wpływ polskiej tradycji prawnej na kodyfikację prawa prywatnego (1918–1939), (w:) Między tradycją a nowoczesnością. Prawo polskie w 100-lecie odzyskania niepodległości, red. naukowa Ł. Pisarczyk. Warszawa, 2019. P. 248–251.

[2] Kodeks Napoleona. Kodeks cywilny Królestwa Polskiego. Kodeks zobowiązań i inne przepisy obowiązujące w województwach centralnych, Warszawa 2008. P. 7–12; *Radwański Z.* Prawo cywilne i proces cywilny, (w:) Historia Państwa i Prawa Polski 1918–1939, część II, pod red. F. Ryszki, pod ogólną red. J. Bardacha, Warszawa 1968. p. 148; *Bardah J., Lesnodorsky B., Pietrchak M.* Istoryia hosudarstva y prava Polshy [History of the State and Law of Poland]. Moscow, 1980. P. 489–490.

[3] *Górnicki L.* Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919–1939. Wrocław, 2000. P. 70–71.

2) to unify the legal system by adopting the law of others;

3) to create original sets of legal norms, gradually replacing regional norms[1].

In the end, the latter concept won, due to which the Polish Codification Commission (Komisja Kodyfikacyjna Rzeczypospolitej Polskiej) was set up by Act of June 3, 1919 (Dziennik Praw Państwa Polskiego No. 44, item 315). It is worth noting that the codification was in practice almost exclusively concerned the law of commerce, in terms of the civil law field[2]. The inauguration of the Codification Commission took place on November 10, 1919. It was created for an indefinite period, as a central state body. It was of an advisory nature and engaged in the preparation of opinions and proposals. The act of June 3, 1919 based the commission's activity on internal autonomy and its organization was specified in its rules of procedure, which had been published four times between 1919 and 1939. The aim of the organizational changes in the Commission was to simplify its structure and speed up the codification work[3].

**2.** At first, it was assumed that the Civil Law Section and the Commercial Law Section of the Codification Commission would draft the law of obligations jointly. However, this idea was quickly abandoned. The Civil Law Section first commissioned Ernest Till to prepare an abstract entitled "On damages other than an existing binding relationship". The abstract had already been submitted to the Section in 1921 on "Reparation for Damages Caused by Unjust Acts". Ignacy Koschembahr-Łyskowski then presented his own draft of the law of obligations. E. Thiel, who circulated a handwritten draft entitled 'On Obligations' to members of the Section in March 1922, outdid him, however. Part one. General provisions. Then E. Till, in coopera-

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[1] *Radwański Z.* Kształtowanie się polskiego systemu prawnego w pierwszych latach II Rzeczypospolitej, Czasopismo Prawno-Historyczne" 1969, t. XXI, z. 1; *Górnicki L.* Pogranicza systemów prawnych, w szczególności pozaborowych, w pracach nad kodyfikacjami prawa cywilnego i handlowego w II RP, Acta Universitatis Wratislaviensis, No 3799, Prawo CCCXXIV, Wrocław 2017.

[2] *Grodziski S.* Prace nad kodyfikacją i unifikacją polskiego prawa prywatnego (1919–1947), „Kwartalnik Prawa Prywatnego" 1992, z. 1–4; *Jastrzębski R.* The Impact of the Economic Legislation on the Restoration of the Polish State after the First World War, „Optimum. Economic Studies" nr 1 (91) 2018.

[3] *Górnicki L.* Organizacyjne zagadnienia kodyfikacji prawa handlowego w Komisji Kodyfikacyjnej RP (1919–1939), (w:) Acta Universitatis Wratislaviensis, No 2501, Prawo CCLXXXV, Studia Historycznoprawne, tom dedykowany profesorowi doktorowi Kazimierzowi Orzechowskiemu, pod red. A. Koniecznego, Wrocław 2003; *Górnicki L.* Pogranicza systemów prawnych, w szczególności pozaborowych, w pracach nad kodyfikacjami prawa cywilnego i handlowego w II RP, Acta Universitatis Wratislaviensis, No 3799, Prawo CCCXXIV, Wrocław 2017; *Górnicki L.* Wpływ obcych ustawodawstw i doktryny prawa na polską kodyfikację prawa prywatnego w Drugiej Rzeczypospolitej, „Zeszyty Prawnicze Uniwersytetu Jagiellońskiego. Towarzystwo Biblioteki Słuchaczów Prawa" 2005, z. 13; *Górnicki L.* Zagadnienie systematyki kodyfikacji prawa cywilnego i handlowego w pracach Komisji Kodyfikacyjnej (1919–1939), „Kwartalnik Prawa Prywatnego" 2004, z. 3; *Rodziski S.* Komisja Kodyfikacyjna Rzeczypospolitej Polskiej, „Czasopismo Prawo-Historyczne" 1981, t. XXXIII, z. 1.

tion with Maurycy Allerhand, Aleksander Doliński, Romana Longchamps de Berier, and Kamil Stefka, drafted the general part and its justification. The Codification Commission published it in 1923. The Civil Law Section then decided to draw up a separate Code of Obligations, following the Swiss model. The assumption was that it could come into being earlier, before the work on the complete Civil Code was completed. This made the draft by E. Till the basis for work on the Polish Code of Obligations. In 1924 a Law of Obligations Subcommittee was set up within the Section. Since March 1927, the code had been discussed by the Sub-Section of the General Part of the Civil Code and Code of Obligations, and the Sub-Commission of the General Part of the Civil Code and the Code of Obligations. Work on the code also involved contacts with academics from abroad, for example France and Italy. These included the French-Italian draft of the Code of Obligations. The first reading of the draft was held from August 1929 until March 1931. The second reading took place in August-November 1931[1]. During the readings, the Sub-Commission was chaired by Henryk Konic, with R. Longchamps de Berier as a referent, and Ludwik Domański as a co-referent, and I. Koschembahr-Łyskowski as a member. The draft of the law, passed in the second reading, was published and sent to courts, associations and legal institutions for their comments before July 1, 1932. The last reading in the Sub-Commission took place from November 1932 to April 1933. The draft was adopted by the Approval Board of the Codification Commission in June 1933[2]. It is worth noting that the Sub-commission separately sat on a draft of provisions introducing the Code of Obligations, which was adopted by the Board in September 1933. Both drafts were submitted to the Minister of Justice and then some amends were made. They were finally adopted by the President of Poland on October 27, 1933, and became binding on July 1, 1934[3].

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[1] Projekt części szczegółowej prawa o zobowiązaniach w opracowaniu referentów głównych projektu Ernesta Tilla i Romana Longchamps de Berier, Komisja Kodyfikacyjna, Podsekcja III Prawa cywilnego, Lwów 1928; Projekt Kodeksu Zobowiązań, Komisja Kodyfikacyjna, Podkomisja prawa o zobowiązaniach, zeszyt 1. Warszawa, 1933.

[2] *Balken-Neuman J.* Zobowiązania. Kodeks zobowiązań oraz 35 ustaw dodatkowych. Zarys systemu polskiego prawa obowiązkowego do nauki i praktyki, Lwów 1934. P. 17–23; *Górnicki L.* Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919–1939. Wrocław 2000. P. 397–404.

[3] *Balken-Neuman J.* Zobowiązania. Kodeks zobowiązań oraz 35 ustaw dodatkowych. Zarys systemu polskiego prawa obowiązkowego do nauki i praktyki. Lwów, 1934; *Domański L.* Instytucje kodeksu zobowiązań. Komentarz teoretyczno-praktyczny. Część ogólna. Warszawa, 1936; *Domański L.* Instytucje kodeksu zobowiązań. Komentarz teoretyczno-praktyczny. Część szczególna. Warszawa, 1938; *Korzonek I., Rosenblüth I.* Kodeks zobowiązań. Komentarz, t. I. Kraków, 1936; *Korzonek I. Rosenblüth I.* Kodeks zobowiązań. Komentarz, t. II. Kraków, 1937; *Longchamps de Berier R.* Polskie prawo cywilne. Zobowiązania. Poznań, 1999; *Longchamps de Berier R.* Zobowiązania. Lwów, 1939; *Namitkiewicz J.* Kodeks zobowiązań. Komentarz dla praktyki, t. I. Część ogólna. Łódź, 1949; *Namitkiewicz J.* Kodeks zobowiązań. Komentarz dla praktyki, t. II. Część szczegółowa. Łódź, 1949;

The Codification Commission had been working on the Code of Obligations of 1933 (Dziennik Ustaw *[Legislative Gazette]* of Poland No. 82, item 598) for over 10 years. He worked with laws from other countries, especially the German Civil Code of 1896, the Austrian Civil Code of 1811, the Napoleonic Code of 1804, the Russian Code of 1832, the Swiss Law of Obligations of 1911; the French-Italian draft of 1927, and the Russian Civil Code of 1913[1].

The Codification Commission reflected the controversy concerning individualistic and public law of obligation. The former was represented by 19th century civil codifications, including the German Civil Code and the Swiss Law of Obligations as amended in 1911. In principle, the individualist theory assumed that the will of the parties was realized in the law of obligation. In this context, the right was what the parties had agreed to and this could not be in conflict with applicable law or rules of conduct. This meant that the will of the parties was limited by the law and the judicature.

Public law of obligation, as a trend that aimed to generalize civil law, emerged at the end of the 19th century. The main thrust was that the unanimous will of the parties was a fiction, as an economically weaker party had to go along with the offer of the economically stronger party. Therefore, limiting the will of the parties to legislation and good custom is not enough. In this regard, the law must essentially seek to implement justice, irrespective of the will of the parties. Jus is the law, not the will of the parties, it was to be decisive in concluding a contract. Thus the state had to equalise the position of the economically weaker party by means of appropriate legislation[2].

Another important issue was the domestic system of draft of law of obligation. Three systems were competing with each other at that time:

1) personal (Roman) applied in the Napoleonic Code, based on the autonomy of will of the parties to civil legal relations;

2) subject-matter (Germanic) applied in the German Civil Code, where the only source of law was the will of the legislator, the State, which gave effect to the agreements of the parties;

3) bi-juridical applied in the Swiss law, combining mainly Romanic and Germanic elements, i.e. in principle of the first two systems[3].

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*Peiper L.* Kodeks zobowiązań. Kraków, 1934; *Rymowicz Z., Święcicki W.* Suplement do prawa cywilnego Ziem Wschodnich (t. X cz. I Zwodu Praw). Warszawa, 1934.

[1] *Górnicki L.* Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919–1939. Wrocław, 2000. P. 404–437.

[2] *Górnicki L.* Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919–1939. Wrocław, 2000. P. 410–412.

[3] *Górnicki L.* Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919–1939. Wrocław, 2000. P. 412–415.

The Polish Code of Obligations of 1933 was based on the subject-matter system, with certain concessions in favour of the personal system. The influence of the French-Italian draft of the Law of Obligations of 1927 and the Russian draft, submitted to the State Duma in 1913, was also noticeable. This implied that the Polish Law of Obligations would be a compromise between the Germanic and Romanic world views. In practice, however, the subject-matter system prevailed.

Characteristic features of the Code of Obligations were, among others:

1) the generalization of the law of obligations, especially in connection with the employment contract, and the introduction of the collective labour contract as a source of law, which was associated with the opposition to the use of economic overweening or exploitation by one of the contracting parties;

2) the introduction of the principles of lawfulness, good faith and good custom, and the equitable interest of the employer into the code;

3) introduction of the clause *rebus sic stantibus*, which indicated a departure from the dominant principle of *pacta sunt servanda*[1];

4) the code was divided into a general part which contained, inter alia, sources, essence and types of obligations, creation of obligations, transfer of rights and duties ensuing from obligations, expiry of obligations and a detailed part concerning individual contracts, such as sale, replacement, donation, hiring, lease, loan, labour contract, contract of work, trust, rent, life maintenance, gaming and betting, transfer of agreement and surety;

5) the rules relating to contractual relations in the Code of Obligations were based on Swiss bond law as revised in 1911 and adapted to commercial relations;

6) all contracts, apart from the custody agreement, had the character of consensual contracts in the Code[2].

**3.** The opinions on the Code of Obligations were predominantly positive, especially the French scholar Henri Capitant, who stressed the good technique and the solid system, especially in comparison to the German Civil Code. The most serious criticism was directed first at the *rebus sic stantibus* clause and the principle of *pacta sunt servanda* associated with it[3]. Another French jurist, Henri Mazeaud, called the code "a serious development in the world of jurisprudence" and also

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[1] *Jastrzębski R.* Wpływ siły nabywczej pieniądza na wykonanie zobowiązań prywatno prawnych w II Rzeczypospolitej. Warszawa, 2009. P. 394–421.

[2] *Górnicki L.* Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919–1939. Wrocław, 2000. P. 438–453; *Sójka-Zielińska K.* Historia prawa. Warszawa, 1997. P. 253–254; *Bardah J., Lesnodorsky B., Pietrchak M.* Istoryia hosudarstva y prava Polshy [History of the State and Law of Poland]. Moscow, 1980. P. 494–495; *Waśkowski E.* Nowe idee w kodeksie zobowiązań. Lwów, 1934.

[3] *Capitant H.* Préface (w:) Code des obligations de la République de Pologne. Traduit par Stefan Sieczkowski et Jan Wasilkowski, avec la collaboration de Henri Mazeaud. Paris, 1935. P. V–XX.

"a modern and scholarly code". Its founders, he argued, were guided by a "spirit of moderation" and a "spirit of justice". Edward Swoboda, a professor at the German University in Prague, pointed out that the Polish law of obligations was influenced especially by three systems: the French, German and Austrian systems[1].

The Code of Obligations was an important law-making achievement of the Polish state. It is also worth noting that other sections of civil law, i.e. the general part, property law, family and guardianship law, as well as inheritance law, were not codified during the interwar Poland. The consequence of this was that foreign regulations introduced during the partitions of the Polish-Lithuanian Commonwealth continued to apply. Importantly, the codification of the Polish Law of Obligations was connected with the codification of commercial law, which followed from the Polish legislator's conception of the economic unification of Polish lands from a legal perspective. Therefore, almost simultaneously with the Code of Obligations, the Commercial Code, Insolvency and Bankruptcy Act, and contract law were enacted. The point is that the new system of commercial law was to be an introduction to political unification, and the Code of Obligations was to be one of its elements. It should be noted that it was an original regulation, based on the existing legal order and new trends in jurisprudence. The code was, among other things, a kind of synthesis of the systems of mandatory law of the time. It was modern thanks to the use of legal techniques and it contained up-to-date legal constructions, as expressed by the clause *rebus sic stantibus*. It has been translated into foreign languages, including French and German[2].

After the World War II, the Code of Obligations was modified a great deal owing to the unification of civil law in 1945–1946, as well as political and social changes in Poland[3] [30, 33]. The Code of Obligations was abolished by the Regulations Introducing the Civil Code Act of April 23, 1964 (Dziennik Statute of the Republic of Poland No. 16, item 94), i.e. the entry into force of the Civil Code Act of April 23, 1964. (Dziennik Statute of the Republic of Poland No. 16, item 93). It is worth noting, however, that the current Civil Code of 1964 retained many legal solutions from the Code of Obligations of 1933, which made it an important law-making achievement of the reborn Polish state.

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[1] *Górnicki L.* Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919–1939. Wrocław, 2000. P. 457–462.

[2] Code des obligations de la République de Pologne. Traduit par Stefan Sieczkowski et Jan Wasilkowski, avec la collaboration de Henri Mazeaud. Paris, 1935; *Górnicki L.* Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919–1939, Wrocław, 2000. P. 403–404.

[3] *Stawarska-Rippel A.* Kodeks zobowiązań w pierwszych latach Polski Ludowej, „Kwartalnik Prawa Prywatnego" 2004, z. 3; *Zoll F.* Zobowiązania w zarysie według polskiego kodeksu zobowiązań. Warszawa, 1948.

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# THE MAIN CONCEPTS OF GUILT AND THE PARTICULARITIES OF THEIR REPRESENTATION IN RUSSIAN CRIMINAL LAW

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**Abstract:** Guilt is an obligatory feature of a crime under the Criminal Code of the Russian Federation (hereinafter referred to as the Code)[1]. However, there is no legal definition of guilt in the Code, as well as in most criminal laws of foreign countries. Understanding of guilt is sometimes contradictory in the doctrine so the authors consider the main concepts to present a holistic understanding of the formula of guilt in Russian Criminal Law: psychological concept, evaluative (normative) and dangerous state of mind.

Guilt is a criminal law concept and therefore has psychological, social and legal (criminal law) content. In Russian Criminal Law, it is usually considered within the framework of its social and psychological interpretation. At the same time, echoes of the other two concepts can be found, for example, in the interpretation of negligence as a form of guilt (Part 3, Article 26 of the Code) and criminal

[1] Criminal Code of the Russian Federation: Federal *Law No.* 63-FZ of 13.06.1996 (rev. from 19.06.2020) // Sobranie zakonodatelstva Rossiyskoy Federatsii = Russian Federation Code. 1996. No 25. Art. 2954.

responsibility for taking the highest position in the criminal hierarchy (Article 210[1] of the Code) due to the fact that certain elements of external assessment (normative concept) and subjective imputation (theory of a dangerous state of mind) can be seen in the construction of these rules by the legislator.

The paper strongly focuses on the analysis of the individual basic elements, attributes, components of the phenomenon in question and their relationship to each other: guilt and guiltiness, intellectual and volitional elements, knowledge, awareness, foreknowledge, understanding, desire, presumption, indifference and calculation.

**Key words:** guilt, concepts of guilt, subjective side of a crime, elements of crime, motive, purpose, intent, carelessness, direct intent, indirect intent, thoughtlessness, negligence, forms of guilt, knowledge, will, awareness, foreknowledge, understanding, intellectual moment, volitional moment.

## 1. Introduction

The doctrine of guilt is of great methodological importance for the cognition, development and application of categories and institutions of law in general. Guilt is an inter-branch category, so theoretical aspects of guilt have been studied by representatives of the general theory of law[1], and civil[2], and administrative[3], and other branches of domestic legal science. However, the most profound development of this problem was received in the criminal law science. And the issue of modern concepts of guilt in criminal law is one of the essential aspects of the mentioned problem.

Guilt is a mandatory feature of a crime under the Criminal Code of the Russian Federation (hereinafter referred to as the Code): a crime is a socially dangerous act committed culpably and prohibited by this Code under the threat of punishment (Article 14 of the Code). Article 5 of the Code enshrines the principle of guilt,

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[1] See: *Yurchak E. V.* [Vina kak obshchepravovoy institut] Guilt as a General Legal Institution. Thesis. Candidate of Juridical Sciences. M., 2016.

[2] See: *Matveev G. K.* [Vina v sovetskom grazhdanskom prave] Guilt in Soviet Civil Law. Kyiv, 1955; *Belyakova A. M.* [Grazhdansko-pravovaya otvetstvennost' za prichinenie vreda: Teoriya i praktika] Civil Liability for Damage: Theory and Practice. M. 1986; *Idrisov H. V.* [Vina kak uslovie otvetstvennosti v rossiyskom grazhdanskom prave] Guilt as a Condition of Responsibility in Russian Civil Law, 2010.

[3] See: *Yakuba O. M.* [O priznakakh administrativnogo pravonarusheniya] On the signs of an administrative offence // Pravovedenie. 1964, No. 3; *Kositsina L. A.* [Opredelenie viny yuridicheskogo litsa pri sovershenii im administrativnogo pravonarusheniya v oblasti tamozhennogo dela] Determination of guilt of a legal person in committing an administrative offense in the field of customs affairs // Aktual'nye voprosy publichnogo prava. 2012. No. 9; *Channov S. E.* [Vinovnost' kak priznak administrativnogo pravonarusheniya] Guiltiness as a sign of an administrative offence // Grazhdanin i pravo. 2017. No. 10.

according to which responsibility without guilt is not allowed. However, the Code does not contain a legal definition of guilt in either Chapter 1 or Chapter 5 (as do the vast majority of foreign criminal laws); limiting itself to an indication that guilt may be intentional or negligent.

Part 1 of Article 24 of the Code mentions two forms of guilt: intent and negligence, and Articles 25 and 26 of this law reveal the content of the said forms of guilt. The provisions of Article 28 of the Code on innocent infliction of harm are also of great importance in characterising guilt.

## 2. Research methodology

The above norms constitute the legislative basis for theoretical consideration of the problem of guilt in Russian criminal law. It is also important to understand the basic concepts of guilt in the science of criminal law and their implementation in the criminal law in order to define the concept of guilt.

There are three main concepts of guilt in Russian criminal law scholarship: psychological, evaluative (normative) and dangerous state of mind. The first two are considered the main ones. Their analysis suggests those modern theoretical concepts of guilt and its varieties in one way or another represent a reflection of a particular concept of guilt or a combination of their elements.

## 3. Main results

Psychological and evaluative concepts of guilt are similar in that each of them recognises the existence of an internal (psychological) side of the act, which expresses the attitude of the subject of the crime to the act. However, they substantially differ in the significance and role of this factor for the characterisation of guilt as a whole.

According to the psychological concept, the content of guilt is the mental attitude of the person himself towards his act and its consequences in the form of intent and negligence. Therefore, intent and negligence constitute the generic concept of guilt in the Russian criminal legal theory. Different combinations of its conscious and volitional elements form different combinations of guilt.

In the evaluative (normative) concept of guilt, the mental attitude of a person to the act is considered only as one of a number of factors determining the presence (or absence) of guilt, which is established at the discretion of the law enforcer. Law enforcer's conclusion on guilt is based on the consideration of other objective and subjective circumstances (sanctity, absence or presence of force majeure, etc.)[1].

[1] See: [Kurs sovetskogo ugolovnogo prava: Prestuplenie] Course of Soviet Criminal Law: Crime. In 6 volumes: General Part. V. 2 / A. A. Piontkovsky; Edited by: A. A. Piontkovsky, P. S. Romashkin, V. M. Chkhikvadze. M.: Nauka, 1970. P. 277.

Consequently, guilt is not a mental activity of a person, but an external evaluation of his behaviour, which has the nature of a blame to the offender. This assessment (statement of the blameful nature of the act) is considered as guilt, constitutes its main content. Therefore, this concept of guilt is called evaluative guilt in the Russian criminal law literature.

The evaluative concept of guilt is most commonly referred to in contemporary foreign literature as normative or ethical. Specialists note that the philosophical basis for its early interpretations was neo-Kantianism and then the ideas of phenomenology. It is believed that the implementation of these ideas in criminal law was primarily because it was difficult to justify the nature of liability in negligence[1] within the framework of the psychological concept. A number of other Russian sources most often referred to other circumstances that had mainly social and political roots, rather than just legal roots.

The concept of guilt under consideration is referred to in Russia as evaluative guilt, because guilt is determined within the framework of a negative evaluation of the behaviour of the offender by the court, and its essence is determined in the ethical blamefulness of the act violating the rule of law or blamefulness of willfulness[2]. This concept of guilt is later in time and borrows certain provisions of its psychological variety: it does not completely reject the element of the psychological (internal) attitude of a person to his criminal act, although it may give this factor a secondary importance.

One of the founders of the normative (evaluative) concept of guilt, Reinhard Frank, pointed out that blamefulness, as an evaluation of a person's behaviour and guilt, is determined by a combination of factors: the subject's sanity, the court's determination of the mental attitude of the person to the act that he commits and a number of factual circumstances by which the person commits the act. Representatives of the *subjective* branch of the normative theory adopted this approach. The notable German scientist and criminalist G. Welzel in two articles (1938 and 1948) formulated his variant of the evaluative concept of guilt, which was called the final theory of action. According to it, guilt means blame of a person for not showing the necessary will to change the course of events and thereby allowing harmful consequences to occur.

Criticising the main conclusions of the final theory, A. A. Piontkovsky emphasised that the substitution of the individual guilt of the offender (and it

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[1] See: *Pankov I. V.* [Umyshlennaya vina po rossiyskomu ugolovnomu pravu: teoreticheskiy i normativnyy analiz] Intentional guilt in Russian criminal law: theoretical and normative analysis: dissertation. Thesis. Candidate of Juridical Sciences: 12.00.08 / Ilya Vladimirovich Pankov. SPb., 2010. P. 20–21.

[2] See: *Lyass N. V.* [Normativnaya teoriya v sovremennom burzhuaznom ugolovnom prave] Normative Theory in Modern Bourgeois Criminal Law. L.: Leningrad University Press, 1963. P. 28, 43.

exists objectively *before* any judicial opinion on the case has been rendered) by the judge's negative judgement on the offender's socially dangerous behaviour is "deeply flawed"[1]. This view is also supported in contemporary Russian criminal law literature[2]. It criticises the excessive objectification of the concept of guilt, where the content of guilt is taken out of the awareness and understanding of the social danger of the act of conduct[3].

There have been attempts in German criminal law to find an acceptable compromise between the psychological and normative concepts of guilt, but only within the framework of the theory of blamefulness. In the early 70s of the last century, G. Jeschke, revealing the content of guilt, argued that the perpetrator is blamed by the act committed by him, and not the intention itself. Its realisation provides the basis for guilt and blamefulness and for criminal liability. This position became characteristic of the *objective* branch of normative theory. However, according to Russian scientists, supporters of the normative concept of guilt in any of its modifications do not depart from the evaluative concept of guilt[4].

It should be recognized that in the Soviet criminal law doctrine there was an attempt to introduce elements of the evaluative concept of guilt in the traditional for the Russian science social and psychological understanding of it. A monograph by B. S. Utevsky[5] was published in 1950, considering guilt in two qualities: as a subjective side of a crime and as a general basis for criminal responsibility. In the first sense, guilt was presented as intent or negligence, and in the second sense as a negative assessment by the court of the objective and subjective circumstances of the act, which "is much wider and richer than the concept of guilt as a subjective side of a crime". In his view, "the establishment of the defendant's mere intent or negligence does not always mean that the defendant is guilty as the basis of his criminal responsibility to the socialist state". However, B. S. Utevsky contrasted guilt as the general basis of criminal responsibility with guilt in bourgeois justice

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[1] [Kurs sovetskogo ugolovnogo prava] Course of Soviet Criminal Law: in 6 vols. V. 2. M., 1970. P. 283–284.

[2] See: [Ugolovnoe pravo. Obshchaya chast': uchebnik] Criminal Law. General part: textbook / Rev. by I. Y. Kozachenko. 4-th ed. updated and revised. M.: Norma, 2008. P. 273.

[3] *Kozlov A. P.* [Ponyatie prestupleniya] The concept of crime. Saint Petersburg: Yuridicheskiy Tsentr Press, 2004. P. 563.

[4] *Lyass N. V.* [Problemy viny i ugolovnoy otvetstvennosti v sovremennykh burzhuaznykh teoriyakh] Problems of guilt and criminal responsibility in modern bourgeois theories. L.: Leningrad University Press, 1977. P. 29–30, 49–50.

[5] *Utevsky B. S.* [Vina v sovetskom ugolovnom prave] Guilt in Soviet Criminal Law, Moscow, 1950. See also: *Sergeeva T. L.* [Voprosy vinovnosti i viny v praktike Verkhovnogo Suda SSSR po ugolovnym delam] Issues of Guilt and Guilt in the Practice of the Supreme Court of the USSR in Criminal Cases. M.-L., 1950.

because he was convinced that the assessment of the Soviet court had nothing in common with the social and political assessment, which was the basis of bourgeois neo-Kantian theories[1].

It should be noted that even in contemporary Russian literature there is sometimes an opinion that domestic science, legislation and practice have not actually abandoned the evaluative elements of guiltiness[2]. These conclusions are usually generated by identifying the concept of guilt and guiltiness, ignoring the existing differences in assessing the social content of guilt and the facts underlying the establishment of the mental attitude of a person to the act committed by him and its consequences. Thus, S. V. Sklyarov writes that the establishment of the subjective properties of the act depends on the totality of the available factual circumstances and on the professionalism of the law enforcement officer. On the same basis, he concludes that guilt is a concept *of evaluation*[3]. A number of other academics have a similar position[4].

Other researchers challenge the conclusion about the evaluative nature of guilt because guilt, like other features characterising a particular crime, is surely subject to legal assessment, but this does not "become an evaluative concept"[5]. It is true that the court evaluates the factual circumstances of the case when determining guilt. However, they are seen as a source of cognition: the presence (or absence) of the relevant (intellectual and volitional) components of guilt. There is no blamefulness of guilt of the act in such an assessment.

The **psychological** concept of guilt emerged as a negative reaction to the pre-existing notion of responsibility as an expression of revenge against any wrongdoer, regardless of guilt. The literature emphasizes the significant role of Roman law and the ideas of Christianity in the legal formulation of the psychological understanding of guilt[6]. It associates the problem of responsibility with the phenomena of con-knowledge and freedom to act at will of the actor. According to the famous Russian criminalist N. S. Tagantsev, the first rudiments of this kind of responsibi-

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[1] *Utevsky B. S.* Op. cit. P. 9–11.

[2] See: *Luneev V. V.* [Sub"ektivnoe vmenenie] Subjective imputation. M.: Spark, 2000. P. 12.

[3] See: *Sklyarov V. S.* [Vina i motivy prestupnogo povedeniya] Guilt and motives of criminal behaviour. SPb: Juridicheskiy Tsentr Press, 2004. P. 11.

[4] See: *Trukhin A. M.* [Vina kak sub"ektivnoe osnovanie ugolovnoy otvetstvennosti] Guilt as a subjective basis for criminal responsibility. Krasnoyarsk, 1992; *Veklenko S. V.* [Vinovnoe vmenenie v ugolovnom prave] Guilty imputation in criminal law. Thesis of the Doctor of Juridical Science. Omsk, 2003.

[5] [Ugolovnoe pravo Rossii. Obshchaya chast': Uchebnik] Criminal Law of Russia. General part: Textbook / Ed. by F. R. Sundurov, I. A. Tarkhanov. 2nd ed. updated and revised. M.: Statut, 2016. P. 318.

[6] See: *Fletcher J., Naumov A. V.* [Osnovnye kontseptsii sovremennogo ugolovnogo prava] Basic concepts of modern criminal law. M.: Yurist, 1998. P. 284.

lity in Russia can be found already in the Russkaya Pravda (Rus' Justice), where the punishable is not the fact of infliction of harm, but the attitude of the guilty person to it[1].

The psychological concept of guilt received its conceptualization in the XIX century in the works of foreign representatives of the classical school of criminal law (C. Binding, A. Feuerbach, etc.). In the domestic criminal law literature, it is considered that in Russia the psychological concept of guilt is mainly reflected in the works of N. S. Tagantsev, N. D. Sergeevsky, A. F. Kistyakovsky. However, a prominent researcher of Russian criminal law thought, G. S. Feldstein, underlined the contribution to Russian criminal law science underestimated by his contemporaries of Professor Gavriil Ilyich Solntsev of Kazan University[2]. He lectured there in Latin and Russian, knew European languages and scientific works, prepared manuscript editions of the first course of the Russian criminal law, wrote about the foundations of the general criminal law, and performed a number of other important works. After reading most of his manuscripts, G. S. Feldstein concluded: "only G. Solntsev should be seen as ... the first Russian criminalist who gave in his writings a model of scientific dogma of criminal law"[3].

Within the framework of the psychological concept of guilt, G. I. Solntsev characterises the subject of a crime as a person who has reason and free will, capable of "judging his actions and desires". This is admissible when the criminal act "was acted upon either by malice or negligence or failure to use due care". Thus, G. I. Solntsev not only takes the signs of the subject outside of the limits of guilt, but also forms an idea about its specific content and forms. The existence of a crime, from the point of view of the criminal law, requires an external action which has occurred under certain psychological conditions or depends, according to the scholar's words: on an "internal psychological basis", i.e. "on a different disposition of the will and attention of the perpetrator"[4].

The psychological concept of guilt, endorsed by many Russian scholars, was also reflected in Soviet criminal legislation. However, the latter was not always

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[1] See: [Russkoe ugolovnoe pravo] Russian Criminal Law. Lectures: General Part: In 2 vols. V. 2 / N. S. Tagantsev; Compiler and responsible editor: N. I. Zagorodnikov. M.: Nauka, 1994. P. 223.

[2] The works of A. Feuerbach did have a serious impact on the mindset of the most authoritative Russian criminalists of the time. G. I. Solntsev, who had independent opinions on many issues of criminal law science, also belonged to this pleiad. These extended to ideas about the elements of crime, sanctity, guilt, imputation, determining the nature of attempt, complicity, concurrence, etc.

[3] *Feldstein G. S.* [Glavnye techeniya v istorii nauki ugolovnogo prava v Rossii] Main trends in the history of the science of criminal law in Russia / edited and prefaced by V. A. Tomsinov. M.: Zertsalo-M, 2003. P. 298.

[4] *Feldstein G. S.* Op. cit. P. 315–316.

consistent in this direction and its development was not straightforward. To some extent, that was due to politics and the associated position in the Soviet criminal law doctrine at the time. Today, the social and psychological concept of guilt must be considered dominant, although there are scientific modifications that are reflected in theoretical studies of guilt and in the understanding of its structural components.

In Russian criminal law, guilt is usually considered within the framework of its *social and psychological* interpretation. Meanwhile, certain elements of external assessment can indeed be traced in the legislator's characterization of negligence as a type of guilt. The theory sets out a different understanding of them: the objective reality surrounding a person, requiring a mental attitude to it, is reflected in the form of appropriate images in the psyche of the subject. Their totality is usually referred to in philosophy as subjective reality[1]. A person's ability to adequately reflect objective realities (social facts) is a prerequisite for establishing a mental attitude to them. Famous criminalist L. D. Gaukhman writes: "The mind is the means, human awareness reflects objects and phenomena of the objective world, their essential features, interrelation between them"[2].

However, the processes that take place in the human psyche are indeed not directly perceptible. They are cognisable, but the law enforcer establishes them indirectly. Objective indicators are human actions (deeds) as social facts. Taken together, they constitute the subject of cognition of guilt and a means of establishing the actual mental attitude of a person towards his act and its consequences for the law enforcer. Thus, for the law enforcer guilt is a reality, i.e. an object of cognition external to him. This constitutes the methodological basis for establishing guilt as a mental attitude of a deceased person towards the deed.

There is a debate about the relationship between guilt and such concepts as "guiltiness", "imputation" and "find guilty" in the science of criminal law. They are not only used in theory, but are also applied in law. For example, there is a view in science that guilt and guiltiness should be regarded as identical concepts. Firstly, this statement cannot be considered correct, because in part 1 of article 14 of the Code the legislator does not use the term guiltiness, but refers to the crime as "guilty committed socially dangerous act, prohibited by this Code under the threat of punishment". However, the concept of guiltiness is often given a different meaning in Russian criminal procedure. It is therefore argued that

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[1] Consciousness in philosophy is defined as a subjective image of the objective world, a subjective reality. See: Encyclopaedic Dictionary of Philosophy. M.: Sovetskaya Encyclopaedia, 1983. P. 622. Сознание в философии определяется как субъективный образ объективного мира, субъективная реальность. См.: Философский энциклопедический словарь. М.: Советская энциклопедия, 1983. С. 622.

[2] *Gauchman L. D.* Op. cit. P. 143.

Russian criminal law "is dominated by a social and psychological understanding of guilt, in criminal proceedings guilt has broad sense, guilt considered as the commission of a crime"[1].

The criminal procedure law does distinguish between guiltiness and guilt. Thus, Article 73(1) (2) of the Russian Federation Code of Criminal Procedure (hereinafter referred to as the Code of Criminal Procedure) states that among the circumstances to be proved the law refers not only to the guiltiness of the person in committing the crime but also to the form of guilt and motives. The following questions are put to the jury (among others): whether *it is proved* that, the defendant committed the act and whether the defendant *is guilty* of committing the crime. The Code of Criminal Procedure allows, at the same time, for a jury questionnaire to include "one main question on the guiltiness of the defendant, which is a "combination of the questions specified in part one of this article" (Art. 339 of the Code of Criminal Procedure)[2].

The definition of guilt within the framework of its social and psychological concept cannot be constructed without taking into account the provisions of philosophy, psychology and other humanities concerning the processes occurring in the human psyche. The criminal law concept of guilt should be based on the data of these sciences. It is important to take into account that both philosophy and psychology have their own subject of research, somewhat different basic directions of research and corresponding methods. The common object in terms of legal cognition of relevant aspects of the psyche and mental activity is the problem of *knowledge*. In criminal law, it is considered as one of the components of the content of guilt, although its manifestations are not always precisely defined.

Philosophy explores knowledge in its epistemological, and social and logical aspects, mainly within the framework of solving the basic question of the relation of being and knowledge. Psychological science studies knowledge mainly at the individual level. Therefore, the theoretical literature notes that all these approaches are of particular methodological value when they are presented in a certain way within a general theory of knowledge, as D. A. Kerimov writes: "... the researcher will succeed based on a general theory of knowledge, which summarizes the achievements of all social and natural sciences in this area"[3].

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[1] *Kozlov A. P.* [Ponyatie prestupleniya] The concept of crime. Saint Petersburg: Yuridicheskiy Tsentr Press, 2004. P. 554, 561.

[2] Therefore, there were certain grounds for a scientific understanding of guilt as a set of objective and subjective circumstances justifying the imposition of a particular punishment on a person. See: *Sergeeva T. L.* Op. cit. P. 34.

[3] *Kerimov D. A.* [Metodologiya prava. Predmet, funktsii, problem filosofii prava] Methodology of law. Subject, Functions, Problems of Philosophy of Law. 2nd ed. M.: Avanta+, 2001. P. 387.

Russian jurisprudence usually takes as its basis the notion that knowledge is a psychological concept[1]. However, on another level, this does not exclude differences in the understanding of the elements of the content of guilt and their relationship to each other. At the same time, the concepts of knowledge and awareness are often equated; there is a debate about their substantive content, accompanied by reference to the data of psychological science.

When examining the content of guilt, one should refrain from excessive psychologicalisation of guilt and from the desire to infuse the terms by which the law defines intent and negligence with the meaning that is necessarily invested in them by psychology. However, this caveat is often criticised by some academics. For example, A. P. Kozlov, while agreeing that law uses psychological categories for its own purposes, draws the controversial conclusion that "guilt is primarily a social and everyday phenomenon". It should, in his view, "contain nothing but the categories of the psyche, psychology and psychiatry in their reproduction of society"[2]. This view appears to be highly controversial.

Guilt is a criminal law concept and therefore has not only psychological but social and legal (criminal law) content. In criminal law, a crime, which is understood as an act of will, includes such a basic objective attribute as an act (action or failure to act), which entails certain negative consequences. Guilt, as a psychological phenomenon, of course, must contain in its content the mental processes reflecting the *attitude of a person* to the act committed by him and its consequences. However, it should be defined within the framework of the construction of the relevant corpus delicti.

In psychological aspect, the term of an act is usually seen as a certain present and its consequences as some future. The idea of them, their subjective images, belong to *the realm* of knowledge. It is in this sense that it is seen in philosophy as "a preliminary mental construction of an image of reality itself and the result it produces"[3]. This knowledge "is expressed first and foremost in the understanding, in the comprehension of certain factors and provisions ..."[4]. On this basis, the criminal law constructs guilt as a specific legal phenomenon.

The content of guilt includes a set of elements such as *consciousness and will*. Sometimes it is considered that the elements of the content of guilt are thinking,

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[1] See e.g.: *Strogovich M. S.* [Izbrannye Trudy: Problemy obshchey teorii prava] Selected Works: Problems of the General Theory of Law. In 3 volumes. Vol.1 M.: Nauka, 1990. P. 53–54.

[2] *Kozlov A. P.* Op. cit. P. 568.

[3] [Kratkiy filosofskiy slovar'] Brief Dictionary of Philosophy / A. P. Alekseev, G. G. Vasiliev et al; Edited by A. P. Alekseev. M.: TK Velbi, Prospekt Publisher, 2004. P. 355.

[4] *Kerimov D. A.* Op. cit. P. 384.

will and emotions. Proponents of such an approach proceed from the fact that it is "through thinking that human knowledge reflects objects and phenomena of the objective world ..."[1].

In Russian doctrine, guilt is most often defined as a person's mental *attitude* towards the act he or she committed and its consequences. This fragment of the definition is traditional and practically not contested. Modern definitions of guilt contain, in addition, an indication of the forms of guilt: intent and negligence. Therefore, a representative of the criminal law school of Kazan University, Professor A. V. Naumov understands guilt as a mental attitude of a person to a socially dangerous act committed by him and its consequences in the form of intent or carelessness[2]. However, the definition of the concept of guilt is often supplemented with an indication of its social (axiological) component, which expresses, according to its supporters, the essence of guilt. "Guilt is a mental attitude of a person in the form of intent or negligence towards a socially dangerous act committed by him in which an antisocial, asocial or insufficiently expressed social attitude of this person towards the most important social values is manifested"[3].

Modern criminal law science also presents such definitions of guilt, which include its criminal law *meaning*. Thus, according to another representative of the Kazan school of criminal law professor V. A. Yakushin, guilt is a mental attitude of a person to a socially dangerous act committed by him, expressed in the forms determined by law, revealing the relationship of intellectual, volitional and sensual processes of the person's psyche with the act and being therefore the basis for subjective imputation, qualification of the act and determination of the limits of criminal responsibility[4]. With some refinements, this definition is reproduced by other academics[5]. While there are differences, each of them emphasises that guilt is a person's mental attitude to his or her act.

As the content of guilt is constituted by knowledge and will, the question arises to what extent *knowledge* expresses this attitude. Moreover, the legisla-

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[1] *Gauchman L. D.* [Kvalifikatsiya prestupleniya: zakon, teoriya, praktika] Qualification of a crime: law, theory, practice. M.: AO TsentrYurInfor, 2005. P. 143.

[2] See: *Naumov A. V.* [Rossiyskoe ugolovnoe pravo] Russian criminal law. General Part: A Course of Lectures. M., 2000. P. 223.

[3] *Rarog A. I.* [Nastol'naya kniga sud'I po kvalifikatsii prestupleniy] Handbook of the Judge on the Qualification of Crimes. M., 2009. P. 61.

[4] See: *Yakushin V. A.* [Sub"ektivnoe vmenenie i ego znachenie v ugolovnom prave] Subjective imputation and its significance in criminal law. Togliatti: TolPI, 1988. P. 122.

[5] See: *Bikeev I. I., Latypova E. Yu.* [Otvetstvennost' za prestupleniya, sovershennoe s dvumya formami viny] Liability for crimes committed with two forms of guilt. Kazan: Poznaniye, 2009. P. 22.

tor's description of negligence as a form of guilt does not actually present the sphere of knowledge.

In the psychological concept of guilt, a person's sanity is considered to be a prerequisite that embodies the reflective and cognitive with transformative and volitional aspects of guilt[1]. The sphere of knowledge is usually associated with a person's reflective and cognitive abilities, while the transformative and volitional aspect characterises the subject's state of will. Thus, according to the Code (Articles 25, 26), a person's mental attitude towards the *consequences* of his act may be expressed in their desire (direct intent), conscious assumption or indifferent attitude towards them (indirect intent) or in the expectation of their prevention (recklessness). According to a number of criminologists, the intentional element also occurs in crimes, which in theory are called formal crimes (i.e. which do not contain a legislative indication of the harmful consequences of the act). Therefore, the identification of the psychological element appears to be an urgent task not only in the will, but also in the very consciousness of the person.

Authoritative psychologists argue that knowledge is not the sum of its constituent elements, but a complex structural whole that reflects the *active* role of human knowledge. This manifests not only in the reflection of reality, but also in the attitude towards it: "The more aware a man's action is, the more pronounced" in this action is his attitude[2]. At the same time, in A. P. Kozlov's opinion, there are two blocks of such a person's mental attitude: the attitude towards the fact of behaviour and the attitude towards its social component (i.e., the asociality of the mental attitude)[3]. In other words, a person's knowledge encompasses not only the actual, but also the social side of the act. Therefore, an understanding of guilt defined in general as a person's mental attitude should be recognised as justified.

In the Code, the sphere of a person's knowledge is represented by its two main components: the person's awareness of the public danger of his actions (inaction) and his foreknowledge of the possibility or inevitability of socially dangerous consequences (Articles 25, 26, 27 of the Code). They are usually recognised as an *intellectual* element of guilt. However, in the theory of Russian criminal law there is no unity in understanding the content of each of them and their totality. This makes it difficult for law enforcers to establish this element in the process of qualifying a crime.

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[1] See: Russian Criminal Law: in 2 vols. Volume 1: General part: textbook / Edited by L.V. Inogamova-Khegay, V. S. Komissarov, A. I. Rarog. Moscow: Prospekt, 2006. P. 159.

[2] See: *Myasishchev V. N.* [Lichnost' i nevrozy] Personality and neuroses. L.: Leningrad University Press, 1960. P. 109, 114.

[3] See: *Kozlov A. P.* Op. cit. P. 564.

The psychological phenomenon of awareness is, in theory, identified with knowledge as a more general category. Previously, there were certain legislative grounds for this: in the Code of the Russian SFSR of 1960, the legislator to refer to the fact that a person understood the public danger of his or her deed used the term "knew". However, in the Code of 1996 the term "knew" was replaced by another term "was aware of". It, in our opinion, more corresponds to the meaning of the psychological concept considered here. In our opinion, the law now excludes the identification of the terms and concepts of knowledge and awareness and recognises them as equal in meaning and significance. The concept of awareness reflects such qualities (derivatives) of consciousness as knowledge and thinking. Awareness is the process *of functioning* of knowledge. It is addressed by the Russian legislator to the assessment of a person's actions (or failures to act).

A qualitatively different form of manifestation of the sphere of human knowledge is the *foreknowledge* by him of the possibility or inevitability of occurrence of consequences of his act. It is addressed to the future, and the Russian legislator addresses this psychological element to a sign of objective side of a crime, which is called consequence of act. In psychological terms, it is the mental perception by a person of the harm that will come (or may come) as a result of the act. In the Code, it is referred to as socially dangerous consequences (Articles 25, 26, 27, 28 of the Code).

Unlike awareness, foreknowledge is prognostic in nature, which also relies on knowing and is associated with thinking as an element of knowledge and its product. Consequently, foreknowledge and awareness share the same mental source, but differ significantly in the focus of cognition, its objects, methods and the totality (circle) of the factual circumstances to be proved.

Contrary to the current prescriptions of the Russian criminal law, in the domestic theory of law there is a real position of identification of the concepts of awareness and foreknowledge. For example, V. P. Malkov states that knowledge (in the sense of awareness) of the socially dangerous nature of a deed "is equivalent to foreknowledge of the consequences indicated in the law"[1]. A different approach is observed in other contemporary scientific sources. An opinion is expressed that "awareness as understanding ... is broader than foreknowledge as an assumption of the occurrence of something"[2]. Authors who believe that knowledge is derived from foreknowledge take the opposite scientific position[3].

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[1] *Malkov V. P.* [Sub"ektivnye osnovaniya ugolovnoy otvetstvennosti] Subjective Grounds of Criminal Liability // Gosudarstvo i pravo. 1995. No. 1. P. 93.

[2] *Bikeev I. I., Latypova E. Yu.* Op. cit. P. 42–43.

[3] See: *Nersesyan V. A.* [Ponyatie i formy viny v ugolovnom prave] The notion and forms of guilt in criminal law // Pravovedenie. 2002. No 2. P. 78.

The diversity of approaches in each case is ensured by reference to relevant psychological sources. This is also reflected in decisions on the problem of the correlation between awareness and anticipation in the temporal (temporal) aspect. For example, V. A. Yakushin states, "knowledge of public danger of committed actions is not unambiguous to the concept of foreknowledge of socially dangerous consequences". Such knowledge, according to the scholar, "precedes the foreknowledge of socially dangerous consequences, it is the basis of this foreknowledge, its base and starting point"[1]. However, there is an opposing view in the doctrine: awareness is derived from foreknowledge[2].

As already noted, the Code uses the terms "awareness" and "foreknowledge" to denote different forms of the functioning of knowledge. The legislator separates them. In our opinion, these concepts should not be considered as either mutually exclusive or equal in meaning. They are interrelated, but multidirectional, and therefore they are different in character. Constituting the intellectual element of guilt, each of them means perception and *evaluation* by a person of different in content objective signs of the objective side of the crime. In the legislative formula of guilt they may have a different designation than in reality. Therefore, awareness should not be endowed with the features of a generic concept in relation to foreknowledge or one should not be considered as a particular manifestation of the other.

A psychological phenomenon is the category of "understanding" seen as a property of knowledge. One of the factors causing a debate about the intellectual content of guilt is that only one of its components, i.e. awareness, is endowed with this property. I. I. Bikeev and E. Yu. Latypova write: "Awareness as understanding ... is broader than foreknowledge as an assumption of the onset of something"[3]. This assertion seems debatable.

Awareness and foreknowledge are seen as different forms of functioning of knowledge, and each of the named components constitutes *understanding* as a specific thought operation. In criminal law it is equally aimed at understanding what is happening and understanding what might happen. It is necessary for qualification in the presence of substantive offences. The exclusion of any of the intellectual components is inconsistent with the current Code. The formula of intent presupposes a person's understanding of each of the named features.

In modern criminal law doctrine there is a view that awareness, as a psychological phenomenon, should be extended not only to the act, but also to the

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[1] *Yakushin V. A.* [Oshibka i eyo ugolovno-pravovoe znachenie] Mistake and its criminal law significance. Kazan University Press, 1988. P. 22–23.

[2] See, e.g.: *Shchepelkov V. F.* [Kvalifikatsiya posyagatel'stv pri chastichnoy realizatsii umysla] Qualification of encroachments with partial realisation of intent // Zhurnal Rossiyskogo prava. 2002. No. 11. P. 205.

[3] *Bikeev I. I., Latypova E. Yu.* Op. cit. P. 42–43.

sphere of its consequences. According to some Russian scholars, the intellectual element of guilt is "the degree to which a subject is aware of the socially dangerous nature of his actions and their consequences"[1]. Sometimes it is considered that "awareness of the danger of actions (failures to act) ... at the same time means the awareness of the possibility of their consequences"[2].

Some scholars take the opposite position on this issue, believing that it is the element of foreknowledge that should be extended not only to consequences but also to the act *as a whole*. Awareness of the nature of the act is not considered to be mere awareness but foreknowledge of the "nature of one's behaviors". It is said to be "knowing of the nature of the act, which will take place in the near or distant future"[3]. Obviously, foreknowledge in this case is given an entirely different meaning, unrelated to the topic under discussion.

Many lawyers seek support for their conclusions from psychologists. For example, it is well known that they take the position that an act cannot be regarded as conscious "unless a significant consequence or result of that act has been aware of"[4]. It can be assumed that the authoritative Russian psychologists also cover the foreknowledge of the consequences of an act by the notion of awareness. It follows that foreknowledge is part of knowledge and therefore it should not be identified as a necessary element of intent together with knowledge[5].

The concept of guilt in Russian criminal law cannot be formulated without taking into account the achievements of psychological science. However, it is important to follow not only the terminology used by it. Often the same terms are used by psychologists in different semantic combinations. In the above statement about awareness as a special psychological phenomenon, S. L. Rubinstein, in our opinion, sought to emphasize that the completeness (or measure) of a person's awareness of his *action* is related to his understanding of the "substantiality" of its consequence (or result). This approach correlates with the prescription of the criminal law that a person is aware not only of the factual side, but also *of the public danger* of his actions (inaction).

The Russian legislator distinguishes between the concepts of awareness and foreknowledge, so the task of lawyers is to provide law enforcement with

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[1] *Luneyev V. V.* [Predposylki ob"ektivnogo vmeneniya i printsip vinovnoy otvetstvennosti] Prerequisites of objective imputation and the principle of culpability // Gosudarstvo i pravo, 1992. No. 9. P. 59.

[2] *Bikeev I. I., Latypova E. Yu.* Op. cit. P. 43.

[3] *Kozlov A. P.* Op. cit. P. 368–369.

[4] *Rubinstein S. L.* [Osnovy obshchey psikhologii] Fundamentals of General Psychology. SPb: Piter. 1999. P. 16.

[5] *Ivanov N. G.* [Umysel v ugolovnom prave Rossii] Intent in the Criminal Law of Russia // Rossiyskaya yustitsiya. 1995. No. 12. P. 17.

criteria for distinguishing these components of the intellectual element of guilt in relation to each form of guilt, to correctly reveal their criminal law meaning, taking into account the data of psychological science. Terminologically expressed judgments of psychologists cannot always be directly extrapolated to the criminal law matter.

***Will*** as an independent component of the content of guilt is essentially different from its intellectual element, although it is related to it. In the Code it is considered as an independent sign of guilt, which expresses *the volitional attitude* of a person to the consequences of his act. This element of the psyche is regarded as a concept not reducible to knowledge[1]. The main characteristic of the human will is its self-determination, which is based on the philosophical understanding of the will as the mind's capacity for self-determination. Characteristically, in Russian criminal law, a person's ability to direct his or her own actions is distinguished as a special feature of mental capacity, distinct from awareness (Article 21 of the Code).

From the position of the Code, the state of will of a person may be expressed in the following types of his/her attitude to the consequences of his/her deed: the desire for socially dangerous consequences, the conscious assumption or indifferent attitude to their occurrence (Article 25) or in the expectation of their prevention (Part 2, Article 26).

The volitional side of the mental attitude of a person to a socially dangerous act committed by him forms the volitional element of guilt, the substantive content of which is determined by the construction of a crime. Each corpus delicti contains the main objective feature, which in a concentrated form embodies the social danger of an act, and the volitional attitude to it "serves as a determining criterion for establishing the form of guilt"[2]. This provision seems relevant in connection with the division in the theory of criminal law of corpus delicti into materially defined, formally defined and inchoate, according to the way the legislator describes the objective side of a certain type of crime.

***Negligence*** is recognised in the Code as a form of negligence, but requires a particular psychological and legal characterisation. This is due to a number of circumstances. Firstly, it is sometimes argued in the literature that the concept of negligence does not fit within the social and psychological concept of guilt. Secondly, the Russian criminal law doctrine recognises as dubious or unpromising attempts to identify the grounds for criminal responsibility for negligence on the

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[1] On the psychological side, the will is characterised as a complex entity associated with a particular representation of purpose (choice, decision, etc.). Psychologists extend awareness to the will. There are degrees of will awareness: attraction, will, desire. See: *Varshava B. E., Vygotsky L. S.* [Psikhologicheskiy slovar'] Psychological dictionary. SPb.: Tropa Troyanova: Roshcha Akademii, 2008. P. 53.

[2] Encyclopaedia of Criminal Law. Vol. 2: Criminal Law. SPb., 2005. P. 707.

basis of its existing legislative formula. Thirdly, there is no unity of opinion on the intellectual and volitional elements of negligence. Fourth, in foreign sources negligence is often excluded from the concept of carelessness and is considered as a special (independent) form of guilt.

Under the Code an offence is deemed to have been committed through negligence if a person *did not foreknow* the possibility of socially dangerous consequences of his acts (or failure to act) although with due care and foresight he *must* and *could have* foreknew these consequences (article 26, part 3, of the Code).

The absence of such foreknowledge in a person allows some scholars to argue that the understanding of negligence does not correspond to the psychological concept of guilt and therefore requires a different legislative solution[1]. This conclusion is not unreasonable, because the psychological concept of guilt is based on the idea of the presence in its content of such elements as knowledge and will. Guilt in Russian law is traditionally viewed as a certain mental attitude of a person to the act committed by him or her.

According to some scholars, the legislative definition of negligence does not include knowledge and will in relation to socially dangerous consequences[2]. Considerations of social necessity and expediency are put forward as justification for the criminal punishability of this type of culpability: such acts cannot go unpunished[3]. With this approach, negligence is endowed with the features inherent in the evaluative (normative) concept of guilt. At the same time, the literature rejects the approach that justifies criminalising negligence by the need to encourage careful and prudent behaviour on the part of others, as this "leads to objective imputation"[4].

There is a tendency in the work of many Russian criminalists to view negligence within a social and psychological concept of guilt. However, there is a lack of unity in the arguments justifying such a commitment.

According to some scientists, with negligence the lack of a person's foreknowledge of the possibility of socially dangerous consequences does not mean that this person is not aware of the social meaning of the actions themselves: a person may be aware of the factual side of his behaviour, but not foreknow the onset of

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[1] See e.g.: *Luneev V. V.* [Sub"ektivnoe vmenenie] Subjective imputation. M.: Spark, 2000. P. 44–48.

[2] *Dagel P. S., Mikheev R. I.* [Teoreticheskie osnovy ustanovleniya viny] Theoretical Foundations of Establishing Guilt. Vladivostok: Far Eastern University Publisher, 1975. P. 67.

[3] See: *Veklenko S. V.* [Ponyatie, sushchnost', soderzhanie i formy viny v ugolovnom prave] Concept, essence, content and forms of guilt in criminal law. Omsk: Publishing house of Omsk Law Academy of the Ministry of Internal Affairs of Russia, 2002. P. 157.

[4] *Filimonov V. D.* [Problema osnovaniy ugolovnoy otvetstvennosti za prestupnuyu nebrezhnost'] Problem of grounds of criminal responsibility for criminal negligence. M.: Centre YurInfoR, 2008. P. 49.

socially dangerous consequences[1]. V. A. Yakushin calls as an intellectual element of negligence also "the personal meaning of the committed". In his opinion, it is not the awareness of impermissibility, blamefulness of committed actions, but the personal sense *dominates* in a crime committed on negligence[2].

Other scholars are moving in the same direction. They believe that a person's negligence has developed as a result of a long interaction with others and has developed a *program* of behaviour in the person's mind. Its peculiarity is own "insufficient attention to the interests of other people, society or the state". If these person's traits dominate, "circumstances that endanger the interests of other people, society or the state, although recognised by the person, are not properly assessed by the person"[3]. It follows that personal interests prevent a person from focusing adequate conation on behavior, consistent with other legally and morally protected interests.

There is also the view that negligence has its own intellectual content. It is characterised by two attributes: negative and positive. *The negative* attribute consists in person's failure to foreknow the possibility of socially dangerous consequences, which covers the lack of awareness of social danger of a committed act. *The positive* element of the content of negligence is seen in the fact that the guilty person should and could show the necessary attentiveness and foresight and to foreknow, thereby, the coming of actually caused harmful consequences. "It is this very attribute that turns negligence into a type of guilt in its criminal law meaning"[4]. It should be noted that the allocation of the mentioned signs in principle corresponds to the legislative formula of negligence in the Code.

Some Russian criminalists link the characterisation of negligence to modern psychological ideas about the nature of knowledge, its properties and functions as manifestations of the mentality *of* a *sane* person. Judging by the nature and content of the arguments put forward, even before the commission of the crime in the case of negligence, there is *information* reflected in the mind of a person *about the possibility* of the onset of harmful consequences. It is presented in the form of a potential, but not realised attitude. According to V. A. Nersesyan, such information "is contained at an unconscious level". Apparently, it is realised in the subsequent behaviour of the person under certain conditions which are external

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[1] See: [Kurs ugolovnogo prava. Obshchaya chast'. T. 1: Uchenie o prestuplenii] Criminal Law Course. General part. Vol. 1: The doctrine of crime. Textbook for Institutions of Higher Education / Under the editorship of N. F. Kuznetsova and I. M. Tyazhkova. M.: Zertsalo, 2002. P. 330.

[2] See: *Yakushin V. A.* [Kvalifikatsiya prestupleniy. Obshchie voprosy] Qualification of crimes. General issues. Togliatti: VUiT, 2016. P. 122.

[3] *Filimonov V. D.* Op. cit. P. 59–60.

[4] *Rarog A. I.* Op. cit. P. 94.

to the subject. V. E. Kvashis referred to these conditions as the environment that develops by the time and in the process of the subject violating the norm of precaution and determining the onset of the consequences of such a violation[1].

In addressing these questions, V. D. Filimonov relies on the doctrine of the *purpose reflex*. The author puts forward the thesis that there is a "peculiar moral program" formed in a human conscience. Its defects prevent a person from adjusting his behaviour in the process of interacting with external factors. The essence of negligence is, in the scientist's opinion, the manifestation of such inattention to legally protected interests. A person, being aware of the danger of his surroundings, is not aware of the danger of his actions (failures to act), which prove to be a direct cause of the occurrence of harmful consequences[2].

The *volitional* aspect (element) of guilt in the form of negligence is seen by Russian criminologists either in the special nature of the will of the person, which is manifested in their behavior[3], or in the desire to commit acts within the personal sense, in the lack of mobilization of their efforts to assess and analyze the possible onset of socially dangerous consequences[4], or in the volitional nature of the act committed by a person and the lack of volitional acts of behavior aimed at preventing socially dangerous consequences[5]. The combination of objective ("was meant to") and subjective ("could have foreknew them") legal criteria of negligence is considered as the basis of the criminal law assessment of negligence[6].

The proposed list of scientific judgments about the willful element of culpability in the form of negligence cannot be considered exhaustive, as it is most often linked to the authors' position regarding the intellectual content of negligence.

There is also a difference of opinion in foreign criminal law doctrine. For example, American specialists believe that when a person is negligent they are not aware that "as a result of their actions there is a significant risk of harm"[7]. In a number of

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[1] See: *Kvashis V. E.* [Prestupnaya neostorozhnost'. Sotsial'no-pravovye i kriminologicheskie problemy] Criminal Negligence. Social and legal and criminological problems. Vladivostok: Far Eastern University Publisher, 1986. P. 63.

[2] See: *Fillimonov V. D.* Op. cit. P. 54, 58–59.

[3] See: Course of Soviet Criminal Law. General Part. Vol. II. M.: Nauka, 1970. P. 317.

[4] See: *Yakushin V. A.* Op. cit. P. 123.

[5] See: [Kurs ugolovnogo prava] Criminal Law Course. General part. Volume 1: The doctrine of crime. Textbook for universities. Under the editorship of N. F. Kuznetsova and I. M. Tyazhkova / G. N. Borzenkov, V. S. Komissarov, N. E. Krylova et al. IKD: Zertsalo-M, Moscow, 2002. P. 331.

[6] *Naumov A. V.* [Rossiyskoe ugolovnoe pravo] Russian Criminal Law. Course of lectures: in two volumes. Vol. 1: General part. Moscow: Yuridicheskaya literatura, 2004. P. 241.

[7] *Burnham W.* The Legal System of the United States. 3rd ed. M.: Novaya Yustitsiya, 2006. P. 861.

European countries, the concept of negligence is developed within the framework of the evaluative (normative) concept of guilt. It occurs when a person omits to take the necessary precaution, which he was able and obliged to exercise in a given case by virtue of his personal capacity and knowledge[1]. It is easy to see that the formula of negligence in the Code in a number of elements to a certain extent corresponds to the evaluative rather than psychological concept of guilt.

## 4. Conclusions

Modern domestic criminal law doctrine relies on the psychological concept of guilt, although some scholars have attempted to give guilt an evaluative connotation. Even weaker is the voice of supporters of interpretation of guilt as a dangerous state of mind. For example, P. G. Ponomarev expressed the opinion that "subjective imputation is nothing else than the establishment of criminal liability in the absence of action or inaction by a person for the presence of a dangerous state of mind"[2]. However, this interpretation of guilt is not supported by Russian criminal law scholarship. For the matter of that, the legislator gave a reason to interpret guilt as a dangerous state of mind by supplementing the Law of 01.04.2019 No. 46-FZ of the Code[3] with article 210[1], which established liability for occupying the highest position in the criminal hierarchy regardless of the commission of specific criminal acts. However, this legislative solution was not supported by the academic community, which still firmly adheres to the psychological understanding of guilt in criminal law.

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[1] See: *Esakov G. A., Krylova N. E., Serebrennikova A. V.* [Ugolovnoe pravo zarubezhnykh stran: uchebnoe posobie] Criminal Law of Foreign Countries: Textbook. M.: Prospekt, 2013. P. 192.

[2] *Ponomarev P. G.* [O printsipe viny, zakreplennom v Ugolovnom kodekse Rossii] On the principle of guilt enshrined in the Russian Criminal Code // Ugolovnoe pravo: strategiya razvitiya v XXI veke. M., 2008. P. 37.

[3] On Amendments to the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation in terms of combating organised crime: Federal Law of April 1, 2019 No. 46-FZ // Sobranie zakonodatelstva Rossiyskoy Federatsii = Russian Federation Code. 2019. No. 14 (Part I). Art. 1459.

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# CIVIL LAW REGULATION AND PROTECTION OF GENES AND GENOMIC TECHNOLOGIES: PROBLEMS OF THEORY AND PRACTICE

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**Abstract:** Currently, both law enforcement activities and dynamically developing legal regulation are aimed at the involvement of genes and genetic structures in civil circulation. The civil-legal direction is actively developed in order to ensure the defense of genes and the realization of the rights and obligations of subjects of biomedical technologies in the field of genes of genomic structures in civil-legal relations.

Especially a large number of questions and difficult from a civil point of view of practical problems arise in determining the possibility of including genes and genomes in the list of objects of civil rights, their turnover.

The article defines some areas of civil regulation of genomic technologies in modern Russia, the qualification of genes and genomes as objects of civil relations, the turnover of genes and genetic structures.

**Key words:** Genes, genome, turnover capacity, objects of civil rights, things, genetic technologies, civil turnover, civil law regime.

Undoubtedly, human life is the highest value in any modern civilised society. Article 17 of the Russian Constitution stating: "fundamental human rights and freedoms are inalienable and belong to everyone from birth" is related to the definition of the beginning of a child's life[1]. Only a physically, genetically and mentally

[1] Constitution of the Russian Federation (adopted by a nationwide vote on 12.12.1993) (with amendments introduced by the Federal Law of the Russian Federation On Amendments to the

healthy man and woman can create a healthy family not transferring the burden of serious illness to their partners and future children.

At the present stage of formation of the rule of law and a developed civil society in the Russian Federation, the possibility of using genes, genomes and genomic technologies, which seem to belong mainly to the private life of citizens, in civil turnover and civil law protection is of particular relevance.

We are convinced that at the present stage of formation of the rule of law and developed civil society in the Russian Federation, the possibility of using genes, genomes and genomic technologies and constructs in civil circulation and their civil legal protection, relating mainly to the sphere of civil law regulation, is of particular relevance. At present, quite a number of scientific and practical researches and experiments of medical and civil nature aiming at involving genes and genetic constructions in civil legal relations as objects of civil rights are being carried out. The question arises, therefore, as to the civil law capacity of genes and genetic constructions.

It is necessary to state that a scientific trend has already been formed in the world with the practical purpose of gene editing. The medical practice of introducing such developments is aimed at realising the genetic "improvement" of human life and health. Society has been in the age of genetic engineering for quite some time.

We believe that awareness of the need for civil law regulation of genetic engineering activities in relation to the human body and protection of rights in the field of genomic technologies has come to the Russian legislator only in recent years, that is, quite recently, due to the rather rapid development of genomic technologies, genetic engineering in the Russian biomedical practice.

The importance of the development of competitive civil law turnover, including social and legal relations, such as biomedical activities and genetic engineering is increasing every year. Healthy competition, free entrepreneurship, and the involvement of more and more objects in civil turnover are the most important factors in the development of civil legal relations in modern Russia, the sustainability of the national economy, and the protection of intellectual rights in the field of biomedicine and genomic research.

A particularly large number of questions and practical problems arise in determining whether genes and genomes can be included as objects of legal relations and defined as objects of civil rights.

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Constitution of the Russian Federation dated 30.12.2008 No. 6-FKZ, dated 30.12.2008 No. 7-FKZ, dated 05.02.2014 No. 2-FKZ, dated 21.07.2014 No. 11-FKZ) // Russian Federation Code. 2014. No. 31. Article 4398.

The search for the most optimal model of relations between the individual, government and society inevitably depends on a scientifically grounded solution of a set of problems in the field of genetic engineering and genomic technologies, which for a long time have not found a uniform resolution both in doctrine and in law enforcement of medical activity. One of these important problems is the definition of the civil law regime for genes.

Medical activity is a type of professional activity, which results in a relationship between a medical organisation (health worker) and a patient. "When seeking medical care, a person quite often has to disclose certain aspects of his or her private and family life to the doctor, and in the process of providing this very care the doctor becomes aware of the person's illnesses, past procedures and other medical features"[1].

The right to health protection is enshrined in the provisions of the Constitution of the Russian Federation[2]. In furtherance of the provisions of the Basic Law, relevant legislative acts have been adopted which are aimed at protecting the health of citizens and the development of genomic technologies, genetic engineering and biomedicine.

The necessity and practical significance of the study of genes, not only from a biological point of view, but also from a legal and civil point of view, is determined by the fact that a gene may directly affect the presence of a trait (phenome) of an organism or take part in the formation of several traits, forming a specific genetic construction, which is involved in civil law relations and becomes an object of civil rights[3].

The importance of developing competitive civil law turnover, including those in social and legal relations such as biomedical activities and genetic engineering, is growing every year. Healthy competition, free entrepreneurship, and the involvement of more and more objects in civil turnover are the most important factors in the development of civil legal relations in modern Russia, the sustainability of

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[1] *Levushkin A.N., Pushkareva A.N.* Publichnyi dogovor ob okazanii platnykh meditsinskikh uslug i zashchita vrachebnoi tainy: teoriia i praktika primeneniia [Public contract for the provision of paid medical services and protection of medical secrecy: theory and practice of application] // Grazhdanskoe pravo = Civil right. 2016. No. 3. P. 14. (In Russian).

[2] Constitution of the Russian Federation (adopted by a nationwide vote on 12.12.1993) (with amendments introduced by the Federal Law of the Russian Federation On Amendments to the Constitution of the Russian Federation dated 30.12.2008 No. 6-FKZ, dated 30.12.2008. No. 7-FKZ, dated 05.02.2014 No. 2-FKZ, dated 21.07.2014 No. 11-FKZ) // Russian Federation Code. 2014. No. 31. Article 4398.

[3] See: *Levushkin A.N.* Grazhdansko-pravovoe regulirovanie genomnykh tekhnologii i oborotosposobnost' genov kak ob"ektov grazhdanskikh prav [Civil law regulation of genomic technologies and gene turnover as objects of civil rights] // Grazhdanskoe pravo = Civil right. 2019. No. 5. P. 26–29. (In Russian).

the national economy and the protection of civil, intellectual rights in the sphere of biomedicine and genomic research.

According to Article 8 (1) of the Constitution of the Russian Federation, the Russian Federation guarantees the unity of the economic space, the free movement of goods, services and financial resources, support for competition and freedom of economic activity.

"Only a physically, genetically and mentally healthy man and woman can create a healthy family not transferring the burden of serious illness to their partners and future children. The rapid pace of modern life does not always provide opportunities for routine health check-ups for certain segments of the population"[1].

We believe that at present, given the development of civil and medical legislation, there is an objective need to qualify and define the legal nature of genes and genomes as objects of civil rights and to establish a special civil law regime for genes, genomes and genetic constructions. This special civil law regime for genes should have a special civil law nature. Genes can be qualified as objects of civil rights and their negotiability can be determined based on this formulation of the question[2].

We are convinced that at the current stage of legal regulation of genetic engineering activities of genes and genomes use, the public law performs such a new function of protecting the rights of citizens as ensuring their private interests in genetic engineering and involvement of genes in the civil turnover. Achieving a balance of public and private law in the regulation of relations arising from the involvement of genes in civil circulation, establishing a regulatory framework for genetic engineering in the Russian Federation is both an objective and a necessary condition aimed at the further development of biomedicine, human health and life, strengthening and implementing the system of citizens' rights in the sphere of biomedicine in any modern society, especially in our country at the present stage.

It is worth agreeing with the doctrine's suggestion that a Federal Law On Government Regulation of Genetically Engineered Activities in relation to Human Beings should be adopted. As G. B. Romanovsky not unreasonably suggests, the said regulatory act should establish general principles of respect for human rights, as well as a number of bans: forced genetic counselling; commercial use of genetic material; genetic screening of the entire population; systematisation of genetic

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[1] *Levushkin A. N.* Pravovye aspekty meditsinskogo obsledovaniia lits, vstupaiushchikh v brak, v stranakh SNG [Legal aspects of medical examination of persons entering into marriage in the CIS countries] // Meditsinskoe pravo = Medical law. 2011. No. 3. P. 41. (In Russian).

[2] See: *Levushkin A. N.* Grazhdansko-pravovoi rezhim genov kak ob"ektov grazhdanskikh prav [Civil legal regime of genes as objects of civil rights] // Lex Russica. Zakon russkii = Lex Russica. The law of the Russian. 2019. No. 6. P. 100–109. (In Russian).

material in relation to Russian citizens by foreign organisations; and discrimination based on DNA information.

Strict government control over the collection of genetic information by foreign organisations, excluding joint activities between foreign and Russian scientific organisations, permitted under a specially established procedure.

Priority of public funding for scientific organisations engaged in human genetics research[1].

Medical tourism is developing at a significant rate worldwide and a new type of similar activity, "gene tourism", is spreading. There is genetic pluralism: cloning is banned in some countries but allowed in others; GMOs are banned from cultivation in some countries but allowed in others; labelling of GMO products is required in some countries; some countries experiment with human genome editing while it is banned in others. There is no reason to believe that the same will not be true of "improving" humans. This is not to say that tomorrow there will be countries where everything is allowed. However, some variation will emerge, it is already taking shape.

The necessity of establishing a special civil legal regime for genes as objects of civil rights has been determined, which is a combination of ways, methods and types of civil legal regulation of the use of genes and genomes, which characterise a special combination of interrelated permissions, prohibitions, positive obligations established for subjects of genetic engineering, genomic research and aimed at ensuring effective use of genes, genomes and genetic constructions in citizens.

Indeed, it is the genes that "endow" the modern human being with biological capabilities, and it is the genes that limit the potential capabilities of the individual. The genes and genomes we have provide us with our essence, our inclinations and our opportunities to realise ourselves. It should be recognised that human beings are biological beings, and genes are the boundaries of our capabilities. To a certain extent, a person's genes and genotype are a person's future destiny and a set of possibilities for further realization during their life.

There is currently a moratorium on the use of biomedical cell technologies for human cloning purposes in Russia (cloning of cells and organisms for research purposes and cloning of organs for transplantation and animals is permitted). At the same time, however, work is proceeding on the experimental gene editing of human embryos.

We believe that the prevailing challenge in the field of medicine, biomedicine and genomic technologies is to ensure the safe transfer of high-tech industries

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[1] See: *Romanovskii G. B.* Pravovoe regulirovanie geneticheskikh issledovanii v Rossii i Germanii [Legal regulation of genetic research in Russia and Germany] // Pravozashchitnik = Rights defender. 2016. No. 2. P. 5. (In Russian).

in medicine and genomic research to locations with low labour and input costs, and to ensure the predominance of Western rights holders in developing country economies in promising markets for genomic technologies.

It is debatable whether genes, genomes, genetic constructions are negotiable and whether it is possible to make various civil transactions with them, and whether the subjects (participants/persons) of genomic technologies enter into binding and proprietary legal relations with genes. The possibility of including genes and genomes in the objects of intellectual property rights and ensuring their patent protection, establishment of legal protection procedures was proved.

A legal analysis of the dynamics of normative regulation of biomedicine and the processes of studying and using genetic engineering and gene use activities in the Russian Federation for scientific purposes allows us to speak about new trends in the development of biomedical and 'gene' legislation, in particular, not only about changes in traditional areas as biology, genetics and medicine, but also about the appearance of new institutes and sub-branches, changes in the structure of legislation regulating activities in the field of medicine, biomedicine and genetics, indicating a transformation of its entire system. The content and scope of regulation and the inclusion of genes and the genome in the legal space are undergoing significant changes. The trend towards expanding the subject of regulation of the 'gene industry' is being realised.

It must be recognised that, in fact, the world has been living in the era of genetic engineering, of genetic modification, for over half a century now, without, however, giving much thought to the significance of the ongoing genetic revolution. In the last twenty to ten years with the development of GMO technology, this trend has attracted a lot of attention. It is undoubtedly objectively impossible to slow down and even more so to stop the spread of genetic technologies, the involvement of genes in civil turnover; genetic engineering is entering a new round of its high-tech development.

It has been established that, unfortunately, the awareness of the need for legal regulation of genetic engineering activities in relation to the human body has come to the Russian legislator just in the last decade, which is associated with a rapid development of doctrine in the field of genetic engineering and genomic research. This explains the backwardness of our government in the development of scientific ideas in the field of genomic research and the implementation of their results in medical practice.

Activities in the field of genomic research, the level of doctrinal and practical research in this field and the application of genetic technologies in the law enforcement process are mainly carried out by legal entities engaged in scientific, innovative, medical and some other activities in the implementation of various genetic engineering projects. For some of them the law already establishes higher require-

ments[1]. It seems that the greatest legislative and practical interest is the problem of qualification of genes as objects of legal relations, in general, and objects of civil rights, in particular, formation of the civil legal regime of genes.

It should be particularly noted that the problem of determining the objects of civil rights and civil legal relations has a rather long history of reflection in civil law doctrine. Indeed, the correlation between the categories of object of rights and object of legal relations is still debatable; what should be considered as the direct object: material and spiritual goods and rights or the actions and behaviour of persons.

Based on the analysis of law enforcement activities, it can be concluded that today it is quite important to resolve the situation and issues regarding the possibility and expediency of referring genes to the objects of civil rights and the formation of a special civil legal regime of genes and genomes, determining its content, implementing a mechanism for the protection of genes and genetic constructions. Accordingly, there is a question of formation of special civil legal regime of genes and genomes. Based on the current level of science and technology development, we believe that it is justified to refer genes to one of the objects of civil rights specified in Article 128 of the Civil Code of the Russian Federation. Such a conclusion can be based on the legal analysis of the category of genes and genome and the definition of the essence of these phenomena.

The concept of forming a civil society and constitutional state in Russia, and the effective development of medical services, where the protection of human rights and freedoms and the social and material wellbeing of people are of paramount importance, predetermine an increased scientific interest in the problem of taking into account the interests and protection of the rights of unborn children in civil turnover and medical practice.

The consideration of the interests and rights of unborn children in medical practice and civil relations must be seen in the context of reforming civil law[2].

Most of the ideas concerning the development of the healthcare system, the expansion of the sphere of civil law services in biomedicine, genomic technologies are based on different methodological approaches, among which are the reorganisation and reform of the system of legislation regulating healthcare, genetic engineering,

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[1] See: *Mokhov A. A.* Dela o preduprezhdenii prichineniia vreda v budushchem (na primere genomnykh issledovanii i vnedreniia ikh rezul'tatov v praktiku) [Cases on prevention of harm in the future (on the example of genomic research and implementation of their results in practice)] // Vestnik grazhdanskogo protsessa = Bulletin of civil procedure. 2019. No. 2. P. 105. (In Russian).

[2] See: *Levushkin A. N.* Nerodivshiesia deti: uchet interesov i prav v grazhdanskom oborote i meditsinskoi praktike [Unborn children: consideration of interests and rights in civil circulation and medical practice] // Zakony Rossii: opyt, analiz, praktika = Russian laws: experience, analysis, practice. 2019. No. 6. P. 18–23. (In Russian).

optimisation of the structure and management of the sector, increased funding, development of biomedical technologies, improvement of civil law mechanisms for healthcare, improving the professionalism of doctors and geneticists in the use of genes, genomes in the delivery of biomedical services.

An important factor that should be noted is the implementation of priority areas for the further progressive development of healthcare in our country. This is certainly improving the quality of medical and biomedical services, which are rather multifactorial and complex phenomena that are at the intersection of the interests of the population and the government, medical organisations and government health agencies.

It can be concluded, not uncontroversially for the doctrine, that genes and genomes, being special intellectual property rights, primarily enter objects of civil rights, have a legal characteristic that distinguishes them from other types of objects as defined by Article 128 of the Civil Code of the Russian Federation.

Thus, as a result of the study, having identified genes and genomes as special objects of civil rights, it seems necessary to implement recommendations aimed at improving the protection of intellectual property rights in the field of providing special civil legal regime for genomes by applying a broader use of patent protection. It is patent protection that can confer monopoly rights on genes and genomes as specific intellectual property by granting patents on them as objects of intellectual work in biomedicine.

Genes and genomes have been shown to have a separate place amongst the subject matter of intellectual property rights or to be attached to one of the existing subject matter (with certain exceptions).

Article 60 of the Family Code of the Russian Federation establishes that every child has the right to parental support or persons in loco parentis. It appears that the right to support also applies to a child who has been conceived but not born. Among other things, Article 89 of the Family Code allows a wife during pregnancy to claim alimony from the other spouse in court.

We consider it justified to clarify Article 17 of the Civil Code of the Russian Federation in terms of the definition of a citizen's legal capacity, which arises from the moment of their birth if vital signs provided for by the medical rules are present.

Thus, in the course of the research work, some areas of civil law regulation of the implementation of genomic technologies in modern Russia, the qualification of genes and genomes as objects of civil legal relations, and the turnover of genes and genetic constructions were determined.

It is argued that at the present stage of legal regulation of genetic engineering of genes and genomes use, the public law performs such a new function of protecting the rights of citizens as ensuring their private interests in genetic engineering, involving genes in civil turnover. Achieving a balance of public and

private law in the regulation of relations arising from the involvement of genes in civil turnover, establishing a regulatory framework for genetic engineering in the Russian Federation is both an objective and a necessary condition aimed at the further development of biomedicine, human health and life, strengthening and implementing the system of citizens' rights in the sphere of biomedicine in any modern society, especially in our country at the present stage.

The main task of the Russian legislator is to establish a balance of public and private interests in the regulation of genetic engineering, implementation of genomic research and to achieve this balance by including genes and genomes as special objects of legal relations and civil rights.

The necessity of establishing a special civil legal regime for genes as objects of civil rights has been determined, which is a combination of ways, methods and types of civil legal regulation of the use of genes and genomes characterising a special combination of interrelated permissions, prohibitions, positive obligations established for subjects of genetic engineering, genomic research and aimed at ensuring effective use of genes, genomes and genetic constructions in civil turnover.

In modern civil turnover there is an objective need to qualify and determine the civil law nature of genes and genomes as objects of civil rights and to establish a special civil law regime of genes, genomes and genetic constructions. The possibility of legal regulation of genomic research and implementation of its results in medical practice in the provision of services of civil law nature is proved.

The possibility of including genes and genomes in intellectual property rights and providing for their patent protection and the establishment of legal protection procedures has been proven.

Thus, de facto humanity is already in the mode of its own genetic transformation and transformation of biosocial environment. Currently, there is an objective need to develop and justify new directions for improving the system of legislation of the Russian Federation, in general, and civil legislation, in particular, aimed at effective and objectively justified regulation of genes and genomes, the objects of genetic engineering, based on the goals of state policy in the field of biomedicine and the existing social and legal potential of genetic engineering practice development.

The civil legal regime for genes and genomic technology is inextricably linked to the right to human life, the provision of qualified medical care to a citizen, and the process of treating a patient, since any interaction between a person (patient) and a doctor, geneticist and other medical personnel gives rise to the right to health care. One of the aims of establishing a civil law regime for genes and genomes is to ensure that the legislator has proper legal regulation of their involvement and subsequent participation in civil transaction.

The special civil legal regime for genes is the possibility or impossibility of certain actions (transactions) with genes that are object, as well as the set of rights

and obligations, permissions and prohibitions associated with such actions of the various persons involved in the genetic engineering relationship.

The inclusion of specific objects such as genes in civil law inevitably involves the establishment of a fiduciary relationship between the parties involved in the use of genes and genetic technology in civil law.

The civil law regime of genes and the genome as objects of law is directly influenced by the legal characteristics of such objects (whether it is a property or another object, free in circulation or restricted, and so on). In turn, the social and legal characteristics of the object are influenced by the properties of the object as a phenomenon of reality[1].

We consider it possible to take into account the interests and rights of unborn children in the civil sphere in the context of ensuring and protecting traditional family values based on the family and parent-child relationships.

The following peculiarities and essential substantive properties of special civil legal regime of genes are distinguished: 1) special basis of origin of such regime. Establishment of the special civil legal regime on genes is connected with rendering of professional medical aid and medical service in the sphere of genetic engineering to the citizen; 2) genes and genomes are special object, complex nature of substances and information included in genes and genomes; 3) inseparable and objective connection of genes with persons; 4) existence of such special persons as doctors, geneticists, biologists and medical personnel, who are obliged not to disclose certain information in genomic developments in connection with performance of their profession; 5) Ensuring the development of genetic engineering sphere by government coercive measures and possibility of application of civil and other legal responsibility, provided by norms of different branches; 6) Regulation on the basis of civil legal regulators and legislation norms in the sphere of medicine, moral injunctions, personal qualities.

It is argued that the special civil law regime of genes is of civil law nature. However, this legal regime is regulated by norms of constitutional, civil, business, administrative, medical law. The civil law regime of genes and genomes receives normative establishment both at the level of private law and public law regulation in order to ensure effective and harmonious protection of citizens' rights in the sphere of genetic engineering, implementation of genomic research and biomedicine.

It has been proved that the civil legal regime of genes and genomic technologies is inextricably linked to the right to human life, the provision of a citizen with qualified medical care, with the process of patient treatment, since any fact of

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[1] See: *Levushkin A. N.* Grazhdansko-pravovoi rezhim genov kak ob"ektov grazhdanskikh prav [Civil legal regime of genes as objects of civil rights] // Lex Russica. Zakon russkii = Lex Russica. The law of the Russian. 2019. No. 6. P. 102. (In Russian).

interaction between a person (patient) and a doctor, geneticist and other medical personnel generates provision of the right to health protection. One of the aims of establishing a civil law regime for genes and genomes is to ensure that the legislator has proper legal regulation of their involvement and subsequent participation in civil turnover.

The result of this study is that the development and scientific understanding of genes and genetic engineering are closely related, and in some cases only within the medical activity (practice) in its broadest sense. Which seems very justified. Indeed, medical activity is one of the most important economic, practice oriented activities, which is of key importance not only to specific individuals who are the consumers of medical services, but also to society and the state[1]. Obviously, biomedical practice also has an important private and public, and social and legal character.

We are convinced that now there is an objective need to develop and substantiate new directions for improving the system of Russian legislation based on the goals of public policy aimed at the development of genetic engineering and the existing social and legal potential for biomedical development.

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[1] See: *Mokhov A. A.* Meditsinskaia deiatel'nost' vid sotsial'nogo predprinimatel'stva [Medical activity a type of social entrepreneurship] // Meditsinskoe pravo = Medical law. 2016. No. 1. P. 6. (In Russian).

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# GOVERNMENT RESPONSIBILITY IN PANDEMIC AND INFODEMIC[1]

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**Abstract:** The article analyzes some preliminary results of the Russian authorities' fight against the pandemic caused by the previously unknown infection Covid-19. The interconnection between the pandemic and the infodemic complicating the authorities' responsibility not only for the physical but also for the mental health of the nation is considered here. The features of government responsibility during the pandemic, changes in labour and other legislation, threats to the mental development and mental health of the younger generation due to the mass transition to distance education caused by the pandemic are considered.

**Keywords:** pandemic, responsibility of authorities, legislation, unemployment, distance education, restrictions on freedom of movement.

## 1. Introduction

Despite the new political realities over the last three decades, which have fundamentally changed all the systemic characteristics of society, government and law, there is still interest in legal responsibility, as the topic has timeless relevance and practical importance. The paradox is that the actual and significant questions of constitutional responsibility of government bodies have been developed fragmen-

[1] The study was funded by the Russian Foundation for Basic Research and the Science Committee of the Republic of Armenia under research project No. 20-511-05003.

tarily (in relation to individual authorities but not in general) and not yet considered in pandemic and infodemic aspect. Furthermore, the system and concepts of responsibility differ from country to country and an interstate comparison is of particular cognitive value.

The problem of government responsibility gets a new meaning and requires a completely new methodological and comprehensive approach, as the structure of government authorities in both countries has changed and continues to change, the implementation of the principle of separation of powers, potential and actual conflicts arising under it; hidden and made public; systemic and local; etc.

Responsibility is a key element of the legal policy of the government, which it is impossible to count on the success of any legal policy, any reform and any modernization without.

The scientific novelty and practical value of the article lies in the systemic approach to the range of problems with an emphasis on overcoming certain clichés and stereotypes in science, mistakes in law-making and false presumptions established in practice. The aim of the article is to study the responsibility of government bodies in systematic interconnection of all its elements, to identify the impact of various challenges to the responsibility of authorities (turbulence of changing values in the world, globalism, migration processes, pandemic, and infodemic) and to develop practical recommendations for scientists, lawmakers and law enforcement authorities.

The scientific works of such authors as S. Avakyan, A. Bayer, D. Bell, M. Bekhterev, N. Bekhtereva, Drukker, S. Freud, D. Gellup, A. Maly, A. Milechin, A. Morhat, V. Nevinsky, D. Pugh, A. Pentland, Ya. Tikhomirov, T. Khabrieva, D. Habermas, D. Hixon, V. Khalin, L. Harlon, A. Handler, V. Chervonyuk, O. Chepverikova, V. H. Emerson, etc. are dedicated to the pandemic and the e-government.

## 2. How pandemic affects responsibility of public actors

The Federal Law of 30.03.1999 No. 52-FZ On the Sanitary and Epidemiological Well-Being of the Population (hereinafter the Law No. 52-FZ) is in effect in Russia. This law defines infectious diseases as occurring and spreading diseases by biological factors of the environment (pathogens of infectious diseases) exposure pathway and transmitted from a diseased person or animal to a healthy person. Herewith, infectious diseases that pose a danger to others are defined as follows: "... infectious diseases of humans characterized by a severe course, high mortality and disability rates, and rapid spread among the population (epidemics)"[1].

[1] Федеральный закон от 30.03.1999 № 52-ФЗ «О санитарно-эпидемиологическом благополучии населения» (с изменениями и дополнениями от 26.07.2019 № 232-ФЗ) // Собрание законодательства. 1999. № 14. Ст. 1650. [Federal Law No. 52-FZ On Sanitary and Epidemiologic Well-Being of the Population]

The Law No. 52 is similar to the US law on the National Environmental Policy[1], and also takes into account the US practice in the fight against AIDS[2].

On 25.03.2020, V. V. Putin, the President of Russia, announced a so-called "long weekend" from Saturday (March 28) to Sunday (April 5, 2020), across Russia in connection with the Covid-19 pandemic, so that the country's residents would stay at home. This was called self-isolation. So far, the word "quarantine" has not even been uttered, but already on 30.03.2020. V. V. Putin again addressed the citizens of Russia and announced the extension of the quarantine for Moscow and Moscow region until April 13, 2020. The fact is that many citizens took the self-isolation regime not in the literal sense, but as an additional holiday: walking in yards and parks, barbecuing on the embankments of rivers and lakes, going on visits, to country cottages, etc. As a result, the coronavirus statistics rose by hundreds of people over the weekend and by Monday, March 30, there were already more than 1,800 infected.

Together with the quarantine a tax holiday for businesses, a deferral of utility bills for individuals and legal entities, a call to landlords to suspend rent payments to tenants for a certain period and other economic, legal and organizational measures have been undertaken. Holiday centers and recovery centers are closed until 01.06.2020. The Russian government has promised interest-free loans to small and medium-sized businesses after the end of the quarantine, provided there are no job cuts.

The public responsibility for some management structures is being postponed for a definite (or indefinite?) time due to the Covid-19 pandemic. Thus, on March 17, 2020, Aleksandr Mitrofanov, the deputy chairperson of the Samara primary organization of the Deistvie interregional union of workers of public health services, has informed that all-Russia protest action of employees of ambulance service is postponed in territory of the Samara region. A similar suspension of protest actions took place all over Russia. It is not known how long the uncertainty will last but it seems that some authorities will take advantage of the uncertainty, including in their economic interests. According to Chronograf newspaper, Mikhail Ratmanov, the Minister of Healthcare of Samara region, can calmly wait till the end of outsourcing of Samara city ambulance station vehicle fleet[3]. Meanwhile, the experience of other regions showed that in places where ambulance service was transferred to outsourcing, salaries of ambulance drivers went down by 30–40%. In Samara

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[1] Закон о национальной экологической политике 1969 года. Pub. Л. № 91–190. § 102, 83 Stat. 852, 853 (1970) (с поправками 1975 года). [National Environmental Policy Act 1969]

[2] *Harlon L.* AIDS Law. Dalton et al. Eds., 1987. 177 p.

[3] *Кошеров Е.* Пандемия вывезла // Хронограф. 2020. Март. С. 4. [*Kosherov E.* Pandemia vyvezla [Pandemic took to safety].

Region, ambulance staff is assured that working conditions will not deteriorate after the transfer to outsourcing. Declaration of the Covid-19 pandemic by Tedros Ghebreyesus, the director general of the World Health Organization on March 11, saved the regional government from threats of mass protests and Italian strikes. However, it seems that Italian panic caused by the coronavirus came instead of the Italian strikes.

The postponed protest and the sudden calm are also beneficial for Igor Komarov, the Presidential Plenipotentiary Representative for the Volga Federal District, because "in case of mass protests (...) his chair could be shaken under him"[1]. The head of the Department for Internal Policy of the apparatus of the named plenipotentiary has this to say about the situation: "The apparatus of the plenipotentiary is constantly monitoring the social and political situation in the regions of the Volga federal district. Crisis situations are discussed with the authorities in the federal subjects of the district"[2].

Thus, the epidemiological situation does not permit rallies and protests. The epidemic has confused plans of ambulance workers to fight for their labour rights and legitimate interests.

However, most authorities and responsible officials are on high alert to fight this epidemiological scourge. The police, doctors, hotline staff and other services are working almost non-stop. But in many parts of Russia, neither doctors nor ambulance workers, who are in the front line of the fight, are issued one pair of gloves and one mask a day (at a time when they are only useful for a maximum of two hours), and protective suits are out of the question. Police officers were obliged to visit the apartments of quarantined persons and draw up reports on their presence/absence in home quarantine. At the same time, police officers have no protective equipment at all (no masks, gloves or shoe covers). Reports on absence of a person in quarantine place results in fines about which amount police chiefs report and some district police officers have to cheat, being afraid to be infected and bring the disease in their families (make fictitious reports and sign for the inspected persons).

Further. The medical state of people arriving from abroad (at least with a thermovisor for fever) was not checked and there were no announcements about the necessity of 14-day home quarantine were made up to the announcement of week quarantine in airports of many cities. The ambulance did not arrive until 6–8 hours later and did not see one patient with symptoms of acute respiratory viral infection until the next day, citing busy schedules. Some citizens could not get through to the hotline, and there were two hotlines in one city that referred callers to each

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[1] *Кошеров Е.* Пандемия вывезла // Хронограф. 2020. Март. С. 4. [*Kosherov E.* Pandemia vyvezla [Pandemic took to safety].

[2] Ibid.

other, i.e. they engaged in so-called buck passing. T. Golikova, the Deputy Prime Minister in charge of health care, initially assured that everything was under control in Russia.

The British Prime Minister first urged not to panic and to let the situation run its course naturally, so to speak, as a result of which the British will acquire collective immunity, i.e. the British people should realise that some of them will die, but the nation as a whole will get stronger. This stance has been criticised in the UK itself and internationally as cynical, forcing the Prime Minister to change not only the rhetoric, but also government policy. Curiously, a little later, among the high-profile names of Covid-19 sufferers (singer Lev Leshchenko and his wife, composer Yuri Nikolayev, actor and government Duma member Nikolai Gubenko and his wife actress Zhanna Bolotova, Senator Lyudmila Narusova and others), the name of the UK Prime Minister was also mentioned.

The situation started to change only after the Address of the President of the Russian Federation, Vladimir Vladimirovich Putin, to the citizens of Russia on TV on March 25, 2020. The rhetoric of all authorities changed, the horrors of Covid-19 and harsh actions by authorities in other countries (fines and criminal liability, hitting those who walk the streets with police batons), empty studios of popular TV shows, a lot of social advertising about Covid-19 prevention measures, and TV messages from leaders of other countries, often simply hysterical, began to be shown en masse on TV. The panic of officials was apparently the trigger for panic and psychosis among the population.

The 2020 pandemic revealed a crisis of national leaders, many of whom proved incapable of controlling the situation and appeared to be capable of hysteria and panic, which is in no way consistent with their high positions (mayors in Italy, Spain, USA). For some people this has caused a sense of squeamishness, and globally, a new wave of social psychosis.

In Russia, however, social psychosis has been minimal. Even the news on the Prime Minister Mikhail Mishustin was down with the Covid-19 was received calmly. The Prime Minister himself calmly endured the illness and was quickly resuscitated. Perhaps this calmness is helped by the Russian humour. Thus, jokes about the illness of Prime Minister immediately spread all over the Internet. For example, this one: "For those who are interested in Mishustin's well-being, we inform: Mishustin's well-being is immense!».

Some academics, even those critical of Russian authoritarianism, noted the Russian leader's dignified composure and the effectiveness of authoritarian methods in the pandemic situation, methods of anticipation. However, some scholars stress that Russia's generally inefficient management (in terms of economics) has proven effective in the Covid-19 situation, for "it has so far succeeded in countering the

pandemic due to good organization and co-operation of the relevant services and structures"[1].

This is understandable, because the distance between the possible negative results of the pandemic and the possibility of losing one's own chair for the managers is the shortest.

### 3. Social psychosis and its characteristics

People communicate daily, hourly, minute by minute on their phones, tablets, laptops and exchange pictures and videos of the most varied spectrum from total disbelief in the supposedly inflated danger (irony, cynicism, sarcasm, healthy arguments with figures, appeals for calm, fatalistic philosophy, etc. panic (buying up food and basic necessities, following all advice, even the absurd and mutually exclusive ones, or, on the contrary, stupor, frustration, depression, etc.). Emotions of some people swing between these states, they do not know who or what to believe in, they are terrified at the prospect of losing their job or business.

There are all kinds of preventive measures on the world wide web! Jokes on the subject are also appearing. For example: "You can't trust anyone! I was told it's enough to wear a mask and gloves outside as a preventative measure. So I did! But others wore clothes as well." A lot of pseudo-healers have appeared who have rushed to capitalise on people's gullibility, fear, mistrust and superstition.

The social psychosis caused by the pandemic is not the first. The Spanish influenza that raged 100 years ago killed 5 per cent of the world's population. Then there was the social psychosis triggered by Millennium expectations, which were linked to the coming end of the world a computer virus that would shut down the internet, and even a full-blown technological catastrophe.

Andrei Milehin, the head of the Romir Research Holding and vice president of the Gallup International, a global sociological service, emphasizes that the subject of epidemics must be discussed carefully: humanity has survived several pandemics. Fear of plague, cholera, unknown bacilli and viruses flows in our veins, and when this fear breaks out, human consciousness shrinks, it becomes both docile and aggressive. "So we have to be extremely careful in terms of communications, recommendations, expert opinions and medical statistics"[2]. According to A. Milehin, what we know today is totally inadequate to the reaction raging in the media and the reaction shown by some politicians (not only and not so much in Russia).

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[1] *Горевой А.* Версия. 23–29.04.2020. С. 6–7. [*Gorevoi A.* Versiya]

[2] *Милёхин А.* О росте социальных психозов в эпоху Путина // Аргументы недели. 2020. 25–31 марта. С. 1 [*Milehin A.* On the rise of social psychosis during the Putin era].

Looking at official statistics (first of all the statistics of the World Health Organization), it is possible to notice that the number of the registered deaths from Covid-19 in Russia is insignificant in comparison with other diseases (in the world 3,500 people daily get smashed up in a road accident; about 55% of all people on the Earth die of cardiovascular diseases, and it is one thousand times more serious threat, than Covid-19 which has caused social psychosis 2020).

Therefore, what happened in our country, says A. Milehin, cannot even be called absurd: "We have many times more died of induced heart attacks and strokes as a result of this inadequate clamour and severe intimidation. This is a new reality that we don't fully understand"[1].

The new reality transforms events into a kind of information vortex, an infodemic that has not yet been learned to manage.

If we look at the figures from Gallup International, we can see that people have no idea what to expect in the coming month or even week. 36% believe that the worst is yet to come, an equal number believe that the peak of negativity is over, and 27% think that the situation will remain the same for a long time. The greatest pessimists are in Great Britain (82% believe the worst is yet to come), the Netherlands (77%), France (70%) and Austria (68%). Much more optimistic are the residents of Kazakhstan (73% of them believe the worst is over), Turkey (63%), Armenia (61%), India (61%).

## 4. Components of social psychosis and culpability of authorities in their cultivation

Social psychosis caused by the pandemic has medical, social, and political and economic components. The fear of global pandemics runs deep in humanity. Especially when one sees that Russia has the largest border in the world, most of it in China and a large part in Europe. In addition, those are the two largest pandemic hotspots. The fact that there have been virtually no casualties from Covid-19 in Russia demonstrates the effectiveness of the measures taken. We should also take into account that despite temporary (for the period of quarantine) blocking of social cards of the pensioners (for their own good, so they would not travel by public transport and get infected), 65 thousand Moscow pensioners on 28.03.2020, the first quarantine day, tried to use their social cards. People have no fear, no common sense, and no civic responsibility; despite the fact, the statistics of other countries are terrible. In Italy, corpses are burnt, relatives cannot say goodbye to the dead; in New York, and refrigerator trucks are adapted to morgues.

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[1] *Милёхин А.* О росте социальных психозов в эпоху Путина // Аргументы недели. 2020. 25–31 марта. С. 3 [*Milehin A.* On the rise of social psychosis during the Putin era].

Even Sergei Sobyanin, the mayor of Moscow, has spoken out about the Moscow residents' abusive failure to comply with the regime of self-isolation, calling Moscow residents to civic responsibility.

According to Gallup International, a global polling service, a majority of the world's residents are alarmed by the Covid-19 pandemic, but consider the threat exaggerated. At the same time, most people agree on personal restrictions. This means that the priority of personal freedoms in the minds of the advanced part of the population has not stood the test of fear. It is essentially the end of liberal philosophy. Moreover, it is also the end of European globalism, when the so-called EU gathering did not help the Italians, saying that they might not have enough masks and breathing apparatuses.

The question arises as to whether the most reasonable people think the threat of the pandemic is exaggerated, why are panic and mass social psychosis there? To answer these questions we must look deeper and read Sigmund Freud, who described panic as a mass government under hypnosis. Great Russian scientists Vladimir Bekhterev, Natalia Bekhtereva wrote about it, who described mass phenomena and examples of how a large and badly structured crowd or social group simultaneously loses its common sense, criticality, and begins to behave like a herd of animals. The way people behave under the conditions of Covid-19 testifies to a certain paradox, the lack of information in the presence of an abundance of it. Objective and authoritative information is drowning in a sea of fakes, lies and delusions.

Public opinion itself is a bizarre mixture of truth and error. But in the modern era, the boundaries between them are blurred and truth has lost its clarity. Hence, there is very little trust, above all little trust in the authorities. The credibility of information is also being eroded by the pandemic, as the authorities themselves are frightened and are losing their grip on reality. Against this background the act of V. V. Putin visiting an infectious disease. Putin's visit to Kommunarka infectious diseases hospital, where Covid-19 patients are kept, is unique as it is intended to demonstrate to the people the calmness and confidence of the authorities. In fact, people often stop believing the authorities when even statistics lie, because, firstly, in all countries the percentage of cases and mortality rates are measured according to different methods, and secondly, even in calm times the statistics are distorted by political aims of specific authorities, not to mention the pandemic when the authorities' actions are close to wartime hostilities. By the way, loudspeakers have been placed in some Russian cities, and the governor in Levitan's voice urges people to observe the quarantine and not to leave their homes.

The Romir report shows that the greatest satisfaction with the response of the authorities was expressed by the residents of Austria (88%), India (84%), Palestine (80%), the Netherlands (79%), Italy (72%) and the Philippines (70%). Not satisfied

with their government in Thailand 76%, USA 46%, Germany 44%. In Russia, 49% are satisfied with the actions of the authorities and 36% are not (Milehin 2020).

Two factors are important for understanding the features of social psychosis in the conditions of Covid-19: 1) the emergence of a new social stratum, fixated on consumer psychology and quality of life (in philosophy there even appeared an entire direction called "quality of life"); 2) the globalization of information.

In the second half of the 20th century, a huge part of the world's population (let it be the notorious "golden billion") has passed a certain threshold, and not just survived the end of wars and world upheavals, the necessity of survival (and the ability to enjoy the basic things of life), but for the first time in human history they wanted to live "well", "qualitatively". In America, this was the so-called baby boomers' time, in our country the children of the thaw period, later the gilded youth. "To live well" phrase became a new challenge and concept. This was especially reflected in the metamorphosis of Russian psychology, for which the main question was not 'how' but 'why'. And when people had a lot of free time, and the ideology of collectivism gave way to the ideology of individualism, a mass consumer society emerged. The ideology of liberalism mirrored this new reality. Paradoxically, the most aggressive critics of the ideology of collectivism, Marxism-Leninism in general, and of all Soviet values were, above all, children from elite families and the rushing to power of the intelligentsia. In September 1992, the professor and lawyer G. being a witness for Boris Yeltsin, the Russian President, in the Constitutional Court of the Russian Federation in the so-called CPSU case against the CPSU, admitted himself that in Soviet times he travelled half the world. And vice versa, V. O. Luchin who was the judge-rapporteur on the CPSU case, eventually wrote an Opinion, more loyal to the CPSU than the Decision of Constitutional Court of Russian Federation on this case. Meanwhile, in 1968, V. O. Luchin, a young lecturer at Voronezh government University, was threatened with expulsion from the party and almost lost his teaching job for having denounced the invasion of Czechoslovakia by Soviet tanks (he was saved from a career collapse by his professor V. S. Osnovin). Incidentally, Alexander Yakovlev, who was the member of the Politburo of the CPSU Central Committee, was awarded the Order of Friendship of Peoples for the Czechoslovak events of 1968. It was he who provided the ideological propaganda outlet of Mikhail Gorbachev, the first critic of Soviet power and the banner of liberalism during perestroika. It was he who symbolised the ideology of the takeover[1].

[1] *Боброва Н. А.* Конституционный строй и конституционализм в России. М., 2003. 263 с. [*Bobrova N. A.* The constitutional system and constitutionalism in Russia].

## 5. Infodemic as a social phenomenon of modern times

The second factor is related to the information explosion. Before the Internet and the omnipotence of the World Wide Web, the time it took for a joke to travel from Moscow to Khabarovsk was two weeks (the time it took for a train to travel on that route). Since around the 2000, there has been a worldwide globalization of information. In this sense, such terms as sovereignty and government border became public. The first social psychosis of the new times dates back to 1999, and was portrayed in the film "End of Days" with Arnold Schwarzenegger (when Satan was about to come to the earth by the chimes in New York's main square on the night of 2000). The film looked very believable, people were afraid that everything would stop, trains would stop, planes and would crash, computers and we would reset to zero. As a result, committees were set up at government level to meet the year 2000, and it turned out to be a form of theft of budget money that had been earmarked for the relevant prevention programmes. This dent people's hopes for the competence and purity of the authorities' intentions too.

This was the "first shot", the world went crazy over numbers! In the pandemic, the same thing is done in the information space, and the pandemic is accompanied by an equally terrifying phenomenon called infodemic. The space is being stirred up in a wave-like progression at the level of SMS, and there are no borders and social regulators, ethical stoppers are missing, consciousness in the world wide web is being shut down. We are waiting almost for a Messiah or no longer waiting for anything, finding ourselves in an ocean of information and a psychological stupor.

Infodemic starts to play the role of a kind of terrorism, since the meaning of a terrorist act is to create panic and social resonance from it. In a sense, the pandemic even supersedes acts of terrorism for the period of its omnipotence, because infodemic during pandemic is even more terrible than ordinary terrorism.

The pandemic and infodemic bring down entire industries and services, service enterprises, and the huge sector of small and medium-sized businesses. The pandemic and the infodemic seem to be rolling in on the well-being of families.

People are drowning in oceans of information, unable to discover the elusive "raft" of truth, even a "sliver" of truth, and the search for truth and the disputes often splinter families and former social communities in different directions. People cease to understand what in the surrounding sea of restrictions is real necessity and what is manipulation. Differing views of these life issues become "dry brushwood" capable of igniting at the slightest match. Moreover this "brushwood" is initially created in the form of a western-inspired educational system, for example, in Hong Kong textbooks were written not according to Chinese, but Western molds, which predetermined the political outbreak in 2020.

Sociological data from Romir indicate that people are willing to temporarily sacrifice some rights and freedoms if doing so would help prevent contagion: 35% Strongly Agree, 41% Rather Agree, 12% Rather Disagree and 6% Reject this prospect. In total, more than three quarters (76%) of the countries surveyed are prepared to sacrifice some freedom until the epidemiological threat has disappeared. The highest levels of readiness were in Austria (95%), Macedonia (94%) and the Netherlands (91%). In Russia, 60% are prepared to sacrifice some rights, while 28% are not[1].

The survey was conducted in Russia and 25 other countries. The numbers are significant. Some kind of panic is evident. There was a very important question: "To what extent do you agree with the following statement: in this critical situation, do I trust the actions of the authorities of my country?" Residents of cities with a population of more than 100 thousand people answered. 12% completely agree and believe that the government is handling the situation well. 37% agree. In other words, about half of citizens highly appreciate actions of the government. However, 22% disagree and 14% completely disagree. It turns out that more than 1/3 treats government actions negatively. The rest of them found it difficult to answer. The figures suggest that governability is not lost. People are waiting for further considered steps; they trust the authorities and do not expect another savior in a difficult situation. Even the church is urging obedience to the authorities' call to stay at home. On March 28, 2020, central TV channels broadcast a sermon dated March 26 by Patriarch Kirill of Moscow and All Russia calling his floc to pray at home.

18% responded to the "Is the threat of the coronavirus exaggerated?" question that they completely agree with it, while 36% generally agreed. Thus, 54% of Russians living in urban areas believe that the threat is exaggerated or greatly exaggerated.

## 6. Limitations on freedom of movement during pandemic

The authorities are responsible for public health and for preventing the spread of the epidemic. For this reason, the authorities are obliged to restrict certain constitutional rights of citizens, in particular the right to freedom of movement. The legal basis for restrictive measures is the provisions of Article 35(3) of the Constitution of the Russian Federation: "Human and civil rights and freedoms may be restricted by federal law only to the extent necessary to protect the foundations of the constitutional order, morality, health, rights and lawful interests of others, to ensure the defence of the country and the security of the state".

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[1] *Милёхин А.* Указ. соч. [*Milehin A.*].

President V. V. Putin gave regional leaders the opportunity to take measures to combat the Covid-19 pandemic, including restricting freedom of movement. On March 5th, S. Sobyanin, the mayor of Moscow approved the decree "On introduction of the high alert regime"[1]. On March 20th, this regime was imposed in all the regions of Russia: the ban on the mass events, suspension of retail objects (except the food, medicines and essentials), transition to the distance education, etc. Although V. V. Putin warned against fanaticism in this matter, some heads of regions have established a strict regulation. For example, the governor of the Amur Region has introduced a regime of self-isolation at the place of permanent or temporary residence for 14 days for persons arriving from other regions[2].

But is there a legal basis for introducing such measures? Does it not violate the constitutional right to freedom of movement?

In fact, the different measures taken by heads of regions in the context of the Covid-19 pandemic add to scholars' thesis that the Russian Federation is asymmetric, with the combination of factors influencing the asymmetry of the Federation "being selective, as there are no criteria for their selection"[3].

The Decree of the Mayor of Moscow was adopted in accordance with Article 6 of the Federal Law № 58-FZ of 21.12.1994 On protection of population and territories against natural and technological disasters[4]. According to Articles 1 and 4.1 of the Act the high readiness mode is one of the modes of operation of the authorities and unified government system for prevention and liquidation of emergency situations. Imposing such a regime there might be: a) the access of people and vehicles may be restricted to the territory where there is a threat of an emergency, as well as to the emergency zone; b) the activities of an organization that is in the emergency zone may be suspended if there is a threat to the life safety of its employees and other citizens located on its territory.

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[1] Указ мэра Москвы от 05.03.2020 № 12-УМ «О введении режима повышенной готовности» [Decree of the Mayor of Moscow].

[2] Распоряжение Губернатора Амурской области от 01.04.2020 № 44-р «О внесении изменения в распоряжение губернатора Амурской области от 27.01.2020 № 10-р» [Amur Region governor order dated 01.04.2020 No. 44-p On amendments to the Order of the Governor of the Amur Region dated 27.01.2020 No. 10-p].

[3] *Малый А. Ф.* О равноправии субъектов Российской Федерации и критериях его проявления // Конституционное и муниципальное право. 2019. № 7. С. 54. [*Maly A. F.* On the equality of the constituent entities of the Russian Federation and the criteria for its manifestation].

[4] Федеральный закон от 21.12.1994 № 58-ФЗ «О защите населения и территорий от чрезвычайных явлений природного и техногенного характера» (с изм. и доп. от 01.06.2020 № 98-ФЗ) // Собрание законодательства. 1994. № 35. Ст. 3548 [Federal Law of 21.12.1994 No. 58-FZ On protection of population and territories from natural and technological emergencies].

The official in the course of the introduction of the government of high alert has the right to implement measures necessitated by the development of an emergency situation that do not restrict the rights and freedoms of a person and a citizen.

The Decree of the Mayor of Moscow restricts a person's right to mobility by obligating them not to leave their place of residence (with certain exceptions) except for travelling to the nearest place of purchase of goods and services whose sale is not restricted, walking pets within 100 m of their place of residence, taking out waste to the nearest place of waste accumulation[1]. However, the reference to "a" subparagraph of paragraph 10 of Article 4.1 of FL-58 seems to be not very good to justify the imposition of said restrictions. Such point of view is held, for example, by S. A. Dronova[2]. According to the meaning of the provision of the law it is obvious that the territory where there is a threat of emergency should be definite and not become so depending on any grounds, in this case it is depending on remoteness from the place of residence (stay).

On 30.03.2020 the Moscow City Court recorded the first claim for declaring the provisions of the Moscow Mayor's Decree on self-isolation invalid and unenforceable. The claimant believes that the mayor of Moscow had no grounds and authority to take measures restricting the constitutional right to freedom of movement. This could only be done by imposing: quarantine, government of emergency, martial law.

The imposition of quarantine would have been applicable to the situation in question, but the quarantine was not imposed for certain reasons. Law No. 58-FZ did not provide for measures against communicable diseases at the time of the suit. However, it was amended on 01.04.2020 and from that moment on the situation in a certain area, including the spread of a disease that is dangerous to the public, was classified as an emergency.

Since then, the Moscow Mayor's Decree complies with the provisions of Law No. 52-FZ. The provisions of the said law established various restrictive measures during the quarantine period: medical, veterinary, administrative and other measures aimed at preventing infectious diseases and providing for a special regime of activities (economic, cultural, educational, etc.) as well as restrictions on the movement of people, vehicles, cargo, goods and animals.

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[1] Указ мэра Москвы от 02.04.2020 № 36-УМ «О внесении изменений в Указ мэра Москвы от 5 марта 2020 г. № 12-УМ» [Decree of the Mayor of Moscow of 02.04.2020 No. 36-UM On Amendments to Decree of the Mayor of Moscow dated March 5, 2020 r. No. 12-UM]

[2] *Дронова С. А.* Ограничение конституционных прав в условиях эпидемиологических потрясений // Конституционное и муниципальное право. 2020. № 6. С. 74. [*Dronova S. A.* Constitutional rights restriction during epidemiological shocks]

## 7. Conclusion

This is not the first economic crisis we have seen. The crises of 1998, 2008 and 2014 have been safely overcome. The crisis of 2020 will be overcome as well, although it is caused not only by an unprecedented fall in oil prices, but also by the Covid-19 pandemic.

Paradoxically, even with an extremely low assessment of the efficiency of Russian economic management, in a critical situation the Russian undivided authority rule allows to act effectively: the authorities, business, citizens and civil society as a whole have managed to master the situation and prevent panic. During pandemic situation, the authoritarian style of Russian governance shows its effectiveness against the failure of political leaders in many countries.

The paradox is that despite evidence that a significant percentage of the population considers the pandemic threat exaggerated an equally significant percentage of the population in pandemic and infodemic is seized by fear for their health and that of their loved ones. There is no direct correlation, and factors influencing the nature and extent of this correlation need to be investigated.

Alongside the pandemic, such entirely new phenomenon as infodemic is emerging in the era of globalised information. The consequences of infodemic are as significant as those of the pandemic. Power is often incapable of managing the situation under infodemic conditions, and is to some extent responsible for its magnitude. The controllability of social processes under infodemic conditions is radically altered than reduced, requiring special scientific developments.

The responsibility of the government and the public authorities during pandemic and infodemic is also being heavily modified: 1) rallies, strikes and other acts of economic character are postponed in time to unite all structures, employers and workers to fight against a common unforeseeable evil; 2) breaking out of the political acts of opposition to the national authorities, fuelled from outside; 3) authoritarian methods of power and administration, the role of controlling and supervising structures are reinforced; 4) responsibility is individualized (for example, on 30.03.2020, V. V. Putin asked his plenipotentiaries in the districts together with governors to ensure the fight against coronavirus); 5) after summing up the results of the pandemic and infodemic, personnel conclusions up to dismissal are possible; 6) restriction of constitutional rights during the pandemic must have an adequate legal basis; 7) legal grounds for limiting the constitutional right to freedom of movement deserve special attention.

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# INFORMATION SERVICES CONTRACT: EVOLUTION IN RUSSIAN CIVIL LAW

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**Abstract:** There is analyzes of the legal regulation of agreements on the provision of information services in the article. The insufficiency of articles in the second part of the Civil Code of the Russian Federation is noted. The author identifies the most significant normative acts of the first years of regulation of this area and provides an overview of further development. The question of the defenses of the agreement on the provision of information services developed in the science of civil law is investigated. The author offers his own definition of this contract. The article contains examples from judicial practice, as well as business practices. The author classifies information service agreements using legal reference systems. Among the most popular types of agreements on the provision of information services in recent years, the author identifies agreements with information services in the form of information databases on the Internet, as well as in mobile applications: cian, avito, taxi aggregators; agreement governing the use of cloud information storage; contracts for online school services. The main practical problems in the field of research are also noted, such as the complexity of the legal qualification of the contract and, as a result, the applicable standards (with aggregator); the difficulty of proving the fact of the provision of information services; responsibility of the service provider.

**Key words:** information services agreement, information, contract, services, aggregator.

Article 779 of the Civil Code of the Russian Federation refers to such type of contract for the paid services provision as an agreement for the information services

provision, to which an agreement for the provision of consulting services can also be attributed. Despite the increasing practical application of information services agreements, it has never been enshrined in the Civil Code of the Russian Federation. The author hereof intends to consider the evolution of legislative regulation of information service contracts, as well as the development of doctrinal approaches.

Information service contracts are covered by a number of laws and regulations: Article 26 of the Federal Law On Archives in the Russian Federation[1], Article 5 of the Federal Law On Banks and Banking Activities,[2] Decree of the Russian Federation Government On Information Services in the Field of Hydrometeorology and Environmental Pollution Monitoring[3], Order of the State Customs Committee of the Russian Federation of 23.12.1998 No. 863 On Approval of the Procedure for Conducting and Organizing Work on Providing Chargeable Services by Central Customs Laboratory and Regional Customs Laboratory and Distribution of Received Funds, approves the form of an example contract for conducting information, consulting and research services, etc[4]. In 2010-2012 numerous by-laws setting requirements to the content, terms and quality of information and consulting services provided by state authorities, e.g. Order of the Ministry of Foreign Affairs of Russia from 14.05.2012 No. 7063 On the Approval of Administrative Regulations of the Ministry of Foreign Affairs of the Russian Federation on the Provision of Public Services of Public Information and Consulting Services Provision have been adopted[5]. Federal Law of 18.03.2019 No. 34-FZ introduced Article 783.1 of the Civil Code of the Russian Federation "Peculiarities of the contract for the

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[1] Федеральный закон «Об архивном деле в Российской Федерации» от 22.10.2004 № 125-ФЗ // Собрание законодательства РФ. 2004. № 43. Ст. 4169. Federal Law On Archives in the Russian Federation dated October 22, 2004. No. 125-FZ // Collection of Legislative Acts of the Russian Federation. 2004. No. 43. P. 4169.

[2] Федеральный закон «О банках и банковской деятельности» от 02.12.1990 № 395-1 // Собрание законодательства РФ. 1996. № 6. Ст. 492. Federal Law On Banks and Banking Activities dated December 2, 1990. No. 395-1 // Collection of Legislative Acts of the Russian Federation. 1996. No. 6. P. 492.

[3] Decree of the Russian Federation Government On Information Services in the Field of Hydrometeorology and Environmental Pollution Monitoring dated November 15, 1997. No. 1425 // Rossiyskaya Gazeta. 1997. No. 232.

[4] Order of the State Customs Committee of the Russian Federation dated 23.12.1998 No. 863 On Approval of the Procedure for Conducting and Organizing Work on Providing Chargeable Services by Central Customs Laboratory and Regional Customs Laboratory and Distribution of Received Funds // Tamozhenny vestnik. 1999. No. 3.

[5] Order of the Ministry of Foreign Affairs of Russia dated 14.05.2012 No. 7063 On the Approval of Administrative Regulations of the Ministry of Foreign Affairs of the Russian Federation on the Provision of Public Services of Public Information and Consulting Services Provision (Registered with the Russian Ministry of Justice on 05.07.2012 No. 24812) // Rossiyskaya Gazeta. 2012. No. 162.

provision of information services", where, despite the name, the features of this contract are not disclosed[1].

It is noted in the literature that the introduction of Article 783.1 of the Civil Code of the Russian Federation is justified by the intended use of an information services agreement in the collection of information during the process of big data generation, i.e. structured and unstructured information of huge volumes which can be processed by modern technical and software tools[2].

The legal definition of the contract in question is contained in Article 13(1) On Informatization, Information and Information Protection of the Model Law of the Commonwealth of Independent States: "Under the contract of information services provision, the performer undertakes, in accordance with the customer's assignment, to find and/or process certain information and transfer it to the customer, and the customer undertakes to pay for these services"[3].

There is still no legal definition of the contract in Russian domestic law, but its definitions have been developed by civil science.

For example, A. E. Sherstobitov points out that under the contract for information transfer one party (executor) undertakes to process and transfer information in the manner which allows using it in practical activities and the other party (customer) undertakes to accept it and pay for services on processing and transfer of material carrier of information[4].

An information contract is defined as an agreement between an information centre and a consumer "For provision of data on a specific request, the content of which is strictly individual: the consumer is given specially selected necessary information"[5].

R. N. Morodumov views the contract for the repayable provision of information services as "an agreement by virtue of which the performer undertakes, to render services in the form of providing a certain volume of information obtained by

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[1] Federal Law of 18.03.2019 No. 34-FZ On amendments to Parts One, Two and Article 1124 of Part Three of the Civil Code of the Russian Federation // Rossiyskaya Gazeta. 2019. No. 60.

[2] *Mikhailov A. V.* Prospects for the development of business legislation in the digital economy // Entrepreneurial Law. Law and Business Appendix. 2019. No. 3. P. 7–13.

[3] Model Law of the Commonwealth of Independent States On Informatization, Information and Information Protection adopted in St. Petersburg at the 26th plenary session of the Inter-Parliamentary Assembly of the CIS Member States (Resolution No. 26-7 dated November 18, 2005.) // Newsletter. Inter-Parliamentary Assembly of Member States of the Commonwealth of Independent States. 2006. No. 37.

[4] *Sherstobitov A. E.* Civil law regulation of obligations to transfer information: Abstract. Thesis paper.: Candidate of Juridical Sciences. M., 1980.

[5] *Dozortsev V. A.* Information as an object of exclusive right // Delo i pravo. 1996. No. 4. P. 35.

means of collection, sampling, analysis, synthesis, etc. on the instructions of the customer, and the customer undertakes to pay for these services"[1].

A. Galaev offers the following definition of a contract for the provision of information services: "... an agreement under which the performer, at the customer's request, undertakes to perform an action or activity to collect, process, store or transmit information (messages, data) regardless of the form of its presentation, where such activity or action is the result of creative and qualitative performance"[2].

In my opinion, the contract in question can be defined as follows. Under the contract for retrieval, processing, storage and (or) transmission of information the service provider undertakes to perform actions on retrieval, processing, storage, transmission of information (one of them or a set of them), and the service recipient accepts or undertakes to accept the result of the service.

Development of legislative regulation in the sphere in question remains fragmented and haphazard. Article 783.1 of the Civil Code of the Russian Federation was mentioned above; its content does not seem to bring any significant changes in regulating relations of information services provision. Of the relatively recent acts, though not of a state body, but of a state corporation, I would like to mention the Procedure for concluding and supporting contracts in bankruptcy proceedings (liquidation) with respect to financial institutions approved by the decision of the Board of the State Corporation "Deposit Insurance Agency"[3]. Thus, this act discloses the subject matter of the information services agreement disclosed in the standard form of the information technology services agreement:

**1. SCOPE OF AGREEMENT**

1.1. The Contractor shall provide the following information technology services to the Customer under this Contract:

1.1.1. Support of provision of the Customer's applied Information Technology Services (hereinafter referred to as the Customer's IT Services) to the Customer's end users in accordance with Appendix No. 1 to this Agreement.

1.1.2. Maintenance of the Customer's IT-services in accordance with Appendix No. 1 to this Agreement.

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[1] *Morodumov R. N.* A contract for the provision of information and consultancy services on a fee-for-service basis: Thesis paper. … Candidate of Juridical Sciences. Volgograd, 2004. P. 96.

[2] *Galaev A. Yu.* A contract for the provision of information services on a fee-for-service basis: Abstract. Thesis paper. ... Candidate of Juridical Sciences. M., 2009. 22 p. / http://uni-mvd.order.hcn-strela.ru/inc_files/801/Galaev_Avtoreferat__oktyabr.doc (accessed on March 9, 2010).

[3] Procedure for concluding and supporting contracts in the course of bankruptcy proceedings (liquidation) with respect to financial organisations (Approved by a decision of the Board of the State Deposit Insurance Agency dated 04.12.2017, Protocol No. 138) // Consultant Plus legal reference system.

1.1.3. Execution of Customer's instructions to search, systematise and present information contained in automated banking systems and required for bankruptcy proceedings (information on debtors, depositors, etc.)".

Despite scanty development of legislation, new types of information service contracts are appearing in business practice.

In 2000–2012 such in-demand services as marketing, auditing, valuation services, information services of legal reference systems were considered as independent services of information nature.

In business practice information services contracts are widespread with the help of various legal reference systems (LRS): "Consultant", "Garant", "Codex", etc.

Under an agreement on information service with the help of a legal reference system the service provider undertakes to provide the service recipient with relevant search tools and perform actions to process and transfer legal information, and the service recipient accepts or undertakes to accept the result of the service.

Several types of information service agreements with the help of legal information systems can be distinguished in terms of their content and subject matter: 1) information service contracts for a fee with any users; 2) information exchange contracts with non-commercial organisations and public authorities; 3) information service contracts without a fee with a certain category of users.

The scope of the agreement is processing and transfer of information. Processing means distribution of information to relevant thematic databases, updating the databank, compilation of surveys, etc. Information may be transferred in several ways: employee of the Service Provider delivers and installs to the Service Receiver additions on CD-ROMs, flash drives or other data carriers; Service Provider performs updating of the Service Receiver's ATP via the Internet. Performance of the above actions is the main obligation of the service provider. The service provider also provides the service recipient with appropriate search tools (in this case an electronic search system, a computer program).

The definition of marketing is given in the Letter of the Pension Fund of the Russian Federation from April 11, 1995 No. 09-12/2094-IN On Marketing Contracts. On the basis of a number of normative acts, the above document concludes that marketing is information and advisory services on a complex study of the market: current and forecasted for the future demand for client's products, supply of respective goods, study of information about competitors, prices, quality of goods and their subsequent servicing. It is further concluded that the marketing contract refers to a contract of work and labour, and in the case of legal actions under this contract, to a mixed contract[1].

[1] Letter of the Pension Fund of the Russian Federation dated April 11, 1995. No. 09-12/2094-IN On the marketing contracts // Consultant Plus legal reference system: Legislation.

Among the types of information services agreements that are widespread at present, I would like to single out agreements with information services in the form of information databases on the Internet, as well as in mobile applications: cian, avito, taxi aggregators; agreement regulating relations on the use of cloud information storage; agreements under which online school services are provided.

Thus, some civil servants point out that the most acceptable contractual construction for an aggregator is the use of a contract for the provision of services: "The aggregator undertakes to provide information services, including by placing information about the customer on its information platform, the customer undertakes to pay for these services (Article 779 of the Civil Code). From the context of art. 128 of the Civil Code it follows that we may consider information as a result of a service or as a result of intellectual activity. However, the meaning of information is much wider and the object of civil rights is not only the result of a service or intellectual activity. So, aggregators of the second type, which limit their activity to providing a platform for placing information on the Internet, just as an object of the contract with consumers have information as it is, which in this case is neither the result of a service (only the aggregator consumer relations, as the customer aggregator relations involves service), nor the result of intellectual activity"[1].

The issue of legal qualification of contracts with aggregators needs further elaboration in the light of paragraph 18 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 26.06.2018 No. 26[2], according to which the person who is approached by the client to conclude a passenger and luggage carriage contract is liable to the passenger for damage caused in the carriage if he has concluded the carriage contract on his own behalf or from the circumstances of the contract (such as advertising signage, information on the Internet website, correspondence between the parties when concluding the contract, etc. The good-faith citizen-consumer may have formed the opinion that the contract of carriage was concluded directly with that person and that the actual carrier was his employee or a third party engaged to perform carriage obligations. Thus, judicial practice sometimes qualifies such contracts as agency contracts. For example, the Moscow City Court noted in its ruling that: "In dismissing the claim against Yandex.Taxi LLC, the district court did not take into account the provisions of paragraph 1 of

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[1] *Deryugina T.V.* The legal nature of the contract mediating the legal relationship involving the aggregator // Civil Law. 2018. No. 6. P. 3–6.

[2] Decision of the Plenum of the Supreme Court of the Russian Federation dated 26.06.2018 No. 26 On certain questions of the application of legislation on the contract of carriage of goods, passengers and luggage by road and on the freight forwarding contract // Bulletin of the Supreme Court of the Russian Federation, 2018. No. 8.

Article 1005 of the Civil Code that under a transaction made by an agent with a third party on its own behalf and at the expense of the principal, the agent becomes liable, even though the principal was named in the transaction or entered into direct relations with the third party to perform the transaction. Under a transaction performed by an agent with a third party on behalf of and for the account of the principal, the rights and obligations arise directly with the principal. According to the explanations in point 18 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 26.06.2018 No 26, the person approached by the client to conclude a passenger and luggage transport contract is liable to the passenger for damage caused in the course of transport if he has concluded the transport contract on his own behalf or from the circumstances of the contract (such as advertising signage, information on the internet website, correspondence of the parties when concluding the contract, etc. The good-faith citizen-consumer may have formed the view that the contract of carriage was concluded directly with that person and that the actual carrier was his employee or a third party engaged to perform carriage obligations. However, the case file showed that Yandex.Taxi had not acted on its own behalf but on behalf of the principal when accepting an order from G. to provide passenger taxi services. The fact that the passenger subsequently entered into a direct relationship with the principal's employee, the taxi driver, and the fact that he was able to obtain information about the principal, in accordance with the above provisions of Article 1005 of the Civil Code, does not in itself affect the obligations of an agent who entered into relations with a third party on his own behalf"[1].

It would seem that the issue of the qualification of contracts with aggregators by the courts is not so much a legal question as it reflects the social importance of this institution and the desire to protect the weaker party in the contract. Certainly, the issue of liability of a taxi aggregator, which is financially more secure than a driver directly providing transportation services, is relevant and is aimed at protecting the rights of consumers of transportation services, however, it can be resolved by setting additional requirements for the service provider rather than by reclassifying the contract.

The next common type of contract for the provision of information services in business practice is an agreement for the storage of information in cloud storage. There is no legal definition of cloud storage in Russia, but a bylaw defines cloud computing. Thus, according to Presidential Decree No. 203 of 09.05.2017, cloud computing is an information technology model for providing ubiquitous and convenient access using the Internet to a common set of configurable computing

[1] Appeal decision of the Moscow City Court. dated 04.04.2019 with regard to case No. 33-4939/2019 // Consultant Plus legal reference system: Juridicial practice.

resources (cloud), storage devices, applications and services that can be promptly provisioned and unburdened with minimal or virtually no provider involvement[1].

The legal literature notes that an agreement on the use of cloud storage can be qualified as a lease agreement, a licence agreement, a contract for compensated services, a mixed contract, an unnamed contract. An analysis of court practice is also provided which confirms that a contract for the use of cloud data storage is often characterised as a contract for the provision of compensated services. This includes the decision of the arbitral tribunal of the Novosibirsk Region dated June 4, 2014 in case No. A45-402/2014, where a memorandum of intent was concluded between the parties whereby a party undertook to provide access to software and perform other actions related to the sphere of information technology. Upon legal assessment of the memorandum, the arbitral tribunal found it to be a fee-for-service agreement, as under the memorandum one party undertook to provide access to the software and the other party undertook to pay for the services in accordance with the terms and conditions set forth therein[2].

Information service contracts with various online schools have become widespread. The Internet and social networks are full of such offers. In this case, virtually all contracts in this area are built on the model of a contract for the provision of services. As an illustration, here is an extract from a public offer of one of the online schools:

Public offer agreement on providing services (public offer)

1. General provisions.

1.1. This document is a formal offer to conclude a paid services agreement (the public offer) of Nikolay Vladimirovich Shapkin, hereinafter referred to as the Contractor, and contains all essential conditions of providing information and entertainment services (in accordance with Art. 435 and Part 2 Art. 437 of the Civil Code).

1.2. Any natural person who has visited https://easydance.online, intends to purchase a service of information and entertainment nature and pays to receive the infotainment service, becomes a Customer.

**2. Scope of offer**

2.1. Provider undertakes obligations upon Customer's assignment to render services on providing courses on the Internet, and Customer undertakes to pay

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[1] Presidential Decree No. 203 dated 09.05.2017 On the Strategy for Development of Information Society in the Russian Federation for 2017–2030 // Collection of Laws of the Russian Federation, 2017, No. 20, Art. 2901.

[2] V.: *Taran K.K.* The legal characteristics of the contract governing the cloud storage relationship in Russia and the US // Law and Economics. 2018. No. 12. P. 45–52.

for these services in accordance with the Price-list approved by the Provider on the date of acceptance of the present offer.

2.2. Complete list of training courses, their cost, topics, content, time, terms and order is available at the Executor's official web-site https://easydance.online[1].

Regarding practical problems, I should also note that in court practice it is not uncommon for the fact that information services have been provided to be disputed. As evidence of the actual provision of services, documents other than acts of acceptance are also encountered. Thus, the actual provision of information services through a reference legal system was confirmed by a printout of data from the server of the service provider's information replenishment for a disputed period, as well as a clipping from a log-file (document testifying the passage of traffic (information) between the IP-addresses of the claimant (service provider) and the defendant (service recipient)). Additionally, a court enquiry was filed to confirm whether the IP address specified by the claimant belonged to the defendant and whether the traffic between the claimant's and the defendant's IP addresses during the disputed period. In response to the request, the defendant's ISP confirmed that the IP address belonged to the defendant (submitted a relevant contract) and confirmed the traffic data[2].

Based on the above analysis, the following problems can be identified in theory and law enforcement practice in this area:

1) the complexity of the legal qualification of the contract and, as a consequence, of the applicable rules (e.g. in the case of a contract with an aggregator);

2) difficulty in proving provision of information services due to the intangible nature of information;

3) the liability of service providers in cases where the provision of information services involves activities of a source of increased danger (e.g. taxi aggregators).

As regards normative regulation of relations connected with rendering of information services it seems that the agreement in question has sufficient specificity to be classified as a separate contractual type. I believe that an information services agreement is an independent type of contract which should be set out in a separate chapter in the special part of the Civil Code of the Russian Federation. This separation may be made on the basis of the focus criterion: the contract is aimed at carrying out such actions with information as search, processing, storage, and (or) transfer. The necessity of special legal regulation is conditioned by the specificity of the subject matter of the contract.

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[1] https://www.easydance.online/oferta (accessed on September 10, 2019).

[2] 9th Arbitration Court of Appeal award dated 10.08.2009 No. 09AP-8268/2009-GK with regard to case No. A40-34889/08-59-310 // Consultant Plus legal reference system: Juridicial practice.

Contract on Information Services could be a possible title for a new chapter of the Civil Code. Structurally, this chapter should be placed after Chapter 39 of the Civil Code. This chapter should regulate such issues as the legal definition, applicable law, the rule of inadmissibility of unilateral refusal by a service provider to enter into an information services agreement, the right of a service recipient to unilaterally withdraw from the agreement and consequences of such withdrawal, quality requirements for information services and consequences of violation of such requirements, provisions on liability of parties under the agreement.

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COMMENTARIES

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# ON THE PROSPECTS FOR THE DEVELOPMENT OF RUSSIAN ECONOMIC LAW

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**Abstract:** The article examines the issues of interaction between law and economics through the prism of the formation of Russian economic law. The historical aspect is highlighted: the analysis of the pre-revolutionary legal doctrine and scientific sources during the Soviet development of the state. In the late XIX early XX centuries a general critical attitude to the Marxist idea of the primacy of the economic basis was formed. It was accompanied by the same skepticism about extreme liberalism, which advocates minimal government interference in the objective laws of economic development. Attention is drawn to the fact that during the Soviet period, by explaining a new branch economic law attempts were made to determine the limits of state influence on economic relations. In modern Russian law, in view of the constitutional consolidation of the canons of a market economy, a change of guidelines has taken place. New concepts have appeared economic constitution, constitutional economics, and economic analysis of law. There is an involvement of efficiency criteria in the evaluation process of the implementation of public power. The article also investigates the thesis about the formation of a new mega-branch of law economic law, which covers almost all aspects of the regulation of the national economy. Highlighted its positive (defining precise guidelines in the interaction of law and economics) and negative aspects (leveling the criteria for differentiation of branches of law).

**Key words:** economics, law, economic constitution, constitutional economics, economic analysis of law, economic law.

## Introduction

Law and economics have been a hot topic for centuries, attracting the attention of both lawyers and economists. However, the viewpoint on the relationship between the two elements often differ between the representatives of the two sciences. Economists (mostly representing the Western traditions) advocate a certain isolation of the economy, developing according to its natural laws. An indirect confirmation of this viewpoint is that the phrase *economic law* is seen as the jus of economics. It does not refer to those adopted by Parliament, but to those under which economic processes develop. In this connection, the laws of demand, the laws of supply, and some others are distinguished, within the framework of which economists are trained to evaluate the emerging social relations. The term *natural (free) market economy rules* is also used[1].

Since *economic law* takes the form of objective rules, economists regard the state as one of the social regulators. The term *free economy* explains its essence by its name. The political implications are seen in the justification of the "night watchman" concept, where public institutions are given the role of guardian of property rights and monopolist of violence. The task of economists is seen as the formation of recommendations for the correct adherence to the laws of economics. This primacy arouses natural jealousy of the legal corporation. For our country, the accusations of snobbery also have a historical background. The Soviet political model was built on the old economic order overthrow, where the dictatorship of the proletariat was to rid the new society of the vestiges of bourgeois ownership of the means of production.

The adoption of the Russian Constitution in 1993 marked a complete transition from an administrative-command system (which applied to all types of social relations) to democratic values as manifested in the following Foundations of the Constitutional System:

— the proclamation of the Russian Federation as a legal, democratic state;
— the construction of public authority according to the principle of its division into legislative, executive and judicial branches;
— the guarantee of the private property right and its equal protection (along with state and municipal property);
— the consolidation of principle of supporting competition and freedom of economic activity.

The vector changing led to an interest in the search for a constitutional basis for the development of the Russian economy, resulting in the formation of a new concept of an economic constitution and the justification of such a new branch as

[1] *Wu B.* Consumption and Management. Chandos Publishing, 2011. 510 p.

the economic law. The first theses were more of a slogan, without elaboration of scientific arguments or consolidation of the unity of terminology. Now, at the end of the first anniversary period (the 25th anniversary of the Russian Constitution was celebrated in 2018, but without any excessive pomp and festivities), it is possible to already present the identified problems and prospects of Russian economic law, highlighting some of the results of the discussion that took place throughout the past period of the new genesis of Russian statehood.

## 1. Economics and law in Pre-Revolutionary Times

The mutual influence of economics and law was considered in prerevolutionary legal literature. At the end of the 19th century, Marxist doctrine was no secret in the Russian Empire. Its main thesis about the subordinate role of law was recognised as having its substantiation. G. F. Shershenevich noted: "When it is meant to establish the importance of the economic factor in the formation of law, when it is stated that law develops under the condition of economic relations, it cannot be objected from the point of view of historical reality. The history of law provides ample evidence for such a position of affairs[1]. In doing so, the author presents such examples, among which the struggle for a new status of women occupies a special place. According to the scholar, this transformation is due to the increasing economic independence of the "weaker sex". Similarly, in the criminal law, the emerging institutions are in most cases driven by economic interests formed as a result of the increasing complexity of economic processes. However, G. F. Shershenevich emphasised the one-sidedness of such a view of law-making. The economics should not be seen as the sole force, ignoring the ideological factor and the conscientiousness of law-making.

In the same vein, I. A. Pokrovsky concluded: Law serves different values, and one cannot choose one of them and reject the others[2]. Yu.S. Gambarov spoke more critically, pointing to the proponents of the "economic support of law" who were representatives of the social direction and apologists for "economic materialism". Regarding Marxists, Yu. S. Gambarov specified that their main peculiarity consist in an attempt at a general methodology: "all social being and all separate manifestations of this being, such as law and state, are conditioned and determined in the last instance only by the movement of economic relations"[3]. Rejecting relations

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[1] *Shershenevich G.F.* [Obshchaya teoriya prava] General Theory of Law. Volumes I–II. Moscow: The Bashmakovs' Edition, 1910.

[2] *Pokrovsky I.A.* [Osnovnye problem grazhdanskogo prava. Petrograd, yuridicheskiy knizhnyy sklad] Basic Problems of Civil Law. Petrograd: Pravo Law Book Warehouse, 1917.

[3] *Gambarov Yu.S.* [Grazhdanskoe pravo. Obshchaya chast'] Civil law. The General Part. St. Petersburg, 1911.

of subordination, Yu. S. Gambarov pointed to "interdependence and solidarity", taking into account not only the doctrine of K. Marx, but also R. Stammler[1] (who understood law and economics not as separate quantities, but as two inseparable sides: "There can be no talk about economic laws outside the social life regulated by law"). B. N. Chicherin's ideas are similar: "The right determines the formal side of man's external freedom, and economic activity gives it its content"[2]. G. V. Mikhailovsky, reviewing the theses of materialists, commented them as the loss of "the solid ground of science" and "replacement of it with a party program" (predicting the appearance of socialist geometry, logic, botany)[3]. M. Kovalevsky stressed that neither economics, nor law, nor morals, in their one-sidedness, "can give us a starting point for reasoning that sets out to determine the conditions of progressive movement of human societies"[4].

A lecture by N. A. Gredeskul on the relationship between law and economics[5], which criticised the Marxist approach (which was popular in Russia in the early twentieth century), received a certain publicity. The outward attractiveness of this doctrine is linked to the justification of bourgeois vices and the natural transition to a socialist order based on the socialisation of the means of production. Thus, N. A. Gredeskul states K. Marx's desire to describe the existing formation and to present a hypothetical picture, the reality of which cannot be accepted as inevitable. In any case, N. A. Gredeskul does not recognize the objectivity of Marxism in the strict subordination of law to economics: "The lines of law and legal aspirations go, as we now see with obviousness in any case, not above the economics, but in its very depth, or even under the economics". Citing historical examples, the Russian scientist adds that law amendments do not always coincide with changes in the economics: "There is an undoubted dependence of law on economics, the dependence of economics on law is also undoubted... Law and economics are closely interwoven, they form as if one common fabric, and what in this fabric forms the basis or skeleton, what is a skeleton supporting the whole figure, so to speak, is a big question. It is quite possible that it is law and not economics". N. A. Gredeskul's con-

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[1] *Stammler R.* Economy and Law According to the Materialist Conception of History. 2 volumes. SPb., 1907.

[2] *Chicherin B. N.* [Kurs gosudarstvennoy nauki] A Course in State Science. Volumes I-III. Moscow, the printing house of the partnership I. N. Kushnerev and Co., 1894.

[3] *Mikhailovsky G. V.* [Ocherki filosofii prava] Essays on the Philosophy of Law. Vol. I. Tomsk, V. M. Posokhin's bookshop edition, 1914.

[4] *Kovalevsky M.* [O zadachakh shkoly obshchestvennykh nauk] On the tasks of the school of social sciences. 1902.

[5] *Gredeskul N. A.* [Pravo I ekonomika] Law and Economics // Law. 1906. No. 40 / https://naukaprava.ru/catalog/435/936/3448/33081?view=1

clusion: Law, in its social significance and in its social role, is undoubtedly broader than economics.

Russian legal scholarship at the time was showing the dangers of the new liberal doctrine embodied by A. Smith and B. Constant, who rejected the possible harmony between individual rights and state intervention. The new thesis of bourgeois society, "Laissez-faire", which demanded a minimalist state, marked a phase in the priority of individualism. It continued by demanding that the state do only protect human rights. The economic trend narrowed the function of the state to the protection of property rights (and nothing more)[1]. A. Antonovich was categorically against such a statement, believing that there was a contradiction in attitudes and a contradiction of interests between the individual and society. This is the reason for the emergence of police law (in pre-revolutionary times this name was used for administrative law). Thus, for example, price regulation does not detract from scientific laws of exaggerated private and public wealth. A. Antonovich also emphasized: "There are some items of property, the use of which is particularly detrimental to granting unconditional freedom to private interests" (giving the example of forest management)[2].

Thus, pre-revolutionary Russian legal science investigated the issues of interaction between law and economics. It must be admitted that this issue was not among the most topical. At the same time, the general critical attitude towards the Marxist idea of the primacy of the economic basis was accompanied by the same skepticism towards the extreme liberalism that preached minimal state intervention in the objective laws of economic development. The possible conflict of private and public interests necessitated state intervention. Given the historical period, this was the rationale for the emergence and development of administrative (police) law.

## 2. Establishment of Soviet Economic Law

The October Revolution of 1917 marked the proclamation of the dominance of Marxist ideology (the same ideology that was criticized by Russian legal scholars), which was confirmed in the first constitutional source of the young Soviet state. It turns out that the Marxists, having gained power, in the first place abandoned their thesis the primacy of the economy. Using legal means, they began to remake it under their ideological canons. The Constitution of the RSFSR of 1918 set the main task: "the destruction of all exploitation of man by man, the complete abolition of the divi-

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[1] *Pokrovsky P.* [Bentam i ego vremya] Bentam and his time. Petrograd, printing house of A.E. Collins, 1916.

[2] *Antonovich A.* [Politseyskoe pravo i politicheskaya ekonomiya] Police Law and Political Economy. Kiev: University Printing House, 1883.

sion of society into classes, the ruthless suppression of exploiters, the establishment of the socialist organization of society and the victory of socialism in all countries".

Thus, in Soviet constitutional law, economic issues were of paramount importance. Subsequent constitutional acts continued this tradition. Article 4 of the USSR Constitution (approved by the Decree of the Eighth All-Union Congress of Soviets of December 5, 1936) proclaimed: "The economic basis of the USSR is the socialist system of economy and the socialist property on instruments and means of production established as a result of the liquidation of the capitalist economic system, abolition of private property on instruments and means of production and abolition of human exploitation by man".

In the Constitution of the USSR (1977) and the Constitution of the RSFSR (1978), a special Chapter 2 "The Economic System" had already appeared, according to which (Article 10) the basis of the economic system of the RSFSR was socialist ownership of the means of production in the form of state (national) and collective farm and cooperative ownership. It was stipulated that the State would protect socialist property and create the conditions for its multiplication. In addition, it was stipulated: "No one has the right to use socialist property for personal gain or other mercenary ends. The source of growth of social wealth and welfare of the people and every Soviet person (Article 14) was declared to be the free from exploitation labour of the Soviet people: "Socially useful labour and its results determine a person's position in society. The State, combining material and moral incentives, encouraging innovation, creative attitude to work, contributed to making labour the first necessity in life of every Soviet man". Controlled economy was envisaged.

The rejection of bourgeois private law influenced the general pattern of interaction between law and economics. A formula was developed for economic law, a revolutionary branch ("a form of economic policy of the proletarian dictatorship") designed to regulate property relations in the transitional period from capitalism to communism, where socialist property was considered the "core" (due to which it was opposed to "bourgeois civil law")[1]. P.I. Stuchka pointed out that certain "vestiges of the past" may persist in Soviet law ("habitual to our old lawyers, the 'commissars' of the legal worldview under the Soviet institutions"). However, even the emergence of the Civil Code is a forced measure, "Soviet law is not eternal", "and it is dying out together with the state as a right based on class coercion"[2].

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[1] *Rubinstein B.M.* [Sovetskoe khozyaystvennoe pravo: Ucehbnik dlya slushateley pravovykh shkol i vuzov] Soviet Economic Law: Textbook for students of law schools and universities. Leningrad Branch of the Communist Academy. Institute of Soviet Construction and Law. Moscow: Soviet Legislation State Publishing House, 1935. 182 p. / https://naukaprava.ru/catalog/435/1108/2871/19863?view=1

[2] *Stuchka P.I.* [Sotsialisticheskoe khozyaystvo i sovetskoe pravo] Socialist Economy and Soviet Law // Revolution and Law. 1927. No. 1.

E. B. Pashukanis (like P. I. Stuchka) defended the thesis of the Soviet law extinction: the conscious regulation of economic processes would be built on other principles such as based on historical materialism. "The problem of the law extinction is the touchstone by which we test the degree of closeness to Marxism and Leninism of this or that jurist. It is just as impossible to try to take some neutrality on this question, as it is impossible to remain neutral in the struggle for socialism, for the successes of socialist construction, which we are practically waging. Those who do not admit that the planned organizational principle is supplanting the technical one are, in fact, convinced that the relations of the commodity and capitalist economy are eternal and that their defect at the present moment is only a certain abnormality which will be eliminated in the future"[1].

Another quotation, devoted to the analysis of the regulation of the economics in the post-revolutionary period, is telling: "The market element, the capitalist elements, is opposed by the proletarian state, which, relying on the most important economic levers of regulation and acting by market methods through its economic bodies and cooperative organizations, must seize the turnover of goods, direct it through those channels which will strengthen the link between town and country, ensure the restoration of industry and thereby strengthen the base of socialist construction"[2]. This was "Lenin's ingenious plan"[3] to break the old economic order by such means of superstructures as law and state. The justification consisted in the fact that in the bourgeois economy the "spontaneous laws of economic development" ruled, the proletarian revolution gave a new recipe: "politics cannot but take precedence over economics", and thus "the politics of the proletarian dictatorship determine the course of our development, the laws of the construction of a classless socialist society"[4]. F. I. Wolfson added: "In the economic field, the importance and weight of the state is more and more increasing. The state, the bearer of power, is becoming the main economic agent. New legal forms are being created, which, in his opinion, will be the last page in the history of the state[5]. A. G. Goykhbarg took

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[1] *Pashukanis E. B.* [Ekonomika i pravovoe regulirovanie] Economics and Legal Regulation // Revolution and Law. 1929. No. 4–5.

[2] *Amfiteatrov G. N., Gintsburg L.* [Upravlenie khozyaystvom I khozyaystvennoe pravo za 15 let proletarskoy diktatury] of Economy and Economic Law Management in 15 Years of Proletarian Dictatorship / 15 Years of Soviet Construction. 1932 / https://naukaprava.ru/catalog/435/1108/5139/37212?view=1

[3] *Gintsburg L.* [Khozyaystvennoe stroitel'stvo pervogo goda proletarskoy diktatury (k voprosu ob istokakh sovetskogo khozyaystvennogo prava)] // Soviet State. 1932. No. 9–10. P. 79–102.

[4] *Rubinstein B. M.* [Sovetskoe khozyaystvennoe pravo] Soviet Economic Law. M., 1935. 182 p. / https://naukaprava.ru/catalog/435/1108/2871/19863?view=1

[5] *Volfson F. I.* [Khozyaystvennoe pravo pervogo desyatiletiya] Economic law of the first decade // Soviet Law. 1927. No. 6. P. 22–32.

stand on the Leninist ideas of aversion to all private things in law, proposing a new branch of economic law, arising just by merging the public and private principles (the author called the lawyers with the opposite view "the most backward") in the regulation of economic activity. In this way, economic law must incorporate both administrative and civil law [1].

The fate of many of these authors is natural for that time. In 1937–1938, representatives of economic law were accused of "sabotage on the legal front in the form of propaganda of economic law and the resulting erroneous restructuring of the system of Soviet law"[2]. At the First All-Union Conference of Legal Scholars in 1938 (chaired by A. Ya. Vyshinsky) confirmed the abolition of economic law. Many scientists were repressed.

A certain prosperity of advocates of economic law took place in the mid-60s of the last century. The pioneer was V. S. Tadevosyan, who put forward a proposal to revise the system of Soviet law and recognize a new branch of law (arguing also that civil law "was created by the bourgeoisie to regulate private property relations")[3]. For several years, there was a heated debate in Soviet legal science about the expediency of the innovation. Its proponents pointed to the existence of an economic-organizational function of the Soviet state, which was covered in an economic policy. The legal form of its implementation should become economic law[4]. The concept of a branch of economic law is largely associated with Academician Vladimir Viktorovich Laptev (Institute of State and Law, Russian Academy of Sciences). He highlighted the fundamental homogeneity of economic relations arising in connection with the management and implementation of economic activities[5].

A scientific team headed by V. V. Laptev developed a draft of the Commercial Code of the USSR (which could significantly improve the image of the industry), but which did not become law. S. S. Zankovsky noted: "The economic legislation in the USSR was represented almost exclusively by by-laws, and the adoption of the Code as an act of supreme legal force was contrary to this tradition, which

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[1] *Goykhbarg A. G.* [Khozyaystvennoe pravo RSFSR] Economic Law of the RSFSR. Vol. 1. Civil Code. Moscow, Petrograd, 1923. 216 p.

[2] *Loffe O. S.* [O khozyaystvennom prave (teoriya i praktika)] On economic law (theory and practice) // Leningradsky juridical journal. 2005. No. 2. P. 179.

[3] *Tadevosyan V. S.* [Nekotorye voprosy sistemy sovetskogo prava] Some Issues of the System of Soviet Law // Soviet State and Law. 1956. No. 8. P. 99–108.

[4] *Laptev V. V.* [O sovetskom khozyaistvennom prave] On Soviet Economic Law // Soviet State and Law. 1959. No. 4. P. 70–87.

[5] *Laptev V. V.* [Predmet i Sistema khozyaystvennogo prava] The Subject and System of Economic Law. M., 1969. 176 p.

allowed the authorities to manage the economics in a "manual" mode. The directors of Soviet enterprises accepted the idea of the Code positively, simply because it protected them from arbitrary action by superior bodies, but they were not a force in the USSR that could really influence the government[1]. S. S. Zankovsky singles out a significant element of V. V. Laptev's ideas, which is the search for "a compromise between administrative law and civil law", which has not lost its relevance in modern Russia, and has acquired "a new expression through the commonality of state regulation and business, public and private legal relations in business"[2].

The new idea was opposed by civil lawyers, who saw some encroachment on the basics of civil law and insisted on following the classical canons of defining a branch on the basis of the specifics of the subject and method. O. S. Ioffe pointed to the inadmissibility of constructing a branch division of law based on the differentiation of state functions, moreover, he added: "But it would be no less a mistake, a mistake of a voluntaristic, subjectivistic nature to build a doctrine about the system of law without taking into consideration the nature of social relations underlying its various branches or the nature of economic laws that regulate these relations. And this is precisely the main methodological flaw in the theory of economic law"[3].

In any case, discussions on the formation of economic law generated comprehension of the role of the state in regulating economic relations, classification of functions of public authorities in the sphere of economics, conclusions about the essence of public administration and limits of its impact on civil legal relations. Omitting ideological elements, it must be admitted that Soviet science, turned off from the mainstream of scientific development (remember, it was at that time that the Nobel Prize in Economics was awarded to representatives of the Western world), tried to fill the gap that had appeared (at least in such a refined form). All this time legal science was fed by socialist dogma, far removed from real economic processes. However, by the end of the 1980s, due to scientific discussion, those canons were being born which gave their "exit" in the period of systemic reforms of the early 1990s. R. O. Khalfina noted: "Ignoring the requirements of objective economic laws in the process of legal regulation led to the fact (as F. Engels predicted) that the

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[1] *Zankovsky S. S.* [Khozyaystvennoe pravo akademika V.V. Lapteva: retrospektiva, ukhodyashchaya v budushchee] Economic Law of Academician V.V. Laptev: a retrospective going into the future / [Tvorcheskoye nasledie akademika V.V. Lapteva i sovremennost'] Creative heritage of Academician V.V. Laptev and Modernity / Editors in Chief: A. G. Lisitsyn-Svetlanov, member of the Russian Academy of Sciences; N. I. Mikhailov, Doctor of Law, Professor; S. S. Zankovsky, Doctor of Law, Professor. M., 2014. 256 p. / http://igpran.ru/public/books/Pamyati_V.V.Lapteva.pdf

[2] *Zankovsky S. S.* Op. cit.

[3] *Loffe O. S.* [Pravovoe regulirovanie khozyaystvennoy deyatel'nosti v SSSR] Legal Regulation of Economic Activity in the USSR. L., 1959. 48 p.

objective economic law eventually worked its way in, but in a perverted form and with great losses"[1]. Let us omit the reference to F. Engels (the edition was carried out in 1989), but R. O. Khalfina formulated practical recommendations on the improvement of legislation, which not only have not lost their relevance, but are repeated in modern science (on the adoption of fundamental laws on the role of the state in regulating the economy).

### 3. Economic Constitution, Constitutional Economics and Economic Analysis of Law in Modern Russia

The adoption of the Russian Constitution in 1993 completed the transition from an administrative-command to a market economy model. The foundations of the constitutional order proclaimed freedom of economic activity, support for competition and protection of private property. At the same time, the Russian Constitution refused to enshrine the economic system without defining the constitutional guidelines for the development of the national economics. The notion of a market economy as the basis for building the country's economics was not enshrined either. Even a cursory analysis of the constitutions of Western European countries, where many ideas of solidarism can be found, reveals the deficiencies of such silence:

1. Part 1 of Section 128 of the Spanish Constitution declares: "The entire wealth of the country in its different forms, irrespective of ownership, shall be subordinated to the general interest".

2. Article 14 of the Constitution of the Principality of Liechtenstein states: "The supreme function of the State is to promote the general welfare of the People" and Article 20 of the Dutch Constitution establishes the duty of public authorities to take care of the equitable distribution of wealth.

3. Article 80 of the Constitution of the Portuguese Republic provides for the principle of democratic planning of economic and social development.

4. Article 14 of the Basic Law of the Federal Republic of Germany has become a classic: "Property entails obligations. Its use shall also serve the public good".

Many more examples from foreign constitutions can be cited, but on the other part, the paucity of the Russian Basic Law predetermined the search for synthetic provisions elaborating its brief norms. The decisions of the Constitutional Court of the Russian Federation, formulating the principles of regulation of economic relations, became particularly important. A concept of an "economic constitution" was developed, but with different contents. The most common approach is related

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[1] *Khalfina R. O.* [Pravovoe gosudarstvo i ekonomika] Legal State and Economics / Socialist Legal State. Problems and Judgments. M., 1989. P. 121–132 / https://naukaprava.ru/catalog/435/1108/551684/62802?view=1

to the allocation of a set of constitutional norms regulating relations in the sphere of economy[1].

There is also an original idea of presenting the Civil Code of Russia as an economic constitution of the country, voiced by the Private Law Research Centre under the President of the Russian Federation named after S. S. Alexeev. S. S. Alekseev together with P. V. Krasheninnikov coined the term: "A kind of super-task in our economic and legal life should be recognized as giving to the Civil Code of the Russian Federation its original meaning of the "economic constitution of the country"[2]. In September 2006 the idea was given an "official hue" in the person of D. A. Medvedev (as First Deputy Prime Minister), who presented Part IV of the Civil Code in the State Duma: "The Civil Code is the economic constitution of the country and it should be stable. Foreign experience, the example of Germany, France show that the most stable there are the Civil Codes. Their constitutions were changed more often than their Civil Codes"[3]. Such a turn of phrase is also popular in the CIS countries: it was cited by M. K. Suleimenov, Director of the Private Law Research Institute of the Republic of Kazakhstan in relation to the Civil Code of the Republic of Kazakhstan[4].

However, this message did not find support in the academic community. The arguments are varied: 1) the Civil Code of the Russian Federation "cannot act as the law with supreme legal force in relation to other laws"[5]; 2) adoption of other codes and laws regulating economic relations reduced the role and importance of the Civil Code of the Russian Federation[6]; 3) there is no such special

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[1] Constitutional Legislation of the Russian Federation / Under the editorship of Yu. A. Tikhomirov. M.: Gorodets, 1999. P. 331; *Doroshenko E. N.* [Konstitutsionno-pravovoe regulirovanie ekonomicheskikh otnosheniy] Constitutional and Legal Regulation of Economic Relations / Thesis abstract. … Candidate of Juridical Sciences. M., 2004. 32 p.

[2] *Alekseev S. S., Krasheninnikov P.* Economic Constitution // Nezavisimaya Gazeta. July 27, 2000 / https://www.ng.ru/ideas/2000-07-27/8_constitution.html

[3] *Shkel T.* Code with Intelligence // Rossiyskaya Gazeta. September 21, 2006 / https://rg.ru/2006/09/21/gr-kodeks.html

[4] *Suleimenov M. K.* [Kak sozdavalsya Grazhdanskiy kodeks Respubliki Kazakhstan] How the Civil Code of the Republic of Kazakhstan was created // Jurist. 2012. No. 1. P. 14–21.

[5] *Mozolin V. P., Barenboim P. D.* [Grazhdanskiy kodeks kak "ekonomicheskaya konstitutsiya strany?"] The Civil Code as the 'economic constitution of the country'? // Legislation and Economics. 2009. No. 4.

[6] *Andreev V. K.* [Mozhno li Grazhdanskiy kodeks Rossiyskoy Federatsii nazvat' ekonomicheskoy konstitutsiey] Can the Civil Code of the Russian Federation be called an economic constitution? (Razmyshleniya o zakonotvorchestve v oblasti ekonomiki) (Reflections on lawmaking in the field of economics) // Russian judge. 2003. No. 8; *Filippova S. Yu*. [Grazhdanskiy kodeks Rossiyskoy Federatsii: peremeny. Kakim byt' Grazhdanskomy Kodeksu?] The Civil Code of the Russian Federation: changes. What should the Civil Code be? // Bulletin of Moscow University. Series 11. Pravo. 2016. No. 2. P. 23–42.

constitution in the world, the terminology distorts the reality[1]. By the way, an indirect argument is also the position of the Constitutional Court of the Russian Federation stressing that no federal law has greater legal force than other federal laws (see e.g: Ruling of the Constitutional Court of the Russian Federation of November 5, 1999 No. 182-O "On the request of the Moscow Arbitration Court to check the constitutionality of paragraphs 1 and 4 of part four of Article 20 of the Federal Law "On Banks and Banking Activities"[2]). At the same time, a general view of the idea of an "economic constitution" has emerged as the basis of an interdisciplinary view of the set of legal norms aimed at regulating economic relations. This is a certain message, forcing jurisprudence to expand "its sectoral" specificity of economic issues, which needs additional support (to go beyond "pure" jurisprudence, to involve the knowledge of such related sciences as sociology, economics, psychology, etc.)[3].

Such related term as constitutional economics has also developed in the Russian legal literature. It is understood as a "studying the principles of optimal combination of economic expediency with the achieved level of constitutional development reflected in the norms of constitutional law regulating economic and political activities in the state" scientific trend[4]. One of the main tasks of constitutional economics is the analysis of the interaction of economics and state, law and economy, and the development of managerial decisions aimed at ensuring the effective functioning of the economics in the interests of citizens and the state[5]. The team of authors of one thematic monograph stated: "Constitutional economics is concerned precisely with the study of constitutional and legal institutions and values in their interaction with economic processes and is more of a legal discipline"[6].

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[1] *Chirkin V.E.* [O terminakh "ekonomicheskaya konstitutsiya" i "konstitutsionnaya ekonomika", a takzhe o rossiyskoy i zapadnoy nauke (otklik na stat'yu G.N. Andreevoy)] On the terms "economic constitution" and "constitutional economy", as well as on Russian and Western science (response to the article by G. N. Andreeva) // Constitutional and Municipal Law. 2016. No. 3. P. 11–13.

[2] Official Gazette of the Russian Federation. 1999. No. 52. Article 6460.

[3] *Andreeva G.N.* [K voprosu o ponyatii ekonomicheskoy konstitutsii] On the Notion of an Economic Constitution // Constitutional and Municipal Law. 2010. No. 7. P. 9–13; *Andreeva G.N.* [O kontseptsii ekonomicheskoy konstitutsii] On the Concept of Economic Constitution // Constitutional and Municipal Law. 2006. No. 1.

[4] Constitutional Economics / Editor-in-Chief G.A. Gadzhiev. M.: Yustitsinform, 2010. 256 p. / http://www.philosophicalclub.ru/content/docs/p5.pdf

[5] *Pavlikov S.G., Avdijskij V.I.* [O sootnoshenii ekonomiki i prava i tendentsiyakh konstitutsionno-pravovogo regulirovaniya ekonomicheskikh otnosheniy] On the ratio of economy and law and trends of constitutional-legal regulation of economic relations // State and Law. 2014. No. 11. P. 35–42.

[6] Constitutional Economics / Editor-in-Chief G.A. Gadzhiev. M.: Yustitsinform, 2010.

The ideological basis of the proposed concepts is the economic analysis of law, tested by Western democracies, where some of the first researchers were G. Calabresi, J. Buchanan[1] and G. S. Becker[2] (the founder of the theory of "human capital"). G. S. Becker applied economic approaches (while excluding the purely egoistic message of greed for profit) to many social institutions and phenomena (including family, marriage, crime). Despite this, his theory of "human capital" has been criticised rather harshly for the possibility of a utilitarian approach to man and spiritual values. Man is transformed exclusively into an economic unit, like a machine, capable of giving away material values. In Germany in 2004, the rejection of Becker's ideas led to the professional community of linguists calling for the word *Humankapital* to be removed from the German lexicon[3].

The idea was completed by R. A. Posner[4], who prepared a voluminous handbook, which presents the economic analysis of the law as one of the promising directions: 1) it offers a neutral point of view on divisive legal issues; "economists do not take sides, they argue exclusively for efficiency"; 2) the economic approach often resolves divisive controversies[5]. Thomas S. Uhlen adds: "A large number of legal decisions are in fact like market choices"[6].

In Russia, this approach has its supporters. A. G. Karapetov notes: "The key role of positive economic analysis of law is to develop predictive models of the real regulatory impact of certain proposed legal norms on human behaviour"[7]. However, there are more economists than lawyers. A. V. Shmakov points out: "The greatest difficulty in the perception of the economic approach by lawyers has been "legal positivism". Any decision of the legislator is taken as a given. The correctness of the law is not discussed, only the problems of its application are discussed. In this connection, the alternative thinking of the economist, who perceives the law only

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[1] *Brennan J., Buchanan J.* The Reason of Rules. Constitutional Political Economy. Vol. 9 of the Ethical Economics Series: Studies in Ethics, Culture, and Philosophy of Economics / Ed. by A. P. Zaostrovtsev. SPb: Economic School, 2005. 272 p.

[2] *Becker Gary S.* Investment in Human Capital: A Theoretical Analysis Reviewed // Journal of Political Economy. 1962. Vol. 70. № 5. Pp. 9–49; *Becker Gary S.* Human behaviour. An economic approach. M., 2003.

[3] Why do we call it human capital? World Economic Forum / https://www.weforum.org/agenda/2016/06/why-do-we-call-it-human-capital/

[4] *Pozner R. A.* [Ekonomicheskiy analiz prava] Economic Analysis of Law. 2 volumes. SPb., 2004.

[5] *Pozner R. A.* [Rubezhi teorii prava] Milestones of the theory of law. M., 2017. 480 p.

[6] *Uhlen Thomas S.* [Teoriya ratsional'nogo vybora v ekonomicheskom analize prava] Rational Choice Theory in Economic Analysis of Law // Bulletin of Civil Law. 2011. No. 3. P. 275–315.

[7] *Karapetov A. G.* [Ekonomicheskiy analiz prava] Economic Analysis of Law. M.: Statute, 2016. 528 p. / https://m-lawbooks.ru/wp-content/uploads/2020/02/004-kniga.pdf

as one of the options to achieve the goal, is not perceived. The law is not perceived by the economist as something immutable, and hence it becomes possible to search for ways to increase its effectiveness"[1].

Meanwhile, reference to these works (A. G. Karapetov, A. V. Shmakov) devoted to the economic analysis of law reveals the presence of systemic gaps in them. The authors attempt to make recommendations for changing the law on the basis of economic perceptions. However, a superficial glance discredits the proposals and often proves the existence of a "chasm" between economists and lawyers. In particular, A. V. Shmakov's works give the example of the surrogacy contract, where the lawyer's thinking is relegated to the categories of the past, which justifies a prohibitive approach to this reproductive practice. The economist, on the other hand, models the behaviour of possible parties to the contract by assessing the consequences of the prohibition. As a result, parents will seek alternative ways of procreating, which will lead to a reduction in the birth rate. The conclusion is striking: "Further analysis must be made on the basis of whether society needs children. If not (due to overpopulation or a large number of healthy children to adopt), then the contract should be invalidated. If they are needed, the contract must be defended"[2]. The view presented is clearly unsubstantiated. One need only turn to the scientific literature to see significant factors that will, among other things, point to the economic aspect of the problem. For example, it has been proven that children born artificially have a significant number of congenital diseases (which places an additional burden on the health care system). The surrogacy program clearly does not make a significant contribution to the demographic situation of the country[3]. At the same time, the economic cost of running each couple constantly creates a debate about the appropriateness of the claimed expenditure (when artificial insemination takes place within the framework of public funding).

A. G. Karapetov goes further, presenting his own vision of modern jurisprudence: "By and large, proposals to change positive law in its relevant fields, which

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[1] *Shmakov A. V., Epifanova N. S.* [Ekonomicheskaya teoriya prava: uchebnik i praktikum dlya bakalavriata i magistratury] Economic theory of law: textbook and practice book for undergraduate and graduate studies. M.: Urait Publishing House, 2018. 420 p. / https://mx3.urait.ru/uploads/pdf_review/E373C704-8D4E-4CFF-8995-299898FDE771.pdf

[2] *Shmakov A. V.* [Ekonomicheskiy analiz prava] Economic Analysis of Law. Novosibirsk, 2005. 136 p.

[3] See: *Romanovsky PG. B.* [Pravovoe regulirovanie vspomogatel'nykh reproduktivnykh tekhnologiy (na primere surrogatnogo materinstva)] Legal regulation of assisted reproductive technologies (by way of example of surrogacy). M.: Urlitinform, 2011. 264 p.; *Romanovsky G. B.* [Pravovaya okhrana materinstva i reproduktivnogo zdorov'ya] Legal Protection of Maternity and Reproductive Health. M.: Prospekt, 2016. 216 p.

have been put forward over all these centuries by lawyers, have been made without reliance on any more coherent theory or methodology, rather purely intuitively"[1].

Among lawyers, there are no such radical accusations against economists (let's disregard the commitment to the professional community). Rather, on the contrary, there is a real involvement in a related science, which gives rise to various studies on the applicability of economic calculations to particular legal institutions[2]. S. A. Sinitsyn emphasises that the doctrinal approach has never been limited to clarifying the literal meaning of a norm in its isolated or systematic consideration. Conversely, one should not forget the limited economic analysis of many civil institutions (in particular, non-property relations)[3]. For the purposes of this study, however, it is the general ideas determining the basic principles of legal development and their impact on the economy that are of most interest. Let us turn our attention to such a significant aspect as the involvement of efficiency criteria in the process of exercising public power. S. A. Kurochkin singles out: "Efficiency is not a legal category, but a concept from the sphere of economics... The economic approach to law is based on the concept of efficiency"[4]. D. V. Lorenz adds: "The economic efficiency of this or that variant of the legal model should be evaluated in terms of minimising costs and risks and the incentive effects for the owner and the bona fide purchaser of stolen property should also be investigated"[5].

The principle of efficiency of public authorities is only gaining "momentum" in legal science and practice, although D. N. Bakhrakh highlighted this key criterion for the organization of public administration[6] (defending it at many public forums and conferences) as early as 1996. The adoption of the Federal Law of December 29, 2006 which amended Federal Law of October 6, 1999, No. 184-FZ "On the

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[1] *Karapetov A. G.* Op. cit. P. 13.

[2] *Stepanov D. I.* [Ekonomicheskiy analiz korporativnogo prava] Economic Analysis of Corporate Law // Bulletin of Economic Justice of the Russian Federation. 2016. No. 9. P. 104–167; *Khavanova I. A.* [O teorii ekonomicheskogo analiza v nalogovom prave (kontseptual'nye osnovy)] On the theory of economic analysis in tax law (conceptual foundations) // Journal of Russian Law. 2015. No. 5. P. 111–124 and etc.

[3] *Sinitsyn S. A.* [Ekonomicheskiy analiz prava i ego mesto v tsivilisticheskoy metodologii] Economic analysis of law and its place in civilistic methodology // Law. Journal of the Higher School of Economics. 2017. No. 2. P. 4–17.

[4] *Kurochkin S. A.* [Ekonomicheskiy analiz prava kak perspektivnyy metod poiska resheniy aktual'nykh problem yurisprudentsii (na primere grazhdanskogo sudoproizvodstva)] Economic analysis of law as a promising method of finding solutions to current problems of jurisprudence (on the example of civil litigation) // Russian Law Journal. 2013. No. 2. P. 166–175.

[5] *Lorenz D. V.* [Ekonomicheskiy analiz pozitsiy Konstitutsionnoho Suda RF otnositel'no zashchity prava sobstvennosti] Economic analysis of the positions of the Constitutional Court of the Russian Federation regarding the protection of property rights // Legislation and Economics. 2016. No. 1. P. 25–31.

[6] *Bakhrakh D. N.* Administrative law. college textbook. M., 1996. P. 162.

General Principles of the Organization of the Legislative (Representative) and Executive Bodies of State Authority of the Subjects of the Russian Federation" with Article 26.3.2 "Performance Measures of the Executive Authorities of Russian Federation", should be regarded as a positive development. The legislation was followed by presidential decrees setting out the criteria for effectiveness. The list of criteria has changed over a short period, which can hardly be reconciled with the principle of legal regulation stability in such a complex issue. Thus, the following were adopted: Presidential Decree No. 825 of 28.06.2007 "On evaluating the effectiveness of the activities of the executive authorities of the constituent entities of the Russian Federation"[1] (48 indicators); Presidential Decree No. 1199 of 21.08.2012 "On Evaluating the Effectiveness of the Executive Bodies of the Constituent Entities of the Russian Federation"[2] (12 indicators); Presidential Decree No. 548 of 14.11.2017 "On Evaluating the Effectiveness of the Executive Bodies of the Constituent Entities of the Russian Federation"[3] (24 indicators); Presidential Decree No. 193 of 25.04.2019 "On Evaluating the Effectiveness of Top Officials (Heads of Top Executive Bodies of State Power) of the Constituent Entities of the Russian Federation and the Activities of Executive Bodies of the Constituent Entities of the Russian Federation"[4]. (15 indicators), currently in force.

The analysis of the performance indicators shows that with each one there is a gradual abandonment of the economic matrix in favour of the political aspects. Thus, the 2019 Presidential Decree puts the level of trust in the government at the top of the performance criteria, which can hardly be measured mathematically.

Let us draw attention to such another aspect of economic analysis of law as the proper construction of incentives. As noted in legal scholarship: "It is important to bear in mind that the economic approach is based first and foremost on the idea of creating the right incentives for potential perpetrators as well as for potential perpetrators and victims, because it is the structure of incentives that ultimately predetermines what effects the rules to society should expect"[5]. Note that there is also an expansive approach to the nature and meaning of incentives in legal theory[6].

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[1] Russian Federation Code. 2007. No. 27. Article 3256.

[2] Russian Federation Code. 2012. No. 35. Article 4774.

[3] Russian Federation Code. 2017. No. 47. Article 6963.

[4] Russian Federation Code. 2019. No. 17. Article 2078.

[5] *Shastitko A. E., Pavlova N. S.* [Pochemu ekonomicheskiy analiz] Why does economic analysis of law matter? // Law. 2018. No. 3. P. 57–66.

[6] *Malko A. V.* [Stimuly i ogranicheniya v prave] Incentives and Restrictions in Law. Revised and enlarged 2nd ed. M.: Yurist', 2004. 248 p.

Thus, the interaction between law and economy is indisputable and unquestionable. Let us refer to T. Y. Khabrieva's opinion: "Law forms a normative equivalent of economic relations and is a universal management tool capable of ensuring the solution of most of the set tasks, achievement of the required goals, and formation of the necessary balance of interests"[1]. History knows many examples of the reverse impact of law on the economy. A striking example: the main idea of Marxism-Leninism is to destroy the market order through the dictatorship of the proletariat (although everyone remembers the doctrine about the basis (economy) and the superstructure (state and law). It seems that the arguments can go on indefinitely. Moreover, it is the legal mechanisms which ensure the normal development of economic relations. Thus, security of the state (in its various manifestations) is achieved[2]. We also support G. A. Gadzhiev's opinion: "Undoubtedly, we are dealing with mutual influences, reverse influences. Probably, the very formulation of the question of what is more important the influence of economics on law or law on economics is not correct. Indeed, how useful is this intellectual tug-of-war? However, lawyers need to be clear about their objectives, be aware of the reasonable ambition of the legal concept and raise the scale of their professional ambition[3].

## 4. Representation of the Mega-Branch of Economic Law in Contemporary Russian Scholarship

Russian legal scholars have also substantiated a broad approach to understanding economic law as a mega-industry. This is based on large-scale geopolitical transformations that are shaping new approaches to legal regulation[4], and foreign experience[5]. Such an argument as the inadmissibility of politically partisan economic decision-

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[1] *Khabrieva T. Ya.* [Ekonomiko-pravovy analiz: metodologicheskiy podkhod] Economic and legal analysis: a methodological approach // Journal of Russian Law. 2010. No. 12. P. 5–26.

[2] *Khabrieva T. Ya.* [Pravovye problemy finansovoy bezopasnosti Rossii] Legal Problems of Russia's Financial Security // Bulletin of Economic Justice of the Russian Federation. 2016. No. 10. P. 48–54.

[3] *Gadzhiev G. A.* [Pravo I ekonomika (metodologiya)] Law and Economics (Methodology). M., 2016.

[4] *Ershov V. V., Ashmarina E. M., Saveliev V. N.* [Sovremennoe ekonomicheskoe pravo kak rezul'tat geoekonomicheskoy, geokul'turnoy, geopoliticheskoy I geotekhnologicheskoy globalizatsii] Modern economic law as a result of geo-economical, geocultural, geopolitical and geotechnological globalization // State and Law. 2018. No. 7. P. 66–72.

[5] *Ershov V. V., Ashmarina E. M., Kornev V. N.* [Ekonomicheskoe pravo: sravnitel'no-pravovoy analiz Germanii, Frantsii, Kitaya i Rossii] Economic Law: Comparative Legal Analysis of Germany, France, China and Russia // State and Law. 2014. No. 9. P. 53–64.

making is added[1]. Various excursions into social and political processes are presented. Thus, according to the authors, historical excursion showed that during the last centuries formation of legal complexes directly depended on the development of economic processes; geographical excursion showed that in such countries as Germany, France, China, from the beginning of the XXI century a consolidation of legal complexes regulating various segments of economic activities in the mega-branch called economic law takes place (a process of agglomeration is outlined in contrast to the previous division); the general theoretical approach has enabled us to surmise that the general trend towards agglomeration of legal complexes does not mean that we have to abandon national specificities and "adapt" our national legal system to the experience of others[2]. Science highlights that "economic law in Russia has already emerged de facto as a collective complex mega-branch", with the formulation of the general concept: "a set of primarily principles and norms of law contained in international and national forms of law, implemented in the state and regulating social relations arising in production and economic activity and its, management". The authors add: "The subject of Russian economic law can be characterized as economic power and dispositive relations arising in the process of implementing types (in accordance with Russian National Classifier of Types of Economic Activity) and directions (Nomenclature) of economic activities, which are regulated by principles and norms of law contained in a unified and multilevel system of international (public and private) and domestic law forms (constitutional, municipal, financial, administrative, criminal, environmental, business, etc.)[3]. At the same time, the branch of law has no clear boundaries, but includes the General and Special parts, where the "General part fixes principles of economic activity, its legal forms and methods; legal personality of parties of economic legal relations (in particular, the range and powers of state bodies controlling economic processes in the country); general provisions on control and responsibility in the area under study and other general issues concerning any institution of economic law. The Special Part, specifying the General Part, consists of sections integrated into independent subgroups, which regulate homogeneous economic relations with characteristic specifics"[4].

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[1] *Miroshnik S. V.* [Ekonomicheskoe pravo v sisteme rossiyskogo prava] Economic law in the system of Russian law // Economic and legal issues. 2016. No. 1. P. 12–14.

[2] *Ashmarina E. M., Stakhov A. I.* [Administrativno-ekonomicheskoe pravo Rossiyskoy Federatsii] Administrative-economic law of the Russian Federation // State and Law. 2018. No. 5. P. 37–43.

[3] *Ershov V. V., Ashmarina E. M., Kornev V. N.* [Ekomocheskoe pravo kak megaotrasl' rossiyskogo prava: ego predemet I sistema] Economic law as a mega-branch of Russian law: its subject and system // State and Law. 2015. No. 7. P. 5–16.

[4] *Ashmarina E. M., Ruchkina G. F.* [Ekonomicheskoe pravo Rossiyskoy Federatsii (predmet i metod, sistema i struktura, istochniki pravovogo regulirovaniya)] Economic Law of the Russian Federation (Subject and Method, System and Structure, Sources of Legal Regulation) // State and Law. 2012. No. 8. P. 57–65.

Complementing the arguments of the proponents of the mega-branch of economic law is the mention in the Arbitration Procedural Code of the Russian Federation (Article 28) of economic disputes (when describing the jurisdiction of arbitration courts). At the same time, this allows the introduction of the "economic justice" term into academic use[1]. However, the legislator does not decipher what exactly should be understood under an economic dispute, which, in its turn, makes it possible to interpret through such a more comprehensible term as an "entrepreneurial activity"[2]. It is defined in Article 1 of the Civil Code of the Russian Federation as "independent, risk-based activity aimed at systematic profitmaking from the use of property, sale of goods, performance of work or rendering of services".

We should support the research premise of singling out economic law as a science whose mission "is the systemic analysis of the optimization of the legal regulation of economic processes in their development in order to prevent negative trends"[3]. From that perspective, the economic law is called upon to formulate the basic values of the relationship between the economics, law and the state. It should determine the benchmarks and define the scale, in the framework of which such interaction takes place. In part, that will make it possible to avoid the comprehensiveness of economic law. A broad approach to the mega-industry has the right to exist, but it could overwhelm the entire classical legal structure. It is unlikely to be supported by the legal community. The canons of branch structure have undergone certain changes, but the matrix has remained the same: the key indicators are the peculiarities of the subjectology and methodology. However, the collective of authors who consistently and logically explain the departure from the basic structure of law and the transition to an interdisciplinary method of differentiation should also be supported. Moreover, the popularisation of an economic approach to legal problems has

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[1] *Ershov V. V., Ashmarina E. M., Kornev V. N.* [Ekonomicheskoe pravo i ekonomicheskoe pravosudie kak parnye kategorii. Klassifikatsiya ekonomicheskikh sporov] Economic law and economic justice as paired categories. Classification of economic disputes // State and Law. 2016. No. 8. P. 40–51.

[2] Features of arbitration proceedings: textbook / O.V. Aboznova, Y.V. Averkov, N.G. Belyaeva et al; ed. by I.V. Reshetnikova. Moscow: Yustitsiya, 2019. Arbitration series. 324 p.; *Andreeva T.K.* [Voprosy kompetentsii arbitrazhnykh sudov v novom Arbitrazhnom protsessual'nom kodekse Rossiyskoy Federatsii] Issues of competence of arbitration courts in the new Arbitration Procedural Code of the Russian Federation // Economy and Law. 2002. No. 9; Arbitration process: textbook / A.V. Absalyamov, I.G. Arsenov, E.A. Vinogradova et al. V.V. Yarkov, main editor. 4-th edition, revised edition. M.: Infotropic Media, 2010. 880 p.

[3] *Ershov V.V., Ashmarina E.M., Kornev V.N.* [Ekonomicheskoe pravo kak nauka] Economic Law as a Science // State and Law. 2016. No. 3. P. 54–65.

strategic aims in understanding the essence of law, enriches general theory and gives it a new impetus in its development.

## Conclusions

This analysis leads to a number of general conclusions:

1. The complication of social relations, the development of integration processes and the change of the economic structure actualise interdisciplinary research based on the junction of sciences: law, politics and economics. The final transition to a market economy model (legally formalized in the Russian Constitution of 1993) caused a special interest in its doctrinal foundations. The synthesis gave birth to such a new direction as economic law.

2. The limits of state influence on economic relations are only relevant in a market economy. Socialist principles are based on the rejection of private law principles, where the public authority becomes not only a regulator but also a participant in the economic process. The Soviet state showed the consequences of a total command and control system, expressed not only in economic but also in political bankruptcy. That is why economic law is experiencing a certain prosperity in contemporary Russia.

3. A number of terms are used in legal science to reflect the interaction of economics and law at the institutional level. *Economic constitution* is a concept reflecting the essence of legal regulation of economic relations, but used not as a legal category, but as a catch phrase caused to emphasise its meaning. *Constitutional economics* is a scientific trend designed to correlate the content of constitutional norms and their reflection in the economic life of the country, the forms of interaction between the economy and law at the constitutional level. *Economic analysis of law* is an economic approach to the study of legal norms and institutions.

4. The formation of a new mega-branch of economic law in contemporary Russia should be considered premature. It would seem that the formulation of the question in this way is misleading. The model of economic analysis of law (used to a greater extent in Western democracies) shows that the impact of law and economics can be seen at different levels and in nearly all of the classical branches of law. Even the evaluation of criminal behaviour is carried out, among other things, by means of material indicators. For example, a financial assessment of a terrorist act (distinguishing between "costly" acts such as the attack on the World Trade Centre buildings on 11 September 2001 and "low-budget" ones, such as the use of trucks by a lone terrorist) is becoming popular abroad. Transferring such an approach to the structure of the law would lead to economic law absorbing all existing branches of law to a greater or lesser extent, and thus negating the criteria for differentiating branches of law.

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# THE LEGAL NATURE OF THE AGREEMENT ON THE OFFICIAL NATURE OF THE TECHNICAL SOLUTION CREATED BY THE EMPLOYEE

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**Abstract:** In this article, the author conducts a study of the legal nature of the agreement between the employee and thae employer on the rights to technical solutions, created by the employee within the framework of labor functions. Absence of comprehensive legislation of legal relations between the employee and the employer concerning potential objects of patent law created by the employee, and absence of unitized scientific approach about the nature of the agreement between them negatively influence the process of administration of the law. The analysis of the court practice conducted by the author allows us to understand that in most cases the employer and the employee who created the patentable technical solution do not have a legally formalized agreement. This implication mat lead to conflict situations between the parties, that can negatively affect the stability of stream of commerce. The author concludes that such situations are a consequence of the ambiguity of the legal nature of the agreement (contractual terms) on the procedure for creating patentable technical solutions by an employee and determination of its legal status. From a practical point of view, the existing uncertainty leads to difficulties for both parties to the employment contract in determining the form and content of the document in which the relevant arrangement should be enshrined. In this article the author, examineting the legal nature of the agreement between the employee and the employer, regulating their legal relations concerning the official objects of patent law, finds additional arguments in support of the concept of interbranch nature of regulation of the institute of official objects of patent law.

**Keywords:** patent law, service objects of patent law, employment contract, sectoral affiliation, multi-sector agreement, agreement on the service object of intellectual property.

At the current stage of development of domestic scientific thought, there is no unity of approach for defining the legal nature of such an agreement, and the question of the branch of law (labour or civil law) to which its legal regulation refers has not been resolved.

Determining the legal nature of an agreement on the distribution of rights to a patentable technical solution created by an employee has scientific and practical relevance. From the point of view of the doctrinal approach to the topic under study, the importance of determining the sectoral affiliation of the relevant agreement between the employee and the employer stems from the need to clarify the legal nature of the institution of service objects of patent law, designed to ensure the effective commercialisation of technical solutions created by employees.

Article 1370 (3) of the Civil Code of the Russian Federation establishes that the exclusive right to the employee's invention, the employee's utility model or the employee's industrial design and the right to obtain a patent belong to the employer unless the employment contract or the civil law contract between the employee and the employer provides otherwise. Consequently, the civil law norm regulating the legal regime of the service object of patent law allows agreeing the legal fate of technical solutions created by employees both in the form of an independent condition included in the employment contract and in the form of a civil contract not named in the Civil Code of the Russian Federation (obviously, regardless of which contract the employee and the employer agreed on the named issue, the legal nature of such agreement will remain unchanged).

Relevant legal relations between the employee and the employer are regulated by a single rule of civil legislation (Article 1370 of the Civil Code of the Russian Federation), while allowing additional contractual regulation of such relations. Therefore, mandatory legislative regulation must be supplemented by agreements between the subjects of legal relations, at least as regards the legal fate of the technical solutions created by the employee and the mechanism for determining the technical solutions that fall under the category of professional solutions. A lack of clarity about which branch of law governs such agreements and when and to what extent an employee and an employer need to reach an agreement on the said issues often becomes the reason why such agreements (provisions in contracts and local acts of the employer) do not exist. This situation leads to abuses and impairment of the rights of both the employee and the employer and has a negative impact on the stability of civil rights turnover in the field of patent rights.

Law enforcement practice has developed a specific approach to determining the mechanism for classifying technical solutions created by employees as business-related, in the absence of a clear agreement on such a mechanism between the employee and the employer.

Thus, in its judgment dated 18.07.2019 in case No. SIP-721/2017 the Intellectual Rights Court Presidium noted that in determining whether a particular technical solution was created within the framework of employment duties of its authors a wide range of circumstances may be taken into account, including subsequent conduct of the employee and employer, documents prepared by them in the course of the employee's employment, which together could indicate that technical solutions were developed in connection with performance of employment duties, other circumstances in conjunction. This approach correlates with the explanations contained in paragraph 129 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 23.04.2019 No. 10 "On Application of Part Four of the Civil Code of the Russian Federation" and with the previously established law enforcement practice on this issue as reflected in the information note of the Scientific Advisory Board of the Intellectual Property Rights Court[1].

The analysis of court practice on disputes regarding the establishment of the patentee of the patent right object, which, from the employer's point of view, is serviceable, shows that in most cases, the court resolves the relevant issue on the above indirect signs if there are no any agreement between the employee and the employer (for example, cases No. SIP-598/2018, No. SIP-477/2018, No. SIP-775/2016 considered by the Intellectual Property Rights Court). For the parties to a dispute, the judicial assessment of such circumstantial features of their legal relationship regarding the creation of a patentable technical solution (or registered object of patent right) and the distribution of rights thereto is not obvious, which affects the duration and complexity of the dispute and predetermines an unpredictable outcome of the latter.

The algorithm for protection of infringed rights and establishment of relevant circumstances becomes linear and simpler in cases when the employee and employer have determined, at least in advance, a mechanism for classifying technical solutions created by the employee as proprietary and the procedure for allocation of rights to such technical solutions. This contributes to stability of civil circulation of industrial property and effectiveness of their commercialisation. Otherwise, situations often arise when an employer, believing that a technical solution created by an employee is a proprietary solution, acquires exclusive rights to that solution, proceeds to use it (introduces it into production, manufactures products, contracts to sell goods) but loses the exclusive right by court decision because the employee proves in court that the invention was created outside the scope of his employment. There are also reverse situations where employees acquire the exclusive right and attempt to use it (e. g. conclude a licensing agreement), believing that the created solution is not proprietary or that the employer has lost the right to obtain a patent, but the court later determines that the employee's position is wrong.

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[1] Intellectual Rights Court Information Brief of the Academic Advisory Council // Zhurnal suda po intellektual'nym pravam = Journal of the Intellectual Rights Court. 2017. No. 18. P. 45.

Such situations, taking into account the dispositive nature of Article 1370 of the Civil Code of the Russian Federation, demonstrate the need for separate contractual regulation of the respective legal relations between the employee and the employer.

As mentioned above, the issue of the sectoral nature of the agreement (or the terms included in an employment or other contract) to create a patentable technical solution in the course of employment, as well as the allocation of rights to such a solution, remains debatable.

Article 1370 of the Civil Code of the Russian Federation, which regulates the legal regime of service objects of patent law, does not "bind" such an agreement to a particular branch of law, moreover, paragraph 3 of the article allows the inclusion of relevant conditions in both employment and civil law contracts concluded between the employee and the employer. The study of scientific approaches to this issue has established that scholars believe that labour law or civil law, respectively determines the sectoral affiliation of such agreements.

The study of the sectoral affiliation of the agreement between the employee and the employer takes place in the context of resolving two questions: 1) which branch of law regulates the legal relationship between the employee and the employer in the process of creating a technical solution; 2) which branch of law regulates the legal relationship between the employee and the employer in the distribution of rights to the technical solution created by the employee.

A number of scholars believe that in both cases the predominant regulation belongs to labour law. Therefore, D. Y. Shestakov points out: "labor norms characterize relations of a creator of creative result with administration of enterprises, institutions, organizations concerning service works"[1]. S. A. Kazmina believes that "the emergence, amendment and termination of the rights and obligations of the parties in connection with the creation and use of service inventions are the necessary elements of the relationship between employees and employers, transferring these relations from the field of patent to labor and contract law"[2]. A. A. Inyushkin agrees with the above position and believes that "the basis for the regulation of obligations to create databases within the framework of labor relations should be recognized as the labor law. The basis for the regulation of relations between the employee and the employer is the employment contract"[3].

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[1] *Shestakov D. Yu.* [Intellektual'naya sobstvennost' v sisteme rossiyskogo prava i zakonodatel'stva] Intellectual property in the system of Russian law and legislation // Rossiyskaya yustitsiya. 2000. No. 5.

[2] *Kazmina S. A.* [Pravovoe regulirovanie sluzhebnykh izobreteniy v Rossiyskoy Federatsii] Legal regulation of service inventions in the Russian Federation: Extended abstract of dissertation. ... Candidate of Juridical Sciences.

[3] *Iniushkin A. A.* [Grazhdansko-pravovoi rezhim baz dannykh] Civil law regime of databases: Thesis. ... Candidate of Juridical Sciences.

Thus, the institute of service objects of patent law, according to a number of scholars, in all its manifestations belongs to the sphere of labour law and should be regulated by its norms.

Scholars with the opposite viewpoint refer to the employee-employer relationship, in one way or another, with the proprietary intellectual property to civil law regulation.

Thus, V. O. Dobrynin, notes that labour relations, as a legal fact which are giving rise to civil law relations on the use of rights to proprietary facilities, only create a precondition for the emergence of such objects, and the legal regime of proprietary facilities is not the subject of labour law regulation[1].

V. S. Vitko, examining the legal nature of the condition on the creation of a specific intellectual property object included in an employment contract, comes to the conclusion that such a condition can only be civil law in nature, since "at the moment when the employer gives the employee an official task to create a work, along with the existing employment obligation, the contract of copyright is concluded, from which a civil law obligation to create a work by the employee arises"[2].

E. P. Gavrilov, pointing out the civil law nature of legal relations arising in the field of creation and use of service inventions[3], associates it with the impossibility to include the obligation to create an invention in the official functions of an employee.

A third view holds that the legal regulation of the employee-employer relationship in the process of creating a technical solution is a matter of labour law and the distribution of rights to the technical solution created by the employee is a matter of civil law.

According to I. S. Krupko, "for the legal regime of a service invention to arise and for any agreements that may be concluded between the author and the employer to be valid, there must be an employment relationship and the creation of the object within the performance of the work function"[4].

E. A. Ivanova and Y. V. Antonova believe that legal relations in the sphere of service work are regulated by the rules of civil law, but for the recognition of a work,

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[1] *Dobrynin V. O.* [Osobennosti pravovogo regulirovaniya sluzhebnykh izobreteniy] Peculiarities of legal regulation of service inventions: Thesis. Candidate of Juridical Sciences.

[2] *Vitko V. S.* [Pravovaya priroda dogovorov o sozdanii proizvedeniy nauki, literatury i iskusstva] The Legal Nature of Contracts for the Creation of Works of Science, Literature and Art. Moscow: Statut, 2019.

[3] *Gavrilov E. P.* [O sluzhebnykh izobreteniyakh. Ch. I] On service inventions. Part I // Patents and Licences. 2011. No. 9.

[4] *Krupko S. I.* [Institut sluzhebnykh izobreteniy. Novelly i problem pravovogo regulirovaniya] Institute of service inventions. Novels and Problems of Legal Regulation // Intellektual'naya sobstvennost' v Rossii i ES: pravovye problemy = Intellectual Property in Russia and EU: Legal Problems: Collection of Articles edited by M. M. Boguslavsky and A. G. Svetlanov. M.: WoltersKluwer, 2008.

as such it is necessary to have labour relations between the author of the work and the employer, regulated by labour law[1].

O. A. Ruzakova also draws attention to the fact that it is the employment contract that is the basis for the legal regime of the service object, noting: "if the employment contract includes conditions on the distribution of rights to the created object, the mutual rights and obligations of the parties, this indicates its multi-branch nature"[2].

A similar position is held by B. E. Semenyuta who believes that "labour law does not regulate relations in the sphere of authorship, and civil law does not regulate relations in the sphere of performance of labour functions by an employee", based on which he states that "in this case there is a duality of legal relations between the parties, which are linked by both civil law and labour relations"[3].

B. S. Antimonov and E. A. Fleischitz also noted: "copyright, unlike labour law, mostly regulates not the process of creation of a work, not "live labour". It more often regulates only the subsequent relations arising in connection with the result of work, with the created work. This is the usual distinction between labour law and copyright law"[4].

Attention should be drawn to the non-obviousness of the provision on the admissibility of the application of labour law to any legal relationship between an employee and an employer regarding the creation and use of a proprietary item of patent law.

The labour law provisions for the following reasons cannot regulate the relations of the mentioned subjects concerning the distribution of property rights to a technical solution created by an employee (namely, the right to obtain a patent and, accordingly, the exclusive right). Thus, Article 8 (1) (5) of the Civil Code of the Russian Federation establishes that civil rights and obligations arise from the creation of works of science, literature, art, inventions and other results of intellectual activity with respect to such objects. This standard, which establishes the subject matter of civil law regulation, in our opinion, excludes the possibility of

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[1] *Ivanova E. A., Antonova Y. V.* [O problem rasporyazheniya sluzhebnym proizvedeniem] On the problem of disposal of service work // Nauka i obrazovanie: khozyaistvo i ekonomika; predprinimatel'stvo; pravo i upravlenie = Science and Education: Economy and Economics; Entrepreneurship; Law and Management. 2012. No. 6 (25).

[2] [Pravo intellektual'noy sobstvennosti] Intellectual Property Law. Copyright: Coursebook (vol. 2) under general editorship of L. A. Novoselova. M.: Statut, 2017.

[3] *Semenyuta B. E.* [Grazhdansko-pravovye dogovory o predostavlenii prava ispol'zovaniya programmy dlya EVM] Civil law contracts on granting the right to use a computer programme: Thesis. ... Candidate of Juridical Sciences. P. 152.

[4] *Antimonov B. S., Fleischitz E. A.* [Avtorskoe pravo] Copyright. P. 345–346.

attributing the issue of distribution of rights to a technical solution created by an employee to the sphere of labour law regulation.

Thus, it must be concluded that the said issue will in any case be resolved from the standpoint of civil law, including the dispositive contractual regulation permitted by Article 1370 of the Civil Code of the Russian Federation.

The more complicated question is which branch of law regulates the legal relations between the employee and the employer in the process of creating a technical solution, in other words, which branch of law can be applied to the conditions to create potential proprietary objects in the employment contract (another document agreed by the employee and the employer) or to the specific assignment of the employer for such creation, mentioned in Article 1370 of the Civil Code of the Russian Federation.

As can be seen from the above scientific points of view, this issue is the most debatable. As rightly pointed out by V. I. Eremenko, the main difficulty in resolving the issue of sectorial affiliation of the institute of proprietary objects of patent law lies in distinguishing similar in purpose (creation of a not yet existing work) labor and civil legal relations; and "the main criterion for this distinction is the performance by the author-employee for payment of a labor function (work in accordance with the staff schedule, profession, specialty with a specified qualification, a specific type, the work assigned to the employee"[1]. However, this issue is of paramount importance for determining the legal nature of an agreement on the proprietary nature of a technical solution created by an employee, as it is relevant in establishing the substance of such an agreement as well as its subsequent implementation.

Studying the employee-employer relations in the above area, the author proceeds from the position that "an employee's work can be created only within the framework of labor relations existing between the parties"[2], and that "only those works whose creation is directly related to the employee's work duties in accordance with his employment contract, job description or other acts governing his activities may be regarded as work-related works"[3].

The proprietary nature of a technical solution created by an employee depends directly on the presence or absence of an employment relationship between the author of the solution and the content of the employment relationship, which is not regulated by civil law, which leads to the conclusion that the institute of propri-

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[1] *Eremenko V. I.* [Razvitie institute sluzhebnykh proizvedeniy v Rossii] Development of the institution of service works in Russia // Legislation and Economy. 2013. No. 1.

[2] *Gursky R. A.* [Sluzhebnoe proizvedenie v rossiyskom avtorskom prave] Service work in Russian copyright law: Extended abstract of dissertation... Candidate of Juridical Sciences. P. 7.

[3] [Pravo intellektual'noy sobstvennosti] Intellectual Property Law: Coursebook / Under the editorship of I. A. Bliznets. 2nd ed., revised and enlarged edition. M.: Prospekt, 2016. P. 150–151.

etary objects of patent law and the agreement on proprietary objects of intellectual property, which is one of its elements, cannot be studied without reference to the provisions of labour law.

Regarding the position of a number of scholars on the fundamental impossibility of regulating relations over proprietary objects of patent law, including at the stage when a technical solution has not yet been created or is in the process of creation, it should be noted that such approach is applicable only to situations where it clearly follows from the job function of the employee that the creation of technical solutions is not part of the employee's job function. For example, if the employee working as a lawyer is fond of computer modeling and can create a patentable design and the employer requests (commissions) him to create such a design, the labour law rules cannot regulate the developing legal relations regarding the creation of the design. However, the object created as a result of such an assignment will most likely not have the attributes of work, since its creation is beyond the scope of the employee's work function. In this case, the relevant agreement between the employer and the employee engaged to perform a task not covered by the employment function is more like a copyright contract, as V. S. Vitko points out[1].

In situations where the employee's job function is to conduct knowledge-intensive research, develop new technical solutions, create solutions for the appearance of products (such situations are characteristic of patent law regulation) employees (scientists, engineers, industrial designers and other specialists) are engaged by employers to conduct scientific and technical research, create potential industrial designs. As E. P. Gavrilov[2] rightly points out: an employer cannot oblige its employees to invent anything, but the employer, based on the job function and competence of such employees, can give a task to conduct scientific (technical) work in a certain direction and provide the conditions for such work, which may result in the creation of an invention (utility model or industrial design). In most cases, such employees create patentable technical solutions, since the creation of an invention by employees of a scientific team is more likely than the creation of an invention by an employee whose job function is not in any way connected to scientific (technical) research.

Foreign jurisdictions, in order to effectively regulate the legal relationship arising from the creation of technical solutions by employees, differentiate between different categories of employees by establishing different legal regulations for the technical solutions created by employees, depending on the purpose of their employment.

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[1] *Vitko V. S.* Op. cit.

[2] *Gavrilov E. P.* Op. cit.

For example, Sean M. O'Connor, Professor of Law at the University of Washington School of Law, referring to the US Supreme Court case United States v. Dubilier Condenser Corp., points to the US "the work-made-for-hire" doctrine. Under the doctrine, in cases where an employee was specifically hired to invent something that was eventually invented, the right to such invention would rightly vest in the employer1[1].

Domestic doctrine has no clearly developed and articulated doctrine on the need to assess the propriety of technical solutions created by employees, depending on the conditions under which these employees were hired by the employer. However, some authors express a similar point of view: E. P. Gavrilov writes: "The contract between the author and the employer is a typical employment contract, in the implementation of which service copyright works are created"[2].

In our opinion, the legal relations between an employee hired "to invent" and the employer which are prior to the creation of a patentable technical solution, belong to the sphere of labour law regulation, which determines the procedure and form of agreement between the employee and the employer on the work function and the employee's work duties, the procedure for the employer to form the relevant goals and objectives, the determination of the form in which the employee will receive tasks, report on the work done and on its result. It is clear that civil law (unlike labour law) does not contain any mechanisms by which these relationships can be regulated.

Regarding the possibility of a civil law relationship between an employee and an employer in the situation in question, similar to an author's contract: Article 15 of the Labor Code of the Russian Federation establishes that no civil law contracts governing the actual employment relationship between an employee and an employer may be concluded. This means that if the employee's job function under the employment contract or other acts of the employer is to carry out work aimed at creating a technical solution, a civil law contract with a similar assignment cannot be concluded, as this would be contrary to the labour law provision.

Assuming that the terms and conditions of the employment function or employment duties included in an employment contract or other agreement are of a civil law nature, it would need to be stated that such an employment contract does not have its own subject matter, as the terms and conditions of the employment function in such a case are of a civil law nature. In this situation, it would seem that

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[1] *Sean M. O'Connor.* Hired to Invent vs. Work Made For Hire: Resolving the Inconsistency Among Rights of Corporate Personhood, Authorship, and Inventorship // https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2098&context=sulr (accessed on October 10, 2019).

[2] *Gavrilov E. P.* [Pravo intellektual'noy sobstvennosti] Intellectual Property Law. General provisions. The XXI Century. Moscow: Yurservitum, 2015. P. 276.

the legal relationship between employers and employees hired "to invent" until the creation of a patentable technical solution falls within the sphere of labour law, but, as noted above, the distribution of rights to such a technical solution and the determination of its further legal fate falls within the civil-law sphere of regulation. Where an employment contract between an employee hired "to invent" and an employer contains provisions on the procedure for creating technical solutions and on the distribution of rights to them, such contract should be recognised as a multisectoral one regulating both labour and civil law relations of the mentioned subjects.

The research carried out in this article has highlighted the problems encountered in determining the legal nature of a service agreement in patent law and the consequences that these problems create: impairment of the rights of both the employee and the employer, as well as the unpredictable outcome of the protection of infringed rights.

Investigation of the legal essence of such an agreement involves finding answers to the questions of which branch of law governs the legal relations between the employee and the employer in the process of creating a technical solution and which branch of law governs the legal relations between these entities regarding the distribution of rights to the technical solution created by the employee. Determination of the legal nature of the agreement between the employee and the employer on the intellectual property object is impossible without examining each of the stages of the potential intellectual property object creation (from the stage when the employer sets the task to create the technical solution or the employee incurs a labour obligation to determine the legal fate of the technical solution created by the employee).

In our opinion, the issue of distribution of property rights to a technical solution created by an employee should be resolved in favour of referring the said legal relations to the sphere of civil law regulation. The civil standards apply to the legal relations between the employee and the employer arising in the process of the employee's creation of a potential intellectual property object and relating to that object when the employee's creation of such objects is not part of his employment function. If the employee's job function includes carrying out work aimed at creating technical solutions, the relevant condition should be attributed to the subject matter of the employment contract and the scope of labour law regulation.

The foregoing leads to the conclusion that the analysis of the stage preceding the direct creation (implementation) of a technical solution, in order to better understand the content of the legal relationship between the employee and the employer in each particular case, should be conducted with due regard to the circumstances of employment of the employee who is the author of the patent right object.

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