ISSN 1997-1370 (Print)
ISSN 2313-6014 (Online)

Журнал Сибирского федерального университета

Гуманитарные науки

Journal of Siberian Federal University

Humanities & Social Sciences

2022 15 (8)

ISSN 1997-1370 (Print)
ISSN 2313-6014 (Online)

ЖУРНАЛ СИБИРСКОГО ФЕДЕРАЛЬНОГО УНИВЕРСИТЕТА
Гуманитарные науки

2022 15(8)

JOURNAL OF SIBERIAN FEDERAL UNIVERSITY
Humanities & Social Sciences

Издание индексируется Scopus (Elsevier), Российским индексом научного цитирования (НЭБ), представлено в международных и российских информационных базах: Ulrich's periodicals directiory, EBSCO (США), Google Scholar, Index Copernicus, Erihplus, КиберЛенинке.

Включено в список Высшей аттестационной комиссии «Рецензируемые научные издания, входящие в международные реферативные базы данных и системы цитирования».

Все статьи находятся в открытом доступе (open access).

Журнал Сибирского федерального университета. Гуманитарные науки.
Journal of Siberian Federal University. Humanities & Social Sciences.

Учредитель: Федеральное государственное автономное образовательное учреждение высшего образования «Сибирский федеральный университет» (СФУ)

Главный редактор Н.П. Копцева. Редактор И.А. Вейсиг
Корректор О.Ф. Александрова. Компьютерная верстка И.В. Гревцовой

Свидетельство о регистрации ПИ № ФС77-28723 от 29.06.2007 г.

№ 8. 30.08.2022. Тираж: 1000 экз.

Свободная цена

Адрес редакции и издательства: 660041 г. Красноярск, пр. Свободный, 79, оф. 32-03

Отпечатано в типографии Издательства БИК СФУ
660041 г. Красноярск, пр. Свободный, 82а.

http://journal.sfu-kras.ru

Подписано в печать 24.08.2022. Формат 84x108/16. Усл. печ. л. 12,9.
Уч.-изд. л. 12,4. Бумага тип. Печать офсетная. Тираж 1000 экз. Заказ № 15820.

Возрастная маркировка в соответствии с Федеральным законом № 436-ФЗ: 16+

CONTENTS

Journal of Siberian Federal University. Humanities & Social Sciences
2022 15(8): 1070–1081

DOI: 10.17516/1997-1370-0910
EDN: OPFQWN
УДК 343.3/.7

Protection of Historical Truth: a New Task of Russian Law

Georgii L. Moskalev*
Siberian Federal University
Krasnoyarsk, Russian Federation
Shanghai University of Political Science and Law
Shanghai, People's Republic of China

Received 18.03.2022, received in revised form 25.04.2022, accepted 26.04.2022

Abstract. The purpose of the presented article is to define the concept of «historical truth». The necessity of solution of this problem is due to the inclusion in the Constitution of Russia in 2020 of a norm prescribing the protection of historical truth, as well as the setting of similar tasks in the new National Security Strategy of Russia. The purpose of the work is achieved by interpreting 23 documents posted in the legislative support system, as well as analyzing doctrinal sources devoted to or affecting the issue of determining historical truth. The synthesis of the obtained results leads to the conclusion that the historical truth is socially significant reliable information about historical events related to the defense of Russia, and, mainly, the history of the Second World War, which requires protection from its change, consisting of precisely confirmed historical facts. This definition made it possible to determine the starting points for subsequent rulemaking aimed at solving the problem of protecting historical truth. Understanding historical truth as information corresponding to objective reality implies a prohibition on distortion, falsification of historical facts, but not on their evaluation, which provides a balance between freedom of speech and protection of historical truth. On the basis of this thesis, restrictions on the use of evaluative features in prospective compositions of offenses and crimes designed to ensure the protection of historical truth are justified. The formulated concept of historical truth makes it possible to detect norms aimed at protecting it in the current legislation, which is illustrated in the work by the example of articles 243.4 and 354.1 of the Criminal Code of the Russian Federation. Thus, the well-founded concept of historical truth creates the necessary prerequisites for further legal steps to ensure its protection in compliance with the Constitution of the Russian Federation.

Keywords: historical truth; historical memory; historical fact; rehabilitation of Nazism; constitutional reform; national security; the Great Patriotic War; illegal dissemination of information.

* Corresponding author E-mail address: eucaliptus@yandex.ru
ORCID: 0000-0002-0418-0227

Research area: law.

Citation: Moskalev, G.L. (2022). Protection of historical truth: a new task of Russian law. J. Sib. Fed. Univ. Humanit. soc. sci., 15(8), 1070–1081. DOI: 10.17516/1997-1370-0910

Охрана исторической правды: новая задача российского права

Г.Л. Москалев
Сибирский федеральный университет
Российская Федерация, Красноярск
Шанхайский политико-юридический университет
Китайская Народная Республика, Шанхай

Аннотация. Целью статьи является определение понятия «историческая правда». Необходимость решения этой проблемы обусловлена включением в 2020 г. в Конституцию России нормы, предписывающей обеспечить защиту исторической правды, а равно постановкой аналогичных задач в новой Стратегии национальной безопасности России. Цель работы достигается путем толкования 23 документов, размещенных в системе обеспечения законодательной деятельности, а равно анализа доктринальных источников, посвященных или затрагивающих вопрос определения исторической правды. Синтез полученных результатов приводит к выводу о том, что историческая правда – это требующая охраны от ее изменения социально значимая достоверная информация об исторических событиях, связанных с обороной России и, главным образом, с историей Великой Отечественной войны, состоящая из точно подтвержденных исторических фактов. Данная дефиниция позволила определить исходные точки для последующего нормотворчества, направленного на решение задачи по защите исторической правды. Понимание исторической правды как информации, соответствующей объективной действительности, предполагает запрет на искажение, фальсификацию исторических фактов, а не на их оценки, что обеспечивает баланс между свободой слова и защитой исторической правды. На основе этого тезиса обосновываются ограничения на использование оценочных признаков в перспективных составах правонарушений и преступлений, призванных обеспечить охрану исторической правды. Сформулированное понятие исторической правды позволяет обнаружить нормы, направленные на ее защиту в действующем законодательстве, что проиллюстрировано в работе на примере статей 243.4 и 354.1 Уголовного кодекса РФ. Таким образом, обоснованное понятие исторической правды создает необходимые предпосылки для дальнейших правовых шагов по обеспечению ее защиты во исполнение Конституции РФ.

Ключевые слова: историческая правда, историческая память, исторический факт, реабилитация нацизма, конституционная реформа, национальная безопасность, Великая Отечественная война, незаконное распространение информации.

Научная специальность: 5.1.4 – уголовно-правовые науки.

Введение

Вопрос правовой охраны исторической правды начал активно обсуждаться в 2020 г. Главной причиной этого стало вступление в силу Закона РФ № 1-ФКЗ, в соответствии с которым в Конституцию РФ была включена ст. 67.1. Часть 3 новой статьи основного закона страны провозгласила: «*Российская Федерация чтит память защитников Отечества, обеспечивает защиту исторической правды. Умаление значения подвига народа при защите Отечества не допускается*». Данное изменение акта высшей юридической силы впервые нормативно поставило вопрос защиты исторической правды средствами национальной правовой системы.

Новая конституционная норма стремительно вошла в информационную и законотворческую повестку, причем еще до проведения всенародного голосования в июне, по результатам которого поправки в основной закон 2020 г. приобрели юридическую силу: направления предстоящих конституционных изменений начали освещаться уже с января 2020 г. Подтверждают данный тезис материалы, размещенные в системе обеспечения законодательной деятельности, согласно данным которой историческая правда упоминается в 7 проектах правовых актов, размещенных в 2020 г., 6 из которых – с января по май. Всего же за 2020–2021 гг. упоминание исторической правды встречается в 12 проектах правовых актов, размещенных в системе. Для сравнения в 2018–2019 гг. таких документов всего 2, а за весь период работы системы законодательной деятельности до 2020 г.– 10.

Приведенные цифры демонстрируют серьезный количественный рост интереса субъектов нормотворчества к теме защиты исторической правды, очевидно, обусловленный включением в Конституцию РФ ч. 3 ст. 67.1.

Качественный рост значения защиты исторической правды в политико-правовой повестке иллюстрирует ее место в новой Стратегии национальной безопасности РФ (далее – Стратегия). В частности, в разделе об информационной безопасности указывается, что «по политическим причинам пользователям сети “Интернет” навязывается искаженный взгляд на исторические факты» (п. 53). В разделе, посвященном защите традиционных российских духовно-нравственных ценностей, культуры и исторической памяти, говорится: «Участились попытки фальсификации российской и мировой истории, искажения исторической правды и уничтожения исторической памяти» (п. 88). В п. 93 Стратегии задача защиты исторической правды ставится дважды в подпунктах 2 и 11. Кроме того, противодействие попыткам фальсификации истории и защита исторической правды указывается в качестве самостоятельной задачи в разделе «Стратегии», посвященном стратегической стабильности и взаимовыгодному международному сотрудничеству (пп. 21 п. 101).

Для сравнения, в Стратегии национальной безопасности РФ до 2020 г. лишь в п. 81 отмечалось: «Негативное воздействие на состояние национальной безопасности в сфере культуры усиливают попытки пересмотра взглядов на историю России, ее роль и место в мировой истории», а словосочетание «историческая правда» в тексте не упоминалось ни разу. Отсутствовало оно и в Стратегии национальной безопасности РФ, принятой в 2015 г., в которой в п. 21 содержалось только указание на «стремление некоторых стран использовать информационные и коммуникационные технологии для достижения своих геополитических целей, в том числе путем манипулирования общественным сознанием и фальсификации истории».

Таким образом, задача по охране исторической правды и исторической памяти нашла отражение в Конституции РФ и Стратегии национальной безопасности РФ, а ее выполнение средствами права становится предметом дальнейшей нормотворческой деятельности. Ключевой проблемой на этом пути является неопределенность самого понятия исторической правды. В отсутствие ее решения поставленные задачи рискуют в лучшем случае остаться декларациями, а в худшем – превра-

титься в оправдание для нормотворчества, никакого содержательного отношения к их решению не имеющего. В изложенных условиях определение исторической правды для целей права становится необходимым.

Понятие исторической правды в правовых актах

Проблема правового определения исторической правды состоит не просто в отсутствии ее нормативной дефиниции, но и в том, что до конституционных изменений 2020 г. данная категория вообще не появлялась в нормах ни российского, ни советского права, согласно данным справочной правовой системы «Консультант Плюс».

Проведенный нами анализ текстов ненормативных правовых актов и их проектов, опубликованных до начала процесса по изменению Конституции РФ в 2020 г. (из них окончательно приняты только два), демонстрирует, что словосочетание «историческая правда» встречается в них редко, в единичных случаях в каждом источнике. При этом авторы никогда не акцентируют внимание на значении этой категории.

Проиллюстрируем данный тезис. Так, в пояснительной записке к проекту Федерального закона «О статусе детей Великой Отечественной войны» сказано, что «дети войны имеют большой культурный, научный и интеллектуальный потенциал и в настоящее время работают по передаче традиций патриотизма обществу в целом и молодежи в школах, колледжах, музеях, не давая забыть историческую правду о народе – победителе!». В проекте заявления Государственной Думы РФ «Об исторических уроках и о недопустимости притеснения христиан в современном мире» указывалось, что «искажение исторической правды приводит к катастрофическим последствиям для всей мировой цивилизации».

Тем не менее в использовании понятия «историческая правда» все же можно обнаружить определенные закономерности. Во всех 23 документах, размещенных в системе обеспечения законодательной деятельности, историческая правда предстает как объект, требующий охраны. В одних случаях об этом говорят слова «сохранять» (в 1 документе), «отстаивать» (в 1 документе), «защищать» (в 10 документах). В других – обозначают угрозы исторической правде, указывая их словами «пересматривать» (в 1 документе), «забывать» (в 2 документах), «искажать» (в 6 документах). Напомним, что в приведенных выше положениях Стратегии национальной безопасности РФ от 02.07.2021 аналогично историческая правда упоминается в связи с необходимостью ее защиты от искажения и фальсификации. Следовательно, историческая правда в правовых актах и их проектах представляет собой социально значимую информацию, которая требует охраны от ее изменения.

Кроме того, в 21 документе из числа проанализированных историческая правда упоминается в связи с военной историей России, в 11 из которых с историей Великой Отечественной войны (в остальных случаях без связи с конкретными историческими событиями).

В этой связи стоит обратить внимание, что ч. 3 ст. 67.1 Конституции также говорит об исторической правде в контексте памяти о защитниках Отечества и подвига народа при защите Отечества. Ясно, что норма говорит о защите правды о военной истории, о событиях, связанных с обороной России (защитой Отечества). При этом не все такие события имеют одинаковое социально-политическое значение. Поэтому особое внимание и уделяется защите исторической правды именно о Великой Отечественной войне – самой трагической и в то же время самой национально объединяющей странице российской истории. Не случайно, что в год принятия поправок в Конституцию РФ президент России в своих выступлениях отмечал особую опасность героизации нацизма. Так, на церемонии открытия центра архивных документов В.В. Путин указал, что правда о Второй мировой войне за рубежом порой целенаправленно замалчивается на государственном уровне, добавив: «Мы заткнем поганый рот, который откры-

вают некоторые деятели за бугром для того, чтобы достичь сиюминутных политических целей, мы заткнем его правдивой фундаментальной информацией». На пресс-конференции 17 декабря 2020 г. он заявил: «Что касается Великой Отечественной войны, то вы знаете, мы сейчас вскрываем архивы, мы публикуем архивные материалы, мы создаем определенные структуры, которые на постоянной основе будут этим заниматься. Я уже много раз говорил, что вот это переписывание истории – оно делается в угоду сиюминутным политическим конъюнктурам и в конечном итоге пойдет во вред тем, кто это делает. В том числе это касается героизации нацизма».

В этой связи не удивительно, что исследователи, обратившие свое внимание на рассматриваемую тему, прямо ассоциируют появление новой конституционной нормы с попытками переписывания истории именно Великой Отечественной войны (Drozdova, 2021: 104; Kunyaev, 2020: 6; Cherdzhemov, 2021: 128).

Таким образом, на основе анализа ч. 3 ст. 67.1 Конституции РФ и всех 23 случаев использования рассматриваемого понятия в правовых актах и их проектах, размещенных в системе обеспечения законодательной деятельности, можно сделать предварительный вывод о том, что историческая правда – это требующая охраны от ее изменения социально значимая информация об исторических событиях, связанных с обороной России, и, главным образом, об истории Великой Отечественной войны.

Понятие исторической правды в науке

Тем не менее для понимания того, какая именно информация охватывается понятием «историческая правда», сделанного вывода недостаточно. В поисках направлений его конкретизации следует обратиться к научным источникам.

Подобно тому, как это произошло в сфере нормотворчества, всплеск интереса к исторической правде в науке также неразрывно связан с поправкой к Конституции РФ 2020 г. По данным электронной научной библиотеки Elibrary.ru, словосочетание «историческая правда» встречается в названиях и/или ключевых словах 427 индексируемых публикаций, изданных с 1980 г. по настоящее время. Из них 165 вышли в свет в 2020–2021 гг. Нельзя не отметить, что публикации правовой тематики в этой выборке до 2020 г. практически не встречаются.

Не становится удивительным отсутствие комплексных диссертационных исследований, посвященных исторической правде. Электронная библиотека диссертаций Российской государственной библиотеки содержит лишь 5 авторефератов, в названиях которых присутствует понятие «историческая правда». Интересно отметить, что все они посвящены филологическим наукам. В целом, обзор публикаций, посвященных исследованию художественных произведений, демонстрирует, что противопоставление исторической правды и художественного вымысла в их названиях является своеобразным клише для подобного рода работ, в том числе и современных (Antsyferova, 2021; Stepanova, 2021). Среди авторефератов, размещенных в РГБ, один не содержит понятие «историческая правда» в своем тексте после заголовка (Usmonova, 2012). В трех других рассматриваемое понятие не раскрывается. При этом из контекста становится ясно, что историческая правда представляется авторам работ как «действительность в прошлом» (Akhmetova, 1995: 29), «историческая действительность» и «исторические события» (Makhmadiev, 1995: 9), отраженные в «документах, исторических свидетельствах, служебной и личной переписках» (Zhutrbaev, 1992: 11). Наиболее последовательным видится подход, изложенный в работе Х.К. Утемуратовой, в рамках которого автором было предложено собственное определение исторической правды в литературе: «Это объективная истина, которая произошла в определенный промежуток времени. Историческая правда состоит из фактов» (Utemuratova, 1992: 10). Тем не менее говорить о сложившемся в науке понимании исторической правды не приходится.

Что же касается правовых исследований, затрагивающих вопросы исторической правды, подавляющая доля которых, как было сказано выше, опубликована в 2020–2021 гг., то в большинстве из них содержатся лишь фрагментарные суждения о рассматриваемом изменении основного закона страны. Так, на страницах работ отмечается, что поправка об исторической правде является ответом на недобросовестную коррекцию исторических фактов, информационные инсинуации, а также осквернение и даже разрушение в некоторых зарубежных странах воинских захоронений и памятников (Khabrieva, 2020). Часто авторы указывают на идеологический (Astafichev, 2021: 120; Cherepanov, 2020: 36), духовно-нравственный (Aver'ianova, 2021) или мировоззренческий характер данного изменения Конституции РФ, который переводит «духовно-нравственное содержание национальной идентичности в категорию национальной идентичности» (Mazaev, 2021: 27; Iusubov, 2021: 15). При этом исследователи отмечают опасность необдуманного подчинения дальнейшего нормотворчества новым идеологическим ориентирам (Gritsenko, 2020; Kondrashev, 2021). С последним тезисом сложно спорить: целесообразность исследования содержания понятия «историческая правда» перед разработкой и принятием норм во исполнение ч. 3 ст. 67.1 Конституцией РФ проиллюстрирована в предшествующем разделе настоящей работы и является причиной ее написания.

В связи с изложенным необходимо обратиться к исследованиям авторов, предлагающих сущностные признаки исторической правды. Позиции ученых по этому вопросу можно условно разделить на две группы.

Первой из них природа исторической правды представляется объективной, точнее – соответствующей объекту. В рамках этой позиции историческая правда представляет собой знание о прошлом, основанное на точно подтвержденных исторических фактах (Basova, 2021: 32; Sazonnikova, 2020: 29), или, исключая тавтологию, совокупность исторических фактов. Разумеется, исторический факт не формируется без участия человека, поскольку представляет собой «достоверное знание о событиях и процессах социального прошлого, где чувственное и рациональное знание синтезированы, а общее – обязательно облечено в единичную и особенную формы, знание которое строго фиксировано по отношению к определенным историческим явлениям и относительно завершено в самом себе» (Rakitov, 1982: 192). Но в то же время исторический факт соответствует объекту. В этом состоит его ценность. Стоит согласиться с М. А. Кожевиной в том, что исторический факт существует лишь как результат научной работы историка, необходимыми условиями которой выступают: «репрезентативность источниковой базы; добросовестность исследователя; объективность, доказанность, проверяемость и воспроизводимость факта; публичное признание установленного факта профессиональным сообществом, популяризация научного знания о факте» (Kozhevina, 2021: 11). Исторический факт как составляющая исторической правды является результатом выявления и описания события прошлого, а не его интерпретации (Kozhevina, 2021: 11). На то, что интерпретация отдаляет историка от исторической правды, указывают и зарубежные исследователи (Guandalini, 2020; Sherwin, 1994).

Вторая группа ученых считает, что историческая правда имеет субъективную природу. Так, П. А. Астафичев в поддержку этого тезиса указывает, что события прошлого могут переоцениваться потомками, забываться или искажаться (Astafichev, 2020: 10). Субъективную природу правды видит и В. С. Уакиев. Автор противопоставляет ей истину, полагая что последняя выражает соответствие наших знаний о мире самому миру, а правдой становится лишь та истина, в которую верит человек (Uakiev, 2019: 68). На разграничении правды и истины настаивают и некоторые другие авторы (Presniakov, 2018: 70).

В противовес такому подходу можно привести понятие правды согласно толко-

вым словарям русского языка, в которых она определяется как синоним истины, как то, что есть на самом деле (Ushakov, 2008) и существует в действительности, соответствует реальному положению вещей (Ozhegov, 1994). Следовательно, историческая правда – это информация, соответствующая исторической действительности, адекватно отражающая события, произошедшие в прошлом.

Несколько иной позиции придерживается М.В. Пономарев. Автор соглашается с тем, что правда тождественна истине, но при этом предлагает понимать историческую правду в контексте ч. 3 ст. 67.1 Конституции РФ как историческую память (Ponomarev, 2021: 254). Это понятие по сравнению с исторической правдой уже с конца XX в. гораздо чаще появляется в научных текстах (Tishkov, 2018: 12), публицистике и бытовом общении. Число упоминаний исторической памяти в правовых актах также преобладает над исторической правдой. С 2020 г. эти понятия в официальных правовых текстах обычно указываются совместно через соединительный союз «и», что в достаточной мере иллюстрируют примеры, приведенные выше на страницах настоящего исследования. Подобное использование понятий в праве уже само по себе говорит об их различном содержательном наполнении.

В науке под исторической памятью понимают феномен сознания, существующий как на индивидуальном, так и на социальном уровне (Sinitsina, 2008: 9). Историческая память является личностным образованием, которое включает индивидуальные исторические воспоминания, личностно значимые исторические события и целостный образ истории (Tregubenko, 2013: 5). На коллективном уровне историческую память можно представить как набор передаваемых из поколения в поколение исторических сообщений, мифов, субъективно преломленных рефлексий о событиях прошлого (Sidorova, 2012: 85) или виртуальный континуум, отражающий особенности национального менталитета, архетипические образы, мировоззренческую рефлексию, нелинейное сочетание образовательных, культурно-просветительских и научно-исследовательских дискурсов, художественные формы репрезентации прошлого (Ponomarev, 2021: 254). Из изложенного следует, что историческая память формируется субъективно и в силу этого не обязательно корректно отражает события прошлого. Поэтому некоторые ученые вообще не считают исследования исторической памяти в чистом виде историческими (Nikiforov, 2018: 81).

Рассмотренные позиции относительно природы исторической правды и ее соотношения со смежными категориями в целом соответствуют двум основным подходам, сложившемся в исторической науке, относительно ее предмета (Lonchinskaia, 1993: 14; Krom, 2018: 7). Очевидно, дискуссия на эту тему внутри исторической науки не несет в себе ничего плохого и будет продолжаться. Однако для обеспечения перспективного нормотворческого процесса требуется однозначное понимание конституционных положений. Нет сомнений, что историческая память обладает своей культурной ценностью, но в то же время закрепление требования защищать что-либо потенциально ложное в Конституции страны было бы немыслимо.

Становится ясно, почему более распространенному и изученному понятию «историческая память» предпочли новое. В связи с тем, что историческая память, как следует из изложенного, может и некорректно отражать события прошлого, ее правовая охрана необходима лишь в той части, которая соответствует исторической правде. Поэтому указание в ч. 3 ст. 67.1 Конституции РФ на защиту исторической правды без исторической памяти дает правильный ориентир для дальнейшего нормотворчества и представляется достаточным.

Заключение

Синтез определений исторической правды в науке, правовых актах и их проектах позволяет сформулировать ее понятие применительно к ч. 3 ст. 67.1 Конституции РФ. Историческая правда – это требующая

охраны от ее изменения социально значимая достоверная информация об исторических событиях, связанных с обороной России и, главным образом, историей Великой Отечественной войны, состоящая из точно подтвержденных исторических фактов.

Данная дефиниция позволяет определить направления для последующего выполнения задачи по защите исторической правды, нашедшей отражение в Конституции РФ и новой Стратегии национальной безопасности РФ.

Во-первых, из определения можно уяснить границы такой защиты. Авторы, выступающие за субъективное понимание природы исторической правды, более всего опасаются неоправданного ограничения свободы слова. С нашей же точки зрения, именно такой подход и открывает дверь для установления идеологических запретов на распространение частных позиций о событиях прошлого. Предложенное понимание исторической правды как информации, соответствующей объективной действительности, предполагает запрет на искажение, фальсификацию исторических фактов, а не на их оценки. Там образом, обнаруживается баланс между свободой слова и защитой исторической правды.

Данный тезис имеет практическое значение для перспективного установления уголовно-правовых запретов. В соответствии с разъяснениями Пленума Верховного Суда РФ, данными в Постановлении от 22.12.2015 № 58, признаки состава преступления отражают характер его общественной опасности. Науке уголовного права известно деление признаков на имеющие постоянное значение и оценочные признаки. Последние не раскрываются в точно определенных, абсолютных значениях, а устанавливаются в процессе применения нормы с учетом конкретных обстоятельств дела на основе правосознания субъекта (Pitetskii, 1993: 24). В связи с тем, что историческая правда, как было показано выше, понимается как часть исторической действительности, диспозиция статьи, направленная на ее охрану, не должна содержать оценочных признаков, относящихся к объекту преступления. Очевидно, что условная историческая ложь не соответствует действительности прошлого вне зависимости от сознания правоприменителя. Соответственно, объективная сторона такого состава не может включать действия, выразившиеся в субъективной оценке событий прошлого, если само событие происходило в действительности.

Во-вторых, понимание сущности исторической правды позволяет определить, какие нормы действующего законодательства направлены на ее защиту. Исследователи предлагают различные варианты защиты исторической правды вплоть до заключения соответствующих международных договоров (Khizhniak, 2020: 215). С нашей точки зрения, подобные шаги следует предпринимать только после анализа системы действующих норм, ее обеспечивающих. В противном случае существует риск нарушения системы правовой охраны.

Безусловно, на искомую роль в первую очередь претендует ч. 1 ст. 354.1 УК РФ. Фактический, объективный характер информации о прошлом, запрет на фальсификацию которой необходимо обеспечить в целях охраны исторической правды, может быть придан через ее документальное, правовое закрепление. Ранее мы указывали, что установление исторического факта – составляющего исторической правды является задачей историка. Интерпретация информации о прошлом, ее правовая оценка при этом могут быть осуществлены юристом. Само же событие вынесения такой оценки при соблюдении прочих условий само по себе становится историческим фактом. Наиболее наглядно этот тезис ученые иллюстрируют на примере приговора Нюрнбергского трибунала (Resta, 2013). В этой связи запрет отрицания не любых фактов о Великой Отечественной войне, но установленных приговором Международного военного трибунала для суда и наказания главных военных преступников европейских стран оси (Нюрнбергского трибунала), закрепленный в ч. 1 ст. 354.1 УК РФ, полностью отвечает критерию объективности охраняемой исторической правды.

Память о событиях прошлого может сохраняться в символике, праздниках, предметах материальной культуры. На охрану этой части исторической правды направлен запрет, установленный в ч. 3 ст. 354.1 УК РФ: «распространение выражающих явное неуважение к обществу сведений о днях воинской славы и памятных датах России, связанных с защитой Отечества, а равно осквернение символов воинской славы России, оскорбление памяти защитников Отечества либо унижение чести и достоинства ветерана Великой Отечественной войны, совершенные публично».

В едином контексте с обозначенным изменением Конституции РФ и усилением общественно-политического дискурса по вопросу охраны исторической правды и исторической памяти находится введение в 2020 г. в УК РФ новой ст. 243.4 «Уничтожение либо повреждение воинских захоронений, а также памятников, стел, обелисков, других мемориальных сооружений или объектов, увековечивающих память погибших при защите Отечества или его интересов либо посвященных дням воинской славы России». Поэтому не удивительно, что содержание этого запрета также относится к рассматриваемой теме. Указанные в названии статьи объекты материального мира, с одной стороны, направлены на увековечение исторической памяти, а с другой – служат средством объективизации правды о событиях прошлого.

Понятие исторической правды позволяет обнаружить запреты, направленные на ее защиту, и в КоАП РФ. Например, ст. 20.3 «Пропаганда либо публичное демонстрирование нацистской атрибутики или символики, либо атрибутики или символики экстремистских организаций, либо иных атрибутики или символики, пропаганда либо публичное демонстрирование которых запрещены федеральными законами». Тем не менее вопрос определения полного перечня действующих норм охранительных отраслей права, обеспечивающих защиту исторической правды, выходит за рамки предмета текущего исследования.

Таким образом, обоснованное понятие исторической правды создает необходимые предпосылки для дальнейших правовых шагов по обеспечению ее защиты во исполнение Конституции РФ.

Основные тезисы представленного исследования прошли апробацию в ходе выступлений с докладами на пяти научных мероприятиях: 2021 International Conference on the Cooperation and Integration of Industry, Education, Research and Application, 1st China-Russia Roundtable on Law (Jilin University, 17.09.2021); X Международная научно-практическая конференция «Проблемы современного законодательства России и зарубежных стран» (Иркутский институт (филиал) Всероссийского государственного университета юстиции (РПА Минюста России), 01.10.2021); Межведомственная научно-практическая конференция «Стратегии противодействия экстремизму» (Московская академия Следственного комитета РФ, 28.10.2021); Международная научно-практическая конференция «Уголовному кодексу Российской Федерации 25 лет: история, проблемы, перспективы» (Рязанский государственный университет им. С. А. Есенина, 16.11.2021); VI научный форум «Нюрнбергский процесс: история и современность» (Университет Прокуратуры РФ, 24.11.2021).

Список литературы / References

Akhmetova, K.S. (1995). *Istoricheskaia Pravda v khudozhestvennom proizvedenii (na osnove romana-esse «Ternistii put'» S. Seifullina) [Historical Truth in a work of Fiction (based on the novel-essay «The Thorny Path» by S. Seifullin)].* Almaty, 29.

Antsyferova O. Yu. (2021). Vzaimodeistvie istoricheskoi pravdy I khudozhestvennogo vymysla v metamodernistskom romane Ali Smit «Kak byt dvymia» [The Interaction of Historical Truth and Fiction in Ali Smith's metamodern novel «How to Be Two»] // In *Vestnik Ivanovskogo gosudarstvennogo universiteta. Seriya: gumanitarnye nauki [Bulletin of the Ivanovo State University. Series: Humanities],* 3, 13–20.

Astafichev, P.A. (2020). Obespechenie zashchity istorichaskoi pravdi kak novii printsip v konstisutsionnom prave Rossii [Ensuring the protection of historical Truth as a new Principle in the Constitutional Law of Modern Russia]. In *Pravoprimenenie [Law enforcement]*, 4(4), 5–11.

Astafichev, P.A. (2021). Istoricheskaia pravda kak kategoriia sovremennogo konstitutsionnogo prava: opyt konstitutsionnikh popravok 2020. [Historical Truth as a category of Modern Constitutional Law: the Experience of Constitutional Amendments in 2020]. In *Vestnik universiteta imeni O.E. Kutafina (MGYuA) [Bulletin of the O.E. Kutafin University (MSAL)]*, 5 (81), 116–121.

Aver'ianova, N.N. (2021). Kategorii «obshchee» i «lichnoe» v konstitutsionnom prave Rossii [Categories «general» and «personal» in the constitutional law of Russia]. In *Aktualye problem rossiiskogo prava [Actual problems of Russian law]*, 7, 44–51.

Basova, A.V. (2021). Konstitutsionnaia okhrana istoricheskoi pravdy: problem realizatsii [Constitutional protection of historical truth: problems of implementation]. *Materiali XII Mezhdunarodnogo Konstitutsionnogo foruma «Stabil'nost I dinamizm rossiiskoi Konstitutsii» [Materials of the XII International Constitutional Forum «Stability and Dynamism of the Russian Constitution»]*. Saratov, 31–33.

Cherdzhemov, S.R. (2021). Konstitutsionnoe stroitel'stvo v Rossiiskoi Federatsii: k voprosu o zashchite istoricheskoi pravdy [Constitutional Construction in the Russian Federation: on the Protection of Historical Truth]. In *Vestnik universiteta imeni O.E. Kutafina (MGYuA) [Bulletin of the O.E. Kutafin University (MSAL)]*, 5(81), 122–129.

Cherepanov, V.A. (2020). O neobhodimosti I tselesoobraznosti konstitutsionnih izmenenii [On the necessity and expediency of constitutional changes]. In *Rossiiskaia Yustitsiia [Russian Justice]*, 8, 35–38.

Drozdova, A.M., Komarov, S.A. (2021). Novelly v Konstitutsii Rossiiskoi Federatsii [Novelties in the Constitution of the Russian Federation]. *Materialy V obshcherossiiskogo yuridicheskogo foruma [Materials of the V All-Russian Legal Forum].* Ufa, 98–105.

Gritsenko, E.V. (2020). Federalizm I mestnoe samoupravlenie v svete rossiiskoi konstitutsionnoi reform 2020 goda [Federalism and local self-Government in the light of the Russian Constitutional Reform of 2020]. In *Sravnitel'noe konstitutsionnoe obozrenie [Comparative Constitutional Review]*, 4, 80–97.

Guandalini, W., Mazarotto, E.B. (2020). Historical truth and right to truth: theoretical proposals over Hayden White's thought. In *Quaestio Iuris*, 13(3), 1375–1396.

Habrieva, T. Ia., Klishas, A.A. (2020). *Tematicheskii kommentarii k Zakonu Rossiiskoi Federatsii o popravke k Konstitutsii Rossiiskoi Federatsii ot 14 marta 2020. № 1-FKZ «O sovershenstvovanii regulirovaniia otdel'nykh voprosov organizatsii i funktsionirovaniia publichnoi vlasti» [Thematic commentary to the Law of the Russian Federation on the Amendment to the Constitution of the Russian Federation dated March 14, 2020 No. 1-FKZ «On Improving the Regulation of Certain Issues of the Organization and Functioning of Public Power»]*. Moscow, Norma. InFRA-M, 240.

Iusubov, E.S. (2021). Znaki i znacheniia popravok k Konstitutsii Rossiiskoi Federatsii [Signs and meanings of amendments to the Constitution of the Russian Federation]. In *Konstitutsionnoe I munitsipal'noe pravo [Constitutional and municipal law]*, 7, 11–16.

Khizhniak, V.S. (2020). Stat'ia 67 Konstitutsii Rossiiskoi Federatsii I problema ee realizatsii v mezhdunarodnikh otnosheniiakh [Article 67 of the Constitution of the Russian Federation and the problem of its implementation in international relations]. In *Tsivilistika: pravo I protsess [Civil Law: Law and Process]*, 3(11), 212–215.

Kondrashev, A.A. (2021). Konstitutsionnye popravki – 2020: o kolliziiakh I defektakh, porozhdayushchikh neustranimye konflikty mezhdu «vechnymi glavami» i glavami 3–8 Konstitutsii Rossii [Constitutional Amendments 2020: on Collisions and defects that Generate irremediable conflicts between the «eternal chapters» and Chapters 3–8 of the Constitution of Russia]. In *Konstitutsionnoe I munitsipal'noe pravo [Constitutional and municipal law],* 3, 18–29.

Kozhevina, M.A. (2021). Realizatsiya stat'I 67.1 Konstitutsii Rossiiskoi Federatsii v kontekste nauchnogo istoriko-pravovogo opyta [Implementation of Article 67.1 of the Constitution of the Russian Federation in the context of scientific historical and legal experience]. In *Pravoprimenenie [Law enforcement]*, 5(3), 5–19.

Krom, M.M. (2018). Chto takoe istoricheskii fakt? Evolyutsiia predstavlenii ob osnovnoi kategorii istoricheskogo poznaniia [What is a historical fact? Evolution of ideas about the main category of historical knowledge]. In Vestnik Permskogo universiteta. Istoriia [Bulletin of Perm University. History], 4(43), 5–14.

Kuniaev, N.N. (2020). Zashchitim istoricheskuyu pravdu: k obshcherossiiskomu golosovaniyu 1 iyulia 2020 goda po vneseniyu izmenenii v Konstitutsiyu Rossiiskoi Federatsii [Let's protect the historical truth: for the all-Russian vote on July 1, 2020 on amendments to the Constitution of the Russian Federation]. In *Vestnik VNIIDAD [Bulletin of VNIIDAD]*, 3, 3–7.

Lochinskaia, L. Ia., Lamyrev, A.N. (2014). Istoricheskaia «pravda» i problem istochnikovedeniia [Historical «truth» and problems of source studies]. *Bakuninskie chteniia [Bakunin readings]*. Yekaterinburg, 92–96.

Makhmadiev, M.M. (1995). *Istoricheskaia Pravda I khudozhestvennii vymysel v «Shakhname» Firdousi: Istorii dinastii Sasanidov [Historical Truth and Fiction in Firdousi's «Shahnameh»: The History of the Sassanid Dynasty]*. Dushanbe, 22.

Mazaev, V.D. (2021). Poisk novikh smyslov vrodolzhaetsia (po vnesennym popravkam k Konstitutsii RF) [The search for new meanings continues (according to the amendments to the Constitution of the Russian Federation)]. In *Lex Russica (Russkii zakon) [Lex Russica (Russian Law)]*, 7(176), 15–31.

Nikiforov, A.L., Sokolova, T.D. (2018). Pravda i istina kak klyuchevie poniatiia folosofii istorii: k epistemologicheskoi otsenke istoricheskikh sochinenii [Righteousness and Truth as Key Concepts of the Philosophy of History: towards an Epistemological Assessment of Historical Writings]. In *Voprosy filisofii [Questions of philosophy]*, 12, 81–85.

Ozhegov, S.I., Shvedova, N. Yu. (1994). Tolkovyi slovar' russkogo iazyka [Explanatory dictionary of the Russian language]. Moscow, Az, 907:

Pitetskii, V.V. (1993). *Otsenochnye priznaki ugolovnogo zakona (sushchnost', funktsii, perspektivy ispol'zovaniia v zakonodatel'stve) [Evaluative features of the criminal law (essence, functions, prospects of use in legislation)].* Krasnoyarsk, Krasnoyarsk state university, 88.

Ponomarev, M.V. (2021). «Istoricheskaia pravda» kak doktrinal'naia novella I yuridicheskaia kategoria rossiiskoi Konstitutsii [«Historical Truth» as a Doctrinal Novel and a Legal Category of the Russian Constitution]. *Materialy vserossiiskoi konferentsii «Pravo i prava cheloveka v sovremennom mire» [Materials of the All-Russian Scientific Conference «Law and Human Rights in the Modern world»]*. Saratov, 252–256.

Presniakov, M.V. (2019). Zashchita istoricheskoi pravdy v Rossii: «mostik» v istoriyu ili «tropinka» dlia obhoda svobody slova [Protection of historical truth in Russia: a "bridge" to history or a "path" to circumvent freedom of speech]. In *Mazhregional'nie Pimenovskie chteniia [Interregional Pimenov readings]*, 18(18), 69–77.

Rakitov, A.I. (1982). *Istoricheskoe poznanie: Sistemno-gnosseologicheskii podkhod [Historical cognition: A System-epistemological approach]*. Moscow, Politizdat, 303.

Resta, G., Zeno-Zencovich, V. (2013). Judicial «Truth» and Historical «Truth»: The Case of the Ardeatine Caves Massacre. In *Law and history review*, 31(4), 843–886.

Sazonnikova, E.V. (2020). Pamiat' o zashchitnikakh Otechestva I zashchita istoricheskoi pravdy kak konstitutsionnie tsennosti [The memory of the defenders of the Fatherland and the protection of historical truth as constitutional values]. In *Konstitutsionnoe I munitsipal'noe pravo [Constitutional and municipal law]*, 10, 29–32.

Sherwin, R.K. (1994). Law frames – historical truth and narrative necessity in a criminal case. In *Stanford law review*, 47(1), 39–83.

Sidorova, L.O. (2012). Kontseptualnye podhody k poniatiyu «istoricheskaya pamiat'» [Conceptual approaches to the concept of «historical memory»]. In *Vestnik Moskovskogo gosudarstvennogo universiteta kul'tury I iskusstv [Bulletin of the Moscow State University of Culture and Arts]*, 4(48), 81–86.

Sinitsina, N.A. (2008). *Istoricheskaia pamiat' kak reguliativ sovremennoi kul'tury: sotsiologicheskii analiz [Historical memory as a regulatory of modern culture: sociological analysis]*. Maikop, 24.

Stepanova, A.A. (2021). Istoricheskaia Pravda I khudozhestvennaia istina: smysly p'esy Pitera Scheffera «Amadei» [Historical truth and artistic truth: the meanings of Peter Schaeffer's play «Amadeus»]. In *Chelovek: obraz I sushchnost [Man: image and essence]*, 3(47), 101–119.

Tishkov, V.A. et al. (2018). *Istoricheskaia pamiat' I rossiiskaia identichnost' [Historical memory and Russian identity]*. Moscow, Russian Academy of Sciences, 508.

Tregubenko, I.A. (2013). *Istoricheskaia pamiat' v kontekste sub'ektivnoi kartiny zhiznennogo puti lichnosti [Historical memory in the context of a subjective picture of a person's life path]*. Saint-Petersburg, 23.

Uakiev, V.S. (2019). Dialektika pravdy I nepravdy v protsesse izucheniia voennoi istorii [Dialectics of truth and falsehood in the process of studying military history]. In *Gumanitarnii vestnik Voennoi akademii Raketnikh voisk strategicheskogo naznacheniia [Humanitarian Bulletin of the Military Academy of Strategic Missile Forces]*, 2(15), 62–75.

Usmonova, N.K. (2012). *Istoricheskaia Pravda i publitsisticheskie motivy v romane Dzhumy Odina «Beg Vremeni» [Historical truth and journalistic motives in Juma Odin's novel «The Flight of Time»]*. Duskanbe, 22.

Utemuratova, Kh.K. (1992). *Istoricheskaia Pravda i obrazy istoricheskikh lichnostei v trilogii «Dastan o karkalpakakh» T. Kaipbergenova [Historical truth and images of historical figures in the trilogy «Dastan about Karakalpaks» by T. Kaipbergenov]*. Nukus, 21.

Zhurtbaev, T.K. (1992). *Khudozhestvennaia i istoricheskaia Pravda v povestiakh M.O. Auezova «Likhaia godina» i «Vistrel na perevale» [Artistic and historical truth in the novels of M.O. Auezov «Dashing Godina» and «Shot at the pass»]*. Almaty, 26.

Journal of Siberian Federal University. Humanities & Social Sciences
2022 15(8): 1082–1093

DOI: 10.17516/1997-1370-0911
EDN: PRFVMS
УДК 343.1

Criminal Proceedings in the Context of Global Digitalization of Society

Elena V. Mishchenko, Natalia O. Nikuradze and Elena A. Marina*
Orenburg State University
Orenburg, Russian Federation

Received 03.09.2021, received in revised form 11.04.2022, accepted 26.04.2022

Abstract. The topicality of the research question is attributable to the social and legal importance of the criminal procedural form development in the context of the digitalization of society. Since it is a natural process caused by the milestones of our time, digitalization is actively penetrating the sphere of criminal procedural relations, with the desire of their subjects not being taken into consideration. Procedural scientists today are concerned about global issues for the expediency of the practical use of digitalization and its efficiency, as well as the prospects for the transition to e-filing in criminal cases, the creation of "electronic courts", the automation of the functionality of participants in criminal proceedings, the use of artificial intelligence in the criminal procedural activities, and others. At the same time, both the categories of electronic evidence, electronic media and the procedure for their application in criminal proceedings have long been perceived as well-established.
The purpose of the research is to study the development and transformation of the criminally-remedial form in the context of the digitalization of society.
The main findings of the study are to substantiate the positive prospects for digitalization of criminal proceedings, which results in reducing the workload on the officers automating elementary functional of actions; simplification of working with big data, providing quick search, collection, storage and processing of information; implementation of ranked access to information for all parties to the criminal process, based on their procedural status; effective control and supervision over the activities of the bodies of inquiry and preliminary investigation, etc. However, with all the advantages taken into consideration, while choosing between digitalization and human needs, priority must be given to the individual, since the former is a means of facilitating the activity of the latter, and not replacing or excluding them.

Keywords: criminal proceedings, digitalization, informational support, e-filing in criminal cases, remote justice, electronic proceedings, digital technologies.

Research area: 12.00.09 – Criminal procedure.

* Corresponding author E-mail address: map_1234@mail.ru, nikinatali2012@yandex.ru, marina250610@mail.ru
ORCID: 0000-0001-5936-1861 (Mishchenko), 0000-0002-8343-1695 (Nikuradze)

Citation: Mishchenko, E.V., Nikuradze, N.O. and Marina, E.A. (2022). Criminal proceedings in the context of global digitalization of society. J. Sib. Fed. Univ. Humanit. soc. sci., 15(8), 1082–1093. DOI: 10.17516/1997-1370-0911

Уголовное судопроизводство в условиях глобальной цифровизации общества

Е.В. Мищенко, Н.О. Никурадзе, Е.А. Марина
Оренбургский государственный университет
Российская Федерация, Оренбург

Аннотация. Актуальность исследования обусловлена социально-правовой важностью развития уголовно-процессуальной формы в условиях цифровизации общества. Цифровизация активно проникает в сферу уголовно-процессуальных отношений и не зависит от желания их субъектов, поскольку является естественным процессом, вызванным вехами современности. Ученых-процессуалистов сегодня волнуют глобальные вопросы целесообразности и эффективности, а также перспектив перехода к электронному порядку производства по уголовным делам, создания «электронных судов», автоматизации функционала участников уголовного процесса, использования искусственного интеллекта в уголовно-процессуальной деятельности и другие. В то же время категории электронных доказательств, электронных носителей информации и порядок их применения в уголовном процессе давно уже воспринимаются как устоявшиеся.
Цель исследования – изучение вопросов развития и трансформации уголовно-процессуальной формы в условиях цифровизации общества.
Основные выводы исследования заключаются в обосновании положительных перспектив цифровизации уголовного судопроизводства, позволяющей уменьшать нагрузку на должностных лиц посредством автоматизации элементарного функционала действий; упрощения работы с большими данными, обеспечивающей оперативный поиск, сбор, хранение и обработку информации; осуществления ранжированного дистанционного доступа к информации участникам уголовного процесса исходя из их процессуального статуса; эффективного контроля и надзора за деятельностью органов дознания и предварительного следствия и т.д. Однако при всех плюсах цифровизации важен факт приоритета человека над цифрой, поскольку последняя является средством, облегчающим деятельность первого, а не заменяющим или исключающим его.

Ключевые слова: уголовное судопроизводство, цифровизация, информатизация, электронное уголовное дело, удаленное правосудие, электронное производство, цифровые технологии.

Научная специальность: 12.00.09 – уголовный процесс.

Введение

Информация – главный неисчерпаемый ресурс развития современного общества. Переход к информатизации различных сторон его жизнедеятельности ознаменован принятием в начале двадцать первого века ряда международно-правовых актов, а именно: Окинавская хартия глобального информационного общества 2000 года; Декларация принципов «Построение информационного общества – глобальная задача в новом тысячелетии» 2003 года и План действий Тунисского обязательства 2005 года. Факторами, влияющими на развитие информационного общества, служат информационно-коммуникационные технологии (далее – ИКТ), оказывающие революционное воздействии на все стороны жизнедеятельности общества, взаимодействие личности и государства, создающие почву для открытия «огромных возможностей».

В литературе справедливо отмечается, что феномен цифровизации сохраняет дискуссионность среди ученых и практиков, а область проводимых исследований расширяется исходя из потребностей соответствующего периода времени (Leksin, 2021). Так, например, сегодня при всех положительных сторонах технологического прогресса остро стоит вопрос защиты и безопасности данных. Не вызывает сомнений необходимость обеспечения информационной безопасности общества и государства как основы их процветания (Ducuing et al., 2019: 1–10). Право и цифровизация для современного социума – это неразрывно связанные ценности, нуждающиеся в постоянном поддержании баланса между ними. С одной стороны, получение, накопление, хранение и обработка знаний, обеспечивающие высокую информированность общества посредством цифровых технологий (например, большие данные, которые являются мощным инструментом в руках государства), с другой – права и свободы, гарантирующие неприкосновенность частной жизни, автономию личности и т.д. На этом фоне цифровизация таких сторон жизни общества, как правопорядок и правосудие, в известной мере замедленна, особенно в области уголовного судопроизводства, хотя ряд стран стремительно развиваются в данном направлении (Республика Казахстан, США и др.).

Цифровизация в отечественном уголовном судопроизводстве представляет собой процесс внедрения в уголовно-процессуальную деятельность цифровых технологий в виде технических устройств, приспособлений, позволяющих получать и обрабатывать информацию в цифровой форме, а также осуществлять ее хранение и передачу. Уголовно-процессуальным законом регламентированы: применение видеоконференцсвязи (например, ст.ст. 240, 278.1 УПК РФ); порядок использования электронных документов в уголовном судопроизводстве (ст. 474.1 УПК РФ); особенности изъятия электронных носителей информации и копирования с них информации при производстве следственных действий (ст.ст. 81.1, 164.1 УПК РФ). Все это свидетельствует о поступательном развитии цифровых форм в уголовном процессе. Современная уголовно-процессуальная доктрина позволяет говорить не просто о применении ИКТ при производстве следственных действий, использовании электронных носителей информации в качестве доказательств в уголовном процессе, а об уголовном деле в электронном формате сквозь призму уже имеющегося опыта зарубежных стран.

Проблема

В проводимом исследовании нами предпринята попытка изучения актуальных вопросов определения баланса между консервативностью уголовного судопроизводства и прогрессивностью процесса цифровизации российского общества и зарубежных стран, целесообразности и эффективности применения современных цифровых технологий в уголовном процессе.

Методология

В основу исследования положен диалектический метод познания, а также общенаучные методы анализа и синтеза. Применение указанных методов позволяет логически структурировать исследование,

сохраняя его целостность и последовательность изложения, формулировать основные выводы и заключительные положения.

Теоретический материал составили исследования зарубежных ученых в вопросах цифровизации уголовного судопроизводства, перспективах удаленного правосудия и опыта применения цифровых технологий в период пандемии коронавируса и отечественных ученых в области автоматизации, электронизации и цифровизации сферы уголовного процесса, тенденциях и перспективах этих процессов в России.

Эмпирическую базу составили: решения Европейского суда по правам человека; официальные статистические данные Европейской Комиссии по оценке индекса цифровой экономики и общества (Digitial Economy and Society Index (DESI) и Европейской Комиссии по оценке эффективности правосудия совета Европы; официальные статистические данные Генеральной прокуратуры Республики Казахстан о зарегистрированных преступлениях и результатах деятельности органов уголовного преследования за 2019–2020 годы и первое полугодие 2021 года; судебная статистика Управления судебного департамента в Оренбургской области за 2018–2020 годы и первое полугодие 2021 года; судебная практика.

Обсуждение

Цифровые технологии в уголовном судопроизводстве зарубежных стран

Особая значимость ИКТ как одного из средств обеспечения жизнедеятельности общества стала неоспорима с начала пандемии 2020 года, и каждая из стран в разной степени были подготовлены к ней с цифровой точки зрения ввиду необходимости обеспечения эффективного и качественного дистанционного формата взаимодействия. Прогрессивные взгляды ученых Великобритании касаются активного внедрения ИКТ в судебную систему. Британскими юристами разработан и реализован интернет-проект «Remote Courts Worldwide» под руководством Ричарда Сасскинда, ориентированный на обмен разных стран опытом в разработке удаленного правосудия. Ричард Сасскинд отмечает, что в меняющемся мире государства должны готовиться к будущему, а судебная система пройти три временные перспективы: краткосрочную (минимизация сбоев в работе судебных органов в удаленном формате, стабилизация и совершенствование специальных систем), среднесрочную (учитывать опыт удаленного судебного производства в целях повышения качества программ, существовавших до кризиса) и долгосрочную (радикальное изменение судебной системы, построение новой технологически прогрессивной и устойчивой). Ученый смело заявляет, что «асинхронные слушания, искусственный интеллект и виртуальная реальность являются центральными столпами наших судебных систем» (Susskind, 2020).

В Великобритании в период пандемии коронавируса принят регламент (руководство) проведения удаленных судебных заседаний. Регламент предоставляет судьям право самостоятельного выбора формата судебного заседания исходя из интересов правосудия с учетом специфики рассматриваемых вопросов, положения и потребностей участников производства и т.п. Возможны онлайн, очный и гибридный форматы судебного разбирательства.

Предусмотрено проведение конференцсвязи с использованием телефона с помощью программы BTMeetMe, что существенно облегчает материальную сторону, поскольку нет необходимости в каком-либо специальном оборудовании, за исключением самого телефона и, при необходимости, колонок или наушников к нему. Видеоконференцсвязь проводится с помощью Skype for Business, участникам же судебного заседания достаточно приложения Skype в бесплатной версии, поскольку получают соответствующую ссылку перехода в качестве «гостя». Регламент описывает и процедурные аспекты, например такие, как требования к исправности оборудования, изолированность помещения, созда-

ние аудиотишины, порядок подключения участников к заседанию и т.д. Для участников процесса разработаны инструкции, детально разъясняющие вопросы подключения к веб-ресурсам и указывающие, какие из них применяются в конкретном суде. Обязательно наличие модераторов (помощников) из Службы судов и трибуналов, обеспечивающих запись проводимого удаленно судебного заседания, ее хранение. Помимо разработанных регламента, инструкций, были приняты меры по увеличению ресурсов облачной видеоплатформы.

Нидерланды являются одним из мировых лидеров в области цифровизации по данным Европейской Комиссии, которая оценивает индекс цифровой экономики и общества (Digitial Economy and Society Index (DESI) с точки зрения развертывания и использования связи, развития цифровых навыков, использования интернета, интеграции цифровых технологий и цифровых государственных услуг (European Commission, 2020). Так, с декабря 2018 года в Нидерландах открыт веб-портал Верховного суда, позволяющий подавать для рассмотрения дела в цифровом формате. Изначально веб-портал был доступен по уголовным делам и делам о конфискации, а с 2020 года значительно расширен. Удобство работы с ним заключается в том, что адвокаты, прокуроры имеют возможность просматривать, скачивать доступные для них процессуальные документы в рамках уголовного дела, а также загружать свои, получать автоматические уведомления на электронную почту обо всех изменениях по делу. Все документы доступны в любом временном интервале. Назначение адвокатов и представителей также осуществляется через веб-портал (Editorial lawyer's gad, 2020).

В пандемию удаленная работа стала вынужденной необходимостью, с одной стороны, и сильным толчком в развитии дистанционных форм взаимодействия членов общества и государства, включая осуществление правосудия, – с другой. Судебное производство в Нидерландах, как и в других странах, перешло в удаленный режим. Как отмечает в своем исследовании Е.К. Антонович, юридическое сообщество европейских стран оказалось надежным и устойчивым в вопросах цифровизации (Antonovich, 2020: 136–137). Хотя наряду с положительными отзывами юристов о прогрессивности, оперативности процесса с использованием цифровых технологий неизбежны утверждения и о высокой степени интенсивности цифровизации, вызывающей невозможность успеть за изменениями, в том числе меняющимися потребностями членов общества.

Внедрение цифровых технологий в судопроизводство Нидерландов и рассмотрение уголовных дел в судебном разбирательстве дистанционно осуществлялось с позиции соблюдения и гарантии права на защиту подсудимому, гласности и равенства сторон. Применение видеоконференцсвязи Европейский суд по правам человека оценивает как средство, обеспечивающее доступ к правосудию, не противоречащее непосредственности судебного разбирательства, справедливому и открытому слушанию, поскольку это не лишает подсудимого возможности наблюдать весь ход судебного разбирательства, видеть и слышать его участников, а также быть заслушанным. Использование в судебном разбирательстве видеоконференцсвязи само по себе не противоречит ст. 6 Европейской Конвенции о защите прав человека и основных свобод (далее – Европейской Конвенции). Но решение о проведении судебного разбирательства с применением видеоконференцсвязи, как указал Европейский суд по правам человека, должно быть мотивированным (защита общественной безопасности, свидетелей, обеспечение правопорядка и т.п.) (Marcello Viola v. Italy, 2006).

Сложности возникали и во время судебных заседаний. Общественность Нидерландов была потрясена суровой несправедливостью по отношению к подсудимому со стороны суда, не предоставившего ему возможность выступить с последним словом ввиду ограниченности трансляции (45 минут) видеоконференцсвязи. Журналист Роб Зийлстра опубликовал блог о том, что

окружным судом Гронингена рассматривалось уголовное дело о вымогательстве в удаленном порядке и подсудимый присутствовал в судебном заседании по видеоконференцсвязи, находясь в пенитенциарном учреждении. Судебное заседание не удалось провести за 45 минут (это время, установленное для данной категории дел), потребовалось чуть больше времени. По окончании лимита связь прервалась, однако суд не отложил судебное заседание, а продолжил его в отсутствие подсудимого еще некоторое время и окончил слушание. В результате подсудимый не воспользовался правом на последнее слово. Блог получил широкую огласку, общественность и юридическое сообщество не остались равнодушными в этом вопросе. Юристы высказывались о грубом нарушении прав подсудимого, о заведомо неравном положении сторон, о недопустимости подобных ограничений времени, а суды пытались найти этому логическое объяснение. Например, то, что в пенитенциарных учреждениях ограничено количество технических средств для проведения видеоконференцсвязи в судебном заседании. В результате Окружной суд Северных Нидерландов возобновил судебное разбирательство, а по инициативе судебных органов и прокуратуры проведены работы над техническим улучшением связи и стало доступным запланировать более длительное время судебного заседания (Droogleever Fortuyn, 2020).

В начале пандемии в Нидерландах, как и в других странах, вопрос относительно открытости судебного заседания стоял достаточно остро, в целях безопасности здоровья населения страны присутствие широкой общественности в судебных заседаниях не допускалось, предъявлялись определенные требования. Во-первых, в зале судебного заседания могли присутствовать не более трех журналистов, за исключением случаев, если помещение позволяло допускать большее число лиц при условии соблюдения полутораметровой дистанции. Приоритет непосредственного присутствия в судебном заседании выстраивался следующим образом: сначала стороны, затем пресса и в последнюю очередь лица, желающие наблюдать ход судебного слушания. При этом последние должны «забронировать» свое присутствие посредством отправки электронного письма в адрес соответствующего суда – предварительная электронная регистрация. Во-вторых, в некоторой степени удаленные судебные заседания носили и письменный характер, поскольку сторонам предлагалось заранее предоставить в суд процессуальные документы для их оглашения. Это вызывало недовольства в среде адвокатов, утверждающих, что часть показаний, заявлений может быть просто не услышана, так как их приходится резюмировать ввиду ограниченности времени, определяя это как нарушение принципа публичности (Droogleever Fortuyn, 2020).

Описанные сложности в Нидерландах преодолевались посредством открытого опубликования судебных актов в средствах массовой информации, а также прямых трансляций судебных заседаний по резонансным уголовным делам, к которым желающие могли подключиться по ссылке. Процесс цифровизации судопроизводства не останавливается под воздействием затрудняющих его факторов, а целенаправленно движется к новому будущему.

Рассмотрим законодательные предпосылки электронного производства по уголовным делам (электронного уголовного дела) и уже имеющийся опыт стран, его регламентировавших. Обращаясь к статистическим данным по вопросу интеграции цифровой трансформации во все сферы жизни общества в общемировом масштабе, отметим, что Европейская комиссия DESI в своем сообщении «Формируя цифровое будущее Европы» от 19 февраля 2020 года изложила тенденции и перспективы цифровой трансформации государств-членов. Они ориентированы на формирование национальных планов цифрового развития общества на основе выстроенных Комиссией приоритетов при поддержке Фонда на сумму 560 миллиардов евро. Индикаторы цифровизации стран Европы, а также

18 стран, не входящих в Европейский Союз (далее – ЕС), оцениваются по 100-балльной шкале. Лидерами по состоянию на 2020–2021 годы с показателями свыше 70 баллов являются Нидерланды (83), Финляндия (80), Швеция (73). Нижние позиции занимают Польша (11), Греция (13), Румыния (18). Достаточно высокие показатели, представленные в сравнительной таблице по индексу интеграции цифровых технологий среди стран, не входящих в ЕС, получили: Швейцария (86), Израиль (76), США (73) (European Commission, 2020). Россия занимает не последнюю строчку в этом списке, однако темпы и масштабы цифровизации оцениваются пока в 28 баллов, что говорит о начале пути развития цифрового общества.

Поскольку лидером среди европейских стран по цифровой трансформации являются Нидерланды и нами рассмотрен аспект внедрения цифровых технологий в сферу судебного производства по уголовным делам, представляется интересным вопрос о предпосылках электронизации уголовного процесса в данном государстве.

Серьезные изменения коснулись уголовно-процессуального законодательства Нидерландов с принятием в 2019 году нового Закона «О киберпреступности III». Так, согласно ст. 125p Уголовно-процессуального кодекса Нидерландов (далее – УПК Нидерландов), прокурор вправе требовать от поставщика услуг связи (провайдера коммуникационных услуг) принять все незамедлительные меры, в которых разумно возникает потребность, по обеспечению недоступности хранящихся или передаваемых данных, с целью прекращения преступной деятельности или предотвращения новых преступлений. (Netherlands Code of Criminal Procedure, 2021). Законодательная норма позволяет по письменному указанию прокурора, по предварительному разрешению следственного судьи, проникновение следственными органами в автоматизированную работу, используемую подозреваемым лицом, если совершено тяжкое преступление, преступление террористической направленности и следствие не терпит отлагательств (ст. 126nba УПК Нидерландов).

Уголовно-процессуальное законодательство Нидерландов содержит понятийный аппарат, раскрывающий понятия цифровых терминов, таких как *электронная подпись, провайдер коммуникативных услуг, пользователь услуг связи.* УПК Нидерландов также регламентирует порядок хранения и использования цифровой информации при производстве расследования по уголовному делу; записи, хранения и уничтожения конфиденциальной информации с использованием технических средств; производства допроса по видеоконференцсвязи (ст. 131a), в том числе в рамках международного сотрудничества по уголовным делам (ст. 513a); применения информационных технологий при производстве следственных и других процессуальных действия для собирания доказательств.

В уголовном судопроизводстве Нидерландов широко применяются современные технологии обработки и хранения больших данных. Например, ордер адвоката или доверенность представителя хранятся в едином реестре, и их назначение в уголовном деле возможно в электронном формате. Поправки в уголовно-процессуальном законе Нидерландов позволили его участникам приносить жалобы, заявлять ходатайства и т.п. в электронном виде, а также получать электронные документы в установленном порядке. Процессуальные решения по уголовному делу, принимаемые уполномоченными должностными лицами, также могут оформляться электронно, например решение о возбуждении уголовного дела (ст. 51g УПК Нидерландов). Электронную форму могут иметь и международные запросы о правой помощи. Такие документы заверяются электронной подписью, регламентированной ст. 138e.

Существует огромное множество национальных проектов по информационным системам, содержащим данные предварительного расследования и обеспечивающим электронный порядок формирования уголовного дела. Так, в Республи-

ке Казахстан еще в 2017 году утверждена государственная программа «Цифровой Казахстан», она ознаменовала новый виток развития уголовно-процессуального законодательства. Так, ст. 42–1 Уголовно-процессуального кодекса Республики Казахстан (далее – УПК РК), посвященная форме уголовного судопроизводства, выделяет бумажный и (или) электронный форматы (Criminal Procedure Code of the Republic of Kazakhstan, 2021).

В целях обеспечения эффективного применения электронного порядка производства по уголовному делу 3 января 2018 года утверждена «Инструкция о ведении уголовного судопроизводства в электронном формате» № 16268 (далее – Инструкция). Электронное производство по уголовному делу, то есть его автоматизированное формирование в электронном виде, осуществляется с использованием информационной системы Единого реестра досудебных расследований (далее – ИС ЕРДР). Должностное лицо, осуществляющее предварительное расследование по уголовному делу, самостоятельно определяет формат производства – бумажный и (или) электронный. При невозможности осуществлять производство электронно можно вернуться к бумажному формату. При электронном формате в информационной системе заполняется шаблонная форма, выступающая отправной точкой начала производства. Система автоматически уведомляет прокурора и участников об электронном формате производства. Участники уголовного дела проходят регистрацию и биометрию в ИС ЕРДР, после чего получают электронную цифровую подпись. Это дает участникам возможность иметь дистанционный доступ к материалам уголовного дела в той мере, в какой это позволяет их процессуальный статус, а также к соответствующим модулям. Модуль SMS-оповещения обеспечивает автоматизированное уведомление участников о ходе производства по уголовному делу посредством рассылки соответствующих процессуальных документов на их электронные почты или мобильные телефоны; публичный модуль отрывает доступ к материалам уголовного дела, подаче и приему заявлений, жалоб и ходатайств. Поскольку ИС ЕРДР сопряжена с информационной системой судопроизводства, то передача уголовного дела в суд осуществляется дистанционно в электронном формате.

По данным Комитета по правовой статистике и специальным учетам Генеральной прокуратуры Республики Казахстан, в первом полугодии 2021 года в производстве находилось 110 757 уголовных дел, из них в электронном формате – 68 476 (62 %), а в 2020 году – 40 %. Статический рост данных показателей свидетельствует о целесообразности электронного уголовного судопроизводства (Committee on Legal Statistics and Special Accounts of the General Prosecutor's Office of the Republic of Kazakhstan, 2021).

О цифровизации уголовного процесса в России

Цифровизация не является веянием моды, скорее это закономерный процесс, который не зависит от желания субъектов уголовно-процессуальных правоотношений. По мнению О. А. Зайцева, научные исследования в области электронных форм фиксации, хранения, передачи и обработки информации особенно актуальны сегодня, а процесс цифровизации, проникающий в уголовно-процессуальную деятельность, неизбежно оказывает влияние на формирование доказательств по уголовному делу (Zajcev, 2019: 42). С января 2019 года УПК РФ дополнен статьей, регламентирующей особенности изъятия электронных носителей информации и ее копирования с них при производстве следственных действий. Соответственно, упоминание об электронных носителях информации содержится и в ст. 81.1 УПК РФ. При этом закон не определяет понятие «электронные доказательства», данная категория разработана и применяется в теории. Как отмечает С. В. Зуев, сегодня электронные доказательства для уголовного процесса стали привычными (Zuev, 2020: 46).

Более того, по мнению А.Ю. Афанасьева, цифровизация уголовного процесса не ставится в противовес следственной деятельности, а, напротив, внедрение искусственного интеллекта может способствовать повышению ее эффективности (Afanas'ev, 2018: 29–33). Искусственный интеллект сегодня применяется в автоматизированных системах, экспертных системах, нейронных сетях и т.д.; так, при производстве по уголовным делам используются системы автоматизации сбора и обработки экспериментальных данных предварительного расследования (автоматизированные информационно-поисковые системы и банки данных: «Металлы», «Оружие», «Наркотические средства» и др.). Указанные системы автоматизируют деятельность человека, снижают ее временные затраты, помогают в принятии решений по конкретной ситуации, обеспечивают информативность.

Предпосылками глобальной цифровизации в российском уголовном процессе можно назвать не только указанные выше законодательные упоминания об электронных носителях информации (ст. 164.1 УПК РФ) и электронных документах (ст. 474.1 УПК РФ), системы поддержки судебных экспертиз, но и развитие практики применения таких цифровых технологий, как государственные автоматизированные системы правосудия и правовой статистики, которые можно определить в качестве первоисточников электронизации уголовно-процессуальной формы.

Уголовно-процессуальное законодательство не регламентирует электронной формы уголовных дел. Однако многие технологии сегодня уже не являются новинкой, например использование в работе правоохранительных органов правовых поисковых систем, баз данных (работа с Big-данными), ведомственных электронных почт, официальных сайтов, интернет-порталов и т.д. Цифровизация судебного производства в некоторой степени интенсивней досудебного. В России действует государственная автоматизированная система «Правосудие» (ГАС «Правосудие»), формирующая единое информационное пространство судов общей юрисдикции и созданный для ее поддержки интернет-портал. ГАС «Правосудие» аккумулирует справочную информацию, судебные решения и акты Верховного Суда РФ, дела судебных участков мировых судей и федеральных судов общей юрисдикции и другие сведения.

Данная система автоматизирует следующие функции: документооборот; правовое обеспечение; эксплуатация сервиса обслуживания системы; обучение пользователей системы; проведение судебных заседаний с использованием видеоконференцсвязи; формирование протокола судебного заедания на базе фонограмм; защита информации и др. С помощью ГАС «Правосудие» можно отслеживать движение дела, подавать обращения в судебный орган и получать результаты их рассмотрения, а также иметь доступ к информации по делу участникам.

В части обращения граждан важно отметить, что уголовно-процессуальный закон в ст. 474.1 допускает подачу в суд ходатайств, заявлений, жалоб, представлений и прилагаемых к ним документов в электронном формате через официальный сайт суда в интернете. При этом документ должен заверяться электронной подписью в соответствии с российским законодательством. Судебное решение, за исключением указанных в ч. 2 ст. 474.1 УПК РФ, также может быть изготовлено в электронной форме и подписано судьей усиленной квалифицированной электронной подписью (при этом обязательно изготавливается экземпляр на бумажном носителе). Такое решение заинтересованное лицо может получить посредством интернета.

ГАС «Правосудие» содержит 27 подсистем, каждая из которых отвечает за определенный функционал и объект автоматизации. Например, подсистема «Видеоконференцсвязь» обеспечивает суды общей юрисдикции услугами видеоконференцсвязи, организацией сеансов многоточечных видеоконференций, передачей электронных копий документов непосредственно в ходе судебного заседания, а также управлением и администриро-

ванием видеоконференцсвязи. Главными задачами этой подсистемы являются: выполнение требований действующего российского законодательства и обязательств России по международным договорам о сотрудничестве; ускорение сроков рассмотрения дел; обеспечение безопасности участников процесса; экономия бюджетных средств; доступ к правосудию; увеличение эффективности и качества работы судов. Создает условия для перехода от традиционного бумажного документооборота к электронному подсистема «Документооборот и обращения граждан». Она предназначена для автоматизации информационных процессов документооборота и делопроизводства в электронном порядке. ГАС «Правосудие» имеет определенный функционал и по судебным экспертизам: подготовку документов в соответствии с уголовно-процессуальным законодательством для назначения, производства судебной экспертизы и получения заключений; унификацию методологии судебно-экспертной деятельности и единообразие практики; доступ в соответствии с политикой информационных сведений к судебным экспертным документам по уголовным делам и предоставление их электронных копий пользователям ГАС «Правосудие» в зависимости от процессуального статуса участника и др.

Другим элементом процесса внедрения цифровых технологий в уголовно-процессуальную сферу является применение цифровых и технических средств в судебных заседаниях, обеспечивающих видеоконференцсвязь, аудио- и видеопротоколирование. Отчеты Судебного департамента Оренбургской области «О работе судов общей юрисдикции по рассмотрению уголовных дел по первой инстанции» показывают, что в 2018 году число судебных заседаний с применением видеоконференцсвязи составило 1639, в 2019 году – 1948, в 2020–1768; аудиопротоколирование в 2018 году применялось по 2150 уголовным делам, в 2019 году – по 7143, в 2020 году – по 15977; видеопротоколирование осуществлялось в 2018 году по 33 уголовным делам, в 2019 – по 100, в 2020 – по 338 (Judicial statistics of the Office of the Judicial Department in the Orenburg region, 2021). В период пандемии коронавируса применение технических средств, обеспечивающих видеоконференцсвязь, аудио- и видеопротоколирование в судебных заседаниях стали особенно актуальными, о чем свидетельствуют данные официальной статистики, отражающие явную прогрессию увеличения числа уголовных дел, по которым они использовались.

В досудебном производстве по уголовным делам тоже применяется государственная автоматизированная система. Так, Постановлением Правительства РФ от 15 декабря 2020 года № 2113 утверждено Положение о государственной автоматизированной системе правовой статистики (далее – Положение). Государственная автоматизированная система правовой статистики (далее – ГАС правовой статистики, ГАС ПС) представляет собой автоматизацию единого государственного статистического учета заявлений и сообщений о преступлениях, состояния преступности и ее раскрываемости, состояния предварительного расследования, прокурорского надзора и автоматизацию формирования и представления отчетности органов прокуратуры. Оператором данной системы является Генеральная прокуратура РФ.

Данная система позволяет формировать единое информационное пространство в области уголовно-правовой статистики. Все государственные структуры, осуществляющие предварительное расследование, оснащены необходимой техникой и программным обеспечением для работы в системе правовой статистики. Должностные лица, в производстве которых находятся уголовные дела, обязаны своевременно вносить данные о ходе расследования по ним и принятым решениям (о прекращении, о приостановлении, об окончании производства и т.д.). Это позволяет осуществлять надзор за деятельностью при приеме и регистрации заявлений и сообщений о преступлении, а также на протяжении всего хода предварительного расследования.

ГАС правовой статистики включает: портал системы правовой статистики (сбор, обработка, хранение и использование информации, мониторинг и анализ сведений, подписание документов); специальное программное обеспечение (документирование данных); закрытый контур системы правовой статистики, составляющей государственную тайну; портал технической поддержки www.gasps-support.genproc.gov.ru (обучение и повышение профессионального уровня компьютерной грамотности); портал правовой статистики www.crimestat.ru или правоваястатистика.рф (официальная статистическая информация); а также три подсистемы.

Заключение

Несмотря на то, что сегодня использование информации в электронном виде в предельной степени широко в современном обществе, правовая регламентация механизма электронных форм в уголовном процессе России слабая. Лишь небольшое число статей уголовно-процессуального закона касаются электронных носителей информации и порядка использования электронных документов. Однако исследование показало, что предпосылки перехода к электронной форме производства по уголовным делам заданы и отвечают современным общемировым тенденциям глобальной цифровизации. Автоматизированные информационные системы, информационно-коммуникационные платформы, порталы, программы с использованием искусственного интеллекта, обеспечивающие электронный порядок производства, как показало исследование, способствуют снижению нагрузки на должностных лиц; упрощению работы с большими данными; оперативному поиску, сбору, хранению и обработке информации; осуществлению ранжированного доступа к информации участниками уголовного процесса; эффективному контролю и надзору за деятельностью органов дознания и предварительного следствия и т.д. Цифровое развитие уголовного судопроизводства должно способствовать его упрощению, но не исключать человеческий ресурс.

Список литературы / References

Antonovich, E.K. (2020). Elektronnoe pravosudie po ugolovnym delam v Niderlandah: sovremennoe sostoyanie i perspektivy [Electronic criminal justice in the Netherlands: current status and prospects]. In *Vestnik Universiteta imeni O.E. Kutafina (MGYUA). [Bulletin of the University named after O.E. Kutafina (Moscow State Law Academy)]*, 10, 136–149. DOI: 10.17803/2311–5998.2020.74.10.136–149

Afanas'ev, A. Yu. (2018). Iskusstvennyj intellekt ili intellekt sub'ektov vyyavleniya, raskrytiya i rassledovaniya prestuplenij: chto pobedit? [Artificial intelligence or the intelligence of the subjects of detecting, solving and investigating crimes: which will win?]. In *Biblioteka kriminalista [Forensic Library]*, 3(38), 28–34.

Committee on Legal Statistics and Special Accounts of the General Prosecutor's Office of the Republic of Kazakhstan (2021). Form No. 1-M «Report on registered crimes and the results of the activities of the criminal prosecution bodies» for 2019–2020 and the first half of 2021. The Republic of Kazakhstan. Available at: https://qamqor.gov.kz/portal/page/portal/POPageGroup/Services/Pravstat?_piref36_ 258157_36_223082_223082.__ora_navigState=eventSubmit_doSearch%3D%25D 0 %259F%25D 0 %25BE%25D 0 %25B 8 %25D 1 %2581 %25D 0 %25BA%26p_YEAR%3D 2019 %26p_MONTH%3D 12 %26p_AREA%3D 190000 %26p_REG%3D 1900__%26p_DEP%3D 000 %26page%3Dmode_report%26currPage%3D 1&_piref36_258157_36_223082_223082.__ora_navigValues (accessed 30 July 2021)

Criminal Procedure Code of the Republic of Kazakhstan (2021). Available at: http:// adilet.zan.kz/rus (accessed 30 July 2021)

Droogleever Fortuyn, S. (2020). Sessions in corona time: water with the constitutional wine. In *Lawyer's magazine,* available at: www.advocatenblad.nl/2020/06/24/zittingen-in-coronatijd-water-bij-de-rechtsstatelijke-wijn/

Ducuing, C., Schroers, J., & Vedder, A. (2019). Introduction: Security and Law in the Digital World. B A. Vedder, J. Schroers, C. Ducuing, & P. Valcke (Ред.), Security and Law: Legal and Ethical Aspects of Public Security, Cyber Security and Critical Infrastructure Security. 1–10. DOI:10.1017/9781780688909.001

Dzhafarov, A. (2018) «Elektronnyj sud» – sistema, oblegchayushchaya rabotu sudebnoj vlasti i pravosudiya [«Electronic court» – a system that facilitates the work of the judiciary and justice]. In *Azerbajdzhanskij vzglyad [Azerbaijani view]*, available at: https://vzglyad.az/news/122859/Азер-Джафаров-«Электронный-суд»-система,-облегчающая-работу-судебной-власти-и-правосудия-.html

Editorial Baku worker (2021). Novyj modul' Minnalogov pozvolit peredavat' materialy po ugolovnym delam v sudy, podklyuchennye k sisteme «Elektronnyj sud» [The new module of the Ministry of Taxes will allow transferring materials on criminal cases to courts connected to the «Electronic Court» system]. In *Bakinskij rabochij [Baku worker]* available at: http://www.br.az/economy/20161111112155410.html (accessed 30 July 2021)

Editorial lawyer's Guide. (2020). Supreme council criminal cases: fax required. In *Lawyer's magazine,* available at: www.advocatenblad.nl/2020/02/04/strafzaken-hoge-raad-post-en-fax-overbodig/

European Commission (2020) International Digital Economy and Society Index – SMART 2019/0087 Luxembourg, Publications Office of the European Union, 57. DOI: 10.2759/757411

Judicial statistics of the Office of the Judicial Department in the Orenburg region (2021). Form No. 1 «On the work of courts of general jurisdiction for the consideration of criminal cases in the first instance». Available at: http://usd.orb.sudrf.ru/modules.php?name=sud_community (accessed 29 July 2021)

Leksin, I.V. (2021). Law and digitalization: some academic illusions and practical issues. J. Sib. Fed. Univ. Humanit. Soc. Sci., 14(5), 602–610. DOI: 10.17516/1997–1370–0745.

Netherlands Code of Criminal Procedure (2021). Available at: https://wetten.overheid.nl/BWBR 0001903/2019–08–01#BoekEerste (accessed 30 July 2021)

Susskind, R. *(2020).* The Future of Courts. In *the Harvard Law School Center on the Legal Profession. The Practice*, 6 (5), available at: www. thepractice.law.harvard.edu/article/the-future-of-courts/

The case of Marcello Viola v. Italy (Application No. 45106/04). Judgment of the European Court of Justice of 5 October 2006 (extract). The judgment was published in the Bulletin of the European Court of Human Rights. Russian edition. No. 4/2007.

Zajcev, O.A. (2019). Osobennosti ispol'zovaniya elektronnoj informacii v kachestve dokazatel'stv po ugolovnomu delu: sravnitel'no-pravovoj analiz zarubezhnogo zakonodatel'stva [Features of the Use of Electronic Information as Criminal Evidence: A Comparative-Legal Analysis of Foreign Legislation]. In *zhurnal zarubezhnogo zakonodatel'stva i sravnitel'nogo pravovedeniya [Journal of Foreign Legislation and Comparative Law],* 4, 42–57. DOI: 10.12737/jflcl.2019.4.4

Zuev, S.V. (2020). Elektronnye dokazatel'stva v ugolovnom sudoproizvodstve: ponyatie i znachenie [Electronic evidence in criminal proceedings: concept and meaning]? In *Pravoporyadok: istoriya, teoriya, praktika [Law and order: history, theory, practice],* 3(26), 46–51.

Journal of Siberian Federal University. Humanities & Social Sciences
2022 15(8): 1094–1107

DOI: 10.17516/1997-1370-0912
EDN: TZPSKY
УДК 343.222.43:004.056.5:004.89(47+57)(510)

Criminal Liability for Actions of Artificial Intelligence: Approach of Russia and China

Pang Dongmei[a] and Nikolay V. Olkhovik[*b, c]
[a]*Law Institute, Institute of intellectual property*
Henan University's Chinese, Russian center of comparative law
Henan, People's Republic of China
[b]*Tomsk State University*
Tomsk, Russian Federation
[c]*Research Institute of the Federal Penitentiary Service of Russia*
Moscow, Russian Federation

Received 14.10.2021, received in revised form 10.12.2021, accepted 02.05.2022

Abstract. In the Era of Artificial intelligence (AI) it is necessary not only to define precisely in the national legislation the extent of protection of personal information and limits of its rational use by other people, to improve data algorithms and to create ethics committee to control risks, but also to establish precise liability (including criminal liability) for violations, related to AI agents.
According to existed criminal law of Russia and criminal law of the People's Republic of China AI crimes can be divided into three types: crimes, which can be regulated with existed criminal laws; crimes, which are regulated inadequately with existed criminal laws; crimes, which cannot be regulated with existed criminal laws.
Solution of the problem of criminal liability for AI crimes should depend on capacity of the AI agent to influence on ability of a human to understand public danger of committing action and to guide his activity or omission. If a machine integrates with an individual, but it doesn't influence on his ability to recognize or to make decisions. In this case an individual is liable to be prosecuted. If a machine influences partially on human ability to recognize or to make decisions. In this case engineers, designers and units of combination should be prosecuted according to principle of relatively strict liability. In case, when AI machine integrates with an individual and controls his abiity to recognize or to make decisions, an individual should be released from criminal prosecution.

Keywords: artificial intelligence; criminal liability; prosecution; to principle of relatively strict liability.

This article was prepared within project of the National fund of social sciences of the People's Republic of China "Institute of the general part of Russian criminal law" (project'

* Corresponding author E-mail address: lawtsuolkhovik@mail.ru

number: 16AFX008), and program of main projects in sphere of philosophy and social science in Henan University (project's number: 2019ZDXM005). In addition, this article is funded by the National Foundation for study abroad.

Research area: law.

Citation: Pang Dongmei, Olkhovik, N.V. (2022). Criminal liability for actions of artificial intelligence: approach of Russia and China. J. Sib. Fed. Univ. Humanit. soc. sci., 15(8), 1094–1107. DOI: 10.17516/1997-1370-0912

Уголовная ответственность за действия искусственного интеллекта: подходы в России и Китае

Пан Дунмэй[а], Н.В. Ольховик[б, в]
[а]Юридический институт, Институт интеллектуальной собственности Китайско-российский центр сравнительного правоведения Хэнаньского университета
Китайская Народная Республика, Хэнань
[б]Томский государственный университет
Российская Федерация, Томск
[в]Научно-исследовательский институт Федеральной службы исполнения наказаний
Российская Федерация, Москва

Аннотация: В эпоху искусственного интеллекта в национальных законах необходимо не только четко определить объем защиты личной информации и границы его рационального использования другими людьми, оптимизировать алгоритмы данных и создать комитет по этике для контроля рисков, но и установить четкую юридическую ответственность (в том числе и уголовную) за нарушения, связанные с продуктами искусственного интеллекта.

В соответствии с действующим уголовным законодательством России и КНР преступления, связанные с искусственным интеллектом, можно подразделить на три типа: преступления, которые могут регулироваться действующими положениями уголовного закона; преступления, которые неадекватно регулируются действующими уголовными законами; преступления, которые не могут регулироваться действующими уголовными законами.

Решение вопроса об уголовной ответственности за преступления, связанные с искусственным интеллектом, должно зависеть от способности продукта искусственного интеллекта влиять на способность физического лица осознавать общественную опасность совершаемого им деяния и руководить своими действиями или бездействиями. Если продукт искусственного интеллекта сочетается с физическим лицом, но не влияет на способность распознавания и суждения физического лица, то физическое лицо несет уголовную ответственность. Если продукт искусственного интеллекта частично влияет на способность распознавания и суждения физического лица, тогда следует привлекать к уголовной ответственности производителей,

разработчиков продуктов искусственного интеллекта и юнитов сочетания в соответствии с принципом относительно строгой ответственности. В случае, когда продукты искусственного интеллекта сочетаются с физическими лицами и контролируют способность распознавания и суждения физических лиц, физические лица должны быть освобождены от уголовной ответственности.

Ключевые слова: искусственный интеллект, уголовная ответственность, привлечение к ответственности, принцип относительно строгой ответственности.

Данная статья подготовлена в рамках проекта Национального фонда социальных наук КНР «Институт общей части российского уголовного права» (проект № 16AFX008) и программы основных проектов в области философии и социальных наук в Университете Хэнань (номер проекта: 2019ZDXM005). Эта статья также финансируется Национальным фондом для обучения за рубежом.

Научная специальность: 12.00.00 – юриспруденция.

Introduction

Due to the development of cybernetics Artificial intelligence (AI) becomes more important object of legal regulation (Kibal'nik, Volosyuk, 2018) and legal research (Shestak, Voevoda, 2019) in our world. Including in Russia and China.

Federal law № 172 of 28 June 2014 "On strategic planning in the Russian Federation" and the Russian Federation Presidential Decree of 07 May 2018 № 204 "On national objectives and strategic concerns of the development of the Russian Federation for the period up to 2024", the Russian Federation Presidential Decree of 09 May 2017 № 204 "On Strategy of the development of information society in the Russian Federation for 2017–2030", the Russian Federation Presidential Decree of 01 December 2016 № 642 "On Strategy of scientific and technological development of the Russian Federation", the Russian Federation Presidential Decree of 10 October 2019 № 490 "On development of artificial intelligence in the Russian Federation" define directions of informatization in the Russian Federation. The later establishes the National strategy of the AI development in the Russian Federation up to 2030.

The President of the Russian Federation V. Putin, addressing to scientists, engineers and representatives of high-technology business, defined the necessity to hold leadership in AI sphere. "Comfortable and safe cities, accessible and qualified medicine, education, modern logistics and reliable traffic infrastructure, space exploration, exploration of the World ocean, and finally, national defense capability, the development of all these spheres depends largely on our success in AI sphere now and in the nearest future. Not to notice changes, to reject them it means to devaluate, to lose existent opportunities, which can be great today, but tomorrow they can become obsolete rapidly or be zeroed out. Artificial intelligence is a resource of extreme power. Those, who owns it, would break forth", – underlined the President of the Russian Federation (Putin, 2019). Main principles of the development and use of AI- technologies, observation of which is compulsory in carrying out the National strategy of development of AI in the Russian Federation, are protection of human rights and freedoms, safety, transparency, technological state authority. Integrality of innovative course, rational economy and maintenance of competitive environment.

On 05 March 2017 Premier of the Chinese State Council of Li Keqiang in the Report of the government's work pointed strictly at supporting the AI development, underlining "we will accelerate elaboration and reorganization of new materials, artificial intelligence, electronics, biopharmaceutics, mobile service of fifth generation and other technologies". (Li Keqiang, 2017). On 08 July 2017 the Chinese State Council passed "Plan of the AI development of new generation", where it was clearly

formulated requirements to creation of legal, ethic and political system of AI". In this official document it was underlined that the important principles of legislation on AI are principle of human interest's protection, principle of clarity and principle of liability. Consequently, formation of corresponding principle of criminal liability is important part of creation of criminal regulation, related to artificial intelligence. On 20 July 2017 the Chinese State Council published "Next generation AI development Plan", suggesting "to build initial advantages of AI development in China, to accelerate creation of innovative country and world scientific – technological state". (http://www.gov.cn/zhengce/content/2017–07/20/content_5211996.htm).

In Russia and in China attempts to use artificial intelligence have even been made in judicial sphere. Chairman of the Council of Judges of the Russian Federation V. Momotov, speaking at plenary meeting of international conference in Qatar on subject "Prospects for the use of artificial intelligence in judicial system of the Russian Federation", underlined "introduction of artificial intelligence in judicial system may provide a) elevation of quality and effectiveness of judicial activity based on use of support system of decision making by court, for example, system of sentencing in criminal proceeding, use of system of analysis of natural speech processing – recognition of general sense of text with possibility to distinguish key thesis from the text, use of speech recognition and video content with purpose to mark audio and video reports of court trials, computer-managed preparation of judicial acts drafts, b) efficiency improvement of judicial protection of rights and legal interests of citizens, organizations, state authority (based on use of intellectual assistants of trial participants, extension of distant participation in trials through use of biometric identification of citizens), c) reduction of conflicts, rising of legal consciousness by means of introduction of expert system of predictive analysis of the results of a trial, d) creation of systems of predictive analysis for changing caseload depending on legislation changes". (Momotov, 2019)

President of the Supreme People's Court of China Zhou Qiang, speaking at the third World internet-congress "Intellectual courts", namely at forum on problems of rule of law in the Internet in 2016, said that he is going "to promote actively application of artificial intelligence in judicial sphere".(Deng Heng, 2017). Simultaneously, technological companies began to join their efforts with courts all over the country for promotion the AI application in justice, for example, IFLYTEKCO., LTD., as high-technology company and the Supreme People's Court from three provinces and one city (Jiangce, Zhejiang, Anhui, Shanghai) signed a Decree on profound strategic cooperation of three provinces and one city at the Yangtze river delta in sphere "Artificial intelligence + court" (http: //www.ah.xinhuanet.com/2018–06/07/c_1122949446.htm.). Alongside this cooperation the Supreme People's Court of Shanghai it was elaborated "Shanghai High People's Court intelligent assistive case-handling system for criminal cases" (system –206) (Yan Jianqi, 2018).

At the same time Russian and Chinese legal communities conduct comprehensive researches on legal issues, related to artificial intelligence. Analyzing existed literature of Russia and China, authors show that today AI researches in legal sphere are concentrated on the following aspects: 1) definition of the notion Artificial intelligence (Arhipov, Naumov, 2017; Ponkin, Red'kina, 2018; Vasil'ev, Shpopper, Mataeva, 2018); 2) studying of the AI influence on the whole legal system and separate legal system (Yu Chengfeng, 2018; Li Sheng, 2018.); 3) studying AI legal capacity (Yastrebov, 2017; Wu Xiyu, 2018; Shestak, Volevodz, 2019.); 4) it is considered possible AI influence on branch law, for example, legal basis of liability for the damages, caused during the operation of an autonomous car (Churilov, 2018); doctrinal criminal law questions (Kibal'nik, Volosyuk, 2018); subject of AI crime and criminal liability (Mosechkin, 2019); legal issues, related to application of criminal legislation in crimes against property (Lin Shaowei, 2018; Jiang Bixin, Zheng Lihua, 2018; Wu Yunfeng, 2018), and system of punishment (Liu Xianquan, 2018; Hisamova, Begishev, 2019.) and others. There are not so many specified researches, related to the problem of criminal liability for AI crimes.

Criminal risks of AI application

AI based on digital technologies is one of tendencies of future society. According to existed difference between types of AI there are two of them: a strong AI and a weak AI. Strong AI, having powerful mathematical and logical abilities, refers to big data, capacity to learn, algorithms, it moves towards mankind model. Regarding this AI type in future we should consider problem of its structured coexistence with humans in a society. At the same time, weak AI, focused on narrow tasks, realizes general human tasks under data guidance, for example, autopilot is typical weak AI (ZhengGe, 2017). Both strong AI and weak AI need big data and it follows risks and problems. Consequently, with a huge development and widespread AI application in different spheres of life there arise some negative problems such as social danger associated with excessive or incorrect use of AI technologies, social damage, associated with "autonomous" AI decisions, made with use of technologies of "computer-assisted instructions" and "deep learning".

Problem which influences the most on human consists of the fact that when artificial intelligence is progressing to such a degree, it can form its own consciousness and it can damage itself or human. Scientists predicted that "during AI Era people will lose their sacred status, they will become animals, who are captured by robots, and they can be murdered by robots at its own wish". (Yuval Noah Hariri, 2017). Analyzing examples when robots damaged themselves or other people, what happened in judicial practice, we can see that there is such a problem. For example, on 12 November 2013 in Austria there was an incident of "suicide" of a robot-cleaner, as a result the house of owner was burnt down. The reason of Roomba "suicide" was concluded as unbearable difficult housework (www.tanling.com/archives/1921.html). On 18 November 2016 at the International High-Tech Fair in China (Shenzhen city) there was the first incident of robot abuse in China, resulting sudden failure. This robot named "Fabo" broke the glass of exhibition booth and injured a visitor because of absence of proper instructions (Yao Wanqin, 2019).

Obviously, criminal risks in human society, created by AI technologies, are increasing quite fast. At present time (i.e. at the Era of weak AI) criminal risks, related to artificial intelligence, can be divided in two categories: firstly, criminal risks, emerging in use of intellectual robots by individual. Including cases, when an individual didn't expect by negligence that intellectual robots could have caused damages, but these actions have serious consequences for the society; or an individual anticipated that robots could have caused damages, but carelessly he planned to prevent from damages, and these actions have socially dangerous results; secondly, criminal risks, related to use of intellectual robots with intention to commit a crime.

It is not unusual when there are serious dangerous consequences when normal using of intellectual robots. For example. In 2016 in Handan, Hebei China self-driving car Tesla during "highway driving" failed to distinguish another car according to its program settings, as a result the driver died. In 2018 in Arizona, U.S. there was an incident when a pedestrian was struck by autonomous car Uber. In 2015 one of employees of Volkswagen was grabbed by robot and crushed against a metal plate while working on production line; he suffered a lot and died from his injuries in hospital (http://news.mydrivers.com/1 /437/437018.htm).

There are a lot of cases when a person uses intellectual robot to commit a crime. For example, a person uses pilotless IR camera to search cannabis farm and manipulates pilotless aerial vehicles to commit cannabis theft. Meanwhile, there are cases, when people equipped pilotless aerial vehicles with guns, loud-speakers and other devices, manipulating pilotless aerial vehicles to rob pedestrians (http: / /digi.163.com/14 /0418 /17/9Q4OQ6IQ00162OUT.html). AI technologies can help in military sphere to clear mines and to provide security of people, but if it is used by terrorists, it can lead to unbelievable dangerous consequences.

Therefore, AI development, extensive use of autonomous devices lead to technical and ethical problems. Including legal regulation's problems of relations between a robot and a hu-

man, between a robot and a robot (Cukanova; Skopenko, 2018). Based on real cases of inflicting injuries to a human by artificial intelligence and cases, which can happen in future, lawyers should consider issues of using criminal norms to prevent AI offences against human interests.

Legal regulation of AI crimes in Russia and China

At this Era of weak AI intellectual robots may act only as extension of human body and mind, accomplishing actions within elaborated programs for realization of human will and consciousness. In the context of current level of development AI technologies existed criminal norms of Russia and China may regulate the majority of crimes, related to artificial intelligence, but there are some statements of the Criminal Code of the Russian Federation and the Criminal Code of the People's Republic of China, which are too blurred. These statements need to be explained by means of judgments or by criminalization of new criminal acts, arising at the AI Era, it is necessary to restore the balance between high development of technologies and relative stability of Criminal Code. According to existed criminal law of Russia and criminal law of the People's Republic of China AI crimes can be divided into three types: crimes, which can be regulated with existed criminal laws; crimes, which are regulated inadequately with existed criminal laws; crimes, which cannot be regulated with existed criminal laws.

1. AI crimes, which can be regulated with existed criminal laws. These crimes refer to AI crimes which can be actually regulated with existed criminal laws of the Russian Federation and criminal laws of the People's Republic of China or they can be regulated only with judicial explication aimed at strict definition of sphere and application of statements of the Criminal Code. For example. In "The first case with AI use for committing a crime in China" (http://www.xinhuanet.com/local/2017–09/26/c_1121726167.htm), criminals using capacity of an intellectual robot to learn, programmed it to distinguish effectively identification code of image data. This skill helped criminals to gain the access to personal accounts and passwords of users on different websites (http: / /www.sohu.com/a/202973604_65917). Essentially it is illegal access to personal information of citizens, it is regulated with part 3 of art.253 of the Criminal Code of the People's Republic of China "Theft or illegal access to personal information through other means", that is why these actions can be qualified as illegal access to personal information. In the Russian Federation illegal access to computer information, containing personal information on private life, committed willfully and knowingly for mercenary or personal purpose, providing causing damage to rights and legal interests of citizens, is treated accumulative sentencing with art.272 and art.137 of the Criminal Code of the Russian Federation.

2. Some traditional crimes have acquired new characteristics in AI context and criminal law cannot cope with it effectively. At this Era of weak AI the behavior of intellectual robots is controlled with programs, elaborated and created by a human, these programs carry out human will and consciousness and they are continuation of human body and mind. By contrast of traditional criminal tools they are not only extension of human body, but they are extension of human intelligence, so this "intelligence" leads to certain changes in initial patterns of human behavior. Previously. In case of traffic accident, happened during a driving of a car (supposing that the driver is fully or partially responsible for the accident): when the accident was caused by quality of a car, responsibility for the product's quality is carried by automobile manufacturer or designer; when the accident was caused by driving violation, responsibility for it is carried by the driver. Nowadays autonomous car requires participation of a driver during the process of driving, that is why it is allowed to make driver responsible for the accident according to mentioned model of responsibility. However, if an autopilot is developing to the stage of fully-automatic driving. In other words, it is driving without participation of a driver, and this autopilot causes an accident, so if the accident is caused by the quality of a autonomous car, we can still charge automo-

bile manufacturer or designer with it; but if the accident is caused by driving violation, we cannot charge the driver with it, because autonomous car is related to weak intelligent robots and cannot be responsible for its actions due to the lack of its own will and consciousness. Criminal liability for a traffic accident, which should be imposed on driver, cannot be transferred to an autonomous car. In this case is it possible to make automobile manufacturer or user of this autonomous car liable for this traffic accident? If the answer is positive, are they liable for the quality of a car or for traffic accident? There is no clear regulation of these questions in existed criminal legislation of Russia and China.

3. AI crimes, which cannot be regulated with existed criminal laws, present a serious danger for the society. These actions cannot be regulated with current Criminal Code of the Russian Federation or Criminal Code of the People's Republic of China for a couple of reasons:

Firstly, actus reus (elements of crime), provided by criminal law, doesn't cover new forms of behavior at the AI Era. For example, today with AI technological development and with its combination with biology and neurology, there were produced AI prosthetic devices, which can help to a variety of disable persons to solve their problems and to reduce their suffering. If a person destroys AI prosthetic device, which works good with human body, it can cause great physical and mental suffering to its owner. Consequently, if we consider these AI prosthetic devices as property of a person and its damage is just a destruction of property, it doesn't make sense; meanwhile if we consider AI prosthetic device as a part of human body, it seems highly probable that damage of prosthetic device leads to health problem of a person. However, according to the Criminal Code of the Russian Federation and the Criminal Code of the People's Republic of China, willful health damage is considered as a crime only in case when bodily injuries form petty bodily harm (in Russia) and minor personal injury (in China), it is possible not to consider damage of AI prosthetic device, which didn't cause short-term health problem or petty loss of ability to work, as minor personal injury or petty bodily harm, so it couldn't be considered as a crime. At the same time with AI technologies development AI prosthetic devices become cheaper. Price of AI prosthetic devices may not be compared to the notion of considerable damage, which is required as actus reus (elements of crime) of deliberate destruction or damage of property. In other words, existed criminal laws of Russia and China do not define liability for damage of AI prosthetic devices of other people.

Secondly, there are no elements of crime. Including new form of behavior, appeared at AI Era in the current Criminal Code of the Russian Federation or the Criminal Code of the People's Republic of China. For example, Microsoft created AI chatter bot Tay (chatter bot Tay was designed as 19-year-old girl), who has capacity to learn from interacting with human users. Some users figured out how it worked and using the mechanism of its learning, began tweeting politically incorrect phrases. Microsoft shut down the service the next day because of inflammatory and offensive tweets such as racism. Microsoft had released this chatter bot for entertainment but deliberately offensive behavior of other users made Tay to be in "instrument" of racist statements. According to the Criminal Code of the Russian Federation and the Criminal Code of the People's Republic of China, extensive use of such statements can be considered as a crime. Imagine is it a corresponding deliberate crime when a person deliberately teaches AI bot to pronounce these words? In addition, if creators of AI robots didn't manage to establish some functions to stop this behavior (i.e. AI robots cannot do it automatically), is it possible to consider these creators guilty in committing crime by negligence? If it is necessary, how should we build and improve corresponding legislation in this sphere?

To sum up. In course of the AI development we have more similar questions, that should be answered, that is why it is necessary to improve statements of the current Criminal Code of the Russian Federation and the Criminal Code of the People's Republic of China to meet the requirements of AI Era.

Influence of AI existence
on traditional definition of criminal liability

Criminal law should respond to the changes of time. However, faced with different criminal risks, related to AI technologies, current criminal legislation can hardly manage all new problems. Thereupon it is necessary to create new conception of criminal law, to improve legislation and judicial practice, adjusting to the requirements of time. Several scientists suppose that it's no purpose discussing criminal liability and legal capacity of intellectual robots, because they are just additional instrument for a human to deal with any work (Shi Fang, 2018). This viewpoint is based on the fact that intellectual robots today are weak AI robots, they can be used as part of a process, created and designed by a human to embody human will, and therefore only users can be subjected to of criminal liability. In our opinion. Intellectual robot is subject of the crime or it is an instrument of crime, it can influence on definition of criminal liability. It is revealed in following:

Firstly. Intellectual robots, used as crime instrument. Influence on criminal liability for committed crime. According to the judgment of the Supreme People's Procuratorate of the People's Republic of China of 18.04.2008 on classification of crime by way of receiving, use a credit card of another person in cash machine (ATM), it is stated that this action is provided by section 3 part 1 art.19 of the Criminal code of the People's Republic of China "use of credit cards, belonging to another person, without their knowledge or consent" and it is considered as credit card fraud. Concerning this Judgment some scientists noted that as far as cash machine (ATM) could not be deceived because it didn't have consciousness, it could not make a mistake of perception and could not dispose its property because of the perception mistake, that is why use of credit cards, belonging to other people without their knowledge or consent should be considered as theft (Zhang Mingkai, 2009). Other scientists stated that the main reason of classification of this crime as credit cards fraud consists in the fact that cash machine (ATM) after programming is business staff which operates on behalf of the financial institution for financial processing: considering that business staff can be defrauded, computer-programmed cash machine can be a fraud subject for sure (Liu Xianquan, 2017). In other words, computer-programmed cash machine is distinct from regular technical vehicles in that they have recognition function of human brain, what can influence on definition of criminal liability in cases when they are subjects of crime. It seems that when people come down the weak AI Era. Intellectual robots have the capacity to deep learning, they acquire functions of human brain, and certainly it will influence a great deal on criminal liability of guilty persons.

Secondly. Intellectual robots, as crime instruments. Influence on criminal liability of guilty persons. Classification of criminal liability between designers and users can vary with the growth of "intellect" of intellectual robots, when robots are instruments for committing crime by people. For example, when a usual car is not dangerous, but its driver violated traffic rules and it led to a big accident, designer of a car is not liable for this crime. The user of this car (i.e. the driver) is liable for this crime. Meanwhile autonomous (self- driving car or robotic car) is controlled by a program of autopilot (for example, the way or direction of the car), there are only passengers in this car, there is no driver in it: in case of serious accident, related to the procedure itself (including violation of traffic rules by autonomous car and so on), the designer of autonomous vehicles can be liable for this accident only. It follows that at AI Era risks, related to AI technologies, are growing up shortly and intellectual robots, by contrast with ordinary auxiliary instruments. Influence on detection and classification of criminal liability towards wrongdoers.

It seems that the conception of the criminal law, criminal legislation and judicial practice should be adapted to time tendencies to provide that criminal law, being "the last defense line of the society", plays its role to guarantee stable and strong development of the society. Conception and system of criminal law in every social form are different, it is reflection of the fact, that criminal law corresponds to tendencies of the society's development. Today we live at the weak AI Era. Intellectual robots with

capacity to deep learning, playing important role in all aspects of social life. Influence and continue to influence on the development of social forms. That is exactly why we should adapt the concept of criminal law to provide stable development of AI technologies, to prevent and to control criminal risks, related to AI technologies, finally to achieve purposes of protection of human interests and contribution of progress in social development. This is the essence of the idea of criminal law at AI Era.

At AI Era we should create a perspective view of the criminal law concept. While technical backgrounds and social conditions, lying in the basis of criminal legislation at AI Era, are changing quickly (Zhao Li, 2015; Begishev, 2018), we should predict possible criminal risks today and think over response strategy.

The solution of the problem of liability for AI crimes

As it was mentioned above, Strategies of AI development were enacted in Russia and in China. In these official documents it was underlined that the important principles of legislation of AI are principle of human rights protection, principle of clarity and principle of responsibility. Consequently, composition of principle of criminal liability is an important part of criminal norms, related to AI.

Summarizing all opinions of Chinese scientists on AI liability (Chen Xingliang, 2010; Xia Chenting, 2019; Liu Honghua,2019), the authors approve introduction of strict liability into system of criminal law and application of relatively strict liability in context of rule of law towards AI crimes.

1. Introduction of strict liability

In the Chinese criminal law imputation of liability. In general, is considered as criminal liability of a person for committing a crime (Feng Jun, 1996), i.e. imputation of liability is general impact of correlation between a crime and criminal liability. AI crimes, as negative consequence of technical progress, are both an output of industrial society and typical effect of technology-related risk in society. Gravity of social risk, created by AI, is beyond human ability to find and to solve the problem, that is why necessity of criminal regulation of AI crimes is obvious. Nevertheless, artificial intelligence, as a highly intelligent "person", may not only create and carry out unlawful risks, but it is able to evade created risks by means of effective control; it means that if an artificial intelligence commits a crime, it will be liable for all negative consequences. In this case there are some theoretical challenges to impose criminal liability on artificial intelligence; consequently, it is essential to create special principles of imputation of criminal liability for AI crimes according to characteristics of social risk to solve general problems on regulation of AI crimes.

General content of traditional principle of imputation of criminal liability lies in the fact that criminal liability is caused with guilt of a person, i.e. guilt of a person is starting point for subjecting to criminal liability. Deliberate intent and negligence as content of guilt are not only individual elements of crime, but it is a condition for determination of criminal liability. Consequently, a subject is not liable for its personal innocence. Faced to numerous complicated social risks, related to technical development, the opinions of Chinese scientists were divided over mentioned problem: some scientists considered that it was necessary to break the limits of principle of criminal liability on a provisional basis and to move to problems of criminal law on prevention and control of risks to provide security (Hao Yanbing, 2012); other scientists noted that it was necessary to follow principle of guilt with guarantee of freedom by criminal law (Lao Dongyan, 2014). Despite disagreements among scientists of criminal law, social practice and legal progress are developing according to its internal patterns, criminal law, as the last defense and control line of the society, enriches itself gradually with its content due to the changes of time. In mentioned case principle of strict liability (Li Lifeng, 2009) become strategic.

AI crimes as impact of technical risks are characterized with co-existence of the present and uncertainty of risk in modern society. AI products may achieve or overpass human intelligence by means of deep learning process, what can considerably increase expectation of

uncontrolled risks (Ma Changshan, 2018). Besides, as far as use of the technology of "black box" in AI agents leads to non-transparency of its algorithms, terminal users do not know how AI agents make their decisions by means of their algorithms. Definition of the process of making up the decisions by AI agents is uneconomic and even impossible task, according to the traditional principle of fault-based liability definition of this element of guilt is important and irreplaceable in the process of imposition of criminal liability. In that context, with reference to uncontrolled risks, related to AI crimes and non-transparency of algorithms of AI behavior, application of the principle of strict liability meets to a greater extent the requirements of technical norms and regulatory requirements at AI Era.

2. Application of the principle of relatively strict liability in context of rule of law

Application of the principle of relatively strict liability in context of rule of law means that it is limited sphere and degree of application of strict liability by means of direct regulation of the legislation, i.e. due to differences between strong AI and weak AI and to the level of combination of AI and an individual it is necessary to establish principle of fault-based liability with amendments of the principle of relatively strict liability.

Today majority of Russian and Chinese scientists, hewing to position "instrument" and " agent" (Wu Handong, 2017; Mosechkin, 2019), consider that designer and user of AI agent should be liable for its actions, if a machine of weak AI is used for committing a deliberate crime, user should be found guilty due to personal guilt. Other scientists noted that despite the fact that machine of weak AI does not have capacity to commit deliberate crimes itself due to absence of full consciousness and individual capacity to identify and to control its actions in context of criminal libility, at the same time it is not equivalent to traditional technical instruments. Weak AI, having the capacity to deep learning, may use technology of "black box" for making corresponding decisions and consequently, it has certain individual characteristics, what will lead to individual "intellectual" differences of different AI units, which can be beyond intentions of designers (Li Zhengquan, 2019). In these cases criminal liability for crimes, committed by AI by negligence, demands introduction of the principle of relatively strict liability to explain classification of liability between AI creators, AI manufacturers, AI owners and AI users. As examples we can name cases of traffic accidents with autonomous cars: a) if the user of this car didn't participate in driving of this car, his liability is excluded and according to principle of relatively strict liability, the owner, manufacturer or programmer of autonomous car are liable for the accident. Nevertheless, mentioned case refers to the problem of responsibility for manufactured products, so corresponding parties should be solidarily liable; b) in case when user participated partially in driving of this car on autopilot mode, but he didn't take any effective and adequate measures to slowdown the car to prevent socially dangerous consequences, he should be solidarily liable for the accident jointly with owner, manufacturer and programmer. Concerned parties may exclude or define shares of liability according to their corresponding and reasonable arguments.

As to imputation of criminal liability for actions of strong AI units, as it was predicted by some scientists, strong AI has remarkable capacities to recognize and control its actions, consequently, it has corresponding criminal imputation, so criminal liability for committing a crime is followed according to the principle of fault-based liability. Although some scientists consider that appearance of strong AI may lead to the end of mankind (Hawking, http://www.sohu.com/a/137173188_609518), however, people's efforts to improve life by means of improvement of technology and science are not stopped, as efforts to improve laws for regulation of the development process of science and technology. In this context, "purpose of the legislator is not to establish definite order, but to create conditions when well-ordered structure can be built itself and be reconstructed permanently" (Friedrich von Hayek, 1997). We are sure that legislators have enough wisdom to restraint the development of strong AI in con-

text of protection of human rights, that is why the discussion of criminal liability towards AI strong units is not excessive.

It is possible to predict that in future the model of combination of human and AI will be permanent. When it comes to imputation of criminal liability in case of integration of a human and AI, we should form out three following consequences: firstly. In case when an AI unit is jointed to a human, but doesn't influence on his ability to recognize and to judge, so unit should be identified as additional instrument, belonging to a weak AI, for example, when using system of improvement of paramedical aid an individual bears criminal liability; secondly. In case when AI is combined with a human and it influences partially on his ability to recognize and to judge, an AI agent is theoretically still a weak AI, but its judgments on making decisions direct and influence on committing of a crime by a person, it is necessary to charge manufacturers, AI machine's engineers according to principle of relatively strict liability; thirdly. In case when AI is integrated with a human and it dominates, controls the ability of a person to recognize and to judge, this AI machines are theoretically strong, and they can bear criminal liability. In this case unit of a strong AI should be held directly liable in its own capacity according to principle of faulted-based liability and an individual should be released.

Conclusion

AI development has attracted attention of many countries and international organizations in the Era of big data. On the one hand, artificial intelligence has the capacity to analyze data, to learn and to execute hard work, which cannot be done by human; on the other hand, there exist some reasonable legal risks, related to it. It is obviously, that AI technology represents not only a direction of prospective technological development, but it is a driving force of prospective legal research. We should keep up with times and improve current legislation due to the development of AI technologies.

References

Kibal'nik, A.G., Volosyuk, P.V. (2018). Iskusstvennyj intellekt: voprosy ugolovno-pravovoj doktriny, ozhidayushchie otvetov [Artificial Intelligence: Pending Criminal Doctrine Questions]. In *Vestnik Nizhegorodskoj akademii MVD Rossii [Bulletin of the Nizhny Novgorod Academy of the Ministry of Internal Affairs of Russia]*, 4, 175–176.

SHestak, V.A., Voevoda, A.G. (2019). Sovremennye potrebnosti pravovogo obespecheniya iskusstvennogo intellekta: vzglyad iz Rossii [Current needs of the legal support of artificial intelligence: a view from Russia]. In *Vserossijskij kriminologicheskij zhurnal [All-Russian Criminological Journal]*, 13 (2), 197–200.

Vladimir Putin: V oblasti iskusstvennogo intellekta sohranyat' liderstvo prosto neobhodimo (2019). [Vladimir Putin: In the field of artificial intelligence, maintaining leadership is simply necessary]. Available at: https://www.ltv.ru/news/2019–11–10/375457-vladimir_putin_v_oblasti_iskusstvennogo_intellekta_sohranyat_liderstvo_prosto_neobhodimo (accessed 5 February 2020).

Doklad prem'er-ministra Li Kecyana o rabote pravitel'stva ot imeni Gosudarstvennogo soveta na pyatoj sessii Nacional'nogo sobraniya narodnyh predstavitelej 12-go sozyva (2017). [Report by Prime Minister Li Keqiang on the work of the government on behalf of the State Council at the fifth session of the National Assembly of People's Representatives of the 12th convocation]. In *ZHen'min' zhibao: Gazeta [People's Daily: Newspaper]*, 17 March.

Uvedomlenie Gosudarstvennogo soveta po pechati i rasprostraneniyu plana razvitiya iskusstvennogo intellekta novogo pokoleniya (2017). [Notification of the State Council for the Press and Dissemination of the Next Generation Artificial Intelligence Development Plan]. Available at: http://www.gov.cn/zhengce/content/2017–07/20/content_5211996.htm (accessed 9 January 2020).

Vystuplenie predsedatelya Soveta sudej RF V. V. Momotova na plenarnom zasedanii po teme "Perspektivy ispol'zovaniya iskusstvennogo intellekta v sudebnoj sisteme Rossijskoj Federacii", g. Katar. (2020). [Speech by the Chairman of the Council of Judges of the Russian Federation V. V. Momotov at the plenary

meeting on the topic "Prospects for the use of artificial intelligence in the judicial system of the Russian Federation", Qatar]. Available at: http://www.ssrf.ru/news/lienta-novostiei/36912 (accessed 5 May 2020).

Deng, Heng (2017). Ispol'zovanie tekhnologij iskusstvennogo intellekta i sudebnye innovacii [The use of artificial intelligence technology and judicial innovation]. In *Narodnyj sud: gazeta [People's Court: newspaper],* 14 December.

Sovmesnoe prodvizhnie sistemy «Iskusstvennyj intellekt+sud» IFLYTEK s Vysshimi narodnymi sudami v del'te reki YAnczy [IFLYTEK joint advanced AI + Court systems with the Higher People's Courts in the Yangtze River Delta]. Available at: http://www.ah.xinhuanet.com/2018–06/07/c_1122949446.htm (accessed 10 January 2020).

Yan, Jianqi (2018). Raskrytie «206»: Perspektiva iskusstvennogo intellekta v sisteme sudov - 164 dnya issledovanij i razrabotok vspomogatel'noj intellektual'noj sistemy v vozbuzhdenii ugolovnyh del v SHanhae [Disclosure "206": The Prospect for Artificial Intelligence in the Court System - 164 days of research and development of the auxiliary intellectual system in criminal proceedings in Shanghai]. In *Verhovenstvo prava narodov [Rule of law of peoples],* 2, 38–43.

Arhipov, V.V., Naumov, V.B. (2017). Iskusstvennyj intellekt i avtonomnye ustrojstva v kontekste prava: o razrabotke pervogo v Rossii zakona o robototekhnike [Iskusstvennyj intellekt i avtonomnye ustrojstva v kontekste prava: o razrabotke pervogo v Rossii zakona o robototekhnike]. In *Trudy SPIIRAN [Proceedings of SPIIRAS]*, 6, 46–62.

Ponkin, I.V., Red'kina, A.I. (2018). Iskusstvennyj intellekt s tochki zreniya prava [Artificial intelligence in terms of law]. In *Vestnik Rossijskogo universiteta druzhby narodov. Seriya: YUridicheskie nauki [Bulletin of the Peoples' Friendship University of Russia. Series: Law]*, 22 (1), 91–109.

Vasil'ev, A.A., SHpopper, Mataeva, M.H. (2018). Termin «Iskusstvennyj intellekt» v rossijskom prave: doktrinal'nyj analiz [The term "Artificial Intelligence" in Russian law: doctrinal analysis]. In *YUrlingvistika [Jurlinguistics]*, 7–8, 35–44.

Yu, Chengfeng (2018). «Smert'» zakonov: krizis yuridicheskoj funkcii v epohu iskusstvennogo intellekta [The "death" of laws: a crisis of legal function in the era of artificial intelligence]. In *Vestnik Vostochno-kitajskogo politiko-yuridicheskogo universiteta [Bulletin of East China Political and Law University],* 2, 5–20.

Li, Sheng (2018). Pravovaya transformaciya v kontekste iskusstvennogo intellekta [Legal Transformation in the Context of Artificial Intelligence]. In *Pravovoj obzor [Legal Review]*, 1, 98–107.

YAstrebov, O.A. (2017). Diskussiya o predposylkah dlya prisvoeniya robotam pravovogo statusa «elektronnyh lic» [Discussion on the prerequisites for assigning robots the legal status of "electronic persons"]. In *Voprosy pravovedeniya [Jurisprudence],* 1 (39), 189–202.

Wu, Xiyu (2018). Teoriya i praktika sudebnogo primeneniya II – o pravosub"ktnosti II [Theory and practice of the judicial application of AI – on the legal personality of AI]. In *Zhejiang social Sciences*, 6, 60–66.

SHestak, V.A., Volevodz, A.G. (2019). Sovremennye potrebnosti pravovogo obespecheniya iskusstvennogo intellekta: vzglyad iz Rossii [Current needs of the legal support of artificial intelligence: a view from Russia]. In *Vserossijskij kriminologicheskij zhurnal [All-Russian Criminological Journal],* 13 (2), 197–200.

CHurilov, A.YU. (2018). Pravovye osnovy otvetstvennosti za vred, prichinennyj pri ekspluatacii avtonomnogo avtomobilya [Legal basis for liability for damage caused by the operation of an autonomous car]. In *Legal Cocept=Pravovaya paradigm [Legal Cocept = Legal Paradigm],* 17 (4), 30–34.

Kibal'nik, A.G., Volosyuk, P.V. (2018). Iskusstvennyj intellekt: voprosy ugolovno-pravovoj doktriny, ozhidayushchie otvetov [Artificial Intelligence: Pending Criminal Doctrine Questions]. In *Vestnik Nizhegorodskoj akademii MVD Rossii [Bulletin of the Nizhny Novgorod Academy of the Ministry of Internal Affairs of Russia],* 4 (44), 175–176.

Mosechkin, I.N. (2019). Iskusstvennyj intellekt i ugolovnaya otvetstvennost': problemy stanovleniya novogo vida sub"ekta prestupleniya [Artificial intelligence and criminal liability: problems of the formation of a new type of subject of crime]. In *Vestnik Sankt-Peterburgskogo universiteta. Pravo [Bulletin of St. Petersburg University. Right],* 10 (3). 461–476.

Lin, Shaowei (2018). Vliyanie iskusstvennogo intellekta na korporativnoe pravo: problemy i otvety [The effect of artificial intelligence on corporate law: problems and answers*].* In *Vestnik Vostochno-*

kitajskogo politiko-yuridicheskogo universiteta [Bulletin of the East China Political and Law University], 3, 61–71.

Jiang, Bixin, Zheng, Lihua (2018). Internet, bol'shie dannye, iskusstvennyj intellekt i nauchnoe zakonotvorchestvo [Internet, Big Data, Artificial Intelligence and Scientific Lawmaking]. In *Pravovoj zhurnal [Law journal]*, 5. 1–7.

Wu, Yunfeng (2018). Primenenie ugolovnogo zakona na primere prestuplenij protiv sobstvennosti v epohu iskusstvennogo intellekta: dilemma i vyhod [The application of the criminal law as an example of crimes against property in the era of artificial intelligence: a dilemma and a way out]. In *YUrisprudenciya [Jurisprudence]*, 5, 165–180.

Liu, Xianquan (2018). Rekonstrukciya sistem ugolovnoj otvetstvennosti i nakazanij v epohu iskusstvennogo intellekta [Reconstruction of criminal liability and punishment systems in the era of artificial intelligence]. In *Politika i pravo [Politics and Law]*, 3, 89–99.

Liu, Xianquan (2018). Pervonachal'noe issledovanie rekonstrukcii sistem ugolovnoj otvetstvennosti i nakazanij v epohu iskusstvennogo intellekta [An initial study of the reconstruction of criminal liability and punishment systems in the era of artificial intelligence]. In *Zakonnost' i obshchestvo [Law and society]*, 3, 206–209.

Hisamova, Z.I., Begishev, I.R. (2019). Ugolovnaya otvetstvennost' i iskusstvennyj intellekt: teoreticheskie i prikladnye aspekty [Criminal liability and artificial intelligence: theoretical and applied aspects]. In *Vserossijskij kriminologicheskij zhurnal [All-Russian Criminological Journal]*, 13 (4), 564–574.

Zheng, Ge (2017). Iskusstvennyj intellekt i budushchee prava [Artificial Intelligence and the Future of Law]. In *CITIZEN AND LAW*, 12, 14–15.

Hariri, Y.N. (2017). *Homo Deus: A Brief History of Tomorrow*. New York, Harper Collins Publishers Inc., 318.

Pervyj v mire robot-samoubijca: samosozhzhenie robota-uborshchika iz-za ustalosti ot raboty (2018). [The world's first suicide robot: self-immolation of a cleaning robot due to work fatigue]. Available at: https://www.tanling.com/archives/1921.html (accessed 19 December 2019).

Yao, Wanqin (2019). Pravovye riski II v epohu bol'shih dannyh i ih predotvrashchenie [Legal risks of AI in the era of big data and their prevention]. In *Obshchestvennye nauki Vnutrennej Mongolii [Social Sciences of Inner Mongolia]*, 2, 87.

Kak sleduet razdelit' otvetstvennost' za chastye avarii, svyazannye s avariyami vozhdeniya? (2018). [How should responsibility for frequent accidents related to driving accidents be shared?]. Available at: http://www.sohu.com/a/232993198_455835 (accessed 10 January 2020).

Pervyj «sluchaj ubijstva robota» proizoshel na zavode Volkswagen v Germanii (2015). [The first "robot killing case" occurred at a Volkswagen factory in Germany]. Available at: http://news.mydrivers.com/1/437/437018.htm (accessed 10 January 2020).

Prestupniki s ispol'zovaniem bespilotnogo letatel'nogo apparata nashli cel' i sovershili ograblenie [Criminals using an unmanned aerial vehicle found a target and committed a robbery]. Available at: http://digi.163.com/14/0418/17/9Q4OQ6IQ00162OUT.html (accessed 10 January 2020).

Cukanova, E.YU., Skopenko, O.R. (2018). Pravovye aspekty otvetstvennosti za prichinenie vreda robotom s iskusstvennym intellektom [Legal Aspects of Responsibility for Causing Damage by an Artificial Intelligence Robot]. In *Matters of Russian and International Law*, 8 (2A), 42–48.

Policiya SHaosina raskryla pervyj sluchaj prestupleniya s ispol'zovaniem II (2017). [Shaoxing Police revealed the first AI crime case]. Available at: http://www.xinhuanet.com/local/2017–09/26/c_1121726167.htm (accessed 10 January 2020).

Informaciya o prestuplenii, svyazannom s iskusstvennym intellektom, vpervye raskryta: vasha lichnaya informaciya byla takim sposobom skomprometirovana [Artificial intelligence crime information first revealed: your personal information was compromised in this way]. Available at: http://www.sohu.com/a/202973604_65917 (accessed 10 January 2020).

Shi, Fang (2018). Otricanie ugolovnoj pravosub"ektnosti II [Denial of the criminal legal personality of AI]. In *YUridicheskaya nauka [Legal science]*, 6, 69.

Zhang, Mingkai (2009). Ugolovno-pravovoj analiz po delu Xu Ting [Criminal case analysis Xu Ting]. In *Kitajskoe i inostrannoe parvo [Chinese and foreign law]*, 1, 35.

Liu, Xianquan (2017*). Nachala ugolovnogo prava po finansovym prestupleniyam [The Beginnings of Criminal Law on Financial Crimes].* Shanghai, Shanghai people's publishing house, 509.

Zhao, Li (2015). Zakonodatel'stvo o kiberbezopasnosti dolzhno byt' perspektivnym [Cybersecurity law should be promising]. In *Fa-zhi-ri-bao*, 7 July.

Begishev, I.R., Hisamova, Z.I. (2018). Kriminologicheskie riski primeneniya iskusstvennogo intellekta [Criminological risks of using artificial intelligence]. In *Vserossijskij kriminologicheskij zhurnal [All-Russian Criminological Journal]*, 12 (6), 767–775.

Chen, Xingliang (2010). *Doktorial'noe ugolovnoe pravo [Doctoral criminal law]*, Beijing, China, People's University Publishing House, 130.

Xia, Chenting (2019). Issledovanie puti vmeneniya ugolovnoj otvetstvennosti v epohu iskusstvennogo intellekta [The study of the imputation of criminal liability in the era of artificial intelligence]. In *Pravovoe obshchestvo [Legal Society]*, 1, 48–52.

Liu, Honghua (2019). O pravovom statuse iskusstvennogo intellekta [On the legal status of artificial intelligence]. In *Politika i parvo [Politics and Law]*, 1, 16–20.

Jun, Feng (1996). *The theory of criminal responsibility*, Law Press China. 227.

Hao, Yanbing (2012). *Riskovoe ugolovnoe pravo: v centre vnimaniya prestupleniya s usechennym sostavom [Criminal Risk Law: The focus of a truncated crime]*, Beijing: China, Political and Law University Press, 66.

Lao, Dongyan (2014). Riskovoe obshchestvo i izmenchivaya ugolovno-pravovaya teoriya [Risk Society and Volatile Criminal Law Theory]. In *Kitajskoe i inostrannoe pravo [Chinese and Foreign Law]*, 1, 92–93.

Li, Lifeng (2009). *Study of Mens Rea in American criminal law.* Beijing: China, Publishing house of the Chinese political and law University. 658.

Ma, Changshan (2018). Social'nye riski II i ih pravovoe regulirovanie [Social risks of AI and their legal regulation]. In *YUridicheskaya nauka [Jurisprudence]*, 6, 49–52.

Wu, Handong (2017). Institucional'nye mekhanizmy i pravovoe regulirovanie v epohu iskusstvennogo intellekta [Institutional mechanisms and legal regulation in the era of artificial intelligence]. In *YUridicheskaya nauka [Jurisprudence]*, 5, 130–133.

Mosechkin, I.N. (2019). Iskusstvennyj intellekt i ugolovnaya otvetstvennost': problemy stanovleniya novogo vida sub"ekta prestupleniya [Artificial intelligence and criminal liability: problems of the formation of a new type of subject of crime]. In *Vestnik Sankt-Peterburgskogo universiteta. Pravo [Bulletin of St. Petersburg University. Right]*, 10 (3), 461–476.

Li, Zhengquan (2019). Teoriya yuridicheskoj otvetstvennosti v epohu iskusstvennogo intellekta – na primere intellektual'nyh robotov [The theory of legal responsibility in the era of artificial intelligence – the example of intelligent robots. In *Vestnik Dalyan'skogo politekhnicheskogo universiteta. Obshchestvennye nauki [Bulletin of the Dalian Polytechnic University. Social Sciences]*, 5, 82.

Guiding AI to Benefit humanity and the environment (2017). Available at: http://www.sohu.com/a/137173188_609518 (accessed 10 January 2020).

Hayek, F. von (1997). *The Constitution of Liberty.* Translate: Deng Zhenglai. Publishing house: Life reading New knowledge Sanlian joint bookstore. 201.

Journal of Siberian Federal University. Humanities & Social Sciences
2022 15(8): 1108–1117

DOI: 10.17516/1997-1370-0913
EDN: WCMUON
УДК 343.369

Bribery of an Arbitrator (Arbitral Referee): Criminal Characteristics

Maria A. Filatova* and Pavel S. Iani
Research and Educational Center "Criminal Law Expertise"
Lomonosov Moscow State University
Moscow, Russian Federation

Received 25.09.2021, received in revised form 27.02.2022, accepted 03.05.2022

Abstract. In 2020, Chapter 22 of the Criminal Code of the Russian Federation was amended by Article 200.7, stipulating liability of arbitrators (arbitral referees) for corruption-related crimes. Such a decision of the law-maker is differently weighed by criminalists, namely, given that the object under protection is referred to the sphere of economics. Although, the explanation of this approach is connected with the fact that the activities of arbitrators, though performed within the system of justice, meaningfully affects a complicated network of relations in the economic sphere.
The article thoroughly analyzes the proposals on criminalization of illicit activities of arbitrators both in Russia and on the international level and in foreign states, gives examples of relevant case-law of those countries where such norms are applied.
The authors elaborate a detailed criminal and legal characteristics of the analyzed deed, revealing the features of all its elements, including the rights and obligations violated by arbitrators which are enshrined in the blanket legislation (first and foremost, in the Federal Law "On Arbitration Tribunals in the Russian Federation"), evaluative features of elements of a crime, a moment of accomplishment of a crime, setting up a correspondence between the elements of a subject and legal provisions of sector specific legislation etc.
Based on the analysis of the case-law on related elements of a crime: bribes, commercial bribe, the article proposes solutions of the problems which will definitely occur in determination of a deed. In particular, given that an arbitration tribunal considers a dispute by three arbitrators, with every one of them participating in making an arbitration award, the authors point out, which exactly actions one arbitrator should perform as a subject of passive bribery and how an issue on determination will be solved if all three arbitrators are bribed.

Keywords: criminal liability, arbitrator, corruption-related crimes, bribery, arbitration award.

Research area: law.

* Corresponding author E-mail address: m_filatova@law.msu.ru

Citation: Filatova, M.A. and Iani, P.S. (2022). Bribery of an arbitrator (arbitral referee): criminal characteristics. J. Sib. Fed. Univ. Humanit. soc. sci., 15(8), 1108–1117. DOI: 10.17516/1997-1370-0913

Подкуп арбитра (третейского судьи): уголовно-правовая характеристика

М.А. Филатова, П.С. Яни
Научно-образовательный центр «Уголовно-правовая экспертиза»
Московский государственный университет имени М.В. Ломоносова
Российская Федерация, Москва

Аннотация. В 2020 г. глава 22 Уголовного кодекса РФ дополнена статьей, предусматривающей ответственность арбитров (третейских судей) за коррупционные преступления. Такое решение законодателя по-разному оценивается криминалистами, в том числе ввиду отнесения объекта охраны к сфере экономической деятельности. Однако объяснение такого подхода связано с тем, что деятельность арбитров хотя и осуществляется в системе правосудия, однако содержательно влияет на сложный комплекс отношений в области хозяйствования.
В статье подробно анализируются предложения о криминализации неправомерной деятельности третейских судей как в России, так и на международном уровне, в зарубежных странах, приводятся примеры из судебной практики тех стран, где существуют аналогичные нормы.
Авторы разрабатывают подробную уголовно-правовую характеристику анализируемого деяния, раскрывая признаки всех его элементов, в том числе нарушаемые арбитрами права и обязанности, закрепленные бланкетным законодательством (в первую очередь Федеральным законом «О третейских судах в Российской Федерации»), оценочные признаки состава, момент окончания преступления, установления соответствия признаков субъекта положениям отраслевого законодательства и др.
На основе анализа судебной практики по смежным составам преступления – взятки, коммерческого подкупа – предлагаются решения проблем, которые неизбежно возникнут при квалификации деяния. В частности, с учетом того, что дела в третейском суде рассматриваются тремя судьями, каждый из которых участвует в принятии решения, авторы указывают, какие именно действия должен совершать один арбитр как субъект пассивного подкупа и как будет решаться вопрос квалификации, если подкуплены все трое третейских судей.

Ключевые слова: уголовная ответственность, арбитр, коррупционные преступления, взяточничество, подкуп арбитра.

Научная специальность: 12.00.00 – юриспруденция.

Introduction. One of the most vivid indicators of the intention of a state to prevent any manifestations of corruption imply numerous changes in the legislation permanently extending the scope of criminal liability for illegal gratification of executive officers, persons discharging managerial functions in a profit-making organization and some other categories of persons

for performance (ommission) of actions in the course of exercise of their powers.

As testimony to the above trend those included:

- Supplementing a group of legal rules on liability for corrupt business practices and bribery (Articles 204, 290 and 291 of the Criminal Code of the Russian Federation) with articles on mediation in corrupt business practices and small-scale corrupt business practices, and on mediation in bribery and small-scale bribery (Articles 204.1, 204.2, 291.1 and 291.2 of the Criminal Code of the Russian Federation);
- Criminalization of bribery of a contract employee, contract executive manager, member of a procurement commission (Article 200.5 of the Criminal Code of the Russian Federation);
- Criminalization of bribery of an arbitrator (arbitral referee) (Article 200.7 of the Criminal Code of the Russian Federation).

Statement of the problem. The reforming has least of all touched upon Article 184 of the Criminal Code of the Russian Federation envisaging criminal liability for exerting influence on the results of professional sport competitions or entertainment profit-making contests. Over the last 25 years of history of this legal provision, it has been amended twice – to correct a title, to introduce a part on mediation and specify in a footnote conditions to discharge from responsibility.

Based on the records of the Judicial Department of the Supreme Court of the Russian Federation, data from legal reference systems and the Internet-based resource "Judicial and Normative Legal Acts of the Russian Federation (sudact.ru), it should be concluded that the above legal provision was absolutely deadborn – between 2012 and 2020 no person[1] was convicted under that legal provision, it was not possible to find earlier or later judgments either. Assuming that the findings of journalist investigations are true[2], the latency of crimes is absolute.

Before proceeding to the analysis of the criminal legal characteristics of bribery of an arbitrator (arbitral referee), one should uphold the conclusion on systematic shortcomings evincing in supplementing of the criminal law with the analyzed legal provision.

Thus, on evaluating a legislative decision to supplement the law with a legal provision on bribery of an arbitrator, A. V. Ivanchin pointed at:

– inconsistency of a law-maker in questions of inclusion of the elements of giving and taking of a bribe in a single article, as it was done in Articles 184, 204 and 200.5 of the Criminal Code of the Russian Federation as opposed to division into separate articles in respect to giving and taking of a bribe;

– similar incoherence in respect to the institute of mediation, because in certain elements it was singled out in a separate article (for example, Article 291.1 of the Criminal Code of the Russian Federation), in others – it was included in one of the parts of the article (for example, Article 184, Part 5 of the Criminal Code of the Russian Federation), in the new one – it was missing at all, whereupon the institute of accomplice should be used for criminal and legal evaluation of a relevant act;

– absence – once again in violation of logical supplement of the criminal law with legal rules on small-scale bribery and minor corrupt business practices – of liability for small-scale bribery of an arbitrator (Ivanchin, 2020).

A. N. Kameneva partially upholds the proposals to "single out" giving to and taking a bribe by an arbitrator likewise the appearance of a separate legal provision on mediation, on the whole positively evaluating the elements of crime introduced by the law-maker (Kameneva, 2021).

Although, the fact of imposition of criminal liability for arbitrators in the absence of law-based guarantees of their independence and security, which protect government judges, is evaluated controversially, because "there is no official data that the cases of receiving illegal gratifications by arbitrators occur widely (and especially in the "post-reform" period) while there are risks of ungrounded instigation of criminal cases against arbitrators in the

[1] Judicial Statistics on Corruption-Related Cases, Judicial Department at the Supreme Court of the Russian Federation. Available at: http://www.cdep.ru/index.php?id=150

[2] Tricking with Bets: "Leaks" of Rigged Matches – All Schemes and Disclosure. Details on the "Chempionat"]. available at: https://www.championat.com/bets/article-3719927-razvod-v-stavkah-na-sport-sliv-dogovornyh-matchej—-shemy-i-razoblachenie.html?utm_source=copypaste (in Rus.)

above described circumstances, and they are quite substantial" (Il'ichev, Savranskii, 2020).

It appears that such concerns should not prevent from execution of legislative initiatives on imposition of liability for these or those socially dangerous acts. Although, the question on criminalization of such acts is not expressly solved throughout the world.

For example, in the United Arab Emirates the effective criminal liability of arbitrators for taking a bribe enshrined in Article 257 of the Penal Code was excluded in 2018, obviously, due to unfavourable "arbitral climate" in the country in view of possible criminal liability of arbitral referees[3].

At the same time, in Great Britain, which is considered to be one of the most often chosen jurisdictions for dispute settlement, criminal liability of arbitrators is provided for widely enough – both by common rules (fraud[4], breach of confidence in relation to entrusted information, bribery), and special rules. However, only a few such cases are reported in the literature, therefore, it is difficult to find relevant practice, because the parties choose an arbitrator, based on his/her high moral and ethical personal features[5].

Criminal liability is envisaged in other countries too. Thus, in the Republic of Colombia and Federative Republic of Brazil arbitral referees, in the context of criminal legislation, are equated with government judges and, for example, Article 269 of the Penal Code of the Argentine Republic specifically states which parts of the article apply to, particularly, arbitrators[6].

Therefore, the legislation of foreign countries is not uniform in terms of criminalization of this deed, on the whole, and singling it out into a separate legal provision, in particular. Naturally, the countries which are interested in popularization of their jurisdictions chosen for arbitration agreements try to minimize criminal risks because they complicate the procedure of selection of arbitrators and formation of an arbitral panel (for example, the UAE). Although, those countries, where this institute is nevertheless widely used, on the contrary, strengthen the guarantees of honesty and impartiality of arbitrators, applying more criminal legal provisions to them (for example, Great Britain).

Corpus Delicti. By Article 200.7 "Bribery of an Arbitrator (Arbitral Referee)" the Criminal Code of the Russian Federation is supplemented with Federal Law No. 352-FZ dd. 27.10.2020 and, pursuant to the Explanatory Report[7] to the draft law, it resulted from execution of requirements of the Additional Protocol of 2003[8] to the Council of Europe Convention on Criminal Law Convention on Corruption of January 27, 1999[9]. In spite of the fact that the Protocol had been just signed, it was not however ratified by the Russian Federation within the third evaluation by the international organization GRECO (Group of States against Corruption) of fulfillment by Russia of provisions of the Convention, in the domestic legislation numerous recommendations were given, in particular, on criminalization of bribery of national and foreign arbitrators.

The content of the **object** of the analyzed deed became a matter of discussion, which some of participants ignored a circumstance that in the course of definition of this element of the act in question, one should take into account the provisions of the civil procedural law as a branch positively regulating relations,

[3] Criminal Liability of Arbitrators Repealed in the UAE. Available at: https://www.jdsupra.com/legalnews/criminal-liability-of-arbitrators-69719/ (accessed August 8, 2021).

[4] Thus, for example, one of the three arbitrators was charged with fraud committed by a group of persons in the case of Bernard Tapie for own actions in his favour as agreed with his lawyer. The Arbitrator's Liability Report (2017). In Le club de jurists, Ad hoc committee, Paris, 45.

[5] Le The Arbitrator's Liability Report (2017). In Le club de jurists, Ad hoc committee, Paris, 39, 114.

[6] Available at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000–19999/16546/texact.htm#25 (accessed August 8, 2021).

[7] Legislative Activities Support System, Draft law 931211–7 On Amendments to the Criminal Code of the Russian Federation and Article 151 of the Code of Criminal Procedure of the Russian Federation, available at: https://sozd.duma.gov.ru/bill/931211–7

[8] Presidential Decree 158-rp of March 16, 2009 On Signature of the Additional Protocol to the Criminal Law Convention on Corruption, In Collected Legislation of the Russian Federation, 12, Article 1419.

[9] Ratified by the Russian Federation in 2006. Federal Law 125-FZ of July 25, 2006 On Ratification of the Criminal Law Convention on Corruption, In Collected Legislation of the Russian Federation, 31 (1 part), Article 3424).

which were protected by application and threat of application of the commented criminal legal provision.

Thus, some authors point out that "inclusion of this article in Chapter 22 of the Criminal Code of the Russian Federation is not justified so far as the crime obviously infringe the interests of justice, and therefore the main direct object of the crime concerned could be defined as social relations ensuring the interests of lawful and just arbitration (arbitral) proceedings" (Esakov, 2021). Although, one should address, first and foremost, the legal nature of the institute of arbitrators in the Russian Federation in order to understand whether it can refer to infringement on justice in case of bribery of an arbitrator.

Articles 2 through 4 of the abovementioned Additional Protocol focus on active and passive bribery of domestic and foreign arbitrators (i.e., on giving and taking of a bribe). Here, an arbitrator shall be understood as a person by reference to the national law of the State Parties, but shall in any case include a person who by virtue of an arbitration agreement is called upon to render a legally binding decision in a dispute submitted to him/her by the parties to the agreement (Article 1, part 1 of the Additional Protocol). The above GRECO Report dated March 22, 2012, contained recommendations in point 69, and recommendation "ii" was directly dedicated to arbitrators[10]. At the same time, the first Report of the Russian Federation[11], adopted by GRECO on 16–20 June, 2014, the Russian representatives referred, first of all, to the draft Federal Law "On Introduction of Amendments to Legislative Acts of the Russian Federation for the purposes of strengthening of liability for corruption" elaborated by the Prosecutor General's Office of the Russian Federation, considered at an on-site meeting of the Committee of the State Duma on Security and Combating Corruption, and which was at that time "a matter of public discussion where it was proposed to supplement the Criminal Code of the Russian Federation with Article 202.2 (point 13 of the Report). It quoted the text of the draft law which was close to the existing version, although it offered to criminalize a proposal to take or promise to give money, securities and etc. to an arbitrator, and also an agreement of an arbitrator to take the above property assets.

In the same Report, Russia referred to the draft federal law which would supplement a note to Article 285 (abuse of official powers) of the Criminal Code of the Russian Federation with point 6 stating as follows: "6. For the purposes of application of Articles 290, 291, 291.1 and 304 of this Code, an official should be understood as an arbitrator (arbitral referee), considering a dispute in compliance with the legislation of the Russian Federation on arbitral tribunals and international commercial arbitration". It also specified that Article 290 of the Criminal Code of the Russian Federation would be supplemented with point 3, intended to state that "a crime envisaged by part 1 of that Article shall be considered to be committed by an arbitrator (arbitral referee) in case of taking by him/her personally or through a mediator of a bribe in the form of money, securities, other property or in the form of illegal provision of property-related services, illegal entitlement of other property rights for commission of actions (omission) in the interests of a giver or persons he/she presented within the framework of discharge of functions of an arbitrator (arbitral referee) in a particular case".

Considering the fact, that none of the draft laws at that time had been submitted to the State Duma, the recommendation was not accepted as being fulfilled. In 2016, the second Report on fulfillment of recommendations was issued[12], stating adopted and effective laws connected with organization of activities of arbitral tribunals aimed at creation of legal framework for criminalization of bribery of arbitrators (point 9 of the Report). Although, it specified that despite the previous position, the bribery of arbitrators would not be criminalized within the Chapter on Crimes against Civil Service, instead, Article 202 of the Criminal

[10] Evaluation Report on the Russian Federation Incriminations (ETS 173 and 191, GPC 2) (Theme I), available at: https://www.coe.int/en/web/greco/evaluations/russian-federation

[11] GRECO RC–III (2014) 1E, available at: https://www.coe.int/en/web/greco/evaluations/russian-federation

[12] GrecoRC 3(2016)9, available at: https://www.coe.int/en/web/greco/evaluations/russian-federation

Code "Abuse of authority by private notaries and auditors" and Article 204 of the Criminal Code "Bribery in a profit-making organization" would be expanded in view to spread their action to cover arbitrators (arbitral referees), including foreign ones. Such a draft law was indeed submitted to the State Duma[13], whereby GRECO admitted the recommendation to have been partially fulfilled. Although, the draft law was returned by the relevant committee of the State Duma to the subject of the right of legislative initiative to comply with the rules and provisions of the Constitution of the Russian Federation (Article 104) and Regulations of the State Duma of the Russian Federation (Article 105) dd. 23.05.2017.

In 2018 after sharing of additional information between the parties, the Annexes were elaborated to the Second Compliance Report[14], stating that on July 24, 2017 draft Federal Law No. 232807–7 "On Amendments to the Criminal Code of the Russian Federation" was registered to strengthen the liability for corruption", which further amended Articles 202 and 204 of the Criminal Code of the Russian Federation.

The draft law was excluded from consideration because it was revoked by the subject with the right of legislative initiative. At that, an official revocation of the Government of the Russian Federation published on November 25, 2017 stated that the Government did not uphold the draft law in the presented revision. In support of that two arguments were made. First, all above-considered draft laws contained as an addition of the subject matter (for all corruption-related crimes) with non-profitmaking services, which, according to the Government, could lead to complications connected with evaluation of the amount of gratification and problems in the law-enforcement practice.

Although, of the utmost interest is an argument based on the fact that the indication mentioned in the draft law on actions (omission) falling within the office duties of an arbitrator (arbitral referee), will lead to the formation of ambiguous law-enforcement practice due to the fact that office duties of these persons are not defined by the Federal Law "On Arbitration (Arbitral Tribunal) of the Russian Federation.

Finally, on March 26, 2020, Federal Law No. 931211–7 "On Amendments to the Criminal Law of the Russian Federation" and Article 151 of the Code of Criminal Procedure of the Russian Federation (with respect to imposition of liability of arbitrators (arbitral referees) for corruption)" was registered in the Russian State Duma. After its numerous discussions and technical modifications, on October 27, 2020, by Federal Law No. 352-FZ Article 200.7 of the Criminal Code was added to Chapter 22 "Crimes in the Sphere of Economics".

Pursuant to Article 31 of the Federal Law "On Arbitrators in the Russian Federation", the parties who have concluded an arbitration agreement shall assume responsibility to **voluntarily** execute an arbitral award. In professional literature, therefore, arbitral tribunals are denied to be referred to the bodies administering public justice.

The substantiation of that lies, first of all, in "significant differences in the reasons for origination of terms of reference of arbitrators and government judges, and also in procedures and legal results of arbitration proceedings" (Mezhdunarodnyi…, 2018). The key differences are indicated below, in particular:

- Imperative initiation of procedural form of government proceedings, at the same time when basically the parties participate in the arbitration;
- Absence of delegation of a public and procedural function for administration of justice by the government;
- Determination of the nature of an arbitration agreement as a private procedural agreement;
- Significant difference of the legal force of an arbitral award from acts of state courts.

Such an approach is quite widespread in the doctrine. Thus, it is rightfully to argue that arbitration proceedings is a private form of law-enforcement and arbitration tribunals are not included in the government system of justice

[13] Draft Law 3633–7 On Amendments to the Criminal Code of the Russian Federation and Code of Criminal Procedure of the Russian Federation for the Purposes of Strengthening of Liability for Corruption, registered on 11.10.2016, available at: https://sozd.duma.gov.ru/bill/3633–7

[14] GrecoRC 3(2018)5, available at: https://www.coe.int/en/web/greco/evaluations/russian-federation

which results from their legal nature (Iarkov, 2020), and also arbitration tribunals (arbitrages) are not included in the government judicial system and cannot administer justice which is a prerogative of government courts (Ruzakova, Gaifutdinova, (2018).

The Constitutional Court of the Russian Federation also highlighted that arbitration tribunals do not execute government (judicial) powers and are not included in the judicial system of the Russian Federation consisting of government courts[15]. Based on this postulate, the Constitutional Court confirmed that arbitration tribunals did not administer justice, which fell within the exclusive prerogative of state courts (Mezhdunarodnyi…, 2018).

In view of the above analysis, consistent attempts of criminalization of the discussed deed, it becomes evident that the law-maker does not also consider arbitrational tribunals to be referred to the system of justice because none of the draft laws has ever contained proposals to include this crime in Chapter 31 of the Criminal Code of the Russian Federation.

Moreover, the inclusion of bribery of an arbitrator into the system of crimes against justice should have led to introduction of amendments to Article 295 of the Criminal Code "Encroachment on the life of a person administering justice or engaged in a preliminary investigation", punishable, all the way to, by capital punishment (changed, at present time, for deprivation of liberty for life). Encroachment on the life of other participants of arbitration proceedings would happen to be equated to other crimes against justice. It appears that there are no grounds for such an expansion of the scope of provisions of Chapter 31 of the Criminal Code.

Thus, it can be argued that justice cannot be an object of the considered crime.

The immediate object of bribery of an arbitrator (arbitral referee) shall constitute public relations in the sphere of legitimate and impartial execution of functions of an arbitrator (arbitral referee) in compliance with the legislation on arbitration and arbitration agreement.

The subject-matter of bribery shall constitute money, securities, other property, and also property-related services, property rights. In view of understanding of these categories in the criminal law doctrine and law-enforcement practice, property-related services have a significantly wider interpretation rather than the services are understood in the civil law. The Supreme Court of the Russian Federation refers to such services, namely: provision of any property benefits, including discharge it from property-related obligations (for example, granting of a low-interest rate loan for its use, free of charge package tours, apartment renovation, construction of a summer home, transfer of property, in particular, of a motor vehicle, for its temporary operation, fulfillment of obligations to other persons). If the subject-matter of bribery constitutes "property-related rights, the person … awarded such an illegal award, shall have a possibility to take possession or dispose of someone else's property as his/her own, requires that the debtor shall discharge property-related obligations in his/her favour, generates revenues from usage of non-documentary securities or digital rights etc. The property given as a bribe or a subject-matter of commercial bribery, rendered property-related services or granted property-related rights shall have a monetary value based on the evidence provided by the parties, including, where applicable, in view of an expert opinion or expertise"[16].

The objective element of a crime consists either of illegal giving (Part 1 – Part 4) to an arbitrator (arbitral referee) of a bribe for commission of actions (omission), if they fall within the powers of an arbitrator or if they facilitate performance of the above actions (omission)

[15] Ruling 10-P of the Constitutional Court of the Russian Federation dd. 26.05.2011 "In the Case of Verification of Constitutionality of Provisions of Article 11, Point 1 of the Civil Code of the Russian Federation", Article 1, Point 2 of the Federal Law "On Arbitration Tribunals in the Russian Federation", Article 28 of the Federal Law "On Government Registration of Rights to Real Estate Property and Transactions Therewith", Article 33, Point 1 and Article 51 of the Federal Law "On Mortgage (Mortgage of Real Estate) in view of the request from the Higher Court of Arbitration of the Russian Federation". (2011), Sobranie zakonnodatelstva Rossiiskoi Federatsii [Collected Legislation of the Russian Federation], (23), 3356.

[16] Point 9 of Resolution 24 of the Plenum of the Supreme Court of the Russian Federation dd. 09.07.2013 "On Bribery and Other Corruption-Related Crimes Case Law".

due to his/her position; or illegal acceptance by an arbitrator (arbitral referee) of a bribe for performance of the above actions (omission) or facilitation of their performance.

The complicated issues of admittance of the discussed deed to be complete shall be solved in view of the position stated in the precedent-creating document of the higher court – Resolution 24 of the Plenum dd. 13.07 2013. Considering the above, the rules of definition of a bribe of an arbitrator as a completed deed shall consist of the following:

a crime shall be considered to have been completed if an arbitrator accepted at least a part of given valuables (for example, from the moment they were given personally to an arbitrator, placing them to an account he/she provided, "E-wallet"); at that, as a completed crime shall be determined taking and giving a bribe in case when, as previously agreed, a bribe-giver puts valuables into a pointed place, which an arbitrator has an access to, or receives an access after the valuables are placed in it;

if a bribe constitutes an illegal provision of property-related services, the crime shall be deemed to be complete from the beginning of performance of, when agreed by an arbitrator, actions directly aimed at deriving property-related benefits (for example, from the moment of destruction or return of a promissory note, transfer of property to another person towards performance of obligations of an arbitrator, conclusion of a loan agreement with deliberately low interest-rate for its use, from the beginning of renovation works at a deliberately low cost);

if an arbitrator intended to achieve a bribe on a considerable, large-or especially large scale, although, the illegal gratification he/she actually received, did not reach the above scale, the deed shall be determined as a completed crime, respectively, on a considerable, large-or especially large scale;

taking or giving of a bribe, if the above actions were performed in the conditions of operative and search activities, shall be determined as a completed crime, in particular, in case when the valuables were confiscated by law-enforcement authorities immediately after they had been taken by an arbitrator;

if, as agreed between an arbitrator and mediator, the money and other valuables received for transfer as a bribe, remain with the mediator, then illegal transfer and taking of a bribe shall be deemed to be complete from the moment of receipt of valuables by the mediator, whose actions are determined as complicity in commission of a crime envisaged by Article 200.7 of the Criminal Code of the Russian Federation;

a crime shall be deemed to be complete from the moment of taking of a bribe by at least one of the arbitrators included in a criminal group of arbitrators. Although, in case the organized criminal group acknowledges bribe-taking, the crime shall be deemed to be complete from the moment of taking of an illegal gratification by any of the group members.

In cases, when an arbitrator deceives a giver whether he/she obtains one or another powers (i.e., when in fact he/she cannot perform or facilitate performance of these actions (omissions), which he/she takes a bribe for), his/her actions shall be determined as fraud pursuant to Article 159 of the Criminal Code of the Russian Federation. The giver in such situations shall bear liability for attempted bribery.

A subject of the crime envisaged by Article 200.7, Parts 1 through 4 of the Criminal Code of the Russian Federation, is general, and by Parts 5 through 7 hereto, – special, that is an arbitrator (arbitral referee), which definition is given in Federal Law No. 382-FZ dd. 29.12.2015 "On Arbitration (Arbitral Proceedings) in the Russian Federation[17]. In compliance with Article 2, an arbitrator (arbitral referee) – is a natural person, chosen by the parties or selected (appointed) in accordance with the procedure agreed by the parties or established by the federal legislation for resolution of a dispute by the arbitration tribunal.

The researchers note, that the "parties of arbitrational proceedings are free to form its board and may agree, at their option, a procedure of selection (appointment) of an arbitrator or arbitrators. At the same time, there are conditions based on requirements of the

[17] Rossiiskaia Gazeta (2015) [Russian Newspaper], 297 (6868), available at: https://rg.ru/2015/12/31/arbitrazh-dok.html

public order, which limit the freedom of the parties in formation of a panel of arbitrators. In the Russian Federation, such requirements are defined in Article 11 of the Federal Law "On Arbitration" (Arbitral Proceedings) in the Russian Federation, Article 11 of the Law of the Russian Federation "On International Commercial Arbitration" (Kurochkin, 2017). One of the conditions stated in Article 11 of the Federal Law "On Arbitration" (Arbitral Proceedings) in the Russian Federation, addressed to an arbitrator settling a dispute sitting alone, is a requirement "to have a higher legal education, supported by the standard form diploma issued in the territory of the Russian Federation" (Article 11, Part 6, Para. 1). In view of the above, the question arises as to whether a person could be referred to a number of subjects of a deed stipulated by Article 200.7 of the Criminal Code of the Russian Federation, selected or appointed by the court (Article 11, Part 3, Para. 2), but who has no higher legal education, at that either knowingly for the parties appointed him/her, or concealed that and submitted a fake diploma?

For determination of official crimes, this question is solved by the highest judicial body the following way: "if a person appointed to a post in violation of requirements or limitations, established by law or other normative legal acts, to a candidate to this post (for example, in case of absence of a higher education diploma, required work experience, in case of criminal record and so on), out of mercenary or personal interest, used duties of office contrary to the interests of office or performed actions apparently beyond the scope of his/her powers, which led to significant violation of the rights and legal interests of citizens or organizations, or legally protected public or government interests, then such actions shall be determined accordingly as abuse of office or exceed authority"[18]. Such an approach may be used for determination under Article 200.7 of the Criminal Code.

Mens rea of a crime shall be characterized by direct intent both in case of illegal giving and illegal taking of a bribe.

Aggravated and highly aggravated elements of a crime for illegal giving of a bribe for a person performing an illegal transfer, described in Parts 2–4, shall constitute giving of a bribe:

- on a large scale (Part 2);
- group of persons by previous concert or organized criminal group, for knowingly unlawful actions (omission), on a large scale (Part 3);
- on a specially large scale (Part 4).

Apart from the above-mentioned, a defining element of association with extortion of a bribe shall be envisaged for a person taking a bribe.

A considerable scale shall constitute an amount exceeding twenty-five thousand roubles, a large scale – one hundred thousand roubles, especially large scale – one million roubles.

In view of the fact that the subject of taking of a bribe is special, the alleged defining element of a group of persons by previous concert (Article 200.7, Part 7, Para. "a" of the Criminal Code) shall be possible in case there are two accessories complying with the elements of a special subject. Such a situation may occur, for example, if the parties did not define a number of arbitrators for dispute resolution: as a general rule, in this case three arbitrators shall be appointed[19]. The parties may determine a number of arbitrators in their own discretion; therefore, there may be more than three persons. In this case, taking of a bribe shall be covered by a single intent for the purposes of commission of one-directional actions in favour of a giver. For example, when two or three arbitrators agree to make a deliberately false arbitration award in favour of one of the parties, having taken an illegal gratification for that.

As for the organized criminal group, to define a deed according to this element, it is sufficient for the group to have just one person in it who would have elements of a special subject.

[18] Point 6 of Resolution 19 of the Plenum of the Supreme Court of the Russian Federation dd. 16.10.2009 "On Abuse of Office and Exceed Authority Case Law".

[19] Article 10 of Federal Law 382-FZ "On Arbitration "Arbitral Proceedings" in the Russian Federation" dd. 29.12.2015, (Rev. on 27.12.2018, rev.edit.), Rossiiskaia Gazeta [Russian Newspaper], 297 (6868), available at: https://rg.ru/2015/12/31/arbitrazh-dok.html

Point 2 of the Notes to Article 200.7 of the Criminal Code of the Russian Federation contains an imperative provision to exempt from criminal liability a person who has illegally given a bribe, if he/she actively facilitated detection and (or) investigation of a crime and either in relation to him/ her a bribe was extorted or that person voluntarily reported a crime he/ she committed to a body empowered to instigate a criminal case.

At the same time, a perceived, to a certain extent, nature of that position is connected with evaluativity of such characteristics of facilitation of detection and (or) investigation of a crime, as active. "Active facilitation of detection and investigations of a crime, according to the highest judicial body, shall consist of performance by a person of actions aimed at exposure of persons involved in commission of the crime … detection of property given as a bribe or commercial bribe, and so on[20].

Conclusion

The criminal law was amended with a legal provision on liability for bribery of arbitrators owing to participation of Russia in international agreements fostering member-countries to fight against corruption manifestations in all possible spheres. The selection of Chapter 22 by the law-maker for inclusion of the analyzed article seems well-grounded because the Russian doctrine and relevant case-law do not acknowledge the system of arbitration tribunals as a part of the system of justice and arbitrators – as officials whilst their awards have a significant impact on a complicated network of economic relations.

For the purposes of generation of relevant case-law for application of Article 200.7 of the Criminal Code of the Russian Federation, it is acceptable to use explanations of the Supreme Court of the Russian Federation on determination of related elements of crimes – bribery and commercial bribe.

[20] Point 19 of Resolution 24 of the Plenum of the Supreme Court of the Russian Federation dd. 09.07.2013

References

Mezhdunarodnyi kommercheskii arbitrazh. (2018). Uchebnik [*International Commercial Arbitration*. Textbook] (2), St. Petersburg. Journal Staff "Treteiskii Sud"*,* [Arbitration Tribunal], Moscow, Statut (9).

Esakov, G.A. (2021). *Rossiiskoe ugolovnoe pravo. Osobennaia chast'.* Uchebnik *[Russian Criminal Law. Special Part.* Textbook*]*, Moscow, 229.

Iarkov, V.V. (ed.) (2020). Kommentarii k arbitrazhnomu protsessual'nomu kodeksu Rossiiskoi Federatsii (postateinyi), 4 [Commentary to the Code of Arbitration Procedure of the Russian Federation (article-by-article)], Moscow, available at: http://www.consultant.ru/

Il'ichev, P.A., Savranskii, M. Iu. (2020). O proektakh vvedenia ugolovnoi otvetstvennosti dlia arbitrov [On Projects of Introduction of Criminal Liability for Arbitrators]. In *Lex Russica*, 73 (9) (166), 160.

Ivanchin, A.V. (2020). Podkup arbitra (treteiskogo sud'i) (St. 200.7 UK RF): problemy sovershenstvovaniia zakona [Bribery of an Arbitrator (Arbitral Referee)] (Article 200.7 of the Criminal Code of the Russian Federation): Problems of Improvement of the Law]. In *Vestnik Iaroslavskogo gumanitarnogo universiteta im. P. G. Demidova* [Newsletter Yaroslavl State University of P. G. Demidov]. Seria gumanitarnye nauki [Series Humanities], 4(54), 44–49.

Kameneva, A.N. (2021). Sotsial'naia opasnost' i sotsial'naia obuslovlennost' kriminalizatsii podkupaarbitra (treteiskogo sud'i) [Social Danger and Social Dependence of Criminalization of a Bribery of an Arbitrator (Arbitral Referee)]. In *Probely v rossiiskom zakonodatel'stve [Gaps in the Russian Legislation]*, 14(1), 123–127.

Kurochkin, S.A. (2017). *Treteiskoe razbiratelstvo i mezhdunarodnyi kommercheskii arbitraz*h [*Arbitrational Proceedings and International Commercial Arbitration*], Moscow, Statut, 288.

Ruzakova O. A., Gaifutdinova R. Z. (2018). Postateinyi kommentarii k arbitrazhnomu protsessual'nomu kodeksu Rossiiskoi Federatsii [Article-by-Article Commentary to the Code of Arbitration Procedure of the Russian Federation]. In *Vestnik grazhdanskogo protsessa [Bulletin of Civil Proceedings]*, 4, 96–157.

Journal of Siberian Federal University. Humanities & Social Sciences
2022 15(8): 1118–1125

DOI: 10.17516/1997-1370-0914
EDN: XDRQJS
УДК 34

Genesis of Criminal Liability Formation for Crimes Against Women in Uzbekistan

Dilbar J. Suyunova*
Tashkent State University of Law
Tashkent, Republic of Uzbekistan

Received 21.03.2021, received in revised form 18.03.2022, accepted 13.05.2022

Abstract. The article analyzes liability for crimes against women under criminal legislation of the Republic of Uzbekistan, while assessment of Criminal Code rules in terms of identifying its distinctive features of legal regulation conditional to gender and family differences of subjects is provided for the first time. Expert study of criminal legislation related to crimes against women plays a facilitating role in identifying not only the real scope of criminal law rules, but also determine if there is a gap in the law, or legal regulation is insufficiently socially conditioned. Moreover, analysis of the genesis of criminal standards on responsibility for crimes against women made it possible to trace changes in the law in relation to such objects of criminal law protection as, for example, life, health, sexual freedom and sexual immunity, honor, and dignity of woman, interests of the family and its members. As a result, the paper makes some comparisons with the legislation of foreign countries in terms of criminal responsibility for crimes against women, presents practical recommendations for improving the criminal legislation of Uzbekistan.

Keywords: criminal legislation, subjects of criminal matters, crimes against women, life, the health of women, domestic violence, historical variability.

Research area: law.

Citation: Suyunova, D.J. (2022). Genesis of criminal liability formation for crimes against women in Uzbekistan. J. Sib. Fed. Univ. Humanit. soc. sci., 15(8), 1118–1125. DOI: 10.17516/1997-1370-0914

* Corresponding author E-mail address: d.suyunova@list.ru

Генезис формирования уголовной ответственности за преступления против женщин в Узбекистане

Д.Й. Суюнова
Государственный юридический университет Ташкента
Республика Узбекистан, Ташкент

Аннотация. В статье анализируется ответственность за преступления против женщин по уголовному законодательству Республики Узбекистан, при этом впервые дается оценка норм Уголовного кодекса с точки зрения выявления его отличительных особенностей правового регулирования, обусловленных гендерными и семейными различиями субъектов. Экспертное изучение уголовного законодательства, связанного с преступлениями против женщин, играет вспомогательную роль не только в выявлении реальной сферы применения уголовно-правовых норм, но и в определении того, есть ли в законе пробел или правовое регулирование недостаточно социально обусловлено. Более того, анализ генезиса уголовных норм об ответственности за преступления против женщин позволил проследить изменения в законодательстве в отношении таких объектов уголовно-правовой защиты, как, например, жизнь, здоровье, сексуальная свобода и сексуальная неприкосновенность, честь и достоинство женщины, интересы семьи и ее члены. В результате в статье приводятся некоторые сравнения с законодательством зарубежных стран.

Ключевые слова: уголовное законодательство, субъекты уголовных дел, преступления против женщин, жизнь и здоровье женщины, насилие в семье, историческая изменчивость.

Научная специальность: 12.00.00 – юриспруденция.

Introduction

The question of necessity to study criminal responsibility for crimes against women, subject to its specificity, did not arise immediately, since, unlike other branches of law such as labor law or family law, the criminal law is not a daily use one, and is applied only when committing socially dangerous acts (crimes), including against women. In addition, fundamental international legal documents, such as the Convention on the Elimination of All Forms of Discrimination against Women (1979), which Uzbekistan joined in 1995, have no reference to public relations, which are the subject of criminal law.

Thus, the Convention binds States parties over to take necessary measures to eliminate discrimination in political and public life, as well as education field, labor, and matrimonial relations, but it does not address the issues of preventing discrimination against women specifically in the sphere of criminal law. Merely article 6 of the Convention (International documents, 2007: 24) addresses the issue of crimes against women and establishes that "States parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of the prostitution of women". In addition, according to paragraph a) of the second part of article 11, the Convention prohibits, under threat of a sanction, dismissals from work based on pregnancy or maternity leave (International documents, 2007: 28).

Purpose and objectives of research Purpose and objectives of the research are to develop proposals and recommendations aimed at further improving criminal legislation regarding responsibility for crimes against women.

Objectives of the research. Research on formation and development of criminal legislation of Uzbekistan in terms of crimes against

women, research of elements of the crime that are committed against women, comparative analysis of some crimes against women in the Criminal Code of Uzbekistan and some foreign countries, the rationale for amendment of some articles of the Criminal Code of Uzbekistan where the victim is a woman, development of proposals for improvement of national criminal legislation in order to protect the rights and interests of women.

Research methods. As part of the research, general scientific and special methods of scientific knowledge were used: historical, systematic, comparative- legal, analytical, logical-legal, and others, which made it possible to a certain extent to ensure reliability and validity of the results of this research.

Research results. The paper makes a historical analysis of criminal legislation rules relating to crimes against women, provides a comparative review of some types of criminal liability for crimes against women in CIS and non-CIS countries, demonstrates the need to amend existing articles of the Criminal Code that calls for responsibility for crimes against women, proposes improving the criminal legislation of Uzbekistan, in terms of responsibility for crimes against women.

Assessment of rules of criminal legislation in terms of peculiarities of its legal regulation is conditional to gender differences of subjects and objects of elements of the crime. This analysis has shown that during a certain period of formation and development of independent Uzbekistan, rules of criminal legislation concerning liability for crimes against women have also changed. History of criminal legislation allows us to trace changes in public legal consciousness in relation to objects of criminal law protection, among which life, health, sexual freedom, honor, and dignity of women, interests of the family and its members can be indicated.

In ancient Uzbekistan (1884–1917), at the time of Sharia, attitude towards women was more than humiliating. Parents considered the girl as an "extra mouth" in the family, and from the moment of her birth, they thought about her "arrangement" and looked for a suitor for a one-year-old baby. Girl being in the cradle was the property of another person who bought her from her parents according to customary sale and purchases transaction – kalym (repurchase), which was illustrative of the slave position of women in society. The woman was bought and sold for money, no one regarded her opinion.

According to the rule of Sharia – "fear your husband after God" – a woman was the property of her husband, who derived full power over her, could punish for the slightest disobedience continuing until battery legal. Herewith, according to Sharia, the husband was not responsible for the abuse of his wife. A beaten and crippled woman could formally complain about her husband, but no one listened to her or supported her. The Kazi (judge) always took the side of her husband, since he received money from him, and besides himself, as a man, lived according to Sharia.

At the same time, the man had every right to marry again, since the Sharia allowed polygamy, while husbands used a whip against disobedient, obstinate wives since the Sharia enacted "strictness in treatment of wives".

Later (1917–1991) place of women changed, their emancipation took place and women began to take part in elections to local councils, while law codified their rights to labor, education, medical care, pensions, and others. The structure of the executive branch formed women's departments, which assisted women, took measures to provide them with work, and protected them from despotic husbands. It was during this period that Uzbekistan adopted the Marriage and Family Code, the Civil Code, the Criminal Code, and other legislative acts regulating the rights and freedoms of women, including their protection from criminal infringements.

What type of crimes against the person the crimes against women have relation to?

Criminal legislation of many countries places special emphasis on problems related to domestic violence. The Family Code of the Republic of Uzbekistan enshrines equality of women and men in family relations (Article 2) and emphasizes that "all citizens have equal rights in family relations" (Article 3), "spouses enjoy equal rights and bear equal responsibili-

ties" (Article 19). At the same time, established practice in applying the law still encounters cases of violation of these rights, which leads to domestic violence against women.

"Issue of domestic violence has long been taboo all over the world, and any attempts to develop and lobby a law on its adoption was perceived as a negative Western influence. Stereotypes reflected in the mentality of many nations justified the situation of violence, and it stopped perceiving as it is. Attitude towards it for the most part has become commonplace, natural. And it increasingly becomes a common type of offense that trenches upon the life, health, and dignity of women and children. According to statistics, most murders, inflictions of bodily harm of varying degrees of severity, beatings, and humiliations, coercion into early marriages, crimes for sexual reasons are committed in the family on domestic grounds". Today it is no coincidence that programs practicing targeted deterrent models to reduce various forms of violence (Abt 2019) (Morgan, Boxall, Dowling, Brown, 2020) have growing support abroad.

Domestic abuse issues today during the coronavirus pandemic become more pronounced. Many scientists around the world are discussing the danger of COVID-19 not only in terms of health, but also in terms of the atmosphere in the family when all its members are at home, and the likelihood of violence arises. As Katrin Kaukinen rightly noted, "Coronavirus pandemic will have an unprecedented impact on frequency and consequences of crime and violence around the world. This includes influencing the risk, consequences, and decision-making of women experiencing intimate partner violence". Recent article by Taub in the New York Times (Kaukinen, 2020) suggests, "travel restrictions intended to stop the spread of coronavirus could make domestic violence more frequent, more violent and dangerous".

The peculiarity of these crimes is that the weakest members of the family – women and children – become the target of violence. As well as the fact that most of these crimes have latent, i.e. insidious nature, when due to fear of husband (father) or due to family obligations, traditions, religious beliefs, material, and other dependencies, the victims do not report to the law enforcement agencies about acts of violence committing or committed against them (Legal Reform Program in Uzbekistan,2019: 33)

Many changes have taken place in Uzbekistan with the adoption of the Law of the Republic of Uzbekistan "On the Protection of Women from Oppression and Violence" on 17 August 2019, which aims to regulate relations in the field of protecting women from all forms of oppression and violence.

It is thought that the adoption of such important law on the protection of women's rights, their protection from violence, will contribute to the introduction of appropriate amendments to the Criminal Code of the following nature.

Section one of the Criminal Code provides for liability for crimes against the person, where, in case of intentional homicide (Part 2, Article 97), incitement to suicide (Article 103), inducement to suicide (Article 103), intentional grave bodily injury (Article 104), intentional moderate bodily injury (Article 105), intentional slight bodily injury (Article 109), torture (Article 110), the threat of homicide or violent use (Article 112), a victim of criminal acts is a person without gender determination, with the exception of "women are known to the perpetrator was pregnant" distinctive feature. In other words, most rules of criminal liability apply to both women and men.

Taking into consideration Uzbekistan's topical issues on the development of legislative frameworks for combating domestic violence, we presume to include a distinctive feature into indicated elements of the crime against a person that will provide for liability of "spouse or person in an extramarital relationship with perpetrator". It should be noted that similar liability is provided by the Criminal Code of France (in all crimes of intentional infringements of inviolability of the person, spouse or person in extramarital cohabitation with victim committed such a crime is brought to justice), and the Criminal Code of Belgium (Articles 398–405 – crimes of murder that are not qualified and of intentional harm to health, where the perpetrator committed such acts against his spouse or person with whom he cohabits or cohabited,

maintains or maintained long-term love and sexual relations).

The Turkish Criminal Code provides for liability for crimes against life committed against "wife, husband, brother, sister, adoptive parents, adopted son, adopted daughter, stepmother, stepfather, stepson, stepdaughter, father-in-law (both father of wife and father of husband), mother-in-law (both mother of wife and mother of husband), son-in-law or daughter-in-law" (Article 449).

Chapter 4 of the Criminal Code provides for liability for sexual assault and indecent assault. In order to protect women from criminal infringements, attention should be paid to two elements of crime in this chapter: assault (Article 118) and forcible satisfaction of sexual need in the unnatural form, forcible sodomy (Article 119).

Assault (forcible rape) is one of the most serious violent crimes against women. As evidenced by data of criminal statistics, Uzbekistan registered a rise in the number of assaults until 2014 inclusive; while in the period 2015–2019 figures in records for this crime began to decline. Indeed, if 2014 registered 635 assaults in the country, 2019 showed 204 similar crimes (State Statistics Committee of the Republic of Uzbekistan, 2019). Such dynamics can be explained both by large-scale crime prevention works carried out in the Republic of Uzbekistan and by the high latency of this crime due to the fact that many victims of assault do not apply to law enforcement agencies.

Analysis of criminal legislation on this type of crime has shown that historically assault has always been referred to as a serious crime, while the existence of aggravating circumstances was an especially serious crime.

According to edition 1959 of the Criminal Code, liability for simple and aggravated assault is punished by three up to seven years' imprisonment and by eight to fifteen years' imprisonment or by the death penalty (Criminal Code 1966: 32). In accordance with amendments to the Criminal Code introduced by Law in 2001, the current Criminal Code imposes punishment for assault with distinctive features from seven to ten years (part 2, article 118) and from ten to fifteen years (part 3, article 118), while assault of a person under the age of fourteen, punishment is imprisonment from fifteen to twenty years (part 4, article 118) (Criminal Code 2019: 85).

The objective aspect of assault according to edition 1959 of the Criminal Code consisted in sexual intercourse of a male person with a woman with the use of violence or threat of its use, as well as using helpless state of victim, i.e. with a direct indication of victim gender. In 1994, with the adoption of the new Criminal Code, the content of objective aspect of this crime has transformed, the legislator has determined that in case of assault, ф person of both female and male sex can be recognized as a victim. In addition, in the specified period, new article 119 was introduced in the Criminal Code, which provides for liability for forcible satisfaction of sexual necessity in unnatural form, sodomy, committed against the victim (without determining the sex).

Note that such notion of assault as a crime, the perpetrator of which, most commonly, is a man[1], and the victim is a woman, is considered traditional both for the doctrine of domestic criminal law and for the law enforcement practice. This circumstance plays important role in determining the objective aspect of this type of crime, since physiologically sexual intercourse in a natural form, although against the will of the person, with the use of violence and threats, is possible only against a woman.

Article 119 of the Criminal Code establishes liability for unnatural cases when actions of the perpetrator are of a violent nature and they infringe on sexual freedom of the person in unnatural form, whose gender does not matter for determining the objective aspect of a specified crime.

Thus, it can be stated that since liability for assault under Article 118 of the Criminal Code was established without taking into account the physiological characteristics of a person, and in order to protect the rights of women in determining objective aspect of the specified element of crime in this article, it is required to

[1] In practice, there are cases when a woman is recognized as a co-perpetrator of this crime, for example, if she, by using violence, helps to suppress resistance of victim. A woman can also be an accomplice in assault, such as helpmate or abbetor. For example, in 2013–2015, woman involved 21 assault cases.

specify the sex of the person in whose respect sexual intercourse was done with the use of violence, threats or through his helpless state. At the same time, it should be recognized that the existence of responsibility for assault (Article 118) in the modern Criminal Code and forcible satisfaction of sexual needs in an unnatural form, sodomy (Article 119), testifies the justice in the sense of equal criminal law protection of sexual freedom and sexual inviolability as for women and men. Thus, equality has been established in the protection of mentioned individual rights in the event of infringement on sexual freedom.

Women as an objects of crimes against family, youth, and morality

In terms of analyzing crimes against women, we can consider criminal liability for polygamy (Article 126 of the Criminal Code). It should be noted that the Criminal Code of Uzbekistan in 1959 defined "bigamy or polygamy" as cohabitation with two or more women based on a common household (Criminal Code of the Uzbek SSR, 1966: 43), since then this element of the crime has not undergone any special changes, the word "bigamy" is excluded from the name and disposition of specified content of the current Criminal Code.

Main feature of the objective aspect of this crime is cohabitation with two or more women based on a common household. It seems that these actions, defined by the legislator as "polygamy," go beyond the latter, since "polygamy" word means "being in an official marriage with several wives at the same time," while "cohabitation is only life as a couple, living, sexual relationship between man and woman" (Ozhegov, 2014: 587), without the official conclusion of a marriage.

This gives reason to assume that the legislator did not specify under what circumstances actions of the guilty party are recognized as criminal: when a guilty person is in an official marriage relationship with two or more women, or when the guilty party lives together (is in sexual relationships) with two or more women.

It seems that since, according to Article 16 of the Family Code of the Republic of Uzbekistan, marriage is not allowed between persons when at least one is already in another registered marriage, criminal liability is established not for polygamy (based on the context of this word), but for cohabitation – joint living with two or more women without formal marriage.

Similar disposition of criminal liability for cohabitation with two or more women can be found in the Criminal Codes of Tajikistan and Kyrgyzstan, at the same time, for example, the Criminal Code of Switzerland establishes liability specifically for polygamy: "those who conclude marriage being already married, who concludes marriage with a married person" (Article 215) is subject to criminal liability, while in Japan, Great Britain and Norway, polygamy, meaning as officially concluded several marriages, is also a criminal offense.

According to the Criminal Code of Poland, those who conclude a marriage, despite the fact that they are already in a marriage union, are prosecuted (Article 206), Article 192 of the Criminal Code of Austria stipulates liability for polygamy, i.e. to someone "who concludes new marriage while already in marriage, or concludes marriage with a married person".

At the same time, criminal legislation of Azerbaijan, Kazakhstan, the Russian Federation, Latvia does not contain criminal liability for polygamy at all.

In the process of studying crimes against women, the particular interest aroused criminal liability for the maintenance of the house of prostitution (Article 131 of the Criminal Code).

It should be noted that edition 1959 of the Criminal Code of Uzbekistan did not contain liability for indicated criminal acts, this article was introduced into the Criminal Code in 1999 and consisted of two parts, the first of which says that "Organization or maintenance of house of prostitution, as well as procuration motivated by money or other base motives", second part established distinctive features of this crime in the form of involving juvenile, repetition, dangerous recidivist or person who had previously committed crimes related to human trafficking or kidnapping (Criminal Code of the Uzbek SSR, 1999: 76).

Analysis of criminal legislation of foreign countries shows that the concept of

procuration includes prostitution, pimping, engaging in prostitution, etc. For example, the French Criminal Code's section "On procuration and identical criminal acts" determined that "A procuration is an act committed by any person in whatever form, expressed in:

1. Assisting, facilitating, or encouraging prostitution of another person;

2. Capitalizing on the prostitution of another person, participating in the distribution of income from this activity, or receiving payments from the person who systematically engages in prostitution;

3. Involvement in prostitution, seduction or hiring for prostitution, or pressure on the person to force him to engage in prostitution or continue to do so" (Article 225^{5}).

The Code determined distinctive features of this crime: making it easier for a pimp to legalize fictitious sources of his income, actions committed against the juvenile, by the ascendant, etc. (Articles 225^{6}–225^{12} of the Criminal Code of France).

The Turkish Criminal Code contains "Incitement to prostitution", the independent chapter three, which defines the liability of the person who seduces and abets to prostitution a teenager under the age of 15 years, and creates conditions for this if the act of seduction was committed by one of the close relatives in ascendant, from among brothers or sisters, by an adoptive parent, guardian or curator, teacher or tutor, servants or other persons under whose supervision the adolescent has been placed, and if a girl or woman who has reached the age of 21 is incited to prostitution by her husband, a close ascendant relative, brothers or sisters, etc. (Articles 420–426).

The Austrian Criminal Code's "Crimes against morality" section, establishes liability for procuring (§ 213), facilitation of sexual abuse of others for money (§ 214), assistance in professional prostitution (§ 215), pimping (§ 216). At the same time, for procuring, the one "who inclines a person to sexual abuse with another person with whom he is in relationship specified in § 212 (having parental rights), in the presence of prerequisites provided there, or inclines to sexual cohabitation", is subject to criminal liability.

Conclusion

So, concluding the article, we come to the following conclusions:

– the issue of criminal liability for crimes against women in historical development was regulated by the legislation of Uzbekistan, while some elements of crime of forced nature did not determine the gender of victim and criminal violence against women remained without due attention;

– the current domestic legislation on crimes against women needs to be reformed; it is necessary to carefully review the elements of crimes where the victim is a woman;

– the rules of criminal law in terms of identifying features of legal regulation conditional with gender and family differences of subjects are subject to careful analysis since the content of criminal law rules is not sufficiently socially conditioned.

It should be summarized that since the criminal legislation is the finalizing element in the legal system of the state, it must contain all the grounds for the occurrence of the most severe type of legal liability – the criminal liability for crimes against women.

References

Dagel, P.S. (1975). Conditions for establishing criminal liability. In *Legal studies*, (4), 70.

International documents (2007). Gender Equality Regulatory Documents. part 2. In *Law journal,* (17), 28.

Gosudarstvennyi Komitet po statistike Respubliki Uzbekistan [State Statistics Committee of the Republic of Uzbekistan]. (2019) available at: https://stat.uz/ru/164-ofytsyalnaia-statystyka-ru/6575-prestupnost2

Kaukinen, K. (2020). When stay-at-home orders leave victims unsafe at home: Exploring the risk and consequences of intimate partner violence during the COVID-19 pandemic. In *American Journal of Criminal Justice,* 45**,** 668–679. available at: https://doi.org/10.1007/s12103–020–09533–5

Lebedev, V.M., (2013). Kommentarii k Ugolovnomu Kodeksu Rossiiskoi Federatsii [Commentary on the Criminal Code of the Russian Federation], Moskow, Urait, 285.

Morgan, A., Boxall, H., Dowling, C., & Brown, R. (2020). Policing repeat domestic violence: Would focused deterrence work in Australia. In *Australian Institute of Criminology***,** 593, available at: https://www.aic.gov.au/publications/tandi/tandi593

Naumov, A.V. (1996). Ugolovnoe pravo. Obshchaia chast'. Kurs lektsii [Criminal law. General part. Lecture course]. Moskow, 48–56

Ozhegov, S.I., edited by prof. L. I. Skvortsova. (2014). In *Slovar russkogo yazika [Definition dictionary of the Russian language].*– (28). Moskow, 587.

Postanovleniia Plenuma Verkhovnogo Suda Respubliki Uzbekistan [Collection of Resolutions of Plenums of the Supreme Court of the Republic of Uzbekistan], Tashkent, Adolat**,** (2014), 375.

Regulatory legal documents on gender equality. Part 2: International documents. Law journal. № 17. 2007. 24.

Shcherbakova, L.M. (2006). Gendernye aspekty individualizatsii nakazaniia za nasil'stvennye prestupleniia [Gender aspects of individualization of punishment for violent crimes]. In *Bulleten Stavropol'skogo gosudarstvennogo universiteta [Stavropol State University Bulletin],* 44. 186.

Taub, A. (2020). New Covid-19 crisis: domestic abuse rises worldwide. In *New York Times*. available at: https://www.nytimes.com/2020/04/06/world/coronavirus-domestic-violence.html.

Ugolovnyi Kodeks Uzbekskoy SSR. (1966). [The Criminal Code of the Uzbek SSR]. Uzbekistan. 48.

Ugolovnyi Kodeks Uzbekskoy SSR. (1988). [The Criminal Code of the Uzbek SSR]. Uzbekistan. 75.

Ugolovnyi Kodeks Respubliki Uzbekskistan. (2019). [The Criminal Code of the Republik of Uzbekistan]. Uzbekistan. 89.

Voronina, O.A. (2013). Politika gendernogo ravenstva v sovremennoi Rossii: problemy i protivorechiia [Gender Equality Policy in Modern Russia: Problems and Contradictions]. Moskow, available at: https://womaninrussiansociety.ru/wp-content/uploads/2013/11/voronina.pdf

available at: https://www.twirpx.com/file/1067174/ (accessed 5 November 2019).

available at: http://law.edu.ru/norm/norm.asp?normID=1242430&subID (accessed 12 Desember 2019).

available at: https://www.studmed.ru/science/yuridicheskie (accessed 1 February 2021).

available at: discipliny/ugolovnoe-pravo/foreign/codes/(accessed 5 February 2021).

available at: http://continent-online.com/Document/?doc_id=30397325(accessed 25 Desember 2019).

Journal of Siberian Federal University. Humanities & Social Sciences
2022 15(8): 1126–1133

DOI: 10.17516/1997-1370-0915
EDN: XKJBDS
УДК 343.814:340.132.83(47+57)

Optimal Model of Public Control in the Penitentiary System of Modern Russia

Pavel V. Teplyashin*[a] and Ivan V. Teplyashin[b]
[a]*Siberian Law Institute of the Ministry of Internal Affairs of Russia*
Krasnoyarsk, Russian Federation
[b]*Siberian Federal University*
Krasnoyarsk, Russian Federation

Received 11.02.2021, received in revised form 27.02.2021, accepted 13.05.2022

Abstract. In the modern period of development of administrative mechanisms in the penitentiary system, a special place is occupied by the nature and role of the public presence, the institution of public control, which is the subject of this article. Revealing the topic through the significance and strategic necessity of social influence on the legal, organizational, managerial, informational and ideological parameters of the penal mechanism, the authors proclaim the purpose of the study in the form of substantiating the optimal model of the institution of public control in the penitentiary system.

In the methodological aspect, the material is supported by the authentic views of researchers on the nature and main models of civil society participation in the control of the penitentiary system. It is shown that the proper functioning and effectiveness of public control in the area under consideration depends on the level of mutual coordination of the system of legal means, forms, procedures for the activities of public observers, experts, observation groups and commissions.

The conclusion states that the redemption of convicts can be achieved only in the conditions of real presence of public structures in given area of government administration, broad implementation of the aspirations and recommendations of specialized monitoring commissions. The author notes the features and prospects for the development of the most optimal model of public control in the penitentiary system with active interaction between society and the state. The proposed partnership model is a promising and practice-oriented direction for the development of the modern penitentiary system in Russia.

Among the various models of public control in the penitentiary system, precisely the partnership one can serve as the basis for the development and implementation of a legal policy of public influence on the sphere of execution of criminal sentences.

A number of novels are proposed, as conclusions, among which is the creation of a central union (association) of public structures exercising public control in the penitentiary sphere. The need to develop a legal standard that fixes the main attributes and technology

* Corresponding author E-mail address: pavlushat@mail.ru
ORCID: 0000-0002-6737-749X (Pavel Teplyashin); 0000-0001-7849-6059 (Ivan Teplyashin)

of informing all interested parties about the activities of public oversight commissions is substantiated.

Keywords: civil society, public control, partnership model, convicted, penitentiary system; human rights.

Research area: law.

Citation: Teplyashin, P.V., Teplyashin, I. V. (2022) Optimal model of public control in the penitentiary system of modern Russia. J. Sib. Fed. Univ. Humanit. soc. sci., 15(8), 1126–1133. DOI: 10.17516/1997-1370-0915

Оптимальная модель общественного контроля в пенитенциарной системе современной России

П.В. Тепляшин[а], И.В. Тепляшин[б]
[а]Сибирский юридический институт МВД России
Российская Федерация, Красноярск
[б]Сибирский федеральный университет
Российская Федерация, Красноярск

Аннотация. В современный период развития управленческих механизмов в пенитенциарной системе особое место занимают характер и роль общественного присутствия, институт общественного контроля, что выступает предметом исследования настоящей статьи. Раскрывая тему через значимость и стратегическую необходимость общественного воздействия на правовые, организационно-управленческие, информационно-идеологические параметры уголовно-исполнительного механизма, авторы излагают цель исследования в виде обоснования оптимальной модели института общественного контроля в пенитенциарной системе.

В методологическом аспекте материал подкрепляется аутентичными взглядами исследователей на природу и основные модели участия гражданского общества в вопросах контроля в отношении пенитенциарной системы. Показано, что должное функционирование и результативность общественного контроля в рассматриваемой сфере зависят от уровня взаимной координации системы правовых средств, форм, порядка деятельности общественных наблюдателей, экспертов, наблюдательных групп и комиссий.

В заключение указывается, что исправления осужденных можно достичь только в условиях реального присутствия общественных структур в данной области государственного управления, широкой реализации устремлений и рекомендаций специализированных наблюдательных комиссий. Отмечаются особенности и перспективы развития наиболее оптимальной модели общественного контроля в пенитенциарной системе при активном взаимодействии общества и государства. Предложенная модель – партнерская – выступает перспективным и практико-ориентированным направлением развития современной пенитенциарной системы России.

Среди различных моделей общественного контроля в уголовно-исполнительной системе именно партнерская может выступить основой для разработки и претворения

в жизнь правовой политики общественного воздействия на сферу исполнения уголовных наказаний.
В качестве выводов предлагается ряд новелл, среди которых создание центрального союза (ассоциации) общественных структур, осуществляющих общественный контроль в пенитенциарной сфере. Обосновывается потребность разработки правового стандарта, закрепляющего основные атрибуты и технологию информирования всех заинтересованных субъектов о деятельности общественных наблюдательных комиссий.

Ключевые слова: гражданское общество, общественный контроль, партнерская модель, осужденный, пенитенциарная система, права человека.

Научная специальность: 12.00.00 – юридические науки.

Introduction

Currently, the trend of reforming the penitentiary system of the Russian Federation is associated with the idea of optimizing its utilitarian properties, determining the balance of social and legal impact on a person, strengthening the social component in the mechanism of redemptive action on a convicted person. The phenomenon of interconnection of such continuums as society, criminal punishment and the functioning of a correctional institution presupposes the presence of a certain significant for the society role of the tandem – the creation, on the one hand, of a stereotype of social solidarity, justice and cohesion, and on the other, ensuring public safety and order. This role is performed artificially and this presupposes compulsory social and legal impact on the penitentiary sphere.

The relevance of the topic is due to the need to modernize the mechanisms for guaranteeing human rights, preserve and develop human potential, establish social indicators of legality and legal stability.

Objective- determination of the optimal model of social influence on the penitentiary system of modern Russia, that takes into account the socio-legal, ethical, cultural principles and forms of harmonious development of the individual and society.

One can note the results of special studies that the process of implementing criminal punishment is illusory and inherently violent, therefore penitentiary institutions are not able to contain the tension and contradictions that they personify, and are constantly "in crisis" (Carvalho&Chamberlen, 2017; Lesnikov, Ulezko&Klochkova, 2020).

In the legal field of modern Russia, the penitentiary system is a priority and requires close attention from the legislator, law enforcement officer and legal science. In turn, the mechanism for improving the internal segment of the penal system requires an alternative influence from public structures, which must be transformed into an appropriate legal model. So, the legal model is a system of principles, norms, requirements adopted by a specific professional community, which implements the technology of legal impact on the corresponding object (sphere) in order to solve a number of interrelated public tasks. The legal model is organizationally stable, sustainable, which, in turn, reflects the relevant views and ideas that meet objective reality, progressive principles of social development.

Historical aspect of public control in the penitentiary system

The penitentiary system and its specific historical model at different times acts as the most dynamic and capacious management phenomenon, demonstrating the legitimacy and quality of such values as human rights, humaneness, democracy, mutual responsibility of society and the state, solidarity of ideas.

For example, in the pre-revolutionary period of the development of the penitentiary system (from the beginning of the XIXth century), the participation of public structures in the work of the prison and exile-hard labor system, the re-

education of convicts was characterized by public paternalism and wide donations (Romashov & Bryleva, 2019: 833–834), the detachment of the elite and the middle class from solving relevant issues and problems in the presented area.

In the Soviet period, the practice of public participation in the implementation of corrective labor policy followed the path of direct participation of public collectives in the work of corrective labor institutions, supervisory commissions, boards of trustees were created, a mechanism for patronizing the colony was formed by enterprises, collective farm and production links, Soviets of Working People's Deputies, Komsomol and trade union organizations. But this form of public presence was predominantly ideological in nature, was in the mainstream of socialist relations and the construction of a nationwide state, and did not always achieve the desired results in the real re-education of convicts.

If we talk about the 90s of the XX century, we can observe the general tendencies of state-legal relations: a high level of corruption, detachment of society from solving many issues of a public nature, disunity of opinions and interests, legal nihilism and passivity, lack of mutual trust of society and state (Teplyashin, 2011: 530–531). Criminal and correctional legislation during this period was still based on Soviet nominations and established practice, however, in fact, it did not allow maintaining public patronage in its previous form and seeking mechanisms for the influence of public structures on the penitentiary system.

Discussion

In the modern period, the organizational, legal, informational, cultural and value aspects of the participation of civil society in management relations, combating corruption, monitoring the activities of authorities are the subject of research both by Russian and foreign experts. (Mikheev, Dudko & Mikheeva, 2015; Norboev, 2020) Public presence in the penal sphere by citizens and public associations is carried out mainly in the form of public control. In theory and practice, public control is understood as the activities of non-state structures carried out in order to monitor the work of state authorities and local self-government bodies, state and municipal organizations and institutions, as well as for the purpose of public verification, analysis and assessment of their issued acts and decisions.

The legislative consolidation of this form of social influence on the activities of state bodies carrying out the forced detention of persons in places of detention was formalized in 2008 in the federal law No. 76-FZ "On public control over the provision of human rights in places of detention and on assistance to persons in places of detention ". Subsequently, the foundations of the mechanism of public control were unified by the legislator in 2014 as a result of the adoption of federal law No. 212-FZ "On the foundations of public control in the Russian Federation".

Reflecting the aforementioned legal acts, the main forms of public control over ensuring human rights in places of detention are: observation; general inspection of the activities of places of detention; targeted control checks on individual messages, appeals, complaints; legal expertise; monitoring of adopted local legal acts.

It is worth noting that non-state structures, their individual active links, are somehow interested in organizing a stable law and order and legality in the penal sphere, and in the proper re-education of convicts. At the same time, the professional nature of management relations and the need to take into account the specifics of the proposed form of public presence affect the choice of means, forms, directions of influence on a given object of public control. In this regard, the features of public activity in the national penitentiary system are:

1) the presence of deep and ambiguous historical foundations and practice of integrating the penitentiary system into the social sphere, social processes.

2) significant social capacity of the presented object of public control. So, as of July 1, 2020, 499 406 people were kept in the institutions of the penal system, including 104 507 detainees, which forms a dense communicative social space.

3) a fairly stable social contact and the presence of a "feedback" between the subject

and the object of control, which is due to the peculiarities of the long-term static legal status of participants in activities related to the identification of violations in the penitentiary system.

Models of public control in the penal system

In the context of an active discussion of a local model of public-private partnership in the penitentiary system (Skiba, 2019: 78–79; Kozin et al., 2019: 259), the relevance and prospects of a corresponding modernization of public control are increasing. It seems that such modernization can be carried out along the path of "sectoral" specialization of public control, the formation of a high level of legal culture and legal awareness of its active participants. Of no small importance are such aspects of the study of the model behavior of public structures in the penitentiary system, such as: the establishment of real criteria for the effectiveness of public activities, the consolidation of legal practice, monitoring of regional experience, the technique of identifying and eliminating shortcomings and gaps, as well as the systematic use of digital technologies. In this regard, the practical implementation of theoretical views and proposals is due to a long period of reforming the national judicial and penal systems.

When modeling the institution of public control, one should recognize the spatio-temporal variability of this public law institution. Within the boundaries of public administration in the penal sphere, specific approaches that establish an appropriate species range of models of public control can be determined.

So, depending on the object of observation, the model of public control can be: static and dynamic; depending on the chosen and implemented methods and means: non-democratic and democratic; from the level of formation: international and national. In turn, the national model can be divided into: a) an external model implemented at the central and regional levels through the creation and operation of public councils under the Federal Penitentiary Service; b) an internal model, which is implemented through the formation and activities of public oversight commissions.

The most representative criterion is the goal of exercising public control and the completeness of the results obtained, depending on which the chamber, detailed and progressive model is determined.

The chamber model is formed during the implementation of public control, which is aimed at checking and diagnosing the state of human rights in the penitentiary system, its legal status, as well as in order to bring to the public information about the violations identified both by specific officials and the system as a whole.

The detailed model is aimed at establishing objective and real facts of corruption in the penal system, determining the specifics and characteristics of the work of specific penitentiary institutions. This model contributes to the creation of a national map of tension in the field of observance of the rights of convicts, the development of recommendations and proposals from public professional groups aimed at improving the penitentiary educational mechanism.

A progressive model is able to identify complex problems and shortcomings in the functioning of the penitentiary system, determine its deformation, and also establish latent offenses in this area. The model provides for the formation of a holistic and systemic worldview of persons exercising public control in this area, as well as a mechanism for predicting the dynamics of the implementation of civil initiatives.

It is extremely important to pay attention to the nature of the rights and freedoms of convicted persons and, at the same time, to the legal status of public figures exercising public control. The following models are distinguished here: imperative, local, liberal, coordination, partnership.

The imperative model is based on the principle of priority of public funds and methods in matters of public participation in the operation of the object of control. In this model, the rights and interests of persons in places of imprisonment and other forms of isolation are considered in the context of labor and produc-

tion resources, the material condition of correctional institutions, and their possibilities in state construction. At the same time, the social and legal status of a public figure to a greater extent depends on his place in the management hierarchy, where the state of his real interests and aspirations in public verification is practically leveled. The presented model operated during the socialist period of the development of the national penitentiary system.

The local model is characterized by the selectiveness of the object of control, a truncated set of means and forms of social influence. In this case, the consistency and scale of the implementation of the institution of public control are lost. The presented model was characteristic of the period of the 90s of XXth century, as well as the 2000s. During this period, the first forms and technologies of interaction between public structures and the state apparatus were launched. The local model ensured the rehearsal nature of individual links in the mechanism of public control, made it possible to establish the most acceptable forms and methods of public influence, as well as to determine specific areas of the penal system included in the supervisory relationship being formed.

The liberal model is predominantly based on modern European standards, practices and largely avant-garde advances in the penitentiary system (Tomczak & Thompson, 2019). It is based on the progressive nature of social impact on the results of penitentiary standards, which does not guarantee that historical traditions and features of the national development of the penal educational system are taken into account. In turn, the subjects of public control, not receiving significant means of influencing the object, are faced with new requirements and technologies (for example, V. I. Seliverstov quite correctly points out the problems of using measuring instruments by members of public supervisory commissions to control the microclimate in residential and industrial premises (Seliverstov, 2018: 401)), ultimately concentrate their attention only on certain areas of the functioning of the penal mechanism. The attention of social activists is mainly drawn to human rights, the legal status of the convict, while individual components of the optimal mechanism of public presence remain aside: the algorithm for re-educating the convict, the possibility of his post-penitentiary adaptation, means of public assistance, information and ideological support of the reform being implemented.

The coordination model is aimed at an organized and consistent social impact on the practice and standards of keeping convicts in social isolation, the procedure for observing the established rules by the administration of the penitentiary institution. Here there is a high level of supervision of the subjects of public control on the part of civil society institutions, the parameters and target orientation of the behavior of public figures are detailed. The coordination model should be recognized as acceptable in the absence of traditions and experience of interaction between civil society institutions and the state.

The partnership model presupposes significant autonomy and a high degree of independence of supervisory commissions and public councils in exercising public control in the penitentiary system. A special role in the proposed model is assigned to the development and adoption of legal provisions regulating this activity, legal acts adopted by the authorities in conjunction with advanced public structures. Here the consolidated interests of the subjects of public control, details the rights, guarantees and legitimate interests of a public figure are taken into account. The institution of public control itself is primarily based on the principles of democracy, mutual trust of society and the state, dynamism and constant organizational improvement. The presented model of public control in the penitentiary system seems to be the most optimal for modern Russia.

Conclusion

To a certain extent, public control in the penitentiary system, taking into account its specific features of a closed and targeted nature, shows the promise of the concept of public-private partnership of public participation in corrective action on convicts, and acts as a qualitative indicator of the development of civil society. It is possible to outline the main directions of increasing the efficiency of public

control and the development of its partner model in the modern national penitentiary system:

1) it is extremely important to create a systematic and practically demanded mechanism for informing society about the activities of public oversight commissions and other subjects of public control in the penitentiary system. For example, the Public Chamber of the Russian Federation only publishes individual authentic decisions. In turn, the Ministry of Justice of the Russian Federation practically does not record the law enforcement activities of public structures. In this case, it is important to raise statistics, development indicators, achievements of penitentiary and post-penitentiary measures to the public level. The establishment of technical, legal, organizational, managerial and informational support in the implementation of public initiatives in the field of the penitentiary complex can only contribute to the strengthening of law and order in society and the state

2) the Russian society, in close cooperation with state authorities, needs to create a central union (association) of public structures exercising public control in the penitentiary sphere. Today there are public oversight commissions at the level of each region. At the same time, a centralized and effective public structure that monitors and improves this direction of public control has not been formed today. In unison with the noted direction, it is advisable to reform national monitoring mechanisms in accordance with the recommendations of international organizations (in particular, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) and detailing the corresponding reporting procedure;

3) the process of codification of legal norms aimed at the comprehensive regulation of public control in the national penitentiary system seems to be in demand. A federal law that provides motivation for the organizational work of public figures, social significance and guarantees of their activities, as well as the forms, types and stages of such control, assessment criteria and indicators of the effectiveness of public control in the penal system of Russia should be adopted;

4) an interesting and promising solution to the issue of holding joint research events (conferences, seminars, symposia) with the participation of not only specialists-scientists of the penitentiary direction, but also researchers of the institute of public control itself. The interdisciplinary, inter-sectoral nature of scientific communication can serve as the basis for a qualitative understanding not only of current problems and omissions, but also the development of proposals, ideas aimed at their promising implementation (experimental projection, forecasting) into life;

5) today we can talk about the emergence of a new form of legal policy in the development of the penitentiary system – public penitentiary control. This type of legal policy is being formed in the context of the convergence of European standards into the national penal system. The legal policy of public control in the penitentiary system is a systemic organizational, managerial and informational and analytical activity of public structures aimed at forming criteria, performance indicators and ways to optimize the partnership model of public control in the context of objective modernization of the penal system in Russia.

As a result, the consolidation of public and state structures in the formation of the desired model of public control in the penitentiary system will ensure the progressive development of civil society. At the same time, it is the partnership model of such control that can act as a nodal link in the mechanism of optimal functioning of the penitentiary system in modern Russia.

References

Carvalho, H. & Chamberlen, A. (2017). Why punishment pleases: Punitive feelings in a world of hostile solidarity. In *Punishment & Society*, 20: 2, 217–234. DOI: 10.1177/1462474517699814.

Kozin, M.N., Rodionov, A.V., Gruzdeva, L.M. &Harlamova, J.A. (2019). Production Projectsunder Public-Private Partnership in the Sphere of Economic Security of the Penitentiary System: Issues of Finan-

cial, Personnel and Operational Management. In *International Journal of Economics and Business Administration*, VII: Special 1.252–260.DOI:10.35808/IJEBA/269.

Lesnikov, G., Ulezko, S., & Klochkova, A. (2020). Public Control of the Criminal Sanctions in Information Society International Experience. In *Lecture Notes in Networks and Systems*, 87, 994–1001. DOI: 10.1007/978–3–030–29586–8_113

Mikheev, D.S., Dudko, I.G. & Mikheeva, T.N. (2015). Public control in the mechanism of realization of the principle of local authority publicity. In *Mediterranean Journal of Social Sciences*, 6:3, 41–46. DOI: 10.5901/mjss.2015.v6n3s7p41.

Norboev, T. (2020). The fight against corruption as a priorite condition for the development of civil society. In *European Science Review,*1–2. 133–136. DOI: 10.15405/epsbs.2020.04.120.

Romashov, R.A. & Bryleva, E.A. (2019). Post tyuremnaya resotsializatsiya: mifilireal'nost'? [Post-prison resocialization – myth or reality?]. In *Vestnik Sankt-Peterburgskogo universiteta. Pravo*, 10:4, 827–835. DOI: 10.21638/spbu14.2019.414.

Seliverstov, V.I. (2018). Obshchestvennyy kontrol' za obespecheniyem prav cheloveka v mestakh prinuditel'nogo soderzhaniya: novelly 2018 goda [Seliverstov Public control over the provision of human rights in places of detention: novelties of 2018]. In *Ugolovno-ispolnitel'noye pravo,* T. 13 (1–4): 4, 397–408.

Skiba, A. P. (2019). O nekotorykhnapravleniyakhrazvitiyaugolovno-ispolnitel'nogoprava [On some directions of criminal executive law development]. In *Vestnik Moskovskogo gosudarstvennogo oblastnogo universiteta. Seriya: Yurisprudentsiya*, 4. 77–85. DOI: 10.18384/2310–6794–2019–4–77–85.

Teplyashin, I.V. (2011). Prichiny vozniknoveniya korruptsii i rol' rossiyskoy obshchestvennosti v antikorruptsionnom mekhanizme [Causes of corruption and the role of the Russian community in the anti-corruption mechanism]. In *Nauchnyy yezhegodnik Instituta filosofii i prava Ural'skogo otdeleniya Rossiyskoy akademii nauk*, 11, 530–541.

Tomczak, P. & Thompson, D. (2019). Inclusionary control? Theorizing the effects of penal voluntary organizations' work. In *Theoretical Criminology,* 23:1. 4–24. DOI:10.1177/1362480617733724.

Zin'kov, Ye. N. (2020). Pravovoye regulirovaniye obshchestvennogo kontrolya za obespecheniyem prav i zakonnykh interesov lits, soderzhashchikhsya v uchrezhdeniyakh ugolovno-ispolnitel'noy sistemy [Legal regulation of public control over ensuring the rights and legitimate interests of persons held in institutions of the penal system]. In *Vestnik Samarskogo yuridicheskogo instituta*, 2, 43–52.

Journal of Siberian Federal University. Humanities & Social Sciences
2022 15(8): 1134–1144

DOI: 10.17516/1997-1370-0916
EDN: IAJGPX
УДК 342.9

Digital Transformation of the Procedure for Administrative Expulsion, Deportation and Readmission of Foreign Citizens and Stateless Persons from the Territory of Russia

Yulia V. Paukova*
National Association of Specialists of Administrative Law
Moscow, Russian Federation

Received 20.07.2021, received in revised form 11.12.2021, accepted 04.05.2022

Abstract. The necessity of reforming the administrative expulsion, deportation and readmission of foreign citizens and stateless persons from the territory of Russia has been substantiated.
Police officers should be authorized to bring to administrative responsibility with the appointment of administrative expulsion and to make decisions on the deportation and readmission of foreign citizens and stateless persons on the basis of the proposals of the "Automated Information System of Migration Control", formed using artificial intelligence technologies. The decisions must be appealed in court.
The approach developed in the study for the implementation of "The Social Rating System of Foreign Citizens and Stateless Persons" will influence the adoption of such decisions and establishing the exact period of non-entry into the Russian Federation.
The article substantiates the measures that will make the relevant procedures transparent, and the decisions made verified and justified, that will also help eliminate subjectivity in decision-making.

Keywords: administrative expulsion, deportation, readmission, non-entry decision, foreign citizen, social rating, digitalization, automated information system, artificial intelligence, migration.

Research area: law.

Citation: Paukova, Yu.V. (2022). Digital transformation of the procedure for administrative expulsion, deportation and readmission of foreign citizens and stateless persons from the territory of Russia. J. Sib. Fed. Univ. Humanit. soc. sci., 15(8), 1134–1144. DOI: 10.17516/1997-1370-0916

* Corresponding author E-mail address: ypaukova@mail.ru
ORCID: 0000-0001-6434-3983

Цифровая трансформация порядка назначения административного выдворения, депортации и реадмиссии иностранных граждан и лиц без гражданства с территории России

Ю.В. Паукова
Национальная ассоциация административистов
Российская Федерация, Москва

Аннотация. Обоснована необходимость реформирования административного выдворения, депортации и реадмиссии иностранных граждан и лиц без гражданства с территории России.
Предложено уполномочить сотрудников органов внутренних дел привлекать к административной ответственности с назначением административного выдворения и выносить решения о депортации и реадмиссии иностранных граждан и лиц без гражданства на основании предложений «Автоматизированной информационной системы контроля миграции», сформированных с использованием технологий искусственного интеллекта.
Разработанный в статье подход по внедрению «Системы социального рейтинга иностранных граждан и лиц без гражданства» будет влиять на принятие указанных решений и на установление точного срока неразрешения въезда в Россию.
В статье обоснованы меры, которые позволят сделать соответствующие процедуры прозрачными, а вынесенные решения выверенными и обоснованными, что также будет способствовать устранению субъективизма при принятии решений.

Ключевые слова: административное выдворение, депортация, реадмиссия, неразрешение въезда, иностранный гражданин, социальный рейтинг, цифровизация, автоматизированная информационная система, искусственный интеллект, миграция.

Научная специальность: 12.00.00 – юриспруденция.

Introduction

Many countries of the world at the state level make decisions to move to a new economic and technological order based on digital technologies. Special attention is also paid to digitalization of the activities of the Russian state. The active development and implementation of digital technologies will make it possible to make breakthrough transformations in the country and allow the state to be competitive on the world stage.

The Strategy for the Development of the Information Society in Russia, approved by the Russian President in 2017, for several decades determined the directions of the State's activities in the application of information and communication technologies (Decree of the President of the Russian Federation No. 203). The Russian Government has been entrusted to organize accelerated implementation of digital technologies until 2024, in particular, in the field of public administration (Decree of the President of the Russian Federation No. 204).

The Presidential Council for Strategic Development and National Projects approved a number of documents aimed, in particular, at the development of systems capable of processing and storing large amounts of data, as well as at the development of artificial intelligence (hereinafter referred to as AI), robotics, and the creation of a state unified cloud platform (Pass-

port of the National Program "Digital Economy of the Russian Federation").

Successful development and implementation of the above-mentioned tools will allow the state to make a qualitative growth in public administration. However, digital technologies need to be introduced into such a sphere of public administration as the fight against illegal migration.

The List of Instructions on the Implementation of the Concept of State Migration Policy for 2019–2025 is dedicated mostly to the digitalization of the migration sphere. However, little attention has been paid to the modernization of administrative coercion measures applied to foreign citizens and stateless persons (hereinafter – foreign citizens, foreigners, migrants) in case of violation of migration legislation, despite the fact that the State traditionally pays special attention to combating illegal migration.

The procedures for administrative expulsion from Russia and deportation have been in effect in Russian legislation since 2002 without significant changes. Transfer on the basis of international readmission agreements (hereinafter – readmission) was introduced into the Russian law in 2008. Since then, the procedure for applying these measures has not changed significantly (administrative expulsion, deportation and readmission hereinafter – expulsion).

Theoretical framework

The study of the expulsion of foreigners in international law was carried out by Bluntschli (1877), Gefter (1880), Oppenheim (1948).

The issues of administrative expulsion, deportation and readmission from the territory of Russia have been investigated in scientific works by Shurukhnova (2001), Kondakov (2004), Gorbunov (2005), Gerasimov (2005), Kuz'menko (2006), Kataeva (2007), Poliakova (2008), Sherstoboev (2009), Kazhaeva (2014), Zubova (2016), Simakov (2016), Ogienko (2019).

The use of AI in legal practice and bringing to administrative responsibility was studied by Thompson (2015), Kingston (2016), Ashley (2017), Zeleznikow (2017), Pullen (2019), Zaplatina (2019), Reiling (2020).

Social credit system has been studied by Hodson (2015), Backer (2017), Chen and Cheung (2017), Chorzempa et al. (2018), Blomberg (2020), Bayer et al. (2020), Everling (2020), Timofeeva (2020).

Currently, foreign citizens who are outside the border territory, in case of violation of migration legislation, can be expelled from Russia by administrative expulsion, deportation and readmission.

Decisions on administrative expulsion from the country, deportation and readmission in Russia are not made (except in some cases) from March 15, 2020 to September 30, 2021 due to the measures taken in connection with the COVID-19 pandemic. At the same time, until June 15, 2021, the courts could make decisions on administrative expulsion in the form of a "controlled self-departure". At the same time, the validity of all kind of permits were extended (Decree of the President of the Russian Federation No. 274; Decree of the President of the Russian Federation No. 364).

The countries of the European Union have also taken a number of similar measures. At the same time, "there was no uniformity between the EU Member States regarding the measures taken" (Sommarribas and Nienaber, 2021).

Administrative expulsion from the Russian Federation, which is one of the types of administrative punishments, is applied in accordance with the Code of Administrative Offenses as a punishment for committing certain administrative offenses by foreigners.

Cases of administrative offenses committed in the field of migration legislation are got turned on by the police with their subsequent transfer to the court for consideration. If a migrant is brought to administrative responsibility, a judge will impose an administrative fine with or without administrative expulsion. When imposing punishment, the courts take into account the nature of the offense, the identity of the offender, his property status, as well as the circumstances mitigating responsibility (include marital status) and aggravating responsibility (include bringing to administrative responsibility before). The choice of the form of administrative expulsion belongs to the judge considering the case, and depends on

the circumstances, including the material and physical possibilities for independent departure from the territory of the Russian Federation (Kostyria, 2017).

At the same time, firstly, some provisions of the Code of Administrative Offenses provide for the appointment of an administrative fine with mandatory administrative expulsion, that in some cases contradicts Article 8 of the Convention for the Protection of Human Rights. In this regard, D. N. Shurukhnova proposes to envisage administrative expulsion as an additional alternative punishment, imposed or not when a decision is made on the case, taking into account the personality of the person brought to administrative responsibility and other circumstances of the case (Shurukhnova, 2019). Secondly, the judicial practice on bringing migrants to administrative responsibility in case of violation of migration legislation is not uniform.

Internal discretion of judges when making decisions exists in other countries. For example, in the USA "judges' personal attitudes, biases, and motivations are often revealed as they articulate their desire to circumvent the removal process for noncitizens they view as "deserving" of relief – but for whom only temporary relief from removal is often available given judges' interpretations of immigration law" (Asad, 2019).

Currently, the courts hear all cases, even in the case of a foreigner's consent of a committing an administrative offense and willingness to be punished. Note that administrative expulsion is appointed by the border authority, rather than the court, if a foreign citizen commits an administrative offense on the Russian border territory (Code of Administrative Offenses).

Unlike the procedure for bringing foreign citizens to administrative responsibility, bringing to responsibility of vehicle owners is carried out automatically when violations are recorded with special technical means (Code of Administrative Offenses).

The next type of removal from the territory of Russia is deportation. This is the forced transfer of a foreigner from the country in case of loss or termination of legal grounds for his further stay (residence) in Russia (Federal Law No. 115-FZ). This type of administrative coercion is aimed at ensuring the safety and protection of citizens and the state (Smashnikova, 2011). The assignment of deportation is carried out by police officers. Russian legislation provides 6 grounds for the deportation of migrants.

The third type of expulsion is readmission. Agreements on readmission provide for the admission by Russia from foreign states of its own citizens and foreign citizens who are citizens of third countries, as well as the transfer of foreigners to another state. There are 5 grounds for the transfer of foreigners on the basis of readmission agreements.

The transfer in accordance with readmission agreements is carried out on the basis of decisions made by the chief of the police authorities. Note that administrative expulsion in the form of forced and controlled transfer is carried out by the bailiffs, and the readmission procedure is carried out by policemen. In this regard, the transfer on the basis of an agreement on readmission of persons subject to administrative expulsion is difficult to implement and requires the issuance of an appropriate interagency legal act.

Administrative expulsion, deportation and readmission from the territory of the country entails the closure of the entry to a foreigner for 3, 5 or 10 years. If the expulsion is carried out for the first time, the entry closure period is 5 years, if it is repeated – 10 years. In case of termination of the readmission procedure due to voluntary departure at their own expense or at the expense of a third party, the deadline for closing entry to Russia is 3 years.

Statement of the problem

In case of violation of migration legislation decisions on administrative expulsion are made by judges, based on materials prepared by the police officers. The decisions on deportation and readmission are made by the police. Preparation, consideration and decision-making is carried out 'in manual mode', that requires large human resources, time expenditures and does not guarantee the absence of the influence of the human factor.

At the same time the period for which the entry is closed does not depend on the personality of the offender or the nature of the offense, but on the number of cases of administrative expulsion, deportation and readmission.

Given that digital technologies allow improving various areas of activity, the procedure of appointment of all types of expulsion should be reformed. The methods of applying the considered measures of administrative coercion should be improved by introducing AI methods in making decisions. Moreover, the period of non-entry for foreign citizens must be fair and proportionate to the committed misconduct and offense. At the same time under the conditions of digitalization, the legality and fairness of decisions should increase.

The subject of this study is the procedure for assigning three types of expulsion of foreign citizens and stateless persons from the territory of Russia in case of violation of migration legislation. The object of the research is the social relations that develop in the process of administrative expulsion, deportation and readmission of these persons in the event of their violation of migration legislation. Its purpose is to develop proposals for reforming the procedure for assigning types of expulsion from the territory of Russia to foreign citizens.

Discussion

It is planned to create In Russia a Unified Information Platform for registering foreign citizens, which will contain digital profiles of migrants. Foreigners will be able to apply for public services in electronic form, receive information about their end of the period of stay and validity of documents, as well as the need to leave the country (In Russia will create a single database of digital profiles of foreigners staying in the country).

Artificial intelligence technologies are one of the most popular and fastest growing areas of scientific research. The ability to process big data exceeds human capabilities. AI generally refers to the ability of a machine to demonstrate human intelligence, for example, when solving a problem without using software containing detailed instructions (Tupchienko, 2018).

Currently, the most popular is machine learning (hereinafter – ML), based on statistical modeling. Popular ML algorithms such as neural networks or gradient boosting are capable of recognizing even the deepest relationships in datasets that can often achieve very high accuracy of predictions (Nikitin, 2018). An example of the effective use of ML methods in making court decisions is the program that achieved 79 % accuracy in determining the outcome of the case, as a result of analysis of 584 judgments of the European Court of Human Rights (Taylors, 2016). To make AI more efficient in decision making, more algorithms need to be introduced to cover more cases contained in judicial decisions *(*Zaplatina, 2019).

With regard to the issuance of 'court' decisions, the computer calculates the result based on the analysis of a large number of documents, based on the input data. Due to the lack of understanding of how the decision was made and what initial data influenced it, the decision-making algorithm is often called a 'black box'. However, to solve the 'black box' problem, programmers have already proposed dozens of programs. Many are based on the idea of replacing a complex, poorly interpreted model with one or more simple models that are similar in their properties (Krakhalev, 2015).

The work of programmers on the black box problem solves a number of issues. First, the ability to provide a person with information, on the basis of which the program made a certain decision. Secondly, psychologically people trust the solution of the system if they have an understanding of how it came to such a result. Third, information about which variables the program uses and how they affect the final result allows it to be improved, thereby improving the quality of the result.

In this case, special attention should be paid to the security of the information system. It is necessary to use effective measures of protection against accidental or deliberate influences on information, impact on systems of its processing and transmission. Information security technical means solve various problems to protect the system, in particular: access control, including authentication and authorization

procedures, audit, information encryption, anti-virus protection, network traffic control (Guseva and Kireev, 2014).

The presence of the described computer technologies makes it possible to modernize the procedure for making the considered decisions in relation to migrants in the event of their violation of migration legislation.

Taking into account the vigorous activity of the state aimed at digitizing the migration sphere, and the availability of the abovementioned technologies, we propose to create an "Automated Information System of Migration Control" (hereinafter – the System). The System will receive information about foreigners from the Unified Information Platform and other state automated information systems. Then, using the machine learning method, the System will propose to the official a draft of the appropriate decision (based on the analysis of a huge number of decisions on bringing foreigners to administrative responsibility and deportation), taking into account information about the identity of the migrant, his marital status and other information affecting the issuance of decisions (including information about family members – citizens of Russia and other information that prevents the adoption of these decisions). The procedure for making decisions is shown in the Fig. 1.

In accordance with the art. 26.2 of the Code of Administrative Offenses, evidence is established by protocols, explanations of a foreigner, testimony of witnesses and other documents. In this regard, it is necessary to provide for the possibility for officials to enter all the listed documents into the System in a formalized way. In the same way it must be entered into the System circumstances precluding the proceedings on an administrative offense under art. 24.5 of the Administrative Code.

The System also should contain information on the existence of valid agreements on readmission and on the conditions for sending applications (requests) for readmission, acceptance and transfer of foreign citizens. When authorized officer confirm the need to apply a readmission agreement, the System should automatically generate a draft decision on readmission and a request for readmission to another state and other documents necessary for the readmission of a migrant.

It is necessary to provide for the possibility of access to the data of a foreigner by policemen not by entering personal data manually, but in a faster way – by scanning a QR code

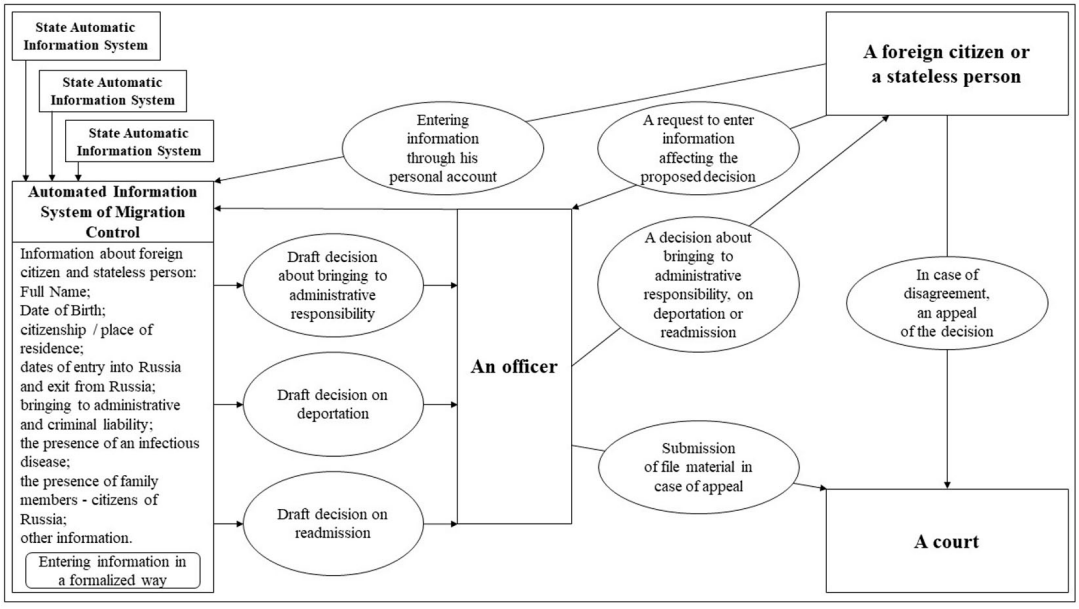

Fig. 1

generated for each migrant when creating his profile in the information system. In addition, it is necessary to establish the possibility of self-entry of information by the migrant (through the created personal account).

All decisions made must be detailed and contain all the information about the foreigner taken into account by the system. If there is any information that is not taken into account by the System, due to the capabilities of the program, a foreign citizen should have the right to appeal the decision to a court. Subsequently, with the help of AI technologies, the System will take into account the decisions of a court when making next decisions.

Many countries have rating based systems. For example, credit ratings are actively used (Cantor and Packer, 1994). At the same time, it is proposed when calculating an individual credit rating to use neural networks along with expert estimates (Rzayev et al., 2019). In Russia, when assigning an insurance pension, an "individual pension coefficient" is calculated, which is also called "pension points" (Federal Law No. 400-FZ).

At the same time, the most controversial is the China's Social Credit System. This Credit System still scares the rest of the World (Bayer et al., 2020). It is planned to evaluate people and organizations based on data on the financial and social behavior of them, and then to punish or encourage in accordance with certain agreed standards of good conduct (Chorzempa et al., 2018). "The more understandable is the assessment, the more impartially it is being fulfilled, the stronger is the public support" for the China's System. It is planned to extend this system not only to persons, but "also companies as legal entities and then various non-profit and management structures and organizations, and their leadership" (Bayer et al., 2020).

The Social Credit System does not create new data about a specific person, it systematizes existing data. Such systems have actually entered our lives. For a long time, applications have been actively using ratings and feedback systems. People prefer to use services with good reviews.

It is necessary to introduce a Social Rating System of Foreign Citizens in Russia, which will make possible to apply administrative coercion measures to migrants, taking into account the points scored and to calculate a fair period of non-entry permission when making decisions on removal from the territory of Russia.

For example, points should be accrued to foreigners for knowledge of the Russian language, the basic knowledge of the law and the history of Russia, the presence of education, work experience in the specialty; the presence of close relatives – Russian citizens and non-Russian citizens permanently residing in Russia; no violations of criminal and administrative legislation during the year; timely payment of fines; the amount of taxes paid; length of stay (residence) in Russia; availability of income and housing in Russia; the amount of investment; passing a medical examination; voluntary departure and payment of removal costs in case of deportation during the previous stay, as well as for "good deeds" (for example, social work) and compliance with the "Code of Ethics" which should be developed.

Penalty points should be awarded in case of committing administrative or criminal offenses, the presence of infectious diseases that pose a danger to others, failure to comply with the requirement to leave the territory of the country in the event of an appropriate decision, evasion from entering the data into the System, entering inaccurate information and falsification documents.

The final rating of a foreigner will affect the amount of an administrative fine when brought to administrative responsibility, making a decision on administrative expulsion, deportation and on the exact deadline for non-entry (up to a day).

With the help of the proposed Social Rating System of Foreigners, the presence of close relatives – Russian citizens will not be an unconditional "indulgence" for migrants who systematically or grossly violate Russian legislation.

In the case of committing an intentional crime, the rating of a migrant should be influenced by the sentence passed taking into account the nature and degree of social danger of the crime committed by him, his personal-

ity, as well as the circumstances that mitigate and aggravate the punishment. We consider that when committing especially grave crimes against life, health or public safety, such a number of penalty points should be awarded so that a foreigner should not be allowed to enter the country for life, and not for 10 years, as provided for by the current regulatory legal acts.

Conclusion

Russian legislation concerning the procedure for the appointment of administrative expulsion, deportation and readmission of foreign citizens from the territory of Russia needs to be reformed. Bringing foreign citizens to administrative responsibility by the police, the appointment of deportation and readmission should be carried out on the basis of the proposals of the "Automated Information System of Migration Control", formed using artificial intelligence technologies, taking into account the information contained in the State Automated Information Systems.

The developed approach to the implementation of the Social Rating System of Foreigners will influence the adoption of these decisions and to establish an accurate term non-permission to enter Russia.

The implementation of these measures will make the procedures under consideration transparent, and the decisions made verified and justified, that will also help eliminate subjectivity in decision-making.

References

Ashley, K.D. (2017). *Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age*. Cambridge, Cambridge University Press, 426. DOI: 10.1017/9781316761380.

Backer, L.C. (2017). Measurement, assessment and reward: the challenges of building institutionalized social credit and rating systems in China and in the West. In *The Chinese Social Credit System 2017*, Shanghai Jaiotong University, 9(20), 18.

Bayer, J.P., Vasilyeva, V.A., Vetrenko, I.A. (2020). The Social Credit System of the People's Republic of China through the Eyes of Foreign Researchers. In *Administrative consulting*, 7, 20–31.

Blomberg, M.V. (2018). The social credit system and China's rule of law. In *Mapping China Journal*, 2, 77–112.

Bluntschli, J.K. (1877). *Sovremennoe mezhdunarodnoe pravo tsivilizovannykh gosudarstv, izlozhennoe v vide kodeksa [Modern International Law of civilized states, set forth in the form of a code]*. Moscow, Indrikh printing house, 634.

Cantor, R., Packer, F. (1994). The Credit Rating Industry. In *The Journal of Fixed Income Summer*, 1–26. DOI:10.3905/jfi.1995.408153.

Chen, Y., Cheung, A. (2017). The transparent self under big data profiling: Privacy and Chinese legislation on the social credit system. In *SSRN Electronic Journal*. DOI: 10.2139/ssrn.2992537.

Chorzempa, M., Triolo, P., Sacks, S. (2018). China's social credit system: A mark of progress or a threat to privacy? In *Policy Briefs PB 18–14, Peterson Institute for International Economics*.

Decree of the President of the Russian Federation No. 203 "On the Strategy for the Development of the Information Society in the Russian Federation for 2017–2030". Available at: http://www.kremlin.ru/acts/bank/41919 (accessed 11 July 2021).

Decree of the President of the Russian Federation No. 204 "On national goals and strategic objectives of the development of the Russian Federation for the period up to 2024". Available at: http://www.kremlin.ru/acts/bank/43027 (accessed 11 July 2021).

Decree of the President of the Russian Federation No. 274 "On temporary measures to regulate the legal status of foreign citizens and stateless persons in the Russian Federation in connection with the threat of the further spread of a new coronavirus infection (COVID-19)". Available at: http://www.consultant.ru/document/cons_doc_LAW_350638/ (accessed 11 July 2021).

Decree of the President of the Russian Federation No. 364 "On temporary measures to regulate the legal status of foreign citizens and stateless persons in the Russian Federation during the period of overcom-

ing the consequences of the spread of a new coronavirus infection (COVID-19)". Available at: http://www.consultant.ru/document/cons_doc_LAW_387279/ (accessed 11 July 2021).

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). Available at: https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c= (accessed 11 July 2021).

Everling, O. (2020). *Social Credit Rating in Reputation und Vertrauen beurteilen.* Springer Gabler, 694.

Federal Law No. 115-FZ "On the Legal Status of Foreign Citizens in the Russian Federation". Available at: http://www.consultant.ru/document/cons_doc_LAW_37868/ (accessed 11 July 2021).

Federal Law No. 400-FZ "On Insurance Pensions". Available at: http://www.consultant.ru/document/cons_doc_LAW_156525/ (accessed 11 July 2021).

Gefter, A.-V. (1880). *Evropeiskoe mezhdunarodnoe pravo [European International Law].* St. Petersburg, Printing house Bezobrazov and Co., 619.

Gerasimov, S.A. (2005). *Readmissiia: konstitutsionno-pravovye osnovy vozvrashcheniia nezakonnykh immigrantov v gosudarstva ikh proiskhozhdeniya: Diss. ... kand. iurid. nauk* [Readmission: constitutional and legal basis for the return of illegal immigrants to their states of origin: dissertation. Thesis of Candidate of Sciences in Jurisprudence]. Moscow, 170.

Gorbunov, V.I. (2005). *Administrativno-pravovye osnovy deyatel'nosti organov vnutrennikh del po obespecheniiu rezhima prebyvaniia inostrannykh grazhdan i lits bez grazhdanstva v Rossiiskoi Federatsii: Po materialam Dal'nevostochnogo federal'nogo okruga: Diss. ... kand. iurid. nauk* [Administrative and legal foundations of the activities of internal affairs bodies to ensure the regime of stay of foreign citizens and stateless persons in the Russian Federation: Based on the materials of the Far Eastern Federal District. Thesis of Candidate of Sciences in Jurisprudence]. Omsk, 225.

Guseva, A.I., Kireev, V.S. (2014). *Vychislitel'nye sistemy, seti i telekommunikatsii [Computing systems, networks and telecommunications*]. Moscow, Publishing Center "Academy", 288.

Hodson, H. (2015). Big brother is rating you (if you're Chinese). In *The New Scientist*, 228 (3043), 22–23. DOI:10.1016/s0262–4079(15)31412–3.

Kataeva, O.V. (2007). *Administrativnaia otvetstvennost' za narusheniia v oblasti obespecheniia rezhima prebyvaniia inostrannykh grazhdan i lits bez grazhdanstva na territorii Rossiiskoi Federatsii: Diss. ... kand. iurid. nauk* [Administrative responsibility for violations in the field of ensuring the regime of stay of foreign citizens and stateless persons on the territory of the Russian Federation. Thesis of Candidate of Sciences in Jurisprudence]. Voronezh, 236.

Kazhaeva, O.S. (2014). *Institut readmissii v mezhdunarodnom prave: Diss. ... kand. iurid. nauk* [Institute of readmission in international law Thesis of Candidate of Sciences in Jurisprudence]. Moscow, 236.

Kingston, J. (2016). Artificial Intelligence and Legal Liability. In *International Conference on Innovative Techniques and Applications of Artificial Intelligence*. DOI: 10.1007/978–3–319–47175–4_20.

Kireev, V.S., Bochkarev, P.V., Guseva, A.I., Kuznetsov, I.A., Filippov S. A. (2019). Monitoring System for the Housing and Utility Services Based on the Digital Technologies IIoT, Big Data, Data Mining, Edge and Cloud Computing. In *Big Data Innovations and Applications.* DOI: 10.1007/978–3–030–27355–2_15.

Kodeks Rossiiskoi Federatsii ob administrativnykh pravonarusheniiakh [Code of Administrative Offences of the Russian Federation] (2001). Available at: http://www.consultant.ru/document/cons_doc_LAW_34661/ (accessed 11 July 2021).

Kondakov, A.V. (2004). *Administrativnaia otvetstvennost' inostrannykh grazhdan, lits bez grazhdanstva i inostrannykh iuridicheskikh lits: Diss. ... kand. iurid. nauk* [Administrative responsibility of foreign citizens, stateless persons and foreign legal entities. Thesis of Candidate of Sciences in Jurisprudence]. Moscow, 199.

Kostyria, A.S. (2017). Administrativnoe vydvorenie, deportatsiya i readmissiya: sravnitel'no-pravovoy analiz [Administrative expulsion, deportation and readmission: a comparative legal analysis]. In *Vestnik Belgorodskogo iuridicheskogo instituta MVD Rossii imeni I. D. Putilina [Bulletin of the Belgorod Law Institute of the Ministry of Internal Affairs of Russia named after I. D. Putilina]*. 2(30), 46–49.

Krakhalev, V. (2015). *Vvedenie v RapidMiner [Introduction to RapidMiner]*. Available at: https://habr.com/ru/post/269427/ (accessed 11 July 2021).

Kuz'menko, I.A. (2006). *Nelegal'naia trudovaia migratsiia kak ob"yekt kriminologicheskogo izucheniia: Diss. ... kand. iurid. nauk* [Illegal labor migration as an object of criminological study. Thesis of Candidate of Sciences in Jurisprudence]. Rostov-on-Don, 206.

Nikitin, E. (2018). *Uzhe ne black box. Novye vozmozhnosti v mashinnom obuchenii (i kak biznesu ikh ispol'zovat') [Not a black box anymore. New opportunities in machine learning (and how businesses can use them)].* Available at: https://rb.ru/opinion/uzhe-ne-black-box/ (accessed 11 July 2021).

Ogienko, A.S. (2019). Administrativno-pravovoe prinuzhdenie v sfere migratsii: Diss. … kand. iurid. nauk [Administrative and legal compulsion in the sphere of migration. Thesis of Candidate of Sciences in Jurisprudence]. Moscow, 189.

Oppenheim, L.M. (1948). *Mezhdunarodnoe pravo: Mir [International Law: Peace]*. Moscow, State Publishing House of Foreign Literature, 440.

Passport of the National Program "Digital Economy of the Russian Federation" approved by the Protocol No. 16 of the Presidium of the Council under the President of the Russian Federation for Strategic Development and National Projects. Available at: http: // government.ru/info/35568/ (accessed 11 July 2021).

Poliakova, N.V. (2008). *Administrativnoe vydvorenie za predely Rossiiskoi Federatsii inostrannykh grazhdan i lits bez grazhdanstva: soderzhanie, problemy i osnovnye napravleniia sovershenstvovaniia pravoprimenitel'noi deiatel'nosti: Diss. ... kand. iurid. nauk* [Administrative expulsion from the Russian Federation of foreign citizens and stateless persons: content, problems and main directions of improvement of law enforcement activity. Thesis of Candidate of Sciences in Jurisprudence]. Voronezh, 257.

Pullen, L.C. (2019). Doctor AI. In *American Journal of Transplantation*, 19(1), 1–2. DOI: 10.1111/ajt.15209.

Reiling, A.D. (2020). Courts and Artificial Intelligence. In *International Journal for Court Administration,* 11(2). DOI: 10.36745/ijca.343.

Rzayev, R.R., Aliyev, A.A., Kravets, O.J. (2019). Credit rating of natural person by expert knowledge compilation in logic basis of neural networks. In *IOP Conference Series: Materials Science and Engineering, 537, 42028.* DOI: 10.1088/1757–899X/537/4/042028.

Sherstoboev, O.N. (2009). *Administrativno-pravovoe obespechenie poryadka prebyvaniia inostrannykh grazhdan v Rossiiskoi Federatsii: na materialakh Sibirskogo federal'nogo okruga: Diss. ... kand. iurid. nauk* [Administrative and legal support of the procedure for the stay of foreign citizens in the Russian Federation: on the materials of the Siberian Federal District: dissertation. Thesis of Candidate of Sciences in Jurisprudence]. Novosibirsk, 221.

Shurukhnova, D.N. (2001). *Vydacha, peredacha i vydvorenie lits v otnosheniiakh gosudarstv: Prava, zakonnye interesy i ikh garantii: Diss. ... kand. iurid. nauk* [Extradition, transfer and expulsion of persons in relations of states: Rights, legitimate interests and their guarantees. Thesis of Candidate of Sciences in Jurisprudence]. Moscow, 178.

Shurukhnova, D.N. (2019). Naznachenie administrativnogo vydvoreniia inostrannym grazhdanam i litsam bez grazhdanstva v svete reshenii Evropeiskogo suda po pravam cheloveka [Appointment of administrative expulsion of foreign citizens and stateless persons in the light of the decisions of the European Court of Human Rights]. In *Sbornik materialov XXIV mezhdunarodnoi nauchno-prakticheskoi konferentsii [Collection of materials of the XXIV international scientific and practical conference]*. Irkutsk, 334–336.

Simakov, A.A. (2016). *Organizatsionno-pravovaia deiatel'nost' pogranichnykh podrazdelenii Federal'noi sluzhby bezopasnosti Rossiiskoi Federatsii po privlecheniiu k administrativnoy otvetstvennosti: Diss. ... kand. iurid. nauk* [Organizational and legal activity of border divisions of the Federal Security Service of the Russian Federation on bringing to administrative responsibility. Thesis of Candidate of Sciences in Jurisprudence]. Kursk, 219.

Smashnikova, T.B. (2011). Vydvorenie nezakonnykh migrantov s territorii Rossiiskoi Federatsii [Expulsion of illegal migrants from the territory of the Russian Federation]. In *Aktual'nye problemy gumanitarnykh i estestvennykh nauk [Actual problems of the humanities and natural sciences].* 4, 234–237.

Sommarribas, A., Nienaber, B. (2021). Migration and mobility of third-country national labour workers to and inside Europe during the Covid-19 pandemic – a legal analysis. In *Comparative Migration Studies*, 9, 22. DOI.: 10.1186/s40878–021–00229–1.

Taylors, A. (2016). *Artificial Intelligence 'Judge' to Predict Outcome in European Court Trials? University Scientists Develop Software*. Available at: https://www.universityherald.com/articles/45702/20161024/artificial-intelligence-judge-predict-outcome-european-court-trials.htm (accessed 11 July 2021).

The List of Instructions on the Implementation of the Concept of State Migration Policy for 2019–2025. Available at: http://www.kremlin.ru/acts/assignments/orders/62960 (accessed 11 July 2021).

Thompson, D. (2015). Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution, *in International Journal of Online Dispute Resolution,* 1(2), 52.

Timofeeva, E.A. (2020). The transition to a digital society in the people's republic of China (development and implementation of the social credit score system). In *Advances in Intelligent Systems and Computing*, 908, 103–110.

Tupchienko, V.A. (2018). *Tsifrovye platformy upravleniia zhiznennym tsiklom kompleksnykh sistem [Digital platforms for managing the life cycle of complex systems]*. Moscow, Publishing house "Scientific consultant", 440.

Ugolovnyi kodeks Rossiiskoi Federatsii [Criminal Code of the Russian Federation] (1996). Available at: www.consultant.ru/document/cons_doc_LAW_10699/ (accessed 11 July 2021).

V Rossii sozdadut edinuu bazu tsifrovykh profilei inostrantsev, prebyvaiushchikh v strane [In Russia will create a single database of digital profiles of foreigners staying in the country]. Available at: https://tass.ru/obschestvo/11014899 (accessed 11 July 2021).

Zaplatina, T.S. (2019). Iskusstvennyi intellekt v voprose vyneseniya sudebnykh reshenii, ili II-sud'ya [Artificial intelligence in the issue of adjudication, or an AI judge]. In *Vestnik Universiteta imeni O.E. Kutafina (MGIUA) [Bulletin of the University named after O.E. Kutafina (Moscow State Law Academy)].* 4(56), 160–168.

Zeleznikow, J. (2017). Can Artificial Intelligence and Online Dispute Resolution Enhance Efficiency and Effectiveness in Courts. In *International Journal for Court Administration,* 8(2), 30–45. DOI: 10.18352/ijca.223.

Zubova, E.G. (2016). *Mery administrativnogo prinuzhdeniia, primeniaemye na deliktnoi osnove k inostrannym grazhdanam i litsam bez grazhdanstva: Diss. ... kand. iurid. nauk* [Measures of administrative coercion applied on a tort basis to foreign citizens and stateless persons. Thesis of Candidate of Sciences in Jurisprudence]. Saratov, 190.

Journal of Siberian Federal University. Humanities & Social Sciences
2022 15(8): 1145–1155

DOI: 10.17516/1997-1370-0917
EDN: LCYYCU
УДК 341.1/8

Protection of Human Rights by the Organisation of Islamic Cooperation: between Universalism and Cultural Relativism

Valeria V. Pchelintseva* and Dmitry V. Ivanov
Moscow State Institute of International Relations (University)
under the Ministry of Foreign Affairs of Russia
Moscow, Russian Federation

Received 23.06.2021, received in revised form 04.08.2021, accepted 12.05.2022

Abstract. Recent developments in the OIC human rights regime, including the adoption of the OIC Declaration of Human Rights in 2020, reflect the changes in the Member States' common position on the issue. This study aims to examine the acts and mechanisms of protection of human rights of the Organisation from the standpoint of universal human rights concept and cultural relativism. It is premised on the idea that development of the existing relativist doctrines can either contribute or impede protection and promotion of human rights on state level. The study examined the OIC treaties and 'soft law' acts, official studies under the auspices of the Organisation as well as the activity of its human rights mechanisms. It revealed that the OIC contributes to the respect of the norms reflected in universal human rights acts in its Member States, although some circumstances exist that could impede international cooperation of the Organisation in this sphere. The approach of the OIC and its mechanisms is defined as pluralistic.

Keywords: human rights, cultural Relativism, Organisation of Islamic Cooperation, Cairo Declaration, Covenant on the Rights of the Child in Islam, Independent Permanent Human Rights Commission, OIC Declaration on Human Rights.

Research area: law.

Citation: Pchelintseva, V.V. and Ivanov, D.V. (2022). Protection of human rights by the Organisation of Islamic cooperation: between universalism and cultural relativism. J. Sib. Fed. Univ. Humanit. soc. sci., 15(8), 1145–1155. DOI: 10.17516/1997-1370-0917

* Corresponding author E-mail address: lintseva.l@gmail.com
ORCID: 0000-0003-2231-0598 (Pchelintseva); 0000-0003-1231-6072 (Ivanov)

Защита прав человека в Организации исламского сотрудничества: между универсализмом и культурным релятивизмом

В.В. Пчелинцева, Д.В. Иванов
Московский государственный институт международных отношений (Университет) Министерства иностранных дел Российской Федерации
Российская Федерация, Москва

Аннотация. Меры, принятые Организацией исламского сотрудничества (ОИС) в области защиты и поощрения прав человека в последние годы, отражают изменения в единой позиции государств – членов Организации. На это указывают и положения принятой в 2020 году Декларации ОИС о правах человека. Цель настоящего исследования – определить изменения в позиции государств – членов ОИС по вопросам прав человека с точки зрения универсальной концепции и культурного релятивизма. В его основу легло представление о том, что культурный релятивизм государств может как способствовать, так и препятствовать имплементации международных стандартов защиты и поощрения прав человека. В ходе исследования были рассмотрены международные договоры и акты рекомендательного характера, принятые в рамках ОИС, исследования под эгидой Организации и документы ее механизмов защиты прав человека. Согласно результатам исследования, деятельность ОИС способствует защите и поощрению универсальных прав человека в государствах-членах, однако некоторые обстоятельства препятствуют международному сотрудничеству Организации в данной области. Подход ОИС к правам человека характеризуется как плюралистический.

Ключевые слова: права человека, культурный релятивизм, Организация исламского сотрудничества, Каирская декларация, Пакт о правах ребенка в исламе, Независимая постоянная комиссия по правам человека, Декларация ОИС о правах человека.

Научная специальность: 5.1.5. Международно-правовые науки.

Introduction

In 2020, the OIC Declaration of Human Rights was adopted. Alongside other recent developments, it reflects the changes in the Organisation's approach to human rights. This study aims to examine the developments in acts and mechanisms of protection and promotion of human rights of the OIC from the standpoint of universalism and cultural relativism.

In relevant publications, cultural relativism is referred to as a doctrine justifying certain variations in moral rules and social institutions by cultural and historical divergences between the societies (Donnelly, 1984). As applied to human rights, the doctrine suggests that certain derogations in interpretation and application of the universal human rights norms could be historically and culturally justified.

This study is premised on the idea that relativist doctrines can either contribute or impede protection and promotion of human rights by states. The focus is drawn on the concepts and methods that facilitate respect of the universal standards as reflected in the universal human rights acts.

The study explores the origins of different human rights approaches and debate on their correlation. It analyses the legal nature of the conflict between the concepts from the standpoint of implementation, fragmentation

and eurocentrism of international public law. Then, it considers different aspects of the OIC activity. Finally, it draws conclusions on the OIC position in the debate on cultural relativism.

For the purposes of the study, the OIC treaties and 'soft law' acts on human rights were explored alongside with its human rights mechanisms' activity and officially published studies and reports. Human rights doctrine in the field of human rights and Islamic law was taken into account.

I. Islamic States Relativist Approach and Universal Human Rights

Alongside adoption of the first universal human rights acts academic works on human rights as recognized and protected by Sharia appeared. The scholars were trying to find the answers to the two main questions, first being whether Islamic law recognized and protected fundamental human rights (Nawaz, 1965; Donnelly, 1982) and second concerning the ratio between the Islamic, Western and universal approaches to fundamental human rights (Ala Maudoodi, 1977; Renteln, 1988; Said, 1979).

A. Islamic Human Rights Doctrine

Some oriental lawyers and philosophers suggested that Sharia had been protecting fundamental human rights long before the adoption of the Universal Declaration on Human Rights (UDHR) and International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR) (Traer, 1989). Meanwhile, it was asserted by other scholars that Sharia did not safeguard human rights enshrined in those acts (Coulson, 1957). The nature of rights and obligations as well as remedies sought in case of prejudice to such values as life, property and honour according to the Islamic legal doctrine revealed their aim of securing general legal order and not the individual.

Scholars attributed the authority of divine commands to states' obligation to protect human rights which is common to all norms of Islamic law due to their concurrently religious and legal nature (Faruqi, 1983). As regards universal standards, the UDHR preamble provides that fundamental human rights protection is essential as their recognition is the foundation of freedom, justice and peace. The protection of human rights itself is considered an obligation under the UN Charter. Although the UDHR's wording does not appear to directly contradict any teaching on the primary source of human rights, one of the objectives raised by Saudi Arabia when abstaining from the vote on the final draft of the declaration was that the UDHR contradicted the notion of human rights as granted by Allah (Traer, 1989).

The existence of a relevant human rights doctrine in Islam is inextricably linked with the debate on the nature of human rights. It appears that it was not the source of the doctrine, religious or secular, that raised concerns but the implications of possible interpretation of Islamic divine provisions protecting the state, social institutions or any other social phenomena instead of the individual. Thus, the lack of individualism was considered an obstacle to inferring that foundations of universal fundamental human rights doctrine are enshrined in Islam.

B. The Ratio between the Universal, Western and Islamic Human Rights

The question of culturally justified regional approaches to human rights in international public law became acute with the adoption of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (Aldeeb Abu-Sahlieh, 1990). According to its preamble, the Convention was issued by Governments of European countries which were like-minded and had a common heritage of political traditions, ideals, freedom and the rule of law. Technically, ECHR was a regional treaty reflecting the European states' approach to human rights, the adoption of which was justified by states' common historical and cultural heritage.

The Islamic states' approach to human rights had not been expressed in any international public law act until the end of the XX century. Before that, a debate occurred on the distinction of Western and other human rights approaches accompanied by the demand that

Western countries not impose their legal and political tradition on other States (Said, 1979). At the same time, the Islamic law concept of human rights was developed.

Anthropological research (Messer, 1997), as well as recent international law doctrine (Hogemann, 2020), suggests that numerous cultural approaches to human rights exist and have to be recognized. A pluralistic approach is introduced that implies coexistence of different cultural traditions alongside universal human rights standards. The distinction between cultural and ethical relativism is drawn (Salmon, 1999). Relativist approaches are deemed appropriate only if they do not contradict core ethical standards.

Today, Islamic States' concept of human rights is reflected in the OIC and the Arab League acts, while that of Western states is represented in e.g. the Council of Europe and the European Union acts. The universal human rights approach as contained in universal acts and UN bodies' activity is to be separated from the Western one so as to prevent eurocentrism.

The correlation and mutual influence of universal concept and relativist approaches are not sufficiently analysed. From the standpoint of international public law, the regional practice influences the inferences on existence of universal norms. At the same time, the universal acts are a means of codification and progressive development of international legal rules that are to be observed by States in their regional cooperation.

II. Legal Nature of the Conflict between Islamic and Universal Human Rights

International obligations of states in the field of human rights include states' implementation of universal standards which involves their adaptation to the particularities of the national legal systems. Regional international organisations may facilitate the process by adopting acts and mechanisms that address legal culture particularities of the member states. However, such acts and mechanisms may contribute to regional fragmentation of international law and its ethnocentrism, a striking example of which in human rights doctrine is eurocentrism.

A. Relevant particularities of Islamic Law

Islamic international law doctrine provides for the respect on equal footing and in good faith of the lawfully concluded agreements, which applies to conventions between Muslims and non-Muslims (Malekian, 2011). Thus, human rights treaties have to be implemented in the legal systems of Islamic state parties according to both international public law and Sharia.

Historically, Islamic law developed upon a set of fundamental principles that differ from those found in other legal systems. Firstly, the initial cause of creation of the state was considered the will of a superior essence, laws being direct commands of that essence. The interconnection between lawful and pious behaviour has been strengthening, the source of applicable legal rules being Islamic scriptures (Van Den Berg, 2006). Thus, for an international law norm to be implemented in national legal systems of an Islamic State, it has to be compatible with Islam.

Secondly, the main sources of Islamic religious and legal knowledge include guidance to any sphere of human life and, thus, they contain or imply all necessary rules of conduct. The Quran, according to its wording, was revealed <…> as an exposition of everything (16:89) (Krachkovsky, 1963). Both the wording and substance of the Revealed Book are to be preserved while no critic of them is allowed. Thus, it is crucial to discover foundations for protection of human rights in the main sources of Islamic law for their effective respect on the territory of Islamic States.

Thirdly, judges and religious and legal scholars play an incomparable role in Islamic legal systems. They make respective inferences and resolve the occurring conflicts between legal provisions, assuring coherence of the system. This idea could be supported by the authority of the founders of the main Islamic law schools (madhab) as well as such sources of legal rules as fatwa, i.e. Islamic case law.

Apparently, legal and religious scholars and practitioners ensure the implementation of the universal human rights standards in Islamic states. Their authoritative judgments and theories based on undisputable sources of Islamic

law influence state practice in the field. Today, some legal scholars tend to believe that Islamic law sources contain all necessary mechanisms for the system's adaptation to the modern universal human rights doctrine (Saeed, 2018).

Finally, the heads of Islamic States are considered Allah's representatives on Earth, one of their primary obligations being to preserve religion from undue practices and ideological influences (Van Den Berg, 2006). All government bodies assume the responsibility for their proper and pious ruling before Allah and their acts are to reflect the divine commands. According to the al-Shura principle of Islamic constitutional law, heads of State and other State authorities should consult the wisest and most decent representatives of the Muslim Umma (Said, 1979). Therefore, it is important for Islamic states' authorities to be sure that the measures taken align with divine prescriptions while taking into account the recommendations of recognised specialists in the field of human rights in Islam.

B. Fragmentation of International Public Law and Eurocentrism

In spite of the claims that countries from different political and cultural backgrounds negotiated the text of the UDHR (Saeed, 2006), a lot of modern-day OIC Member States had not gained independence by the time the Declaration was adopted. They include Algeria (1962), Benin (1960), Mali (1960), Mauritania (1960), Morocco (1956), Tunisia (1956) and other states. Even though some Islamic states were present, such representation did not reflect the global share of Muslim communities. As a result, the legal systems of numerous modern day states were underrepresented, which lead to their advocacy for reconsidering international law norms with equal regard to all existing legal orders and rejection of the 'civilizing mission' of the European countries (Samour, 2014). Today, eurocentrism is considered a topical issue of international public law (Fassbender, 2012).

Eurocentrism seems relevant to human rights law as well. As mentioned above, Islamic scholars insisted that Western human rights approach not be imposed on others. Due regard to all states' teachings and practice could help to elaborate a regime that would be ultimately applicable in most States and would not technically fit only European legal orders.

In some legal families, a separate approach to international public law emerges. Thus, Islamic law scholars develop the doctrine of "Islamic international law" aimed at exploring international law norms and principles enshrined in Islamic legal sources (Malekian, 2011). From certain perspective, this implies development of an 'Islamic' international legal order which could disintegrate the universal one. However, reconsideration of state practice in light of international public law is necessary for progressive development of international law towards a genuinely universal set of norms.

C. The OIC and Universal Human Rights Implementation

The OIC activity in the field of human rights is based upon its Charter as revised in 2008. According to its provisions, the Member States adhere to the principles of the UN Charter and international law, seek to preserve and promote core Islamic values, contribute to the dialogue among civilizations and promote human rights and fundamental freedoms.

Article 1 of the Charter reiterates the Member States' objectives to promote human rights and freedoms including the rights of women, children, youth, elderly and people with special needs alongside preserving Islamic values and heritage. The principles of the OIC functioning include commitment to the principles of the UN Charter, human rights protection and promotion being one of them. In their fulfilment of the OIC principles, the States shall be guided and inspired by the noble Islamic teachings and values. As can be seen, the regime enshrined in the OIC's founding document implies concurrent observance of the universal and Islamic human rights doctrines.

It is worth mentioning that national legal systems of Islamic States are diverse and their human rights practice varies. That makes any international law obligation assumed by states under the auspices of the OIC a step towards creation of a common Islamic approach. At the same time, expertise of the OIC mechanisms in both international human rights law and Is-

lamic law ensures compatibility of the Islamic concept with the universal standards. As regards its international cooperation, the OIC enjoys the UN General Assembly Observer status and participation in its bodies' activity. Thus, the OIC has relevant international law means to ensure application of the universal human rights standards by its Member States.

III. The OIC Human Rights Treaties and 'soft law' Acts

Several human rights treaties and 'soft law' acts have been adopted under the auspices of the OIC that reflect the common position of its Member States.

A. Dhaka and Cairo Declarations on Human Rights in Islam

The 1983 Dhaka Declaration was adopted by Resolution No. 3/14 of the XIV Islamic Conference of Foreign Ministers (Dhaka Declaration). The Declaration recognises fundamental human rights as a part of Islamic faith. It attributes to them the authority of divine commands and to their respect the quality of an act of worship. It is proclaimed that Sharia calls for the safeguard of people's religion, soul, mind, honour, wealth and progeny. The universal application of the Declaration implies that it addresses human rights of all Muslims of the globe.

The Dhaka Declaration appeals to the piety of Muslims in its attempt to give grounds for respect of human rights. It is usually considered as a disadvantage of the Declaration. Yet, Dhaka declaration is a 'soft law' act reflecting the OIC Member States common position on the necessity to integrate human rights concept in their religious and, therefore, legal doctrines.

In 1990, the Cairo Declaration was adopted by Resolution No. 49/19-P of the XIX Conference of Foreign Ministers (Cairo Declaration). The preamble of the act expresses the OIC Member States' intention to contribute to the efforts of mankind to assert human rights in accordance with Sharia. It reaffirms that human rights concept is the integral part of Islamic religion. Impermissibility of human rights' full or partial suspension or violation is proclaimed one of the principles of the Declaration.

The Cairo Declaration enumerates rights and freedoms protected by the OIC Member states. Many of them align with those protected by the UDHR, some of the rights being accorded only to men, such as freedom of movement and residence and the right to seek asylum from prosecution. Some human rights are protected that are not proclaimed by the UDHR, such as protection during war and armed conflict and protection of intellectual property rights.

The Cairo Declaration subordinates the rights and duties proclaimed by it to the provisions of Sharia as both applicable law and source of interpretation. On the one hand, such dispositions make it possible to interpret human rights scope in derogation from the universal standards. At the same time, it is important to consider the Declaration as an act expressing Member States' common position on a catalogue of human rights and freedoms preserved by their legal systems. As such, the Cairo Declaration approximates national practice to the universal standards.

Neither the Dhaka nor the Cairo Declaration defines expressly the correlation between universal human rights and human rights in Islam.

B. The OIC Covenant on the Rights of the Child in Islam

Adopted in 2004, the Covenant on the Rights of a Child in Islam (OIC Covenant) is the first binding international law act adopted under the auspices of the OIC. According to the preamble of the OIC Covenant, the parties thereof proceed from Islamic efforts on issues of childhood which contributed to the 1989 Convention on the Rights of the Child (CRC). Thus, the OIC Covenant is implied to be compatible with and complementing the CRC.

Respect of the provisions of Sharia and observance of the domestic legislation of Member States as well as cultural and civilisation constants of the Umma can be found among the principles of the OIC Covenant. The wording of the act reveals its parties' intention to preserve their relativist approach and respect the internationally recognised standards. Their position could be defined as pluralistic.

By the time of the adoption of the OIC Covenant 55 out of 57 OIC Member States had

bound themselves with the provisions of the CRC, Palestine and Somalia adhering to it in 2014 and 2015 respectively. At the same time, the CRC received numerous reservations by Islamic States, most of them with regards to articles 2, 14, 20 and 21 (Hashemi, 2007). The articles are concerned with freedom of thought, expression and conscience as well as rules on adoption.

Article 20 of CRC mentions the Islamic Kafalah system of guardianship. However, it was found by Islamic States' to contradict the Islamic system of guardianship as opposed to the system of adoption established in other legal systems. The IPHRC outcome document on the OIC Covenant revision of 2017 refers to Kafalah as a means to ensure the bondage with the child's biological family. As the system of Kafalah is itself approved of by CRC, protection of its principles through the OIC Covenant could not be found contradictory to it. At the same time, the wording of article 20 of the CRC reflects the influence of Islamic legal culture on universal human rights protection.

Since 2018, the OIC bodies have been working on the draft of the revised version of the OIC Covenant.

C. The OIC Declaration on Human Rights

Adopted in November 2020 by Resolution No. 63/47 of the Council of Foreign Ministers, the OIC Declaration on Human Rights (OIC Declaration) contains 25 articles, including those on children's and women's rights, freedom of religion and freedom of expression. The Declaration guarantees 26 out of 32 rights and freedoms enshrined in the UDHR (Kayaoglu, 2020). Some of the rights previously attributed only to men are granted to women as well.

The preamble of the Declaration expresses the adherence of the OIC Member States to the idea of human rights and the mission of their protection. It refers to Medina Charter alongside the universal human rights acts. That reflects the OIC Member States' adherence to the Islamic and international law doctrines at the same time. The Declaration affirms that human rights are universal, indivisible, interdependent and interconnected but points at the need to consider states' historical and cultural background.

The revised Cairo Declaration does not contain any direct references to Sharia. However, it uses Islamic religious terms in describing the scope of some rights, for instance the 'right to life as a gift by Allah Almighty' or women's 'right to motherhood in line with Allah's creation'.

Article 1 of the Declaration proclaims that all individuals are equal without any discrimination, including on the grounds of sex, religion, sect and age. Article 5 on women's rights affirms that men and women are equal in their dignity, rights and obligations as prescribed by applicable law. It encourages the OIC Member States to take measures aimed at women empowerment. The effectiveness of these provisions relies on national legal rules application, including interpretation and application of Islamic legal sources.

The OIC Declaration reflects some achievements in the field of the rights of the child. It guarantees equality to all children and prohibits sentencing children to capital punishment. However, the Declaration does not contain dispositions concerning children's freedom of conscience and religion. In general, it approximates the OIC acts regime to universal standards but it doesn't expressly provide for all guaranties granted by the CRC.

The right to security of one's religion is considered a part of the right to privacy (article 19). The approach expressed in the 1990 Cairo Declaration concerning that right hasn't been modified. The OIC Member States continue to grant protection to religion through protection of fundamental human rights.

As for certain negative developments, the right to seek asylum granted by the Cairo Declaration is no longer granted by the OIC Declaration on Human Rights. Although article 12 of the Declaration guarantees the same universally recognized human rights and fundamental freedoms to all refugees and migrants, the general approach to the issue of refugees is reflected in article 11 that only preserves expressly the right of refugees to return to their countries of origin, not their right to assimilation or re-

settlement on the territory of the OIC' Member States.

The OIC Declaration reflects some particularities of the Islamic human rights doctrine, while it refers to universal standards and reflects their wording, demonstrating the pluralistic approach of the OIC Member States. The Declaration gives rise to expectations of further approximation of the two approaches.

IV. The OIC Human Rights Protection Mechanisms

Several human rights protection mechanisms function under the auspices of the OIC. They include the Independent Permanent Human Rights Commission (IPHRC), its Field Visit Commissions (FVC) and Women Development Organisation (WDO). In 2017, IPHRC encouraged the OIC Member States to establish a separate mechanism for the implementation of the revised OIC Covenant.

A. Independent Permanent Human Rights Commission

The IPHRC activity is based on Chapter X of the OIC Charter and its 2011 Statute. According to Article 15 of the OIC Charter the aim of the IPHRC is to promote human rights preserved by both the OIC acts and universal human rights acts in conformity with Islamic values. Thus, human rights promotion by the IPHRC is subject to universal and Islamic doctrines. Meanwhile, as an OIC body, IPHRC's activity is subject to universal principle of human rights protection and promotion.

As can be inferred from Chapter IV of the Statute of the IPHRC, it is rather a consultative body established in order to assist the OIC bodies and Member States in their efforts to promote and protect human rights. The IPHRC is also meant to support the OIC position on human rights at the international level and consolidate cooperation among the Member States in this area.

Representatives of the UN human rights bodies are regularly invited to participate in the IPHRC sessions. At the end of each session outcome documents are adopted. These documents include both interpretation of Sharia provisions and references to universal international law acts. It is common for these publications to outline the areas of common ground between the universal concept of human rights and human rights in Islam. As to the recommendations, they frequently include accession or ratification of universal treaties by the OIC Member States, their implementation and cooperation with the UN bodies. However, some recommendations raise concerns. E.g. the IPHRC Study on Gender Identity of 2018 recommends reducing donations to the UN bodies and organisations and reconsidering cooperation with them if these bodies and organisations promote the views that do not correspond to those held by the OIC Member States. Such recommendations beyond doubt impede international cooperation in the field of human rights.

IPHRC session documents outline the necessity to involve Islamic scholars in further development of human rights doctrines, example of which is a recommendation contained in the 2017 study on the OIC Covenant. It appears that the Commission is especially concerned with ensuring the authoritative interpretation of national legislation that would make OIC acts on human rights effectively applicable on the territory of the OIC Member States.

The IPHRC takes into consideration Islamic States' cultural particularities when including Sharia-based interpretations of universal norms or recommendations to involve religious leaders in human rights promotion processes. It refers to Islamic law and universal treaties at the same time, thus supporting the pluralistic approach and developing a relativist concept with regard to application of universal standards.

B. Field Visit Commissions

Since 2014, the OIC has been sending FVC to countries and regions in which violations of human rights raise concerns of the Member States. So far, four FVC have examined the situation in Central African Republic (CAR) (2014), Palestine (2015), State of Azad Jammu and Kashmir (2016) and Myanmar (2018).

FVC mandates derive from decisions of various bodies of OIC which include Islamic Summit (2015 visit to Palestine, 2018 visit to Bangladesh), Council of Foreign Ministers

(2015 visit to Palestine; 2016 visit to Pakistan; 2018 visit to Bangladesh) and Executive Committee (2014 visit to CAR). Requests and recommenfations to examine human rights situation in a certain area are construed to be a FVC mandate.

Permission of the State visited is required for a FVC to enter its territory. Denial of such permission has been a deterrent factor in case of States that have no member or observer status in the OIC. For example, the Republic of India did not respond to the request to let the IPHRC representatives on its territory. As a result, the examination performed on the questions of human rights violations on the territory of Jammu and Kashmir relied on Pakistani politicians' and refugees' testimony. Similarly, FVC received no positive response from the Government of Myanmar to grant access to its territory so the primary source of information became refugees from the Rohingya refugee camps in neighbouring countries, mostly Bangladesh.

The aim of all four FVC was to investigate human rights violations against Muslim population of the respective territories. Report on each situation contains a description of historical background, findings on current situations and the IPHRC recommendations. The latter are addressed to the OIC, its Member States, non-Member States suspected of human rights violations and even the UN, its bodies and international community.

FVC findings are focused on representation of the factual background of a situation rather than human rights interpretation. FVC reports contain references to the UN Charter, international law in general, international humanitarian law and international human rights treaties. No reference to human rights in Islam or OIC declarations or covenants can be found. Thus, FVCs are aimed at ensuring that the universal standards' are respected with regard to the Muslim population of the globe and not asserting the relativist concept of human rights in Islam.

C. Women Development Organisation

The WDO was established and its Statute was adopted in 2009. It took eleven years for the Statute to enter into force upon the 15th ratification by the Republic of Cameroon. WDO is aimed at women empowerment in the OIC Member States. It does so by means of training, education and rehabilitation in line with the principles of Islamic values.

WDO Members are the OIC Member States that acceded to its founding document. Its Council consists of Ministers concerned with women's affairs in Member States. It is the Council's mission to adopt policies and programs linked with women development.

The main functions of the WDO are to raise awareness about women empowerment and the role of Islam in preserving the rights of Muslim women. As all OIC mechanisms, the Organisation aims at consulting Member States and promoting the interests of the OIC at the international fora. The WDO shall implement the OIC acts and recommendations, including the OIC Plan of Action for the Advancement of Women (OPAAW) of 2016 and Resolutions adopted by the OIC main bodies and conferences of ministers in charge of women.

Conclusions

As of March 2021, 51 out of 57 OIC Member States (89 %) are bound by the provisions of the ICCPR and ICESCR. These At the same time, it cannot be affirmed that the OIC Member States who have bound themselves with the provisions of universal treaties have ensured their full respect on their territories.

The OIC Member States and the OIC itself seek to preserve and develop their relativist concept of human rights in Islam as a part of Islamic legal systems.

The nature of the conflict between the two concepts of human rights is connected with Islamic states' human rights implementation mechanisms. This process should take into account the particularities of Islamic legal culture. From the standpoint of international law, the conflict should be considered in light of eurocentrism and regional fragmentation of human rights law.

The OIC and its human rights protection mechanisms take into account the above mentioned particularities through addressing gov-

ernmental and academic sources as well as international and Islamic doctrines in the field of human rights. Sometimes, lack of cooperation or counter productivity of the OIC bodies' recommendations can impede the alignment of the two approaches. In general, the measures taken by the OIC appear to contribute to human rights protection in its Member States. The approach of the Organisation can be described as pluralistic.

References

Ala Maudoodi S. A. (1977) *Human Rights in Islam*. Islamic Publication Limited, 40.

Aldeeb Abu-Sahlieh S.A. (1990) Human Rights Conflicts between Islam and the West. In *Third World Legal Studies.* 257–284.

Charter of the Organisation of Islamic Cooperation, done at the city of Dakar (Republic of Senegal) (2008). Available at: https://oic-iphrc.org/docs/en/legal_instruments/OIC_HRRIT/305535.pdf (Accessed: 23.06.2021).

Coulson N. J. (1957) The State and the Individual in Islamic Law. In *International & Comparative Law Quarterly*, 6(1), 49–60.

Donnelly, J. (1984) Cultural Relativism and Universal Human Rights. In *Human Rights Quarterly*, 6, 400–419.

Donnelly J. (1982). Human Rights and Human Dignity: an Analytic Critique of Non-Western Conceptions of Human Rights. In *The American political science review*, 303–316.

Faruqi I. R. (1983) Islam and Human Rights. In *Islamic Quarterly*, 27(1), 12–30.

Fassbender B. et al (eds.) (2012). *The Oxford Handbook of the History of International Law.* Oxford University Press, 1228.

Hashemi K. (2007) Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: an Essay on the Relevant UN Documentation. In *Human Rights Quarterly*, 29(1), 194–227.

Hogemann E. R. (2020) Human Rights beyond Dichotomy between Cultural Universalism and Relativism. In *The Age of Human Rights Journal*, 14, 19–36.

Kayaoglu T. (2020) *The Organization of Islamic Cooperation's Declaration on Human Rights: Promises and Pitfalls*. Brookings Institution, 18.

Krachkovsky I. Iu. (1963) *Perevod Smyslov Korana [Translation of the Meanings of the Quran]*. Moscow, Ezhaiev. 483.

F. Malekian (ed.) (2011) *Principles of Islamic International Criminal Law.* Brill Nijhoff, 5, 452.

Messer E. (1997) Pluralist Approaches to Human Rights. In *Journal of Anthropological Research*, 53(3), 293–317.

Nawaz M. K. (1965) The Concept of Human Rights in Islamic law. In *Howard Law Journal*, 11, 325–332.

OIC Covenant on the Rights of the Child in Islam (2004). Available at: https://oic-iphrc.org/docs/en/legal_instruments/OIC_HRRIT/327425.pdf (Accessed: 23.06.2021).

OIC Declaration of Human Rights (2020). Available at: http://oic-iphrc.org/ckfinder/userfiles/files/FINAL%20OHRD%20CLEAN%20 %20VERSION%2024_12_2020.pdf (Accessed: 23.06.2021).

OIC–IPHRC 13th Session Outcome Document of Thematic Debate on 'Revisiting the OIC Covenant on the Rights of Child in Islam to Reinforce the Rights of Children in Member States' (2017) Available at: https://oic-iphrc.org/en/data/docs/session_reports/13th/Outcome%20Document%20 %20for%20 13th%20 %20Session.pdf (Accessed: 23.06.2021).

OIC–IPHRC Report on: Fact Finding Visit to Rohingya Refugees Camps in Bangladesh to Assess Human Rights Situation of Rohingya Muslim Minority in Myanmar (2018). Available at: https://oic-iphrc.org/en/data/docs/field_visits/652137.pdf (Accessed: 23.06.2021).

OIC–IPHRC Report on: Fact Finding Visit to the State of Azad Jammu and Kashmir to Assess Human Rights Situation in the Indian Occupied Kashmir (2017). Available at: https://oic-iphrc.org/en/data/docs/field_visits/236756.pdf (Accessed: 23.06.2021).

OIC–IPHRC Report on: Human Rights Situation in the Central African Republic (CAR) (2014). Available at: https://oic-iphrc.org/en/data/docs/field_visits/103406.pdf (Accessed: 23.06.2021).

OIC–IPHRC Report on: Visit to Palestine (2016). Available at: https://oic-iphrc.org/en/data/docs/field_visits/441355.pdf (Accessed: 23.06.2021).

OIC–IPHRC Study on: 'Sexual Orientation and Gender Identity in the Light of Islamic Interpretations and International Human Rights Framework' (2018). Available at: https://oic-iphrc.org/en/data/docs/studies/46303.pdf (Accessed: 23.06.2021).

OIC Plan of Action for the Advancement of Women (OPAAW) Adopted by the Sixth Session of the Ministerial Conference on the Role of Women in the Development of OIC Member States, Istanbul, Republic of Turkey (2016). Available at: https://oic-iphrc.org/docs/en/legal_instruments/OIC_HRRIT/38864.pdf (Accessed: 23.06.2021).

Renteln A. D. (1988) *The Concept of Human Rights*. Anthropos, 343–364.

Resolution No. 3/14-ORG of the Fourteenth Islamic Conference Of Foreign Ministers, Dhaka, Peoples Republic of Bangladesh. The Adoption of the Draft Document on Human Rights in Islam (1983). Available at: https://www.oic-oci.org/docdown/?docID=4366&refID=1224 (Accessed: 23.06.2021).

Resolution No. 49/19-P of the Nineteenth Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development), Cairo, Arab Republic of Egypt. On the Cairo Declaration On Human Rights In Islam (1990). Available at: http://ww1.oic-oci.org/english/conf/fm/19/19 %20icfm-political-en.htm#RESOLUTION%20NO.%2049/19-P (Accessed: 23.06.2021).

Resolution No. 63/47-Pol On Adoption of the Cairo Declaration of The Organization of Islamic Cooperation on Human Rights (2020). Available at: https://www.oic-oci.org/docdown/?docID=6626&refID=3255 (Accessed: 23.06.2021).

Saeed A. (2018) *Human Rights and Islam: an Introduction to Key Debates between Islamic Law and International Human Rights Law*. Edward Elgar Publishing, 276.

Said A. A. (1979) Precept and Practice of Human Rights in Islam. In *Universal Human Rights*, 1(1), 63–79.

Salmon M. H. (1999) Relativist Ethics, Scientific Objectivity, and Concern for Human Rights. In *Science and Engineering Ethics*, 5(3), 311–318.

Samour N. (2014) Is there a Role for Islamic International Law in the History of International Law? In *European journal of international law*. 25(1), 313–319.

Traer R. (1989) Human Rights In Islam. In *Islamic Studies*, 28(2), 117–129.

Van Den Berg L. V.S. (2006) *Osnovnyie nachala musul'manskogo prava soglasno ucheniiu imamov Abu Hanify i Shafii [Basics of Muslim law according to the teaching of imams Abu Hanifa and Shafi]*. Ripol Klassic [Ripol Classic], 214.

Journal of Siberian Federal University. Humanities & Social Sciences
2022 15(8): 1156–1170

DOI: 10.17516/1997-1370-0918
EDN: GBWPZE
УДК 342.922

Digital Platforms in Russian Higher Education

Natalia A. Sheveleva and Ilia A. Vasilyev*
Saint Petersburg State University
Saint Petersburg, Russian Federation

Received 26.09.2021, received in revised form 27.12.2021, accepted 12.05.2022

Abstract. The processes of active digitalization of various sectors of the Russian economy have influenced the field of higher education. The existence of many digital educational platforms for hosting online courses is a reality. Although it seems obvious, the institution of a digital educational platform has not yet been properly clarified. There is no full-fledged concept of a "digital educational platform" from the standpoint of a legal assessment of its nature. Is the platform a set of services or something else? Does the platform provide services? Is the platform responsible for user access and content? Different types of such platforms created "from above" and "from below" have not yet been systematically considered in legal science. The representative of the first model is "Open education", in the emergence and existence of which a public subject is interested. Private platforms such as "SberUniversity" or "Lectorium", which have several directions of interaction with users and claim their place in the higher education system, can be classified as those created "from below". The coexistence of educational platforms is not limited to competition between them. Platforms are changing the education system: secondary, higher, additional. Therefore, the risks of further penetration of platform reality into higher education need to be predicted. The existence of educational platforms has had an impact on the previous education system. Subjects of education are the first to undergo such a transformation: universities, teachers. Russian universities are actively working to expand the offer of digital analogs of classical academic disciplines. Also, the universities are constructing courses for the formation of competencies in demand today. This is becoming a new educational area for universities. Thanks to the legal regulation of the credit of online courses, universities are differentiated into those offering educational content and using such content. Professors are now competing in an open space where any classic academic discipline can be replaced by an online course. In conclusion, the prospects for the transition of higher education from formalized to informal are noted.

Keywords: digitalization of education, educational platforms, educational services, educational resources, online courses, additional programs, university competition, academic mobility.

* Corresponding author E-mail address: i.vasilev@spbu.ru
ORCID: 0000-0002-3381-5359 (Sheveleva); 0000-0003-1951-0687 (Vasilyev)

This research was funded by RFBR according to the research project No. 19-011-00687 «Influencing of the IT in the Higher Education on Relevant Economical Processes in Modern Russia».

Research area: law.

Citation: Sheveleva, N.A. and Vasilyev, I.A. (2022). Digital platforms in Russian higher education. J. Sib. Fed. Univ. Humanit. soc. sci., 15(8), 1156–1170. DOI: 10.17516/1997-1370-0918

Цифровые платформы в российском высшем образовании

Н.А. Шевелева, И.А. Васильев
Санкт-Петербургский государственный университет
Российская Федерация, Санкт-Петербург

Аннотация. Процессы активной цифровизации разных отраслей российской экономики повлияли на сферу высшего образования. Существование многих цифровых образовательных платформ для размещения онлайн-курсов является реальностью. При кажущейся очевидности институт цифровой образовательной платформы пока не исследован должным образом. Не существует полноценного понятия «цифровая образовательная платформа» с позиции юридической оценки ее природы. Платформа – набор сервисов или что-либо иное? Оказывает ли платформа услуги? Несет ли платформа ответственность за доступ пользователей и содержание? Системно в юридической науке пока не были рассмотрены разные виды таких платформ, создаваемых «сверху» и «снизу». Представителем первой модели является «Открытое образование», в появлении и существовании которого имеет интерес публичный субъект. К создаваемым «снизу» могут быть отнесены частные платформы, такие как «СберУниверситет» и «Лекториум», имеющие несколько направлений взаимодействия с пользователями и претендующие на свое место в системе высшего образования. Сосуществование образовательных платформ не исчерпывается конкуренцией между ними. Платформы меняют систему образования: среднего, высшего, дополнительного. Поэтому нуждаются в прогнозировании риски дальнейшего проникновения платформенной реальности в высшее образование. Существование образовательных платформ оказывает влияние на прежнюю систему образования. Первыми подвержены такой трансформации субъекты образования: университеты, преподаватели. Российские университеты активно работают над расширением предложения цифровых аналогов классических учебных дисциплин, а также курсов для формирования востребованных сегодня компетенций. Это становится новым образовательным направлением для вузов. Благодаря нормативному праву зачета онлайн-курсов происходит дифференциация университетов на предлагающих учебный контент и пользующихся таким контентом. Преподаватели теперь конкурируют в открытом пространстве, когда любая классическая учебная дисциплина может быть заменена онлайн-курсом. В завершение отмечены перспективы перехода высшего образования от формализованного к учитывающему неформальные составляющие.

Ключевые слова: цифровизация образования, образовательные платформы, образовательные сервисы, образовательные ресурсы, онлайн-курсы, дополнительные программы, конкуренция университетов, академическая мобильность.

Статья подготовлена в рамках научного проекта Российского фонда фундаментальных исследований № 19–011–00687 «Влияние цифровизации высшего образования на связанные с ним экономические процессы в современном российском обществе».

Научная специальность: 12.00.00 – юридические науки.

Introduction

The rethinking of the value of distance learning technologies and e-learning that has taken place in recent years in the Russian educational system is largely due to the development of digital platforms for online courses. The platforms have no formally restrictions on the level of education and allow endlessly individualizing the process of obtaining new competencies. A catalyst for the growth processes of educational product offers on platforms should be sought not so much in a pandemic and the forced transfer to the "distance" learning processes, but in the broad horizon of the concept of "education" laid down by the legislator, directly or indirectly, representing "… attitudes, experience, and competence of a certain volume and complexity" (Art. 1 Federal Statute of December 29, 2012 No. 273-FZ "On Education in the Russian Federation"). At the same time, the formalized higher education remains on the agenda of state policy, and its framework (educational standards and relevant curricula, as well as programs of courses or practices) currently demonstrate only limited flexibility for the implementation of the content of any digital platforms in the learning process. We can say that the process of "digitizing" various educational courses has now continued, with new argumentation: from online courses as the equivalent of academic disciplines in higher education programs to any material claimed to be useful in the educational process. The discussion about the content of education has been developing between the three interested parties involved: a public subject, an employer and a student. Each of them has its ranking of expected results in higher education. For the state, the standardization of higher education through the system of "standards-curricula-work programs" is still an indisputable axiom. Accordingly, each product of the digital platform, positioning itself as "educational", must be designed into a normatively defined format. It is quite obvious that in this approach developers of massive online courses can and will only be universities – organizations that realize their higher education programs based on state standards, or university standards and curricula. However, educational organizations are crossing the former corporate boundaries of programs, entering the competitive environment of online courses on a digital platform, and offering various opportunities for offsetting the result within the framework of classical learning process. The reasons for such innovations are different, we will discuss them separately. At the same time, we see it quite logical if a student is confident that upon receiving a diploma, he or she will be able to integrate into the economy without the need for retraining. Employers, who determine the structures of the labor market influence through several factors, including by offering their vision for the necessary knowledge, skills, and abilities of a graduate with a higher education diploma. The digital educational platforms we are considering as the institutional solution for companies to promote their needs in competencies and ways to satisfy them.

Theoretical Framework

Today, the attention is drawn to the emergence of domestic digital educational platforms created as a result of the collaboration of universities (for example, the National Platform "Open Education"), as well as business projects of organizations that are not related to the academic sphere (for example, "SberUniversity"). The multiplication of the number of plat-

forms is an expression of the basic economic postulate of demand, which generates supply. The popularity of online education even before the pandemic made it possible to introduce various materials to the virtual educational "market" from personal self-development to analogs of academic courses of higher education programs. Educational platforms have given for such content a structure, a quality standard, as well as their vision of applicability and usefulness for various social tasks. The super competitive environment for the existence of educational platforms is permanently complicated by several factors. Firstly, the presence of "balanced" representatives ("Open Education" and "SberUniversity"). Secondly, different strategies for preparing online courses exist (academic courses and courses from practitioners). Thirdly, the variability of service offerings (online courses and additional programs). Fourthly, using different approaches to the concept of quality (presumption of the quality of university courses and positioning the significance of the results of development in practice-oriented courses). The first to come to our educational space "Coursera" today concurs with the other digital educational platforms, retaining as a visible advantage the possibility of expanding the audience of consumers – placing online courses in English and other foreign languages.

Statement of the Problem

The processes of digitalization of higher education create a new educational reality for all subjects involved (the platform itself, creators of materials, content users), which one sociologists today call "platform" today. In such a reality, the social component is using the potential of different communities and managing the interaction between them on the platform to achieve maximum efficiency. The difficulty in understanding the latter lies in the lack of understanding of consumer motivation on digital educational platforms. The variety of content allows you to individualize your education, but is there a necessary, scientifically defined limit for such a process? Are consumers of online content themselves aware of the learning goals and how to achieve them? Do clients of educational platforms differentiate between the purpose of higher education courses and e-courses from other organizations? Only professionals understand that university courses are the part of the systemic education, they work for a long term. Educational products of other participants in the educational market solve specific problems at a particular moment in time, provide the acquisition of competencies that are urgently needed at a given moment in time. Both those and other courses are necessary for the student, but their ratio and volume depend on the needs of the individual student.

It is also impossible to get away from the question of whether the educational organizations themselves are the very moderators of higher education? Do universities understand the optimal content of the training program for each direction, determining the necessary and secondary online courses and other materials presented on educational platforms (Sheveleva, Vasiliev, 2021: 53–68)? Should they submit to the dictates of the consumer in education, who speculatively chooses the material necessary for his professional viability? Finally, how does the digital educational platform affect higher education in terms of determining its content, albeit in a virtual plane? Are there risks of the elimination of universities due to the variety of platforms, created without the participation of the academic community?

The fate of classical universities in the new reality does not look like a linear development, various options are possible. The first one is a partnership with companies offering educational products as a way to increase competitiveness in the context of the dominance of educational platforms. The second option, educational organizations become regional research centers (ecosystems), and platforms are assigned the role of technological platforms for uniting interests. The creation and support of their digital systems require large financial resources; universities must seek support either from the state or from a business. How far the forecasts will become in Russian reality, will depend on the results of the implementation of the program of strategic academic leadership "Priority 2030". The task of the authors of this article is to try to offer a meaningful understanding of terminological and institutional components of such

a phenomenon as a digital educational platform in the Russian educational system.

Methods

The implementation of platform solutions in several sectors of the economy, in the social sphere, in the public administration, and in the provision of services had been being a public policy priority over the past three years (The Decree of the President of the Russian Federation of 07.05.2018 No. 204 "On national goals and strategic objectives of the development of the Russian Federation for the period up to 2024"). However, attempts to define the generic concept of "digital platform" are still being undertaken by researchers from various fields of scientific knowledge. For example, philosophers consider a technological platform as a way of dynamically self-describing systems, reaching the level of describing self-descriptions, providing for a regular review of a portfolio of priority projects (Lichutin, 2012: 164–169). Sociologists, referring to foreign researchers, agree with the understanding of a digital platform as a virtual platform that ensures the interaction of two or more parties (user groups) according to certain rules (Shevchuk, 2020: 30–54). For representatives of the exact sciences, a digital platform is a set of technologies based on processes and applications, which represent a mechanism for combining the efforts of all interested parties, used to solve specific problems and having a certain set of properties (Ryazanova, 2020: 26–36). In management, it is proposed to call a platform an enterprise that ensures mutually beneficial interactions between the parties of the producer and the consumer, creates an open infrastructure for participants and sets the rules (Alstin, Parker, Sangeet, 2017: 18). A digital platform is understood as a business module with technology support that facilitates the exchange of information between users of information and its consumers, who do not necessarily know each other, thereby achieving a certain confidentiality (Zaramenskikh, 2018: 105–112). In Russia, platform solutions first appeared in business, later spreading to the education sector. At first glance, the reasons for turning to digital transformation are quite simple and universal for a platform in any area. In the context of digital technologies the uniqueness of a product, which is difficult to maintain for any length of time even with modern legal protection methods, is replaced by the uniqueness of consumer services in the form of customization of the product and the introduction of an ecosystem of accompanying services. As a result, digital platforms act as platforms for the placement of services demanded by consumers, at the same time "creating conditions for the emergence of a new business environment" (Zaramenskikh, 2018: 111). The concept of a digital platform correlates with the above definitions, can be found in the strategic agenda of the Eurasian Economic Union: a system that supports the use of digital processes, resources, and services by a significant number of subjects of the digital ecosystem and provides the possibility of their seamless interaction (The Decision of the Supreme Eurasian Economic Council of October 11, 2017 No. 12 "On the Main Directions for the Implementation of the Digital Agenda of the Eurasian Economic Union until 2025").

In the field of education, the position of the Ministry of Science and Higher Education is important, so in article 3 of the Regulations on the state information system "Modern digital educational environment" educational platforms received a legal definition: "Information platforms in the information and telecommunications network Internet, on which educational organizations host online courses, the development of which is carried out by students through the usage of distance educational technologies and e-learning" (The Decree of the Government of the Russian Federation of November 16, 2020 N 1836 "On the state information system "Modern digital educational environment" (together with the "Regulations on the state information system "Modern digital educational environment"). We could see that the key feature of a digital educational platform is online courses, the free development of which should be platforms understood as technology.

The researchers have noted other essential aspects of the platform, including its purpose – the provision of services (online services). Conceptually, one can agree with the position presented in science that educational platforms are

built around software as a service, thereby ensuring that educational content meets the needs of listeners, as well as, in some cases, including built-in analytics (Ryazanova, 2020: 30). Highlighting the service goal in the digital platforms means raising the issue of compensation or gratuitousness of services provided to users, the first of which is access to online courses.

Summarizing the above definitions and elements of the concept, we propose the following vision of a digital educational platform – a software product on the Internet for providing users with services for educational products (implemented in electronic form or using distance educational technologies of educational programs, online courses) and support of the processes of obtaining related information by users.

Discussion

The formation of digital educational platforms can be carried out on an initiative basis "from above" or "from below". Some researchers have been called the first case a "state model" since platforms are created for the implementation of public policy in a certain area (Veredinsky, Makarov, Slutsky, 2021: 108). The "commercial model" provides for the implementation of the business model chosen by the organizers of the platform project (Veredinsky, Makarov, Slutsky, 2021: 108). The above classification seems to be quite universal for different platforms. However, we will make a few clarifications regarding the initiative as a criterion for classifying the ways of platform implementation. "State" does not mean the creation of an educational platform directly by a public entity and funding from the budget of the corresponding level. The key is to formulate the goals of the platform in the context of the multidimensional mission of education in the Russian legal system. This missions are social (investment in human capital, which means priority-free development of educational products and their availability to any person on the Internet), reputational (proposing their approaches to the structure and the content of the educational product, as well as its possible uniqueness), competitive (the choice among thematically similar educational offers of different universities), the attraction of commensurate resources (the provision of paid related services, starting with the payment of a certificate of successful course completion). Such a model can be implemented indirectly, through state universities as ready-made centers for generating the main educational product of digital platforms today – online courses. The "commercial" creation of an educational platform is distinguished by a change in the ranking of goals: the development of corporate human capital comes to the fore (providing the company`s employees with an appropriate level of competence); transformation of the business landscape (forced changes in the sphere or several areas of the economy according to the ideas of the creator of the platform); making a profit (selling educational products that are currently in demand at the moment). The digital educational platforms that have appeared with the listed goal-setting are to some extent complementary in comparison with the "state" ones since they will be forced to offer innovative and atypical educational products-services that meet a wide range of consumer needs, both in terms of subject matter and content, execution. Therefore, it is quite predictable that the organizers of the "commercial" educational platform are business entities. At the same time, collaboration with universities is a far from obvious solution to achieving a massive offer of educational services on such a platform. Maybe, it is so due to the main target audience – the companies` staff, and only secondarily – the other consumers. Corporate orientation may lead to attention to the "fashionable" (for various reasons, not only because of the effectiveness of the methods and the product being created) creators of educational products that exist outside the academic community. It is enough to see who are the main speakers on the formation of so-called soft skills, digital skills, hard skills: Nathan Fehr – professor of strategy at INSEAD business school, Jörg Missing – professor of INSEAD, lecturer of the discipline "Creating a unique client experience", Simon Seibrands – consultant Leadership Development, Coach of the Kets de Vries Institute (KDVI), Evgeny Dotsenko – Director of R&D of the Training Institute – ARB Pro Group. As a result, "commercial" digital educational platforms imply the offer of products from those who know in what form, based

on what educational technologies (the so-called "EduTech"), and with a focus on what result it is necessary to interact with persons involved in specific business processes.

The right to receive an education is recognized in Russia as a constitutional value, defining the social mission of the state as creating conditions for the accessibility of education. We believe that it is the "state" model that is preferable in the domestic educational system. However, at the moment, only the platform "Open Education" created by the Association "National Platform for Open Education" could be called "state model" in the field of higher education. The educational platform was initiated by a leading university: Moscow State University. M. V. Lomonosov, SPbPU, SPbSU, NUST MISIS, NRU HSE, MIPT, UrFU, and ITMO University. The public entity is not the direct creator of the platform but realized his interest in its appearance in the "support" format (this is how the background of the platform is determined in the methodological recommendations on the use of online courses hosted on "Open Education"), as well as through state universities, the founder of which is (Methodical recommendations: 3). The goal of "Open Education" is the emergence of "a new element of the higher education system in Russia, which will help increase the availability and quality of education". This mission correlates with the principles of state policy in the field of education, presented in paras. 2, 7, 8 art. 3 of the Federal Statute of December 29, 2012, No. 273-FZ "On Education in the Russian Federation" (hereinafter – the Statute on Education): "2) ensuring the right of every person to education, the inadmissibility of discrimination in the field of education; 7) the freedom to choose education according to the inclinations and needs of a person, creating conditions for the self-realization of each person, the free development of his abilities; 8) ensuring the right to education per the needs of the individual, the adaptability of the education system to the level of training, developmental characteristics, abilities and interests of a person".

The effective achievement of public education goals cannot be achieved directive "in manual mode", the Ministry of Science and Higher Education cannot require the founders of the platform and other state universities to systematically prepare a certain number of online courses at a specific time. A different way of encouraging universities to develop courses specifically for this platform is needed. Open Education declares three unified principles for the online courses presented at it: the best-specialized courses of the best professors; quality standards; organization of assessment procedures. However, the positions presented are bonuses only for consumers who could choose online courses in a competitive environment of several educational platforms. In this situation, if the online course is equal to the academic course of the corresponding curriculum, then it has an advantage.

The national platform "Open Education" is characterized by the functioning of interconnected platform services: (a) the ability to search for courses on topics with a filter for a specific university (selection of proposals from the best), (b) a well-thought-out structure of courses (combining videos with presentations, materials for self-study, current issues and final certification as a guarantee of high-quality development), (c) a system of identification of the applicant (guarantees of the fairness of obtaining a certificate). As noted on the platform`s website, in comparison with courses on other online learning platforms (1) all courses are developed under the requirements of federal state educational standards; (2) all courses meet the requirements for learning outcomes of educational programs implemented in universities; (3) emphasis is placed on the effectiveness and quality of online courses, as well as procedures for assessing learning outcomes. Of the above, the first two features stand out – compliance with educational standards and requirements for learning outcomes for higher education programs. This correlation can stimulate universities to develop online courses since their use makes it possible to reallocate their resources and increase the efficiency of their activities. A multi-effect arises – the achievement of several tasks using the created courses: the use of our online courses instead of classical disciplines or as an addition to them, as well as the external transfer of knowledge for universities that

do not have a sufficient base of courses, but strive to optimize the processes of implementing their programs. Some of the parameters of such optimization are given in the material "Analysis of the needs of universities and experience in the inclusion of open online courses in curricula" which is presented on the "Open Education": (a) reduction of financial costs for teaching; (b) filling the shortage of teachers in narrow-profile disciplines; (c) mastering and applying new teaching methods.

At the same time, for the intensity of the transfer of online courses, an important nuance is the payment, based on a standard network agreement concluded between two universities: a developer and a consumer. The digital platform provides incentives for universities to prepare online courses hosted on the platform – income directly depends on the array of in-demand online courses. The founding universities of the national platform, defending their commercial interest, decided that the university can implement an online course in its educational program by concluding a network agreement with the university that developed the course. We know that in a pandemic, the Open Education platform provided online courses free of charge, and this decision was made jointly with the Ministry of Science and Higher Education (Press Release "Leading universities have opened free access to online courses for students"). The use of the network contract model makes one think about the correspondence of the decision to the understanding of the network form of the implementation of educational programs and the current legal regulations (See: the Decree of the Ministry of Education and Science of Russia N 882 of May 8, 2020 "On the organization and implementation of educational activities in the network form of implementation of educational programs" (together with the "Procedure for the organization and implementation of educational activities in the network form of implementation of educational programs", art. 15. Participating organizations are not entitled to charge students for the implementation of a part of the network educational program and (or) the provision of resources for its implementation). We believe that the financial interest of a university-developer of an online course should be protected within the framework of simpler structures – a contract for the provision of services for a fee, and the use of a network contract needs additional justification.

The current content of the Open Education convincingly demonstrates the process of singling out a group of universities (which were its founders), systematically replenishing the base of online courses. The digital educational platform is becoming a catalyst for the processes of complication of the national structure of higher education organizations, according to which some universities are "suppliers" of high-quality educational products that other universities implement in their educational programs. In parallel, there is a branch of the selected vector of development – virtual academic mobility of students who choose an online course from a leading university instead of the disciplines of their educational program, followed by the result of development. This trend is another incentive given by the public subject of interest of universities in the creation of online courses within the framework of "Open Education" – competition for the reputation obtained as a result of replacing courses in other programs, as well as for possible funding within the framework of federal projects.

On the one hand, it seems that the use of online courses presented on the "Open Education" platform fits into the content of the concept of education in the sense that is enshrined in the provisions of art. 2 of the Statute on Education: "a single purposeful process of upbringing and education, which is a socially significant benefit and carried out in the interests of the individual, family, society and the state, as well as a set of acquired knowledge, skills, attitudes, experience and competence of a certain volume and complexity for intellectual, spiritual, moral, creative, physical and (or) professional development of a person, to meet his educational needs and interests". On the other hand, higher education is realized at the levels presented in the provisions of art. 10 of the Statute on Education (bachelor, master, specialty), this means that online courses should also be "tied" to the corresponding level of higher education, they should support the formation of relevant com-

petencies. We can assume the possibility of the existence of "free" online courses, suitable for any educational programs of higher education, however, this requires deep methodological study. Therefore, the value of online courses can be recognized to a greater or lesser extent in the acquisition of higher education, provided that the results of such courses are read in a specific program. Nevertheless, the content of education is doomed to go beyond the strict limits of educational programs, with a competence-oriented setting of higher education, the acquisition of knowledge, skills, and abilities can be carried out using a wider range of educational products (so-called "non-formal education") that meet the needs of the labor market. As a consequence, the emergence of "Open Education" is seen as a timely element of public education policy, not limited only to higher education programs at universities (which thereby stimulate the development of local procedures for recognizing online courses as academic disciplines), but also to include an interest in recruiting and the development of competencies outside the framework of educational programs. This educational platform also offers anyone who wants an initial acquaintance with the professions of the present and the near future (career guidance). But having made the first step, the public subject sooner or later must decide on an "educational reformation" to revise the rigid system "standard-curriculum-program of discipline, practice". The variability of academic disciplines allowed in the current educational standards, which implies the student`s right to choose educational courses, is insufficient. A simple expansion of variability is threatening to develop into a system of a free set of academic disciplines, which fundamentally contradicts our domestic educational system, built on the principle of consistency and the teaching method "from a common to the private". Weighted decisions are needed about the admissibility of replacement, compliance criteria, the amount of variability, and some others. Educational platforms will be needed as tools for the implementation of ready-made methodological solutions.

The second model, "commercial" digital educational platforms, is created not by academic institutions of higher education (and, as it seems to us, even with the principled position of not representing universities in such projects), but by companies from different sectors of the economy. The latter, as we noted earlier, considers the result for the consumer from at least three points of view: (1) the development of their human corporate capital, (2) the impact on the transformation of the professional field on a national scale according to their perception, and (3) as a way of making a profit. At the same time, the forms of functioning of educational platforms may differ. "SberUniversity" is one of the most successful examples. The platform was created by the corporate university of the same name, which has the status of an organization that implements additional professional educational programs (lifelong education) (ANO DPO "Sberbank Corporate University"). The educational partners of "SberUniversity" for several programs are an international business school, as well as companies from their eco-environment: "Access to lectures by teachers from INSEAD and SberUniversity 24/7 in combination with live communication with experts from companies in the Sberbank ecosystem. Remotely, at a convenient time for you" (program "Digital transformation is a new reality"). The flexibility of designing programs allows us to offer thematic diversity, combined for "open programs" (available to any audience, not excluding employees of the "Sberbank" ecosystem companies) by three filters: soft skills, digital skills, hard skills. These filters on the platform are not decrypted and their content remains undefined for users: at the moment the first two do not have fixed courses, hard skills include only "Strategic asset and liability management", the rest of the programs are displayed when the "All" filter is selected. The distribution by filters seems to be expected in the future. We can assume that the use of filters on the platform has at least two goals. On the one hand, new "skills", compliance with the modern agenda, the development of which will benefit the listener. For what are these "skills", and what is the benefit of mastering the program – making decisions only for each consumer. True, it remains questionable whether the skills related to the triad of the result of higher education programs: knowledge and

competence. On the other hand, thanks to the "skills" filters, the "SberUniversity" influences the formation in the professional community (and, therefore, in different spheres of the economy) its vision of a newfangled phenomenon. Having indicated, for example, "hard skills" for the open program "Strategic management of assets and liabilities", the consequence is to fill this type of "skills" with meaning. In comparison, "corporate programs" designed for employees of organizations on the platform are not marked with the listed filters, are purposefully focused on the development and education of the personnel of the ecosystem companies.

Online courses are deliberately not followed with the status of additional educational programs and are distributed according to two previous filters: soft skills, digital skills. The filling of both filters on the platform is uneven: seven courses for the first, two courses marked "digital". For distance programs, as well as online courses, a separate service has been created to provide and support the learning process "Sberbank`s Virtual School". The platform also presents a knowledge bank as a separate service, divided into the author`s short thematic business articles; materials for teaching about the professional skills of the future; the online store of selected business publications.

"SberUniversity", in general, corresponds to our understanding of the digital platform as a set of services and processes associated with their use by consumers. Firstly, there is a set of services for the distance educational programs, support of full-time programs, mastering the presented online courses, and using the knowledge bank. Secondly, services are built on the direct and indirect interaction of subjects within the framework of the necessary processes. The presence of a digital platform for the activities of "SberUniversity" is secondary. The company was looking for the most convenient form for all involved subjects (at the beginning – its employees, later – any consumers) and a flexible form of offering educational products in conditions of objective territorial disunity. The result was quite predictable – a digital platform available 24/7/365 to any external customers, as well as to employees of their eco-environment, allows the user to constantly individualize the educational trajectory (for self-development, lifelong education) with the help of additional professional education and online courses. The consumer demand we noted earlier for the flexibility of modern higher education means the use of not only courses with the "discipline of higher education" filter, which can later be credited in the learning process. Beyond the content rigor of higher education programs, there is sufficient space for educational products that a graduate will need. And here the omnipotence of "commercial" educational platforms, using the example of "SberUnivrersity", is unlikely to be challenged by academic universities and there are several reasons for this, but the main two are financial resources and the absence of a dictate of educational standards.

"Lectorium", like "SberUniversity", represents a group of "commercial" educational platforms, but it has several significant differences. Firstly, the project includes several directions, only one of which is "an educational platform for hosting massive open online courses (MOOCs)". Other main forms of activity: digital publishing (creating online courses for various educational platforms, including our own platform), media library (video archive of educational materials in Russian, more than 6,000 lectures have been published in the public domain), an educational center (training for producers and developers online courses), Eduardo (providing anyone with a platform to create and launch an online course). Thus, the "Lectorium" as an educational platform represents both an available online set of services, as well as offered offline services (digital publishing) or combining the first and second forms (educational center). Secondly, the strategy of placing online courses demonstrates a combination of approaches of other platforms to the repayment of content: they have paid access, similar to "SberUniversity", or paid certification, as in "Open Education". Thirdly, online courses are divided according to user filters "schoolchildren", "specialists", "enrollees", "parents". The subject approach seems to be the correct solution when the understandable terminology "student", "parent" is used. We have doubts about the other two filters used. The question remains, by what criteria should a user classify

himself as an "enrollee" or "specialist". Having chosen the first, a list of courses is offered may be in interest to a wide range of people, without reference to the status of educational programs. After analyzing the set of courses for "specialists", we could say that the platform understands them, first of all, as the audience of students in higher education programs. Some courses (for example, "Genius. Giftedness. Mediocrity") could be considered as the development of any user of the very "skills" that we previously cited concerning "SberUniversity". But then there is no formulated utilitarian result for persons with higher education – why this course is useful for a "specialist", and who is this 'specialist" in need. Fourthly, the "advanced training" filter does not mean offering additional educational programs designed in the format of an online course. In this version, the platform presents content that seems to be a possible beginning (and only a starting point, no more) for acquiring additional specialization – the first knowledge, skill, or competence within the framework of a new profession.

The Strategy for Digital Transformation of the Science Industry and Higher Education, promulgated by the Ministry of Science and Higher Education, identifies two main problems of entering the market for "digital educational services" like "SberUniversity". The first one is the difficulty for companies that are not part of this ecosystem and do not have access to the capital that develops and sells content. All speakers have already been "disassembled" and work for large digital platforms. It seems that in this case, "digital educational services" are hostage to their strategy to attract high-profile external speakers, not from the academic environment, whose market is objectively limited. The second problem is the lack of a standard for the provision of educational services on such digital platforms, as a result of which the content of the programs or courses of the same name may differ significantly.

The quality of education and educational services are the most difficult concepts in the field of higher education. Even the legislator did not dare to define quality, in the Statute on Education quality is understood as the fulfillment of a set of mandatory requirements for a university and its educational program, determined by the criteria of state accreditation and licensing federal state educational standards. This does not help in assessing the quality of online courses of various "manufacturers". How much an electronic product of one "commercial" platform is better than a thematically identical course of a similar platform, and how qualitatively both of these differ in one direction or another from the course of an academic organization on a "state" platform – the equation with many unknowns. Quality in the sense of usefulness concerning online courses and additional educational programs should be lapidary defined as the ability to immediately use what was lawfully heard in practice in one`s interest (professional, interpersonal, social).

Noteworthy is the use of the Ministry of Science and Higher Education in the said Strategy concerning "SberUniversity" and similar projects at the same time by two terms as synonyms: "digital educational services" and "digital platforms". According to GOST R 52653–2006 "Information and communication technologies in education", an electronic educational resource (EER) is an educational resource presented in digital form and including a structure, subject content, and metadata about them (an electronic educational resource may include data, information, the software necessary for its use in the learning process). The standard was adopted in 2007 and could not operate in terms of a digital platform and digital educational service. However, the definition of an e-learning resource is similar to the content of an online course. The latter in para. 3 of the Decree on the state information system "Modern digital educational environment" is considered as a training course implemented using exclusively e-learning, distance educational technologies posted on the official websites of educational organizations, educational platforms, access to which is provided through information and telecommunications network Internet, and aimed at ensuring the achievement of certain learning outcomes by students. To unify terminology, an electronic educational resource should be recognized as identical to an online course and, therefore, is an educational service implemented on a digi-

tal educational platform in the interests of consumers (users).

The national project "Education" involves the implementation of such a federal project as "New Opportunities for Everyone", which is the normative basis for the emergence of a digital platform for lifelong education, combining vocational training and additional education. According to the project passport, together with the platform, a set of services should be created that provide navigation and support to citizens when choosing educational programs and organizations that carry out educational activities, innovative forms of learning in offline and online formats. The main target audience of the platform is working citizens, however, the platform and its services can be used by any person (the Passport of the Federal Project "New Opportunities for Everyone": 20). At the second stage of the implementation of the federal project (2021–2024), it is planned on an ongoing basis to stimulate universities to participate in the formation of the content of the educational platform through a system of grant support (the Passport of the Federal Project "New Opportunities for Everyone": 21). This incentive method should allow a wide range of Russian universities to get involved in the process of creating digital educational products. In comparison with the emerging group of leading universities of "Open Education", concerning lifelong education, other "players" may appear who previously implemented an array of demanded additional educational programs and (or) professional training programs offline (for example, corporate universities). The characteristics listed in the project passport speak of the concept of a digital platform close to "Open Education" – the placement of online courses of a certain educational policy, a unified structure, and a single quality standard.

A systematic approach to the digital transformation of education should undoubtedly take into account the platform solutions that have taken place as tools that create new models of interaction between subjects of educational activity. However, public policy has radically changed with the adoption and implementation of the national projects "Education" and "Digital Economy" in the direction of expanding the actors of digital online services and their audience. A significant milestone is the Decree of the Government of the Russian Federation of November 16, 2020, No. 1836 "On the state information system "Modern digital educational environment", aimed at creating a state information resource that accumulates both information (data) and processing technologies for use by interested subjects in the field of education. This portal is not positioned as a digital educational platform either institutionally or at the regulatory level – it is a management solution for the consolidation of online courses of various platforms into a single register and access to them on a "one-stop" basis. To some extent, this can also be called the consolidation of public resources of state universities (Belov, Linskaya, Kropachev, 2020: 151–163; Vasiliev, Diveeva, Dmitrikova, Kashaeva, Sheveleva, 2020: 877–902). Along with this, the emergence of the project will mark an attempt to "socialize" the accumulated results to increase their general availability and develop a new quality standard. For example, an automated psychometric analytics service has been launched on the "Modern Digital Educational Environment" portal. The service analyzes the online course in four main areas: content difficulties, changes in student readiness, student interaction with content, analysis of evaluation tools; the analytical report that the course developer receives includes recommendations for its modernization to improve the quality of the online course. Separate services are employers` access, with the consent of the student of the online course, to the information of his digital individual portfolio and the assessment of the online course. The portal does not offer its online courses or, moreover, educational programs implemented in the form of e-learning or using distance learning technologies. Nevertheless, new, in comparison with "Open Education", services have been introduced to improve practice orientation, including automatically generated analytics to enhance the interaction of platform subjects. Such decisions act as new incentives on the part of a public entity to involve digital educational platforms and universities-rightsholders in the functioning of the portal. How effective they will be – it will

be possible to say in a few years, when the feedback of the operation of the new structure from the "suppliers" of educational content appears.

Another vector of modern platform reality and a factor that will influence future competition in digital education is the creation of their educational platforms by leading universities. For example, the "Online Education Platform of St. Petersburg State University" or "Online Education Platform at the Higher School of Economics". The strategies of universities for placing online courses on such platforms are, in principle, identical. On the one hand, providing its students with content that meets state standards: direction or areas of training, learning outcomes (competencies, according to the standard), determination of labor intensity in credit units. This approach to course design is similar to "Open Education", where an online course is viewed as the equivalent of a discipline in the curriculum. Whether the course will be implemented as part of the curriculum of the educational program or chosen by the student for credit. Another mission of the course may exist, but it will be secondary to the filling of the educational process with formalized elements. On the other hand, the emergence of their digital educational platforms is a natural desire of universities to exclude an intermediary in the face of an external platform (calling itself an operator in the case of "Open Education"), which, moreover, assumes the only technical responsibility in terms of content and does not bear any responsibility for the content (art. 6.2 the Open Education User Agreement). The emergence of an additional source of extra-budgetary funds through the issuance of certificates for online courses is also an important incentive for the universities. However, this raises two main problems. Firstly, if the online course is included in the curriculum of the university, then payment for the certificate of development can be provided only for educational programs for which only places with payment of tuition fees are provided. Accordingly, the obligation to pay will be included in the contract for educational services as a student`s obligation. For students of a budgetary form, such a requirement would be a violation of the constitutional principle of obtaining free higher education on a competitive basis. Secondly, university online course platforms need to go beyond the corporate offering by offering content for any learner. In addition, there is a regulatory guarantee – educational institutions of higher education, following the existing regulations, are required to provide procedures for offsetting the results of mastering external online courses (see the Decree of the Ministry of Education and Science of Russia of August 23, 2017 No. 816 "On approval of the Procedure for the use of e-learning, distance learning technologies by organizations carrying out educational activities in the implementation of educational programs"). Consequently, universities that have (1) a reputation (academic rating and the demand for a diploma in the labor market), (2) selection of personnel (academic professors and leading practitioners), (3) resources for non-trivial topics and course content (unique issues, interdisciplinary teams), as well as (4) those who can provide a systematic production of courses, can receive additional income.

Conclusion

Digital educational platforms present in the educational environment are identified as a set of online courses and services to support their development. Digital platforms are a relatively new information educational technology, which is associated with development prospects in the field of education, including in matters of individualization of educational trajectories; continuity of education; the availability of the best educational products. Further development of digital platforms in education follows from the tasks set in the national projects "Education" and "Digital Economy". Decree of the Government of the Russian Federation of November 16, 2020, No. 1836 "On the state information system "Modern digital educational environment" without removing the questions that have arisen gives rise to the problem of the relationship between digital educational platforms and the state information portal, including the distribution of functions and responsibilities of participants in educational relations.

An analysis of the legal regulation of existing digital educational platforms indicates the absence of special regulation and the "introduction" of new technologies into the current educational legislation. Nevertheless, the differences between the conditionally "state" and "commercial" digital platforms are evidently. Presumably, their coexistence becomes competitive in the field of additional education, in which the "commercial" digital platforms have a significant advantage.

The expansion of the scope of digital platforms will inevitably affect the development of classical higher education (bachelor, master, specialty), including the stratification of universities into "producers" and "consumers" of online courses, which in turn will require changes in state policy in the field standardization of higher education and increasing the independence of universities in the formation of a model of the educational process.

References

"Open Education" User Agreement. [*Pol'zovatel'skoe soglashenie «Otkrytoe obrazovanie"*]. APA Style (2020). Available at: https://openedu.ru/terms [Accessed September 26, 2021].

Alstin, M., Parker, J., Sangeet, P. Ch. (2017). Network effect as a new engine of the economy. A collection of articles on how to grow a business in an era of change [Setevoj effekt kak novyj dvigatel' ekonomiki]. In *Harvard Business Review [Sbornik statej kak razvivat' biznes v epohu izmenenij]*, 2, 27–31.

Analysis of the needs of universities and experience in the inclusion of open online courses on "Open Education". [Analiz potrebnostej vuzov i opyta vklyucheniya otkrytyh onlajn-kursov v uchebnye plany]. APA Style (2020). Available at: https://cdn.openedu.ru/fd95ff/bb84db21/docs/needs-analysis-2.pdf [Accessed September 26, 2021].

Belov, S.A., Linskaya, Yu.V., Kropachev, N.M. (2020) Unity of the system of state universities in modern Russia [Edinstvo sistemy gosudarstvennyh vuzov v sovremennoj Rossii]. In *Vestnik of St. Petersburg State University. Management [Vestnik SPbGU. Menedzhment]*, 2, 151–163. http://doi.org/10.21638/11701/spbu08.2020.201.

Decision of the Supreme Eurasian Economic Council of October 11, 2017 No. 12 "On the Main Directions for the Implementation of the Digital Agenda of the Eurasian Economic Union until 2025". [Reshenie Vysshego Evrazijskogo ekonomicheskogo soveta "Ob Osnovnyh napravleniyah realizacii cifrovoj povestki Evrazijskogo ekonomicheskogo soyuza do 2025 goda"]. APA Style (2020). Available at: http://www.consultant.ru [Accessed September 26, 2021].

Decree of the Government of the Russian Federation of November 16, 2020 No. 1836 "On the state information system "Modern digital educational environment" (together with the "Regulations on the state information system "Modern digital educational environment"). [Postanovlenie Pravitel'stva RF "O gosudarstvennoj informacionnoj sisteme "Sovremennaya cifrovaya obrazovatel'naya sreda" (vmeste s "Polozheniem o gosudarstvennoj informacionnoj sisteme "Sovremennaya cifrovaya obrazovatel'naya sreda")]. APA Style (2020). Available at: http://www.consultant.ru [Accessed September 26, 2021].

Decree of the Ministry of Education and Science of Russia No. 882 of May 8, 2020 "On the organization and implementation of educational activities in the network form of implementation of educational programs" (together with the "Procedure for the organization and implementation of educational activities in the network form of implementation of educational programs"). [Prikaz Minobrnauki Rossii N 882, Minprosveshcheniya Rossii "Ob organizacii i osushchestvlenii obrazovatel'noj deyatel'nosti pri setevoj forme realizacii obrazovatel'nyh program" (vmeste s "Poryadkom organizacii i osushchestvleniya obrazovatel'noj deyatel'nosti pri setevoj forme realizacii obrazovatel'nyh program")]. APA Style (2020). Available at: http://www.consultant.ru [Accessed September 26, 2021].

Decree of the Ministry of Education and Science of Russia of August 23, 2017 No. 816 "On approval of the Procedure for the use of e-learning, distance learning technologies by organizations carrying out educational activities in the implementation of educational programs". [Prikaz Minobrnauki Rossii "Ob utverzhdenii Poryadka primeneniya organizaciyami, osushchestvlyayushchimi obrazovatel'nuyu deyatel'nost', elektronnogo obucheniya, distancionnyh obrazovatel'nyh tekhnologij pri realizacii obrazovatel'nyh program"]. APA Style (2020). Available at: http://www.consultant.ru [Accessed September 26, 2021].

Decree of the President of the Russian Federation of May 7, 2018 No. 204 "On national goals and strategic objectives of the development of the Russian Federation for the period up to 2024". [Ukaz Prezidenta RF "O nacional'nyh celyah i strategicheskih zadachah razvitiya Rossijskoj Federacii na period do 2024 goda"]. APA Style (2020). Available at: http://www.consultant.ru [Accessed September 26, 2021].

Federal Statute of December 29, 2012 No. 273-FZ "On Education in the Russian Federation". [Federal'nyj zakon "Ob obrazovanii v Rossijskoj Federacii"]. APA Style (2020). Available at: http://www.consultant.ru [Accessed September 26, 2021].

GOST R 52653–2006 "Information and communication technologies in education". [GOST R 52653–2006 "Informacionno-kommunikacionnye tekhnologii v obrazovanii"]. Available at: https://docs.cntd.ru/document/1200053103. Available at: http://www.consultant.ru [Accessed September 26, 2021].

Lichutin, A.V. (2012). Technological and educational platforms as self-description of socio-economic systems [Tekhnologicheskie i obrazovatel'nye platformy kak samoopisaniya social'no-ekonomicheskih sistem]. In *Bulletin of the Adyghe State University. Ser .: Regional studies: philosophy, history, sociology, jurisprudence, political science, cultural studies [Vestnik Adygejskogo gosudarstvennogo universiteta. Ser.: Regionovedenie: filosofiya, istoriya, sociologiya, yurisprudenciya, politologiya, kul'turologiya]*, 4, 164–169.

Methodical recommendations. [Metodicheskie rekomendacii]. APA Style (2020). Available at: http https://cdn.openedu.ru/fd95ff/bb84db21/docs/methodical-recommendations-2.pdf [Accessed September 26, 2021].

Passport of the Federal Project "New Opportunities for Everyone". [Pasport federal'nogo proekta "Novye vozmozhnosti dlya kazhdogo"]. APA Style (2020). Available at: https://minobr.gov-murman.ru/files/98120250-novye-vozmozhnosti-dlya-kazhdogo-pasport-f.pdf [Accessed September 26, 2021].

Press Release "Leading universities have opened free access to online courses for students". [Press reliz "Vedushchie vuzy otkryli besplatnyj dostup k onlajn-kursam dlya studentov"]. APA Style (2020). Available at: https://minobrnauki.gov.ru/press-center/news/? ELEMENT_ID=21638 [Accessed September 26, 2021].

Ryazanova, A.A. (2020). Digital platforms: integrative potential, basic concepts and properties [Cifrovye platformy: integrativnyj potencial, osnovnye ponyatiya i svojstva]. In *Bulletin of modern digital technologies [Vestnik sovremennyh cifrovyh tekhnologij]*, 4, 26–36.

Shevchuk, A.V. (2020). From factory to platform: autonomy and control in the digital economy [Ot fabriki k platforme: avtonomiya i kontrol' v cifrovoj ekonomike]. In *Sociology of power [Sociologiya vlasti]*, 32, 30–54.

Sheveleva, N.A., Vasiliev, I.A. (2021). Corporations of universities [Korporacii vuzov kak moderatory cifrovizacii programm vysshego obrazovaniya]. In *Yearbook of Russian educational legislation [Ezhegodnik rossijskogo obrazovatel'nogo zakonodatel'stva],* 15 (20), 53–68.

Strategy for Digital Transformation of the Industry of Science and Higher Education. [Strategiya cifrovoj transformacii otrasli nauki i vysshego obrazovaniya]. APA Style (2020). Available at: https://minobrnauki.gov.ru/upload/iblock/e16/dv6edzmr0og5dm57dtm0wyllr6uwtujw.pdf [Accessed September 26, 2021].

Vasiliev, I.A., Diveeva, N.I., Dmitrikova, E.A., Kashaeva, A.A., Sheveleva, N.A. (2020). Autonomy of universities: a necessary condition for the development of Russian higher education in the context of digitalization [Avtonomiya universitetov: neobhodimoe uslovie razvitiya rossijskogo vysshego obrazovaniyav usloviyah cifrovizacii]. In *Vestnik of St. Petersburg University. Law [Vestnik Sankt-Peterburgskogo universiteta. Pravo]*, 4, 877–902. DOI: 10.21638/spbu14.2020.404.

Veredinsky, S. Yu., Makarov, V.V., Slutsky, M.G. (2021). Digital platforms for the development and implementation of innovative university projects [Cifrovye platformy dlya razrabotki i realizacii innovacionnyh proektov vuza]. In *Journal of Legal and Economic Research [Zhurnal pravovyh i ekonomicheskih issledovanij]*, 1 (S), 105–110.

Zaramenskikh, E.P. (2018). Digital platforms as a means of aggregation, production and provision of digital goods and services [Cifrovye platformy kak sredstvo agregacii, proizvodstva i predostavleniya cifrovyh tovarov i uslug]. In *Management of complex systems [Upravlenie slozhnymi sistemami]*, 3, 105–112.

Journal of Siberian Federal University. Humanities & Social Sciences
2022 15(8): 1171–1178

DOI: 10.17516/1997-1370-0919
EDN: ABYAYI
УДК 341.231.14:341.443

Implementation of the European Convention on Human Rights in Extradition Proceedings in Russia

Kirill G. Zharinov* and Ekaterina A. Torkunova
Moscow State Institute of International Relations of the Ministry of Foreign Affairs of the Russian Federation (MGIMO University)
Moscow, Russian Federation

Received 14.03.2022, received in revised form 05.04.2022, accepted 12.04.2022

Abstract. The present article gives a complete overview of developments in the Russian law and practice since the adoption of the Russian Criminal Procedure Code in light of the European Convention standards applicable in extradition and transfer cases.
The authors analyze the positive and negative trends and identify the remaining problems on the basis of legislative acts, national jurisprudence, conclusions of the European Court of Human Rights, academic studies and the direct professional experience of one of the authors dealing with extradition cases in Russia for the last 9 years as a representative of requested persons before national courts and the ECtHR.
Since the adoption of the Russian Criminal Procedure Code in 2001 the Russian authorities has made a number of improvements in law and legal practice as regards extradition proceedings. These steps proved to be quite effective and put an end to the gravest human rights violations in this sphere such as detention without any time-limits or judicial review of its lawfulness. Moreover, national courts began to analyze extradition orders issued by the Russian Prosecutor General's Office more thoroughly from the European Convention perspective and quash them more often (at least in certain categories of cases). This led to the change of approaches of the Russian Prosecutor General's Office itself.
However, some of the «traditional» problems still remain present. Among them are the improper assessment of risks of ill-treatment in a requesting country and the too lengthy appellate judicial review of detention pending extradition. This results into a flow of new judgments of the ECtHR delivered in a 3-judge Committee formation dealing with repetitive cases.
At the same time, new questions have arisen, for example, regarding the regulation of termination of national search of a person whose extradition has been denied. Furthermore, there are recent worrying trends in the jurisprudence of the Presidium of the Russian Supreme Court in cases where the Presidium reconsiders extradition orders after the European Court judgments.

* Corresponding author E-mail address: objar007@yandex.ru

The existing problems require prompt legislative amendments and other measures aimed at bringing the Russian law and practice in full conformity with the Convention requirements. The authors make their own suggestions as regards such measures.

Keywords: European Convention on Human Rights, European Court of Human Rights, extradition, extradition from Russia, removal, removal from Russia.

Research area: law.

Citation: Zharinov, K.G. and Torkunova, E.A. (2022). Implementation of the European convention on Human rights in extradition proceedings in Russia. J. Sib. Fed. Univ. Humanit. soc. sci., 15(8), 1171–1178. DOI: 10.17516/1997-1370-0919

Имплементация Европейской конвенции по правам человека в процессе экстрадиции в России

К.Г. Жаринов, Е.А. Торкунова
Московский государственный институт международных отношений (МГИМО – Университет)
Российская Федерация, Москва

Аннотация. В настоящей статье дан полный обзор изменений в российском законодательстве и практике с момента принятия Российского Уголовно-процессуального кодекса в свете стандартов Европейской конвенции, применимых в делах о выдаче и передаче.

Авторы анализируют положительные и отрицательные тенденции и выявляют оставшиеся проблемы на основе законодательных актов, национальной судебной практики, выводов Европейского суда по правам человека, научных исследований и непосредственного профессионального опыта одного из авторов, занимающегося делами об экстрадиции в России в течение последних 9 лет в качестве представителя запрашиваемых лиц в национальных судах и ЕСПЧ.

С момента принятия Российского Уголовно-процессуального кодекса в 2001 году российские власти внесли ряд улучшений в законодательство и правовую практику в отношении процедур экстрадиции. Эти шаги оказались весьма эффективными и положили конец грубейшим нарушениям прав человека в этой сфере, таким как содержание под стражей без каких-либо сроков или судебного пересмотра его законности. Более того, национальные суды стали более тщательно анализировать постановления об экстрадиции, выданные Генеральной прокуратурой России, с точки зрения Европейской конвенции и чаще отменять их (по крайней мере, в определенных категориях дел). Это привело к изменению подходов самой российской Генеральной прокуратуры.

Однако некоторые из «традиционных» проблем все еще остаются актуальными. Среди них неправильная оценка рисков жестокого обращения в запрашивающей стране и слишком длительный апелляционный судебный пересмотр содержания под стражей в ожидании экстрадиции. Это приводит к потоку новых решений ЕСПЧ, вынесенных в составе Комитета из трех судей, занимающегося повторяющимися делами России

по делам, когда Президиум пересматривает постановления об экстрадиции после решений Европейского суда.
Существующие проблемы требуют незамедлительных законодательных поправок и других мер, направленных на приведение российского законодательства и практики в полное соответствие с требованиями Конвенции. Авторы вносят собственные предложения относительно таких мер.

Ключевые слова: Европейская конвенция по правам человека, Европейский суд по правам человека, экстрадиция, экстрадиция из России, выдворение, выдворение из России.

Научная специальность: 12.00.00 – юридические науки.

Introduction

The ECtHR has taken a great number of judgments against Russia finding violations of the ECHR in extradition proceedings, mostly of Articles 3 and 5. Since 2017 the Court has been considering a significant part of such cases by a Committee of 3 judges via a simplified procedure developed for repetitive applications based on well-established case law.

This indicates the existence of structural problems with the implementation of the ECHR in extradition proceedings in Russia, which remains important as Russia will remain a party to the ECHR at least until 16 September 2022 and the ECtHR will continue examining cases against Russia.

Theoretical Framework

There are not many studies on the topic despite its importance. Certain related issues were touched upon in papers by attorneys at law and other legal practitioners such as Daria Trenina, E. Z. Riabinina, N. V. Ermolaeva, E. G. Davidian, A. E. Stavitskaia.

Statement of the Problem

The Russian authorities have already taken a range of rather effective steps to bring the national law and jurisprudence regarding extradition in conformity with the Convention standards. However, the number of judgments of the ECtHR finding repetitive violations has not decreased. Moreover, new applications have been communicated and are now pending.

It demonstrates that certain systemic problems remain, which requires an urgent response in legislative and other forms.

Discussion

Implementation of Article 3 of the ECHR in extradition proceedings

1.1. Overview of the developments since the adoption of the Russian Criminal Procedure Code

The Russian Criminal Procedure Code (the CPC)[1] provided a list of grounds for denial of an extradition request in Article 464 not including risks of human rights violations (except the non-extradition clause in case of granting asylum in Russia). As a result, the Russian prosecutors and courts did not carry out thorough analysis of such risks in the light of Article 3 of the ECHR (Riabinina, 2017. 16, 68) with rare exceptions (Ibid. 177–181)[2]. All of these resulted in dozens of judgments taken by the ECtHR from 2007 to 2012 finding violations of Article 3 of the ECHR in extradition cases against Russia[3].

In light of the above, on 14 June 2012 the Plenum of the Russian Supreme Court issued a special Ruling on extradition and transfer proceedings[4]. The Supreme Court specifically reminded that «the grounds and the conditions

[1] Criminal Procedure Code of the Russian Federation of 18.12.2001 № 174-FZ (in Rus.).

[2] Further, see the cassation ruling of the Supreme Court of the Russian Federation of 19 July 2011 in the case of A. T. Niiazov № 66–011–93.

[3] See the list of judgments of the ECtHR in the group of cases "Garabayev v. Russia". Available at https://search.coe.int/cm/Pages/result_details.aspx? ObjectID=090000168091ed13#-globalcontainer (accessed 11 August 2021).

[4] Ruling of the Plenum of the Supreme Court of the Russian Federation of 14.06.2021 № 11 "On practice of consideration by courts of issues connected with extradition of persons for criminal prosecution or execution of a conviction and transfer of persons for serving a sentence" (in Rus.).

for denial of an extradition request are set forth not only in the Criminal Procedure Code of the Russian Federation or other laws but also in the international treaties ratified by Russia». It directly referred to Article 3 of the ECHR and cited the case-law of the ECtHR.

The Court, in turn, welcomed this new ruling and noted that following its provisions by courts could indeed prevent breaches of Article 3 of the ECHR[5].

However, strange as it may seem, the publication of the Ruling in 2012 did not lead to a significant decrease of violations in extradition cases[6]. Some studies even implied that the situation after 2012 deteriorated further (Trenina, 2014a. 63–78). Thus, at least until 2016–2017 in most cases the Russian prosecutors (Riabinina, 2017) and courts including the Supreme Court did not seriously assess risks of ill-treatment with only rare exceptions[7]. They generally required that the requested persons already belonging to especially vulnerable groups should provide additional evidence of risks; accepted vague diplomatic assurances and upheld extradition orders basing solely on ratification by a requesting state of certain human rights treaties (Riabinina, 2017. 86; Trenina, 2014). All of these led to a new stream of judgments of the ECtHR[8].

Fortunately, since approximately 2016–2017 the situation has been gradually improving. Thus, in 2017–2018 the Supreme Court found unlawful at least 45 extradition orders[9]. Some of them were quashed with direct reference to a high risk of ill-treatment[10] or due to certain related facts such as falsification of charges[11].

Since 2016 there has also been a stable trend of setting aside extradition orders in respect of persons belonging to one of the vulnerable groups identified by the ECtHR[12], namely ethnic Uzbeks from Kyrgyz Republic[13].

As to the judgments of the ECtHR of 2017–2018 (regarding extradition proceedings at the domestic level taken place in mostly 2015–2016) by that moment the ECtHR had already delivered a considerable number of judgments against Russia finding violations of Article 3 where the Court had held that persons charged with anti-state crimes by the Uzbekistani authorities formed a vulnerable group[14].

However, the Russian authorities continued to grant such extradition requests. This resulted in the delivery of the judgment *"I.U. v. Russia"*[15], which became the sixty-ninth judicial act within the group of cases *"Garabayev v. Russia"* and the first judgment against Russia concerning extradition delivered via a simplified procedure by a Committee of 3 judges.

---

[5] Savriddin Dzhurayev v. Russia, no. 71386/10, § 259, ECHR 2013 (extracts).

[6] Recommendations of the Russian Presidential Council for Civil Society and Human Rights following the special meeting on the topic "On ensuring rights of foreign nationals in the course of extradition, deportation, expulsion and asylum proceedings in the Russian Federation. 2014. P. 2 (in Rus.).

[7] See, for example, the appellate ruling of the Supreme Court of the Russian Federation of 14 January 2014 № 67-АПУ13–33 (in Rus.).

[8] See the list of judgments of the ECtHR in the group of cases "Garabayev v. Russia". Available at https://search.coe.int/cm/Pages/result_details.aspx? ObjectID=090000168091ed13#-globalcontainer (accessed 11 August 2021).

[9] See information on the execution of the judgments of the ECtHR in the group of cases "Garabayev v. Russia". Available at https://hudoc.exec.coe.int/eng#{%22fulltext%22:[%22garabayev%22],%22EXECIdentifier%22:[%22004–14088 %22]} (accessed 11 August 2021).

[10] See, for instance, the appellate ruling of the Supreme Court of the Russian Federation of 16 February 2017 in the case of S.R. Bazarov № 78-АПУ17–3 (in Rus.).

[11] See, for instance, the appellate ruling of the Supreme Court of the Russian Federation of 15 June 2017 in the case of F.D. Nurmatov № 5-АПУ17–31 (in Rus.). In this case the Supreme Court referred to the serious inconsistencies in the procedural documents submitted by the requesting state.

[12] See, for instance, Makhmudzhan Ergashev v. Russia, no. 49747/11, 16 October 2012, Kadirzhanov and Mamashev v. Russia, nos. 42351/13 and 47823/13, 17 July 2014, Khamrakulov v. Russia, no. 68894/13, 16 April 2015 and R. v. Russia, no. 11916/15, 26 January 2016.

[13] Judgment of the Moscow City Court of 11 February 2016 in the case of A.E. Khasanbaev № 2–0006/2016 (in Rus.); Appellate ruling of the Supreme Court of the Russian Federation of 14 April 2016 in the case of A.E. Khasanbaev № 5-АПУ16–15 (in Rus.); Judgment of the Moscow City Court of 23 May 2016 in the case of D.A. Sarymsakov № 2–22z/16 (in Rus.); Appellate ruling of the Supreme Court of the Russian Federation of 6 September 2016 in the case of D.A. Sarymsakov № 5-АПУ16–40 (in Rus.); Appellate ruling of the Supreme Court of the Russian Federation of 30 January 2017 in the case of D.A. Talibaev № 82-АПУ17–1 (in Rus.).

[14] Muminov v. Russia, no. 42502/06, 11 December 2008; Abdulazhon Isakov v. Russia, no. 14049/08, 8 July 2010; Karimov v. Russia, no. 54219/08, 29 July 2010; Yakubov v. Russia, no. 7265/10, 8 November 2011; Ergashev v. Russia, no. 12106/09, 20 December 2011; Abdulkhakov v. Russia, no. 14743/11, 2 October 2012; Kholmurodov v. Russia, no. 58923/14, 1 March 2016

[15] I.U. v. Russia, no. 48917/15, 10 January 2017.

It is remarkable that soon after the said judgment the Russian courts continued to issue analogous rulings leading to violations of the ECHR[16].

Finally, in 2018 the Court expanded its practice of considering applications by a Committee of 3 judges to cases of extradition to Tajikistan[17].

1.2. Implementation of Article 3 of the ECHR in extradition proceedings at the present stage

Due to the constant increase in the number of judgments of the ECtHR and the Russian courts finding extradition orders unlawful the Prosecutor General's Office has more and more often refrained from taking extradition orders in respect of persons belonging to vulnerable groups since 2017–2018. In some cases extradition checks ended by denials of extradition[18]. In many others requested persons were released from detention without any final decisions on their extradition[19].

Moving further, it seems appropriate to make an overview of the most recent judgments of the ECtHR against Russia in extradition cases. In 2019 the Court took 5 judgments finding violations of Article 3 n regard of 6 applicants[20]. In 2020 the Court issued no such judgments and in 2021 there was one judgment «*A.K. and Others v. Russia*»[21]. All the applicants were nationals of Uzbekistan and Tajikistan charged with anti-state crimes and the violations occurred (in 2017–2021) are similar to those already described in par. 1.1.

Of particular interest is also the judgment of 19 November 2019 in the case «*T.K. and S.R. v. Russia*»[22] where the Court suddenly changed its consistent approach to extraditions of Uzbeks to Kyrgyzstan and concluded that belonging to the Uzbek minority is no longer enough to establish the real risk of ill-treatment in Kyrgyzstan in case of criminal prosecution. The Court referred to the recent positive developments in the situation in Kyrgyzstan and relied on the bilateral mechanism of monitoring diplomatic assurances of humane treatment. The said line of reasoning was unanticipated as it is unclear from the judgment what exactly had changed in the regulation and functioning of the monitoring mechanism as compared to the period when the Court had considered it unreliable[23]. The case is now being reconsidered by the Grand Chamber and the final judgment is yet to be delivered.

Further, there have been unanticipated trends in the case law of the Presidium of the Russian Supreme Court – the highest judicial authority in Russia. Under the Russian criminal procedure law, the Presidium reconsiders criminal (including extradition) cases if the Court has found a violation. Before 2020 the Presidium had always quashed extradition orders following the Court's judgments.

However, on 22 January 2020 the Presidium after fresh consideration found lawful the extradition of Mr. I. Usmanov[24] – the applicant in «*I.U. v. Russia*», which has been already described. The Supreme Court referred to the selected abstracts from the reports of international organizations on Uzbekistan

[16] Judgment of the Moscow City Court of 26 January 2017 in the case of Z. R. Saifullayev № 2–0008/2017 (in Rus.); Appellate ruling of the Supreme Court of the Russian Federation of 21 March 2017 in the case of Z. R. Saifullayev № 5-АПУ17–16 (in Rus.); A.N. and Others v. Russia, no. 61689/16 and 3 Others, 23 October 2018; Judgment of the Moscow City Court of 6 April 2017 in the case of F. D. Nurmatov № 2–0018/2017(in Rus.).

[17] A.N. and Others v. Russia, no. 61689/16 and 3 Others, 23 October 2018.

[18] The author is aware of at least 7 such decisions of the Russian Prosecutor General's Office in 2018–2021. Though, it is not possible to provide further details due to attorney-client privilege.

[19] See, for instance, the judgments and decisions of the ECtHR in the cases B.U. and Others v. Russia, no. 59609/17, 22 January 2019, S.S. and Others v. Russia, no. 2236/16 and 3 others, 25 June 2019, K.Z. v. Russia (dec.), no. 35960/18, 19 March 2020 and also communicated cases K.Z. v. Russia and 1 other application, no. 35960/18 and 1 other, N.K. v. Russia and 1 other application, no. 45761/18 and 1 other, K.O. v. Russia and 4 ther applications, no. 71772/17 and 4 others.

[20] S.S. and B.Z. v. Russia, no. 35332/17 and 1 other, 11 June 2019; S.S. and Others v. Russia, no. 2236/16 and 3 others, 25 June 2019; S.B. and S.Z. v. Russia, no. 65122/17 and 1 other, 8 October 2019; R.R. and A.R. v. Russia, no. 67485/17 and 1 other, 8 October 2019; N.M. v. Russia, no. 29343/18, 3 December 2019.

[21] A.K. and Others v. Russia, no. 38042/18 and 2 Others, 18 May 2021.

[22] T.K. and S.R. v. Russia, nos. 28492/15 and 49975/15, 19 November 2019.

[23] Khamrakulov v. Russia, no. 68894/13, 16 April 2015; U.N. v. Russia, no. 14348/15, 26 July 2016.

[24] Judgment of the Presidium of the Supreme Court of the Russian Federation of 22 January 2020 in the case of I. M. Usmanov № 199-П19 (in Rus.).

covering the period of 2019 and concluded that the situation in Uzbekistan had improved. Apparently, the Supreme Court did not take into account the conclusions of the ECtHR in its judgment «*N.M. v. Russia*» delivered just a month and a half before the hearing of Mr. I. Usmanov's case at the Presidium. Moreover, it was clear from the reasoning of the Presidium that it was unaware that the ECtHR had assessed the risk of ill-treatment *ex nunc*, although this concept had been first formulated back in 1996[25].

After that the Presidium issued a few analogous rulings regarding extradition to Uzbekistan and Tajikistan[26]. Therefore, the recent developments in the case-law of the Presidium might raise new problems with the proper implementation of the judgments of the ECtHR. In 2020 and 2021 the Court communicated the new three applications under Article 3 lodged by the said applicants[27].

2. Implementation of Article 5 of the ECHR in extradition proceedings

There are no serious troubles with implementation of Article 5–1-f guarantees in extradition proceedings at the moment since detention of requested persons is now governed by the general provisions of Chapter 13 of the CPC. These provisions and clarifications made by the Supreme Court ensure the higher level of protection.

Though, the situation has not always been perfect. Conversely, in the first years after the adoption of the CPC it was unclear which legal rules applied to detention pending extradition. This led to detention for years without any court's judgment setting time-limits. As a result, the ECtHR found violations of Article 5 in more than a dozen of judgments from «*Garabayev v. Russia*»[28] and «*Eminbeyly v. Russia*»[29] up to «*Gaforov v. Russia*»[30]. The Russian highest courts, reacted by making certain clarifications. The Constitutional Court in a few rulings[31] and the Plenum of the Supreme Court in its special ruling regarding detention, bail and house arrest[32] explained that Chapter 13 of the CPC did apply to detention pending extradition. The said steps soon put an end to the gravest violations of Article 5 (Riabinina, 2017. 87).

Nevertheless, Article 466 of the CPC, par. 2 still allows a significant exclusion from the general rules. Thus, a prosecutor may detain a requested person without a Russian court's order if the extradition request is accompanied by a requesting country's court's detention order. In «*Kholmurodov v. Russia*» the Court concluded that such legal regulation did not meet the criteria of lawfulness required by Article 5–1-f. Unfortunately, no amendments to Article 466 have been adopted so far. Still, examples could be found where the Russian courts quashed prosecutor's detention orders referring to the Court's case law[33].

There is another issue in the Russian law and practice interesting from the Article 5 perspective. In a number of cases the Russian authorities refused to take out from the national wanted list names of the persons whose extradition had been denied or annulled. For example, this happened to Mr. A. Khasanbaev and Mr. D. Sarymsakov who appealed to courts referring to Article 39 of the CIS Regulation on

[25] See Chahal v. the United Kingdom, 15 November 1996, 112, Reports of Judgments and Decisions 1996-V.

[26] Judgment of the Presidium of the Supreme Court of the Russian Federation of 19 February 2020 in the case of Z. Z. Khudoyberdiev № 197-П19 (in Rus.); Judgment of the Presidium of the Supreme Court of the Russian Federation of 10 June 2020 in the case of S. N. Saidov № 194-П19 (in Rus.); Judgment of the Presidium of the Supreme Court of the Russian Federation of 9 September 2020 in the case of N. A. Makhanov № 9-П20 (in Rus.).

[27] See the communicated cases I.U. and Z.K. v. Russia, no. 12767/20 and N.M. v. Russia, no. 22706/20.

[28] Garabayev v. Russia, no. 38411/02, 7 June 2007.

[29] Eminbeyli v. Russia, no. 42443/02, 26 February 2009.

[30] Gaforov v. Russia, no. 25404/09, 21 October 2010.

[31] Rulings of the Constitutional Court of the Russian Federation of 4 April 2006 № 101-O "On the complaint of the national of the Tajikistan Republic Nasruloiev Khabibullo about the violation of his constitutional rights by parts one and two of article 466 of the Criminal Procedure Code of the Russian Federation" and of 1 March 2007 № 333-O-П "On the complaint of the national of the USA Menakhem Saidenfeld about the violation by part three of article 1 and part one of article 466 of the Criminal Procedure Code of the Russian Federation of his rights guaranteed by the Constitution of the Russian Federation" (in Rus.).

[32] Ruling of the Supreme Court of the Russian Federation "On practice of application by courts of the measures of restriction in the forms of detention, bail and house arrest" of 29 October 2009 (in Rus.).

[33] Judgment of the Frunzenskii District Court of Iaroslavl' of 20 August 2018 in the case № 3 10–43/2018 (in Rus.).

international search[34]. However, the Russian courts upheld the refusals to terminate their search referring to the lack of competence of the respective bodies[35]. At the moment a few other cases of that kind are pending before Russian courts in a number of regions[36].

The presence of the foreigners' names whose extradition has been denied in the national wanted list leads to their periodic arrests with no prospect of their extradition in breach of Article 5–1-f.

As regards implementation of Article 5–4 in extradition proceedings, in the first years after the adoption of the CPC there were also serious problems with that. The absence of common understanding that Chapter 13 rules apply to extradition cases led to no review of detention pending extradition at all. Consequently, the Court found violations in a number of judgments starting from «*Nasrulloev v. Russia*»[37]. Later the regulation was put in conformity with the ECHR. However, even in recent years there have been violations of the requirement of speediness of review of detention[38].

As to the implementation of the Article 5–5 the Russian legal system provides mechanisms of claiming compensation for unlawful detention under the civil law. One of the successful examples is the case of Mr. A. Khasanbaev who was granted 40 000 rubbles for two-months unlawful detention pending extradition[39]. The Court found this sum appropriate[40].

3. Implementation of Articles 13 and 34 of the ECHR in extradition proceedings

As to Article 13 in conjunction with Article 3 the Court found its violation in the very first Russian extradition case «*Garabayev v. Russia*». The violation occurred due to the execution of the extradition order on the same day its copy was provided to the applicant. It contradicted both the Russian law and the requirement of an automatic suspensive effect of a domestic remedy against removal. Later such situations did not recur.

Finally, Article 34 of the Convention have not been always observed in extradition proceedings in Russia. In the recent case «*S.S. and B.Z. v. Russia*» the extradition order was executed 2 days after the Court suspended one of the applicant's removal. Before the ECtHR the Russian authorities claimed that the applicant applied for the interim measure too late. Still, the Court concluded that the Government had had enough time to effectively comply with the interim measure using modern-day technologies and found a violation of Article 34.

Conclusions / Results

For a few years after the adoption of the CPC there were significant troubles with implementation of the ECHR in extradition proceedings, mostly of Articles 3 and 5. They took place due to the absence of provisions allowing to deny extradition on human rights grounds and vague governance of detention pending extradition.

A number of steps was taken to improve the situation. In particular, the Supreme Court delivered two significant rulings: concerning detention, bail and house arrest in 2009[41] and regarding extradition proceedings in 2012 aimed at complying with the ECHR.

These steps put an end to the gravest violations in extradition proceedings such as detention with no time-limits or judicial review. National courts also began to analyze extradition orders more thoroughly and quash them. This

[34] Decision of the Council of Heads of Governments of the CIS "On the Regulation of of the competent bodies of the CIS on conducting international search" (Adopted in Dushanbe on 30.10.2015 (in Rus.).

[35] See the appellate ruling of the Moscow City Court of 2 November 2017 in the case 33a-4913/2017 (in Rus.).

[36] See, for example, cases 02a-0043/2021 at the Tverskoi District Court of Moscow, 02a-0534/2020 at the Butyrskii District Court of Moscow, 2a-154/2021 at the Kanashskii District Court of the Chuvash Republic. See also Cassation ruling of the Sixth Cassation Court of General Jurisdiction of 23 September 2021 in the case № 8a-20097/2021 (in Rus.).

[37] Nasrulloyev v. Russia, no. 656/06, 11 October 2007.

[38] See, for instance, S.S. and B.Z. v. Russia, no. 35332/17 and 1 other, 11 June 2019, R.A. v. Russia, no. 2592/17, 9 July 2019.

[39] Decision of the Simonovskiy district court of Moscow of 8 February 2018 in the case of A. E. Khasanbaiev in the case № 02–0630/2018 (in Rus.).

[40] Khasanbayev v. Russia (dec.), no. 19488/16, 21 May 2019.

[41] Later replaced by the Ruling of the Supreme Court of the Russian Federation of 19.12.2013 № 41 "On practice of application by courts of legislative acts on measures of restriction in the forms of detention, house arrest, bail and prohibition of certain acts" (in Rus.).

led to the change of approaches of the Prosecutor General's Office.

However, some «traditional» problems remain present. The most acute of them are the improper assessment of risks of ill-treatment and the lengthy appellate review of detention. New questions have arisen as to the regulation of termination of search of a person whose extradition has been denied. Moreover, there are worrying trends in the case-law of the Presidium of the Supreme Court.

Suggestions

It has been discussed that most violations of Article 3 of the ECHR in extradition cases may be caused by the fact that the CPC does not include the risk of ill-treatment in the list of grounds for denial of extradition.

The first suggestions to add it were made back in 2010 (Riabinina, 2017. 123–125), though, not adopted.

In 2016 a new legislative draft was prepared[42]. It provided that an extradition order shall not be executed if the ECtHR had granted an interim measure. Article 463 of the CPC was also supposed to include a non-exhaustive list of sources proving a real risk of ill-treatment. In June 2017 the draft law was adopted by the State Duma in the first reading but there has been no developments since then[43]. Still, there remains a strong need in such amendments to the CPC.

It also seems appropriate to repeal par. 2 of Article 466 of the CPC. Moreover, clarity should be made as regards implementation of Article 39 of the CIS Regulation on international search, for instance, by amending the instructions of the Prosecutor General's Office and the Ministry of the Interior.

Beside the legislative amendments other steps may be taken. For instance, the authorities should ensure speedy communication of information on the Court's interim measures to the local officers executing extradition via modern means of communication.

[42] Draft of the Federal Law № 67509–7 "On amendment of the Criminal Procedure Code of the Russian Federation (in part regarding the improvement of the procedure of extradition upon request of a foreign state for criminal prosecution or execution of a conviction)" (in Rus.).

[43] See https://sozd.duma.gov.ru/bill/67509–7 (accessed date 12 August 2021).

References

Riabinina, E.Z. (2017). *Zashchita po delam ob ekstraditsii: prakticheskoe posobie [Defence in extradition cases]*. 2d edition under the editorship of D. V. Trenina, K. G. Zharinov. Moscow, Ankil, 207.

Riabinina, E.Z. (2021). *Zashchita po delam o vysylke iz Rossii: prakticheskoye posobiye [Defence in cases of removal from Russia: a practical guide]*. 3d edition revised and extended. Edited by E. G. Davidyan, K. G. Zharinov, D. V. Trenina and others. Moscow, Nauka, 224.

Trenina, D (2014). Extradition and expulsion of persons from Russia to the countries of Central Asia. In *Shelter from the storm? The asylum, refuge and extradition situation facing activists from the former Soviet Union in the CIS and Europe*, 17–22.

Trenina, D. (2014a) Problemy ispolneniia Rossiei postanovlenii Evropeiskogo Suda v delakh o vydache i vysylke [Problems of execution by Russia of judgments of the European Court in extradition and expulsion cases]. In *Mezhdunarodnoye Pravosudiye [International Justice]*, 3, 63–78.

Journal of Siberian Federal University. Humanities & Social Sciences
2022 15(8): 1179–1193

DOI: 10.17516/1997-1370-0920
EDN: AQEQUX
УДК 342.7+004.8

Human Rights and Artificial Intelligence in Electronic Healthcare Systems

Nadzeya V. Shakel*[a], Maria S. Ablameyko[a], Jan Rabcan[b] and Elena Zaitseva[b]
[a]*Belarusian State University*
Minsk, Republic of Belarus
[b]*University of Zilina*
Zilina, Slovakia

Received 31.10.2021, received in revised form 27.02.2022, accepted 12.05.2022

Abstract. In this paper, we analyze e-Health system from the human-rights based approach, taking into consideration is technical and legal implications; this is important, multidisciplinary approach gives deeper understanding of the problem. Thus an overview of the E-Health legal environment is provided so as to provide a reader with the overall context of electronic healthcare. Technical details of functioning of e-Health systems is also given, with a view to give clear picture of existing risks. As we see the trend of the changing relations between medical professionals (doctors, nurses and other personnel of medical facilities) and patients, we paid specific attention to the issues of data protection, existing advantages and limitations for implementation in E-Health systems. It is shown that COVID-19 led to more extensive application of e-Health system and brought new perspectives to the process. We come to the conclusion that artificial intelligence methods are beneficial for medicine, and from the technical point of view can already provide valuable results. However appropriate legal framework is necessary to ensure the possibilities of control, verification and second opinion by human (doctor).

Keywords: healthcare, e-health, human rights, data protection, medical error, artificial intelligence.

The research presented in this publication was supported by the R. Wallenberg Institute for Human Rights of Lund University (Sweden) in cooperation with the Centre for Human Rights at the Faculty of International Relations of the Belarusian State University and Ministry of Health of the Republic of Belarus, and with the support of the Integrated Infrastructure Operational Program for the project: Systemic Public Research Infrastructure – Biobank for Cancer and Rare diseases, ITMS: 313011AFG5, co-financed by the European Regional Development Fund.

Research area: law.

* Corresponding author E-mail address: nshakel@tut.by

Citation: Shakel, N.V., Ablameyko, M.S., Rabcan, J. and Zaitseva, E. (2022). Human rights and artificial intelligence in electronic healthcare systems. J. Sib. Fed. Univ. Humanit. soc. sci., 15(8), 1179–1193. DOI: 10.17516/1997-1370-0920

Права человека и искусственный интеллект в электронных системах здравоохранения

Н.В. Шакель[a], М.С. Абламейко[a], Ян Рабчан[б], Елена Зайцева[б]
[a]Белорусский государственный университет
Республика Беларусь, Минск
[б]Жилинский университет
Словакия, Жилина

Аннотация. В этой статье мы анализируем систему электронного здравоохранения с точки зрения прав человека, принимая во внимание технические и юридические последствия; это важно, так как мультидисциплинарный подход дает более глубокое понимание проблемы. Таким образом, нами проведен обзор правовой среды электронного здравоохранения, чтобы предоставить читателю общий контекст электронного здравоохранения. Приводятся технические подробности функционирования систем электронного здравоохранения с целью дать четкое представление о существующих рисках. Наблюдая тенденцию изменения отношений между медицинскими работниками (врачами, медсестрами и другим персоналом медицинских учреждений) и пациентами, мы уделили особое внимание вопросам защиты данных, существующим преимуществам и ограничениям для внедрения в системы электронного здравоохранения. Показано, что COVID-19 привел к более широкому применению системы электронного здравоохранения и привнес новые перспективы в этот процесс. Мы приходим к выводу, что методы искусственного интеллекта полезны для медицины, а с технической точки зрения уже могут дать ценные результаты. Однако необходима соответствующая правовая база для обеспечения возможности контроля, проверки и получения второго мнения со стороны человека (врача).

Ключевые слова: здравоохранение, электронное здравоохранение, права человека, защита данных, врачебная ошибка, искусственный интеллект.

Исследование поддержано Институтом прав человека им. Р. Валленберга Лундского университета (Швеция) в сотрудничестве с Центром по правам человека факультета международных отношений Белорусского государственного университета и Министерством здравоохранения Республики Беларусь, а также при поддержке Интегрированной инфраструктуры Программы оперативного проекта – Биобанк рака и редких заболеваний, ITMS: 313011AFG5», софинансируется Европейским фондом регионального развития.

Научная специальность: 12.00.00 – юридические науки.

Introduction

The progress in the development of information and communication technologies (ICTs) in recent decades has led to qualitative changes in the healthcare sector, creating new opportunities in the field of medicine.

The possibilities of ICTs in healthcare are determined by the state of three components: information, telecommunications and medical technologies; thus, their development is an essential basis in the creation of electronic healthcare systems. Such systems are currently put into operation in a variety countries of the world, as the advancement of technologies makes it possible to digitalize many of the existing procedures.

This all lead to the development of the concept of *E-Health or Electronic Healthcare* (EH), which includes a complex of diverse information, communication and medical services provided at a distance. As defined in the Resolution WHA58.28 on E-Health (adopted in May 2005 at the 58th session of the World Health Assembly), the concept of E-Health implies "the use of information and communication technologies both in a given place and at a distance", combining everything related to the use of ICT in medicine.

Telemedicine, including its sub-divisions such as teleeducation, telemonitoring, teleconsultations, plays a major role in this concept. EH covers some other important aspect of healthcare, such as electronic medical records, exchange of medical and managerial data, analysis of laboratory research results and image transmission. Information support for scientific research, etc.

EH is one of intensively developing areas (Sajedi, 2020: 100104): the total funding made by investors in the E-Health industry from 2010 to 2020 increased from 1,1 billion U.S. dollars to 21.6 billion U.S. dollars. These systems have become even more important in the face of the pandemic COVID-19 (Bitar, 2021).

According to Healthcare Information and Management Systems Society (HIMSS) today, a significant number of countries in the world have EH systems, with the United States, Canada and Australia being the leaders in this field. As the HIMSS Annual European Digital Health Survey (HIMSS Survery 2021) shows European Union countries have also established EH systems that are advanced and noteworthy (Sweden, Estonia, Denmark).

However, human rights and their protection are often not viewed as an essential component of such systems; even though countries aim at promotions of respect to human rights. In practice sometimes relevant aspects fall out the focus of attention of those in charge of developing healthcare system in digital environment.

The research in (HIMSS Survery, 2021) analysed the biggest priorities in EH domain (Fig. 1). The dominant e-health priorities are related to security and data privacy issues, the development of which is not only a technical problem (Sajedi, 2020: 100–104). To develop a reliable security model, privacy rights and security for eHealth must be integrated into a comprehensive legal and security framework that addresses the rights and obligations of the healthcare provider: including physicians, hospitals and healthcare enterprises, the patient, medical and cybersecurity researchers, and Internet service providers. The collaboration of government, industry and academia is crucial to the development of security models that will not only protect individual rights, but will meet the future challenges essential to the delivery of healthcare treatment (Bonifazi, 2020: 242–258).

Introduction and development of healthcare system has important influence both on medical professionals (that is, medical professionals involved in the provision of medical services – doctors, nurses, etc.) and on patients (consumers of medical services). It is important to note that from the human rights perspective patients are a very broad category, which covers foreign citizens, stateless persons, and other categories of people that have quite diverse interests, needs, religious and cultural tradition; and thus it is important to take all this into consideration in the process of development of EH systems.

The EH is an interdisciplinary domain, which is influencing the research of the topic, as many different aspects are to be considered. In this respect, in our research the combination of technical and legal knowledge was under-

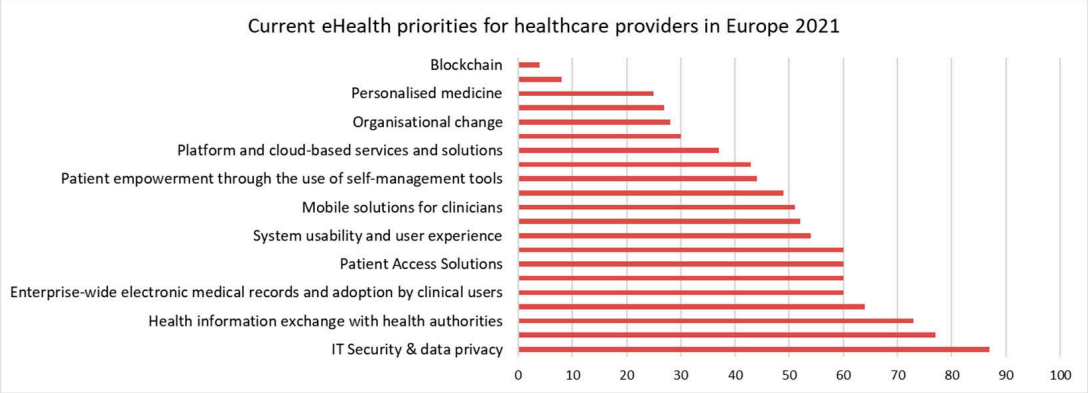

Fig. 1. E-Health priorities

lying the process of tracing the main trends, prospects and challenges in the formation of EH systems taking into consideration the human rights based approach, especially in such areas as decision-making and right to access health information. Specific attention was given to the application of artificial intelligence in medicine, as it influences significantly patient safety and security, and brings new risks with regard to medical errors.

In recent years, there's growing use of the notion "Smart medicine", that is, intelligent healthcare, which uses the latest mobile and digital achievements in the field of E-Health and mHealth, which encourages the development of smart and connected medical devices that ensure constant monitoring of patient indicators outside of medical institutions and, accordingly, the prevention of diseases. In some cases, this type of monitoring can recognize or predict critical health conditions of patients and it can warn health institutions if immediate first aid is needed.

Smart medicine
and electronic health records

The development of the E-Health (EH) is done in a variety of ways that can influence patient's rights. Currently, the creation of E-Health system envisages the formation personal account of the patient, through which it will be possible to make an appointment, call a doctor at home, get an extract from medical documents, a reminder of vaccinations and an electronic prescription, view the results of tests, etc. Implementation of many health information systems is accompanied by creation or linking to it a call service or support services, where all medical information and details, i.e. on the work of medical institutions, cost of their services and other relevant data, can be accessed in one call.

An important part of this process is of course the creation of Electronic Health Records (EHR).

EHR is in its essence a database about patient's medical status (with texts, graphical and other information about his health).

There are a number of human rights that need to be addressed during the process of creation and developing of EHR, which can include, inter alia:

- right to access and read all material in EHR;
- right to refuse to process his data in EHR,
- right to make decisions about his health (including within the framework of digital technologies such as electronic prescriptions),
- the right to remove information about himself and his health from EH systems.

Obtaining health information is an important part of realizing the right to health. Today, the availability of complete, reliable and understandable information is the basis for making further decisions about how and to what extent to receive treatment, how to plan your life taking into account the state of health, etc.

The importance of health data for any patient determines the fact that the information should appear in the EHR promptly and in a sufficient volume (in particular, this applies to the results of tests, data on past appointments, records of information provided to the patient during a personal visit to the doctor, data on manipulations, procedures, medical measures taken in relation to the patient).

In this regard, the **right to obtain information about one's heath** is an important part of States' efforts to improve public health literacy, as it enhances overall effectiveness of healthcare efforts. People are more likely to follow doctor's prescriptions when they understand why they are needed

EHR provides important opportunities for patients, compared to the "regular" way of accessing information about one's health which is stored in a paper format. This process could include making appointment with a medical official, visiting a medical facility, which often leads to problems such as the need to wait in line for a medical worker, requesting your medical card and trying to remember or obtain the copy of the information, limited time to receive information from him, the possibility of illness due to contact with persons who may be infected, etc. There are some other aspects which can hinder the familiarization with one's medical history, such as illegible handwriting of the doctor and the use of special medical terms, without deciphering.

Introduction of a remote access to EHR provides quicker and easier option, which requires only present of a computer (or any other device that can be connected to the Internet, including regular mobile phone), logging and choosing the information that is of interest. As a whole, it seems to be an important way of the realization of the right to access health information, which is an important component of the right to health.

From the technical viewpoint, there are number of steps that one should take in order to access his EHR (Ablameyko, 2007). The first step is authentication. For this, the user account is usually necessary, which is defined by an open user name and an encrypted password. When performing the identification procedure, the user enters her name and password, which are then checked by the system for correctness. If the first step is completed, the user opens a session with the server. All subsequent actions are performed on behalf of the account for which the password was successfully entered.

When accessing the database, the server checks whether the current user has the rights to the information that it requests. In case of a positive decision, the information is provided to the user. In case of a negative decision, the user is denied access.

So, for each HIS object a list must be set, according to which the HIS itself will check whether this user has the right to access this object or not. Such list is usually called Access Control List (ACL). The main objects for which an ACL must be set, are:

- information stored in the database;
- applications included in the system software package;
- commands and functions in applications that can be used with different access levels.

Thus, a patient gets access to EHR only by fully identifying themselves on the network, obtaining a username and password to access the system through their personal account. This is important, as it gives the patient the necessary level of security, as it excludes the possibility of familiarization of third parties.

As a result, within the framework of the current legislation, a centralized approach is considered as most appropriate, as it is focused on the creation of a single database of Integrated IEHR owned by the state and intended for the circulation of information within the health authorities with the right to make changes only by a medical professional. From the point of view of the patient, the IEHR provides for the creation of a personal patient account, where you can: make an appointment with a doctor, call a doctor at home, get an extract from medical documents, get a reminder of vaccinations, get an electronic prescription without visiting a polyclinic, see the results of tests passed.

The EHR can provide quick access to medical information, however the patients may face another problem: they might be unable to **understand medical terms**, slang and ab-

breviations, and thus still not be able to come to the right conclusions about their diagnosis and conditions. There are cases when people thought of committing suicide after seeing in their EHR diagnose or test result that they consider as fatal to them. Thus, automatic placement of all health information in EHR is not a right solution. Special attention should be paid to the so-called "sensitive information", i.e. information that can affect the mental state of a person (a message about cancer, HIV, etc.). In this case, before providing access to this information in the EHR, the doctor must personally familiarize the patient, prepare him morally and give explanations, i.e. the information is entered in the EHR immediately, and access to the patient is provided after a conversation with the doctor. It is obvious that in today's COVID situations, when certain restrictions on movement are in place, face-to-face contact might not always be appropriate; however there are now many technical ways that allow doctor to contact his patient and remotely discuss the details of his condition.

Thus, it is necessary to ensure that health information is fixed in the EHR in an accessible and understandable form to human perception (i.e. decoding of diagnosis). It is important in order to ensure clarity of information about one's health and methods of medical care. Further steps can include the creation of information support services (patient support services): descriptions of diseases, basic treatment methods, descriptions of medicines, etc.

When encoding diagnoses, a reference field should be provided for obtaining general information about a particular disease. This aspect is extremely important, since it is increasingly common for people to receive information from the Internet, which is often of poor quality. In this regard, the provision of general reference information for decoding the diagnosis recorded in the EHR is desirable for the patient himself. In order to avoid misunderstandings. Incorrect interpretation and subsequently self-medication, which can lead to serious consequences.

Another important patient's right, which is close to the personal data protection rights, is a right to **data portability**. At the moment, many medical institutions use their own software and ways of data collection and storage. Thus, patients have problems when they want to transfer their medical history to another institution, as they cannot be viewed or otherwise used there. It is important to aim at the creation of the single information space, which will make it possible to interchange data.

As we've discussed above, Smart Healthcare leverages the latest mobile and digital advances in E-Health and mHealth, driving the development of smart and connected medical devices. The approach to medicine is also changing: with smart trackers, doctors have much more opportunities to constantly monitor patient indicators outside of medical institutions and, accordingly, prevent diseases.

Many jurisdictions give patient a possibility to submit **additional information** about their health into the EHR (assessment of the dynamics (improvement or deterioration) of their condition, assessment of the impact of medicines, data on pressure, the amount of exercise performed, certain pain sensations, etc.). Other countries allow patients only to access their medical data, without making any changes to their own medical record.

In our opinion, the ability to be able to provide additional information is valuable. From the technical view point, it is advisable to provide a section in the EHR that the patient can manage independently. For example, he might be able to supplement the EHR with information obtained in private medical institutions (if the latter do not have access), consultations received abroad, as well as other data (pressure, temperature, etc.). Patients can also add data from their own devices, as there are able to measure the pulse, pressure and other parameters of the human body. Doctors often voice doubts as to reliability of this information; however, it can be useful sometimes, and in any case its application should remain at the discretion of the medical professional.

Let us now turn to the patient's right control of access to his personal data. Who can access patient's EHR? The answers to this questions vary significantly across the world. In some jurisdictions, patients can **decide who**

can access their EHR, and limit even doctors in access to their total medical history. The right of the patient to determine the limits of access to information about his health gives him the opportunity to independently decide whether he wants a particular medical professional to be able to see certain information about him. This can be achieved, for example, by using one-time access codes, generated by the patient who is willing to show his medical details to a specific person.

This approach is quite controversial. The positive thing is that the person himself has the ability to control access to his EHR, i.e. independently decides whether to allow him to get acquainted with his medical history or not. On the negative side, it should be noted that the patient is not always able to understand what information the doctor needs to access to provide qualified care and make the correct diagnosis, because the human body can be considered as a well-coordinated mechanism, and the more information the doctor has, the higher the chances of choosing an effective treatment.

The right to control access to information about one's health may be restricted. In particular to ensure the vital interests of the person, if their consent cannot be obtained. In Finland, the law provides that consent is not required if the patient is unconscious. In France, if a person is unable to express their will and if circumstances require it, the emergency doctor may, in the best interests of the patient, decide to access the EHR without obtaining prior consent.

In recent years, the prevailing position is in favour of providing patients with extended rights, that is, not only to limit access to their EHR, but in some cases to **delete their account** and all information about their health from EHR system.

Due to various circumstances in life, patients sometimes have special interest in selecting persons that can be **informed about their health status**. In Belarus, for example, relevant categories of people (close relatives) are listed in law. However this approach is not always proper, as it often turns out that people have quite tense relations with her relatives, and thus their decisions might not be appropriate. Thus, patients might wish to nominate other people to act in this role. EHR can be used to store this information.

EHR should also include and maybe even specifically mark some other important decision of a patient, e.g. desire not have certain medical care, including medical interventions (namely, consent to donation, blood transfusion, etc.).

EHR should also be considered as a tool for prevention of medical errors.

A medical error can be defined as a preventable adverse effect of medical care, whether or not it is evident or harmful to the patient (Hofer, 2000). Medical errors can result from new procedures, age extremes, complex or urgent care, improper documentation, illegible handwriting or patient actions. But human factor is a dominant source of the medical error (Hofer, 2000).

The analysis and evaluation of medical error can be based on methods of Human Reliability Analysis (HRA).

Though it is often said that E-Health can significantly reduce the level of medical errors, unfortunately they cannot be completely neutralized (List, 2021; Mohapatra, 2021). Therefore, the analysis and evaluation of medical error is important part of E-Health.

There are two ways of solving this issue that are generally discussed (Sanchez, 2017; Zaitseva, 2020:93). The first one is named as "cognitive" and considered in healthcare and medicine and focused on organizational, managerial, ergonomic, physiological factors and their influence on medical errors. Many investigations of this type are presented in journal BMJ Quality & Safety (https://qualitysafety.bmj.com). Alternative way is often named "technical" and bases the studies of patient safety and medical error on the methods of Human Reliability Analysis (HRA). Reviews of HRA methods in healthcare (Lyons, 2004; Sujana, 2016] show that typical HRA methods have restrictions and should be adopted for new area of application. There are differences in organizational and institutional contexts, and the values and needs of stakeholders in healthcare (such as clinical and professional autonomy), as

well as methods from other industries, have to be adapted appropriately.

There are a number of methods of HRA that are most often used in healthcare, for example, FMEA (*Failure Mode and Effects Analysis*), SHERPA (*Systematic Human Error Reduction and Predication Approach*), SPAR-H (*Standardized Plant Analysis Risk – Human Reliability Analysis*), HEART (*Human Error Assessment and Reduction Technique*) and CREAM (*Cognitive Reliability and Error Analysis Method*). Some adaptations and developments of these methods exist for the analysis of specific problems in the healthcare domain. For example, FMEA has been used in cancer diagnosis and treatment (Kapur, 2012) and SHERPA in radiation medicine (Faiella, 2018). The healthcare's SHERPA-based method is OCHRA (Observational Clinical Human Reliability Analysis technique) that allows evaluating of technical error in surgery (Foster, 2016). One more special methods of HRA in healthcare is HFMEA (Healthcare Failure Mode Effect Analysis) (Faiella, 2018). It is FMEA-based method which allows providing the qualitative analysis of healthcare system and for the probabilistic evaluation of medical error.

The process of the medical error estimation starts from the data collection (Dhillon, 2003). This may include ethnographic observation, questionnaires, and structured interviews, examination of time spent on specified activities, verbal protocol analysis. etc. This data is characterized by ambiguity, vagueness and incompleteness. Task description techniques allow this data to be presented in a form that is useful for error analysis and quantification. The most common approaches are hierarchical task analysis and cognitive task analysis (Dhillon, 2003). Task simulation methods build on task description and analysis aspects in different contexts (for instance under stress or time pressure) or in combination with other tasks. This step can be interpreted as qualitative step of the error estimation. The qualitative analysis is continued in the next step on human error identification. Most of these techniques are based on initial task analysis and perhaps also a task simulation to identify a list of the potential errors that could occur associated with this task. For example, such techniques as FMEA or SHERPA can be used in this step. It should be noted that some of techniques (for example SHERPA) incorporate a phase to quantify the human error probabilities. However, mostly the quantitative analysis is provided based on other techniques (Lyons, 2004).

There are some studies of special methods of medical error (Sujana, 2020; Zaitseva, 2020). The Data Mining based method for the medical error evaluation for incompletely specified and uncertain data is presented in (Zaitseva, 2020). The essential goal of this method is construction of the typical mathematical model for the reliability analysis. The well-known methods of the reliability evaluation can be used if the mathematical model is constructed. In paper (Sujana, 2020) authors represented the Safer Clinical System program which aim is to adopt and trial in healthcare proactive safety management techniques from safety-critical industries. Authors of studies in (Dhillon, 2003; Sujana, 2016; Sanchez, 2017) have shown that in medical error evaluation the failure of devices and software should be took into account too. This conception and specific of data collected for medical error evaluation cause the development or adaptation of new methods that allow processing of uncertain and incompletely specified data and quantifying medical error. In particular, the Data Mining based method in (Zaitseva, 2020) allows the evaluating of the complex socio-technical system and can be recommended for analysis and evaluation of E-Health system and/or its components considered in (Ablameyko, 2007).

In any case, EHR system should be construed in a way that takes into consideration the human rights based approach and patient's rights.

Data protection and patient rights

In many jurisdictions information about health is considered as special personal data that require special attention and appropriate measure of protection. As this information is especially sensitive for the people, creation of e-Health system need to take into consideration existing risks. A number of new high-risk ethical issues arose in the process of implemen-

tation of ICT into medical services, which are mainly caused using remote medical equipment, social networks and unclear laws. We were able to identify the following risks which merit specific measures to be addressed properly:

- Risk from device information leakage
- Risk from social network
- Ambiguities in the laws.

Although there are already some laws to protect information security, many laws and regulations on ethical issues are ambiguous. There is no clear indication on the subject of responsibility and the boundaries of information. For example, wrong treatment and diagnosis can cause additional pain and burden to the patient. Therefore, once information leakage occurs, it is still difficult for patients to defend their rights through legal channels. For example, when a device analyzes the users' data and draws a conclusion "do exercise", but the user's physical condition is not good, then how to define responsibility if an accident occurs? (Chang, 2019).

Medical information is a private area, even intimate, so patient confidentiality is the most important issue. But the data can be depersonalized. This way we will get both confidentiality and data integrity. This data will be useful for introducing innovations and strengthening cooperation between suppliers and partners, which will also benefit smart city medicine, including through the exchange of knowledge between doctors from around the world.

The question arises in Smart medicine: who is the true owner of medical data? Who can dispose of them and to what extent (can it be patient, doctor, clinic, insurance company, employer of computing service)?

IoT solutions will play a major role in Smart medicine. IoT interconnects all computational, mechanical, and digital technologies for data transmission over the Internet without the necessity of human interaction. Such interconnected technologies can be considered as remote monitoring systems. Remote monitoring systems based on a sensor system will show, for example, the level of glucose in the patient's blood, and immediately send this data to doctors for analysis and prognosis. Based on the data, specialists will prescribe treatment and prescribe personal medications. And the patient will print the pills at home on a 3D printer. All this without being distracted by visiting a doctor and searching for a pharmacy.

Smart medicine will allow a doctor to quickly communicate with a patient, conduct a remote course of treatment. Through special sensors and chips installed in the human body, the doctor, regardless of the location, will be able to get acquainted with important information about the patient's health status. For example, the doctor will be able to track body temperature, pulse, respiration rate, blood sugar, and blood pressure.

The device-to-device connectivity that underpins smart city services is also opening up a new approach to healthcare. In the concept of a smart city a huge amount of data is accumulated, including on the state of health and well-being of citizens. This data can be used for planning urban space and new services. These data can also invoke some actions focused on improving public urban health – a range of issues that affect urban populations.

This all, however, poses significant data protection issues. What can be done to protect personal data in Smart medicine? From technical point of view, related devices causing information leakage should be identified and protected. These include unauthorized connection to sensors, medical devices, gateways, fog nodes, and mobile devices that capture, aggregate, process, and transmit medical data to the cloud (Tian, 2019).

To respond to threats, IoT devices must always check and censor that the authentication is truly part of the electronic healthcare cloud, and that strong authentication algorithms and key management systems are used to ignore and block unauthenticated requests.

Then network security is very important issue. IoT technologies such as RFID and wireless sensor networks can provide identity verification and tracking capabilities. It should be able to repel cyber-attacks.

Training for patients is also very important, for example, end users should learn how to avoid network's attacks, choose strong pass-

words, and not buy used equipment or equipment of unknown source.

The most important thing is that all service providers should strictly abide by the principle of autonomy priority and provide multiple choices to users. Users have the right not to use these functions or freeze sensor usage and database at any time.

Traditional medical services should not be eliminated, people should have the right to choose between smart medical services and traditional medical services.

Ethical principles include trust, privacy and related data protection, property rights, dignity, fairness and proportionality. Trust must be present in E-Health in such a way that citizens need to be reassured that data are being processed properly, that they are up-to-date and of quality, and that security risks are being taken into account. People will face these problems in new future.

E-Health in COVID-19 pandemic

Electronic health systems that we've discussed above came into the focus of many in the outbreak of COVID-19 pandemic, when practical issues of e-Health application became prominent.

In general, it can be concluded that from the technical viewpoint using E-Health apps helps to mitigate the propagation of COVID-19 and preserve the lives of medical personnel (Mann, 2020; Mollalo, 2020). The use of virtual platforms for medical care reduces the saturation of emergency patients during the pandemic. These virtual platforms allow clinicians to effectively detect patients with early signs of COVID-19 before they arrive at the hospital. Also E-Health applications improve the availability of various medical services and health care in pandemic situation such as home health control for elderly patients and helps patients with minor diseases to get the supportive care they need while minimizing their exposure to other patients.

Authors in (Mann, 220) propose analysis of E-Health transformation under the pandemic of COVID-19 in a large academic healthcare system in New York City – NYU Langone Health (NYULH). A mass migration to telemedicine has been taking place during March and April 2020, co-occurring with a decline of over 80 % in in-person visits. Telemedicine urgent care volume grew from 82 visits on March 4 to 1336 after 15 days. Of these visits, 55.3 % were COVID-19–related, outpacing the 381 COVID-19 visits in all the NYULH emergency rooms that day. Telemedicine visits for urgent care were spread across age strata with the largest use in the group 20 to 44 years of age (Fig. 2). According to the research in (Mann, 2020) the E-Health system in urgent medicine was more effective in COVID-19 pandemic. The intensive application of E-Health in pandemic of COVID-19 has already proved to be an invaluable tool to not only divert an overwhelming volume of patients from the emergency rooms, but also transform the work medical practices, across multiple specialties. E-health system and tools can reliably manage thousands of patients over a short period of time, and provide care at

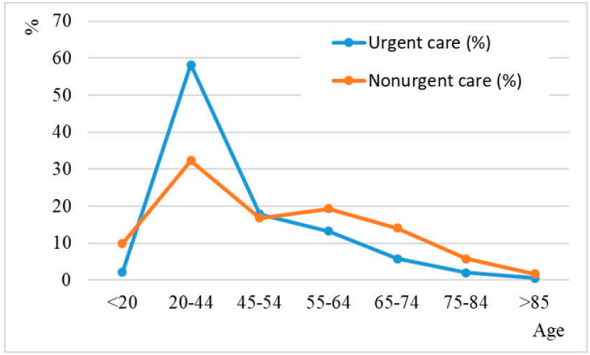

Fig. 2. Distribution of telemedicine visits by age

times of acute shortage in healthcare. The impact of COVID-19 pandemic to E-Health and telemedicine in last year leads the extension of their widespread availability.

Respectively, according to (Bokolo, 2021; Mann, 2020) adoption of E-Health system and virtual software platforms aids in the following:

- Decreases the time required to get a diagnosis and initiate treatment, stabilize, or quarantine a patient
- Facilitates close follow-up with patients who can be monitored from their home to avoid oversaturation of health facilities
- Reduces movement of people, minimizing the risk of intra-hospital infection
- Supports co-ordination of medical resources utilized in distant locations
- Prevents the risk of contagion, particularly for medical practitioners, who are key assets
- Aids in informing the general public
- Saves costs on disposable robes, antiseptic material, gloves, disinfecting of hospital spaces, etc.
- Trains medical practitioners who are new to the treatment of pandemic
- Monitors real-world data.

The efficiency of the E-Health systems in the pandemic is clear, but their wide application depends on some factors. Author of (Bokolo, 2021) considers three groups of factors that have great influence on the E-Health system use: organizational, technological, social. Organizational factors include:

- availability of funding (The deployment of E-Health system requires time and purchase resources and the lack of funding is a barrier for adoption of telemedicine)
- inadequate training (Medical practitioners who interact with patients through E-Health system should be trained and patients need training in adopting digital technologies.)
- workflow integration (Workflows for adoption of virtual software platforms should be drafted to minimize burden for medical practitioners and should them flexibility in providing medical care).

Technological factors are formed by:

- data privacy and access (The protection and privacy of patient's data must be important, but E-Health should guarantee data privacy and access protection, even if in urgent cases (like COVID-19) personal medical data of patients could be accessed without the need to obtain their consent)
- data security and risk (E-Health involves the digital collection and use of sensitive medical information among patients and medical practitioners, which could lead to a security risk, for the collection, use, and disclosure of sensitive personal data).
- broadband access and Wi-Fi quality (The quality of network communication is a key factor that influences adoption of telemedicine)
- availability of IT infrastructure (Uncoordinated and poor technology adoption mostly in developing countries is a major barrier to adopting E-Health)

The most important social factors are:

- licensure requirements (The licensing policy changes should be established during and after the pandemic without geographical borders).
- health insurance and reimbursement policies (Currently, most medical insurances do not cover telemedicine treatment and as such do not provide reimbursement for patients).
- lack of regulation and advocacy (E-Health system can be adopted as an effective tool in helping to manage the current pandemic. However, existing policies are also a barrier that limits how, where, and when they can be used).
- patients' and medical practitioners' willingness (The limited adoption of E-Health systems is mostly attributable to physicians' unwillingness to adopt telemedicine and many hospitals are not adopting telemedicine because many patients are not well-versed in virtual software platforms).

This experience of E-Health system application in the COVID-19 pandemic will likely create future expectations of care convenience and accessibility that will be hard to reverse once the COVID crisis abates. Similarly, the regulatory changes invoked to support easily accessible widespread telemedicine may be equally difficult to reverse.

Artificial intelligence in healthcare

The use of artificial intelligence (AI) in general has a positive impact on many areas of activity, since it is designed to simplify production processes, make life easier for both an individual citizen and society as a whole, but along with this, new challenges and problems arise.

Creation of AI systems in recent years can be characterized by the following

1) Huge increase in data sets sizes;

2) Huge increase in performance of computing;

3) Huge improvement in AI algorithms (Distante, 2020).

However, AI brings together with benefits also various problems. Three main factors can be given that influence significantly absence of trust in Artificial intelligence systems:

- decisions of AI are not transparent: in most cases, the decision taken by AI are not understandable and intelligible to humans;
- AI is biased: the decision taken by AI is not neutral because AI algorithms are learned on training data which affects the decision process;
- privacy and surveillance: there can be concerns about using and collecting some type of data

According to statistics (China, Statista), AI is widely used in medicine. Automation of various sectors of the economy through the introduction of robots creates a threat of failures, unauthorized access with the possibility of modifying embedded programs and actions, the consequences of which are extremely difficult to calculate. At the same time, the regulatory support in this area lags behind the needs of today. On the one hand, this is explained by the fact that adoption of legal acts usually takes place only after new technology (product) appears on the market. On the other hand, technology is developing so rapidly that it is almost impossible to do it in time, given the length of the procedure for adopting legislation, so in most countries it is not available.

If we consider application of AI in health systems, it is possible to see that AI can accelerate the diagnosis process and medical research. The usage of AI in medicine has potential benefits to both doctors and patients. Doctors, for example can be assisted by AI in following cases:

- Assessing the likelihood of complications of diseases;
- Remote first aid and patient data collection;
- Assistance in making diagnoses and prescribing treatment;
- Real-time data analysis of critically ill patients

However, using AI in medicine have some disadvantages:

- Violation of the right of patients to privacy and confidentiality of personal data, disclosure of medical secrets.
- The data from the electronic card is available to the insurance company, which will increase the price of the medical policy and life insurance if the patient does not lead a “healthy” lifestyle and does not follow all the doctor’s recommendations for treatment.
- Overdiagnosis.
- Access to the applicant’s medical data. Refusal of employment due to the presence of chronic diseases and / or genetic predispositions to certain types of diseases. The threat of discrimination against people based on physical and genetic characteristics.
- Many algorithms rely on very complex mathematics, sometimes called the “black box”. In some situations, we should know the reasons for decisions because in the medical area these decisions can affect a patient’s health.

The use of artificial intelligence also brings some ethical challenges, such as:

- Dominance of the technical type model
- Replacing the doctor with robotic systems
- No contact between doctor and patient
- Reducing the responsibility of the doctor
- Loss of specialized skills by doctors.

With the help of AI and machine learning technologies, medical researchers identify the relationship between the patient’s diseases, the conditions in which he lives, and his habits. Even the state of the environment can tell you which patients in a given region are at the high-

est risk. You can also find the most vulnerable regions or segments of the population to give them recommendations in advance, before you need serious medical care (Lehrach).

An important question arises here: can a doctor rely entirely on AI? Because cognitive systems have problems with the quality and volume of medical information. The data accumulated in patients ' medical records may be incomplete, contain errors. Inaccuracies, and non-standard terms. There are not enough records of the patient's life, habits, and behavior. Effective mechanisms for collecting this information do not yet exist. In addition, many of the AI algorithms are considered as black box in which the decision-making process is hidden in network layers. This can be problematic especially in situations that are not present in data set used to train AI algorithms, which will likely result in inaccurate AI decisions.

Another topical issue that needs to be faced are the legal implications of AI systems in healthcare. As soon as AI systems start making autonomous decisions about diagnoses and prognosis, and stop being only a support tool, a problem arises as to whether, when something 'goes wrong' following a clinical decision made by an AI application, the reader (namely, the radiologist) or the device itself or its designer/builder is to be considered at fault (Pesapane, 2018). Legal responsibility for decision making in healthcare will remain a matter of the natural intelligence of physicians. From this viewpoint, it is probable that the multidisciplinary AI team will take responsibility in difficult cases, considering relevant, but not always conclusive, what AI provided.

In the future, the development of intelligent health technologies can also be aimed at simplifying the patient's access to medical services. Today. In the emergency medical centers of hospitals, the order of admission of patients depends on how urgently the patient needs help. Thanks to the use of new technologies, this process can be simplified. Using the digital interface of a dedicated app, patients will be able to report their symptoms, which will be analyzed digitally using standardized symptom tracking protocols to determine the degree of urgency. Some medical services can be provided to the patient at home using digital tools and modern telemedicine. For example, trips to the doctor to ask a few questions and get a prescription for medicines can be replaced by medical kiosks, where patients can communicate with the doctor remotely and get the same answers and prescriptions. These decentralized offices will continue to rely on a reliable central health facility, which will act as the main center for building trust in digital technologies, as well as a digital service provider.

In the future, common digital formats and structures may enable the exchange of comprehensive patient information between all of that patient's healthcare providers. Multimedia and messaging standards can further improve remote treatment, remote patient monitoring, and remote diagnosis. Aggregated health data that is stored in uniform digital formats can improve medical research. Digitally stored genetic data can provide more individualized treatment for patients. Universal standardization, which can be determined by both cooperation between private enterprises and public standards policies, is a necessary prerequisite for any of these advances in E-Health.

Conclusion / Results

The new E-Health system gives fundamentally new opportunities in the development of the industry, qualitatively changes the approaches to the model of mutual support for all participants in the provision of medical care.

Medical professionals receive the necessary information at the time of providing medical care to the patient about critical inconsistencies or deviations from the current standards, or about changes in the patient's vital signs.

For technologies to be useful and transformative, they must be adopted and used by health professionals and end-users. If the tool is designed for patients, but they do not feel its value, or if they do not have enough skills to use this technology, then the digital tool does not benefit. There must also be compatibility between people, so that people's skills and way of thinking about digital health technologies coincide and that they can work with a variety of tools in different circumstances. This means that it is necessary to ensure that both patients

and medical professionals have access to training in E-Health skills related to available technologies.

The ultimate goal of the development of E-Health technologies is to shift the focus in the provision of medical services from the doctor and the hospital to the patient and their well-being through the use of digital technologies. This involves using digital systems to transfer patient data into a single Electronic Health Record that can be accessed by different health professionals, or using electronic medical prescriptions to make it easier for patients to get prescribed medications.

Many countries today considerable attention to the development of E-Health. Many E-Health systems such as Hospital Information Systems, Electronic Health Records and others have been created and work now in hospitals. Using these systems contribute greatly to improve quality of healthcare in a community.

As our research should this process show be structured in a way that promotes human rights. Attention is to be paid to international standards and state's obligation with respect to the right to health and other rights in the process of the development of modern healthcare systems. Foreign experience is valuable too. For example, European countries have extensive expertise in the sphere, that is why they are becoming a reference point around the world (in particular, issues of personal data protection, including the right to be forgotten and the right to delete information). In general, it can be confidently argued that the development of health care within the framework of the development of ICT is inextricably linked with the provision of fundamental human rights and freedoms in particular and society as a whole.

It is fundamentally important that when creating such a system, first of all, the person, his rights, as well as the need to ensure them as fully as possible in the new conditions, are taken into account. This is especially true today, as due to the COVID-19 the level of use of ICT in medical sphere has grown rapidly. People are now more than ever active in using electronic systems. This brings to the light the issues of security and data protection. Moreover, modern e-Health systems seem to be a valuable tool for detection and prevention of medical errors. The amount of data collected in electronic health systems is huge, that, it is possible to use it for different analytical purposes. In some cases, this can lead to the extensive use of the AI, as it has a very valuable potential for the development of healthcare (though some risks exist at the moment too, and it is necessary to take steps for their mitigation or exclusion).

As the analysis has shown, the practical implementation of the measures planned for further implementation, taking into account international obligations, foreign experience and national characteristics, should take into account the need to ensure human rights at the same time. It seems that only in this case, the interaction of medical worker and patient in a new electronic environment will be carried out as effectively as possible, which in general will become an important aspect of the realization of the right to health and other human rights.

References

Ablameyko, S. V., Anishchanka, V. V., Lapitsky, V. A., & Tuzikov, A. V. (2007) *Medical information technologies and systems*, Minsk. UIIP NAS Belarus, 121.

Bitar, H.., Alismail S. (2021) The role of eHealth, telehealth, and telemedicine for chronic disease patients during COVID-19 pandemic: A rapid systematic review. In *Digital Health*, 7(8), 1–19.

Bokolo, A. (2021) Exploring the adoption of telemedicine and virtual software for care of outpatients during and after COVID-19 pandemic. In *Irish Journal of Medical Science*, 190(1), 1–10.

Bonifazi, F., Volpe, E., Digregorio, G., Giannuzzi, V., & Ceci, A. (2020) Machine Learning Systems Applied to Health Data and System. In *European Journal of Health Law,* 27(3), 242–258.

Chang, V., Cao, Y., Li, T., Shi, Y., & Baudier, P. (2019) Smart Healthcare and Ethical Issues. In *International Conference on Finance, Economics, Management and IT Business (FEMIB)*, 53–59. DOI: 10.5220/0007737200530059

China: AI medical imaging industry market size 2018–2022. Statista. Available at: https://www.statista.com/statistics/1024843/china-ai-medical-imaging-industry-market-size/ (accessed on Jun 15, 2021).

Distante, A., Distante, C. (2020) *Handbook of image processing and computer vision*: Volume 1: From energy to image. 491. DOI: 10.1007/978–3–030–38148–6.

Dhillon, B.S. (2003) Human Reliability and Error in Medicine. In *World Scientific*, 232. DOI: https://doi.org/10.1142/5264.

Faiella, G., Parand, A., Franklin, B. D., Chana, P., Cesarelli, M., Stanton, N. A., & Sevdalis, N. (2018) Expanding healthcare failure mode and effect analysis: A composite proactive risk analysis approach. In *Reliability Engineering & System Safety*,169: 117–126.

Foster, J. D., Miskovic, D., Allison, A. S., Conti, J. A., Ockrim, J., Cooper, E. J., Hanna, G. B., & Francis, N. K. (2016), Application of objective clinical human reliability analysis (OCHRA) in assessment of technical performance in laparoscopic rectal cancer surgery. In *Tech. Coloproctol.* 20(6): 361–367.

HIMSS Annual European Digital Health Survey 2021. Available at: https://cloud.emailhimss.org/HA-Trendbarometer-01–14

Hofer, T. P., Kerr, E. A., & Hayward, R. A. (2000), What is an error? In Effective clinical practice, 3(6): 261–269.

Kapur, A., Potters, L. (2012) Six Sigma tools for a patient safety-oriented, quality-checklist driven radiation medicine department. *In Pract Radiat Oncol*, 2: 86–96.

Mann, D. M., Chen, J., Chunara, R., Testa, P. A., Nov, O. (2020) COVID-19 transforms health care through telemedicine: evidence from the field. In *Journal of the American Medical Informatics Association*, 27(7): 1132–1135.

Mohapatra, S., Parija, S. (2021) IoT-Based Modeling of Electronic Healthcare System Through Connected Environment. In *Advances in Intelligent Systems and Computing*, 1199: 423–431.

Mollalo, A., Rivera, K. M., Vahedi, B. (2020) Artificial Neural Network Modeling of Novel Coronavirus (COVID-19) Incidence Rates across the Continental United States. In *Int J Environ Res Public Health.,* 17, 4204, DOI: 10.3390/ijerph17124204

Lehrach, H., Ionescu, A. M. The Future of Health Care: deep data, smart sensors, virtual patients and the Internet-of-Humans. Available at: https://ec.europa.eu/futurium/en/system/files/ged/future_health_fet_consultation.pdf

List, R., Compton, M., Soper, M. (2021) Preserving Multidisciplinary Care Model and Patient Safety during Reopening of Ambulatory Cystic Fibrosis Clinic for Nonurgent Care: A Hybrid Telehealth Model. In *Telemedicine and e-Health,* 27(2): 193–199.

Lyons, M., Adams, S., Woloshynowych, M. & Vincent, C. (2004) Human reliability analysis in healthcare: A review of techniques. In *Int. Journal of Risk & Safety in Medicine*. 16 (4): 223–237.

Pesapane, F., Codari, M., Sardanelli, F. (2018) Artificial intelligence in medical imaging: threat or opportunity? Radiologists again at the forefront of innovation in medicine. European Radiology Experimental. 2:35. DOI: https://doi.org/10.1186/s41747–018–0061–6

Sajedi, H., Yaghobi, S. R. (2020) Information hiding methods for E-Healthcare. In *Smart Health*, 15(3), Art. no. 100104.

Sujana, M.A., Embrey, D., Huang, H. (2020) On the application of Human Reliability Analysis in healthcare: Opportunities and challenges. In *Reliability Engineering & System Safety*, vol.194, art. no. 1061892.

Sujana, M.A., Habli, I., Kelly, T.P., Pozzic, S. & Johnsond, C.W. (2016) Should healthcare providers do safety cases? Lessons from a cross-industry review of safety case practices. In *Safety Science*, 84: 181–189.

Sanchez, J.A., Barach, P., Johnson, J., & Jacobs, J. P. *Surgical Patient Care. Improving Safety, Quality and Value*; Eds. Springer, 2017, 880.

Tian, S., Yang, W., Le Grange, J. M., Wang P., Huang, W., & Ye, Z. (2019) Smart healthcare: making medical care more intelligent. In *Global Health Journal*, Volume 3, Issue 3, September 2019, 62–65.

Zaitseva, E., Levashenko, V., Rabcan, J., Krsak, E. (2020). Application of the Structure Function in the Evaluation of the Human Factor in Healthcare. In *Symmetry.*12(1):93. https://doi.org/10.3390/sym12010093

Journal of Siberian Federal University. Humanities & Social Sciences
2022 15(8): 1194–1203

DOI: 10.17516/1997-1370-0922
EDN: KRGZIR
УДК 343.139

The Line of Defense is a Means of Enforcement of the Position of the Defense in Pre-Trial Proceedings in a Criminal Case

Alexander I. Bayanov*[a], Yury P. Garmaev[b] and Alexander D. Nazarov[c]

[a] *Siberian Federal University*
Krasnoyarsk, Russian Federation
[b] *Buryat State University*
Ulan-Ude, Russian Federation
[c] *Saint Petersburg State University*
Saint Petersburg, Russian Federation

Received 02.12.2021, received in revised form 17.01.2022, accepted 19.04.2022

Abstract. The article analyzes the relationship between the concepts of "defense position" and "line of defense" used in regulatory enactments, which is found in scientific literature. It is concluded that it is necessary to separate these concepts. It is proposed to consider the line of defense in the form of two interconnected parts: logical (internal) and effective (external). The logical part of the line of defense is represented by strategy and tactics and consists of a set of individual defense tasks. It defines the logical direction in achieving the chosen defense position. The effective part of the line of defense is formed from procedural and other actions not prohibited by the legislation of the Russian Federation, aimed at solving the problems of defense. The list of procedural actions is determined by the Criminal Procedure Code of the Russian Federation and the Federal Law "On advocacy and the legal profession in the Russian Federation" and is exhaustive. Other actions of a lawyer that do not contradict the law are recommended in reference, methodological and scientific literature on defense issues. It is concluded that the effective part of the defense line is characterized by the style and demeanor of the lawyer. Thus, the line of defense is presented in the form of a complex structure linking the logical and effective parts of the defense lawyer's activities. The main types of the line of defense in criminal cases at the stage of pre-trial proceedings are given, factors influencing their content are considered. At the same time, attention is drawn to the fact that the line of defense must undoubtedly be a means of protecting the rights and legitimate interests of the client. At the same time, in situations where the rights and interests of the client are not damaged, the lawyer, when choosing a line of defense, must take into account the rights and legitimate interests of other participants in criminal proceedings. Thus, the line of defense can be viewed not only as a complex, but also as a balanced means of forming a defensive position.

* Corresponding author E-mail address: anazarov61@mail.ru

Keywords: defensive position, defensive line, defensive strategy, defensive tactics, defensive line style, demeanor of the lawyer.

Research area: law.

Citation: Bayanov, A.I., Garmaev, Y.P. and Nazarov, A.D. (2022). The line of defense is a means of enforcement of the position of the defense in pre-trial proceedings in a criminal case. J. Sib. Fed. Univ. Humanit. soc. sci., 15(8), 1194–1203. DOI: 10.17516/1997-1370-0922.

Линия защиты – средство реализации позиции защиты в досудебном производстве по уголовному делу

А.И. Баянов[а], Ю.П. Гармаев[б], А.Д. Назаров[в]
[а] *Сибирский федеральный университет*
Российская Федерация, Красноярск
[б] *Бурятский государственный университет*
Российская Федерация, Улан-Удэ
[в] *Санкт-Петербургский государственный университет*
Российская Федерация, Санкт-Петербург

Аннотация. Проанализировано отношение между использованными в нормативных актах понятиями «позиция защиты» и «линия защиты», которое встречается в научной литературе. Сделан вывод о необходимости разделять указанные понятия. Предлагается рассматривать линию защиты в виде двух взаимосвязанных частей: логической (внутренней) и действенной (внешней). Логическая часть линии защиты представлена стратегией и тактикой и состоит из совокупности отдельных задач защиты. Она определяет логическое направление в достижении избранной позиции защиты. Действенная часть линии защиты формируется из процессуальных и иных не запрещенных законодательством Российской Федерации действий, направленных на решение задач защиты. Перечень процессуальных действий определяется Уголовно-процессуальным кодексом Российской Федерации и Федеральным законом «Об адвокатской деятельности и адвокатуре в Российской Федерации» и является исчерпывающим. Иные действия адвоката, не противоречащие законодательству, рекомендуются в справочной, методической и научной литературе по вопросам защиты. Сделан вывод о том, что действенная часть линии защиты характеризуется стилем и манерой поведения адвоката. Таким образом, линия защиты представляется в виде комплексной конструкции, связывающей логическую и действенную части защитительной деятельности адвоката. Приводятся основные виды линии защиты по уголовным делам в стадии досудебного производства, рассматриваются факторы, влияющие на их содержание. При этом обращается внимание на то обстоятельство, что линия защиты бесспорно должна быть средством защиты прав и законных интересов подзащитного. Вместе с тем, в ситуациях, когда правам и интересам подзащитного не наносится урон, адвокату при выборе линии защиты необходимо учитывать права и законные интересы других участников уголовного судопроизводства. Таким

образом, линия защиты может рассматриваться не только как комплексное, но и как сбалансированное средство формирования позиции защиты.

Ключевые слова: позиция защиты, линия защиты, стратегия защиты, тактика защиты, стиль линии защиты, манера линии защиты.

Научная специальность: 12.00.00 – юридические науки.

Введение в проблему исследования

В нормативных актах, регулирующих деятельность адвоката в уголовном судопроизводстве, неоднократно используется понятие «позиция» (адвоката, стороны защиты) (Federal'nyi zakon, 2002; Kodeks, 2003). Вместе с тем, понятие «позиция» адвоката в указанных нормативных актах не раскрывается.

В. Л. Кудрявцев, проводивший исследования содержания понятия «позиция адвоката», дает, по крайней мере, семь различных точек зрения ученых (Kudriavtsev, 2006). Не останавливаясь на их анализе, попытаемся выделить основные подходы при определении содержания исследуемого понятия. Сторонники первого подхода рассматривают *позицию* в качестве предполагаемого результата деятельности (мнение, вывод, цель, версия и т.п.), в котором выражается отношение адвоката к возбуждению уголовного дела, применению меры пресечения или уведомлению о подозрении в совершении преступления, предъявленному обвинению, вынесенному судом приговору и т.д. Таким образом, *позиция* рассматривается как сформулированная (в том числе и как публично представленная) цель деятельности адвоката. Второй подход к понятию «позиция» объединяет в одно целое как позицию адвоката, так и процесс, направленный на реализацию выбранной или заявленной позиции.

Объединение в одном понятии «позиция адвоката» взаимосвязанных, но различных по функциональной направленности и содержанию процессов представляется нам не совсем оправданным и непродуктивным направлением. Оно приводит к логической неопределенности содержания понятия, размывает его границы и затрудняет разработку эффективных методических рекомендаций, направленных на реализацию позиции в различных ситуациях, возникающих в процессе досудебного производства по уголовному делу. Следует также заметить, что в структуре индивидуальной деятельности человека, к разновидности которой относится и деятельность адвоката, в качестве взаимосвязанных, но имеющих самостоятельное значение элементов выделяется не только «цель», но и «план деятельности», в котором определяется стратегия и тактика достижения поставленной цели с учетом объективных и субъективных условий (Lomov, 1984).

В юридической литературе для обозначения плана (программы) деятельности адвоката, направленной на реализацию выбранной позиции, используются следующие понятия: «стратегия и тактика защиты» (Chashchin, 2008), «тактика и методика защиты» (Kudriavtsev, 2006), «линия защиты» (Zaitseva, 2006). Следует отметить, что понятие «линия защиты» встречается и в актах судебной практики (Apelliatsionnoe opredelenie Sudebnoi kollegii po ugolovnym delam Verkhovnogo Suda Rossiiskoi Federatsii, 2017). Необходимо обратить внимание на то обстоятельство, что каждое из приведенных выше понятий раскрывает отдельные стороны деятельности адвоката. Общим, объединяющим понятием, характеризующим деятельность адвоката, на наш взгляд, следует считать понятие «линия защиты».

Постановка проблемы

Понятие «линия» в толковом словаре русского языка рассматривается как направление, образ мысли, образ действий (Kuznetsov, 1997). Основным признаком понятия «линия» является «направление». В рамках направления объединяют-

ся две составляющие линии: образ мысли (мысленно-направляющая) и образ действий (действенно-направляющая), состоящий из совокупности отдельных внешних проявлений, с помощью которых достигаются результаты мыслительной направляющей стороны деятельности.

Мыслительная сторона линии защиты формируется посредством постановки задач защиты. Задачи защиты ставятся с учетом выбранной позиции. Каждая из задач защиты может рассматриваться в виде отдельного промежуточного этапа (планируемого результата), который необходимо достичь для реализации заявленной позиции. С учетом степени влияния на достижение позиции защиты задачи можно разделить на два вида: стратегические и тактические. Стратегические задачи, посредством которых формируется стратегия защиты, представляют основное (главное) направление, обеспечивающее достижение заявленной позиции на весь период досудебного производства или на отдельные его этапы. Стратегия защиты зависит от различных факторов, сопутствующих досудебному производству по уголовному делу. На формирование стратегии в первую очередь влияют как положения законодательства, определяющие основные принципы, вытекающие из назначения уголовного судопроизводства (ст. 6 УПК РФ), так и другие нормативные предписания, регулирующие деятельность адвоката. Положения закона в первую очередь должны учитываться при формировании стратегии защиты. Стратегия защиты может выходить за рамки нормативного предписания. Кроме нормативных предписаний стратегия защиты может основываться на положениях, разработанных в различных научных отраслях знания, которые призваны обслуживать уголовное судопроизводство: в уголовно-процессуальном праве, юридической этике, юридической психологии, криминалистике и науке об адвокатуре. В качестве примера можно указать на стратегическую задачу защиты, предполагающую установление и поддержание делового контакта между адвокатом и его доверителем, между адвокатом, дознавателем, следователем и прокурором. Необходимость решения указанной задачи вытекает из фундаментальных положений судебной психологии и криминалистики (Stoliarenko, 2000).

Стратегия защиты реализуется через ее тактику. Тактика защиты определяет частные (не основные) направления в деятельности адвоката, обеспечивающие решения стратегических задач защиты. Посредством решения тактических задач реализуются стратегии защиты. Характер тактических задач, их последовательность должны полностью соответствовать выбранной стратегии защиты. Любое несоответствие между выбранной тактикой и стратегией защиты будет затруднять или полностью исключать достижение выбранной позиции. Например, решение названной выше стратегической задачи защиты – установление и поддержание делового контакта между адвокатом, его доверителем – потребует решения ряда тактических задач, среди которых можно назвать такие, как внимательное отношение к законным интересам доверителя, своевременная реакция на просьбы и ходатайства доверителя, отчет перед доверителем о проделанной работе и полученных результатах и т.п. Реализация этих и ряда других тактических задач будет способствовать установлению доверительных отношений с подзащитным.

Стратегия и тактика защиты реализуются посредством процессуальных и иных не запрещенных законодательством действий, часть которых совершается в процессе непосредственного (прямого) контакта адвоката с другими участниками уголовного судопроизводства. В ходе такого контакта существенную роль играют *стиль* и *манера поведения* адвоката, которые необходимо рассматривать в виде самостоятельных элементов внешней (действенной) части линии защиты.

Обсуждение

Выбор стратегии и тактики защиты как основание для формирования логической стороны линии защиты, кроме норма-

тивных предписаний и фундаментальных общепринятых научных доктрин, зависит также от следующих факторов:

1) характера защитительной ситуации;

2) правового положения доверителя и его личностных особенностей;

3) профессионального уровня подготовки и личностных характеристик дознавателя, следователя, прокурора;

4) профессионального авторитета и личностных возможностей адвоката;

5) осуществления функции защиты по соглашению или по назначению.

Особое значение при формировании стратегии и тактики защиты отводится характеру защитительной ситуации. Существующая в юридической литературе точка зрения, согласно которой защитительная ситуация состоит из отношения подзащитного к сущности предъявленного ему обвинения, наличия доказательств, изобличающих подзащитного в инкриминированном ему деянии, наличия оправдательных доказательств, не учитывает всех необходимых обстоятельств, на основе которых принимается решение о формировании стратегии и тактики защиты (Kudriavtsev, 2006). Их перечень необходимо расширить.

По нашему мнению, защитительная ситуация должна включать в себя следующий перечень обстоятельств:

1) уровень достаточности и достоверности, а также допустимость доказательств, на основании которых принимаются уголовно-правовые и уголовно-процессуальные решения, затрагивающие права и законные интересы подзащитного;

2) уровень осведомленности в отношении правовой позиции стороны обвинения, ее планов, стратегии и тактики, собранных доказательств;

3) позиция подзащитного по отношению к принимаемым уголовно-правовым и уголовно-процессуальным решениям, затрагивающим его права и законные интересы;

4) позиция, занимаемая дознавателем, следователем, прокурором в процессе досудебного производства по делу (объективная, необъективная);

5) наличие или отсутствие возможностей по расширению доказательственной базы по делу;

6) характер межличностных и деловых отношений, сложившихся между адвокатом, дознавателем, следователем, прокурором;

7) характер межличностных отношений, сложившихся между подзащитным и другими обвиняемыми по уголовному делу, подзащитным и потерпевшим, подзащитным и свидетелями по уголовному делу.

Приведенные обстоятельства защитительной ситуации, как и иные факторы, влияющие на формирование стратегии и тактики защиты, подлежат анализу и оценке. В процессе анализа и оценки некоторые из них могут рассматриваться как основные (решающие), а другие – в качестве второстепенных, не влияющих существенно на выбор стратегии и тактики защиты. Следует обратить внимание на то, что обстоятельства, из которых состоит защитительная ситуация, по сравнению с иными факторами, образующими основание для выбора стратегии и тактики защиты, носят не постоянный, а изменяемый в процессе досудебного производства характер. Изменчивость, непостоянность обстоятельств, входящих в защитительную ситуацию, придает ей динамический характер. Динамичность защитительной ситуации накладывает отпечаток на процесс ее анализа и оценки. При анализе и оценке как отдельных обстоятельств, так и в целом общего характера защитительной ситуации следует учитывать не только их текущее состояние (на момент анализа и оценки), но и возможные перспективы изменений текущего состояния на последующих этапах досудебного производства. Таким образом, рассматриваемый подход при анализе характера защитительной ситуации дает адвокату возможность сформировать оптимальную стратегию и тактику защиты, быть готовым к неожиданным, но прогнозируемым ее изменениям. Остальные факторы, влияющие на выбор стратегии и тактики защиты, носят относительно постоянный характер

и в ходе досудебного производства по уголовному делу вероятность изменения их содержания близка к нулевой. Такие факторы подлежат оценке с учетом их текущего состояния (профессиональный уровень подготовки и личностных характеристик дознавателя, следователя, прокурора; профессиональный авторитет и личностные возможности адвоката и т.п.).

Оценка факторов, влияющих на выбор стратегии и тактики защиты, предполагает также решение двух основных вопросов: во-первых, какие из факторов следует отнести к благоприятным, а какие к неблагоприятным, учитывая их влияние на реализацию защитительной позиции; во-вторых, какие из числа благоприятных и неблагоприятных факторов следует обязательно учитывать, а какие могут признаваться на определенном этапе принятия решения не заслуживающими внимания и не учитываться.

В процессе формирования логической стороны линии защиты сначала ставятся стратегические задачи, а затем выстраивается тактика защиты. Различные стратегии и тактики реализации выбранной позиции формируют отдельные линии защиты. Каждая отдельно взятая линия защиты выражает характер отношений (взаимодействия) между сторонами обвинения и защиты. Для раскрытия содержания взаимодействия между указанными сторонами наиболее часто используются понятия «противодействие» («соперничество») и «сотрудничество». Основной акцент при раскрытии содержания взаимодействия переносится в основном на понятие «противодействие».

Достаточно часто любая деятельность адвоката, создающая, по мнению стороны обвинения, определенные затруднения для процесса предварительного расследования, рассматривается как противодействие. При этом не обращают внимание на то обстоятельство, действует ли адвокат в рамках допустимых законом полномочий или выходит за рамки закона и норм профессиональной этики.

Так, Б. Я. Гаврилов и В. П. Лавров определяют противодействие расследованию преступлений как совокупность умышленных противоправных и иных действий преступников, а также связанных с ними лиц, направленных на воспрепятствование деятельности правоохранительных органов по выявлению, раскрытию и расследованию преступных деяний. Основная цель противодействия, по мнению авторов, «заключается в уклонении от ответственности за совершенное преступление или, по меньшей мере, добиться *незаслуженного* (курсив наш. – А.Б. и др.) смягчения наказания» (Gavrilov, Lavrov, 2017). Подобной позиции по поводу понятия и сущности противодействия придерживаются сегодня большинство ученых-криминалистов (Verenich, Kustov, Proshin, 2014).

Нет возражений по поводу данного подхода. Исходя из него, всякое противодействие, хоть и определяемое авторами как «противоправное *или иное*», все же рассматривается как некий негативный феномен. Такое допущение – а точнее эта часть парадигмы науки криминалистики, транслируемая практически всеми разработчиками данной частной криминалистической теории, безусловно, имеет право на жизнь.

Однако нам представляется, что в контексте указанного подхода рассматривать деятельность адвоката в рамках допустимых законом полномочий как противодействие процессу дознания и следствия ошибочно, непродуктивно и не соответствует принципам уголовного судопроизводства. Аналогичным образом и деятельность стороны обвинения, соответствующая закону, не может быть противодействием стороне защиты. О противодействии можно говорить только тогда, когда одна из сторон выходит за рамки допустимых законом предписаний и полномочий. Противоположная сторона взаимодействия при этих условиях получает право на противодействие, которое должно находиться в рамках правового поля.

Статья 6 УПК РФ определяет назначение уголовного судопроизводства, которое заключается в защите прав и законных интересов как потерпевших от преступления, так и лиц, подвергающихся уголов-

ному преследованию. В равной степени правовая установка, возведенная в основополагающий принцип уголовного судопроизводства, является руководящей, подлежит неукоснительному выполнению и распространяется на обе стороны: обвинение и защиту. Стороны, несмотря на различие в полномочиях, средствах достижения поставленных правовых целей, следует рассматривать как «союзников», а не как «противников». Мы полностью поддерживаем мнение А. С. Барабаша о том, что защитник не является противной стороной: «По своей сути он помощник органов, но только в том случае, когда его деятельность способствует установлению органами обстоятельств, свидетельствующих о невиновности или меньшей виновности его подзащитного» (Barabash, 2017).

Таким образом, для характеристики содержания взаимодействия между сторонами обвинения и защиты, осуществляемого в рамках правового поля, следует использовать понятие «сотрудничество». На сотрудничество, а не на соперничество между следователем и защитником обращается внимание в юридической литературе (Tsarev, 1990).

Сотрудничество как стратегическая задача взаимодействия между сторонами обвинения и защиты определяет установление и поддержание баланса, основанного на взаимном понимании правовых полномочий и соблюдении прав и законных интересов каждой из сторон. С учетом правовых полномочий основная ответственность за установление и поддержание баланса отношений между сторонами ложится на адвоката. В основном сотрудничество, а не противодействие создает благоприятные условия для соблюдения прав и законных интересов доверителя. Любое противодействие (даже имеющее законные основания) чревато не только рассогласованием процессуально-правовых отношений, но и приобретает порой эмоциональный характер, приводящий к конфликтам и напряжению в отношениях, которое может создать препятствие для достижения конечной цели – защиты прав и законных интересов подзащитного. Взаимодействие между сторонами, несмотря на его процессуально-правовой характер, не исключает межличностных отношений. В любом реальном процессуальном взаимодействии всегда присутствует «живая ткань» человеческих отношений. Доверитель ни при каких условиях не должен быть заложником отношений между дознавателем, следователем, прокурором и адвокатом. И прежде всего об исключении негативного влияния межличностных отношений на процессе защиты прав и законных интересов доверителя должен думать адвокат. Это его прямая обязанность: «Адвокат обязан честно, разумно и добросовестно отстаивать права и законные интересы доверителя всеми не запрещенными законодательством Российской Федерации средствами» (Federal'nyi zakon, 2002). Разумность в отстаивании прав и законных интересов предполагает выбор такой стратегии, тактики и средств защиты, которые в любой ситуации не должны ухудшать положение доверителя. Поэтому при обнаружении неправовых действий стороны обвинения, приводящих к возможным нарушениям прав и законных интересов доверителя, адвокату необходимо принимать меры, предусмотренные законом, для устранения неблагоприятной ситуации, одновременно не разрушая сложившиеся отношения сотрудничества. В данной ситуации наиболее рациональной формой взаимодействия следует считать предварительный диалог, направленный на устранение ошибок, допущенных следствием и дознанием, уяснение позиции стороны обвинения, а также разъяснение позиции защиты с выработкой совместного сбалансированного и компромиссного решения. Как отмечается в литературе, квалифицированный опытный адвокат, скорее всего, корректно укажет на ошибки следователя, налаживая психологический контакт с процессуальным соперником, и тем самым, как правило, добьется большего, чем тот адвокат, который будет «строчить» жалобы на каждую «помарку» в процессуальных действиях, документах (Garmaev, 2019). И только в той ситуации, когда сторона обвинения выхо-

дит за рамки закона и не принимает во внимание доводы адвоката, возможен отход от сотрудничества с обязательным предварительным разъяснением оппоненту такого решения.

Приняв решение об отходе от сотрудничества, адвокат обязан осуществить процессуальные действия для защиты нарушенных прав и законных интересов доверителя (заявление ходатайств и отводов; подача жалоб на действия, бездействие, решения дознавателя, следователя и т.д.). Не все адвокаты рассматривают указанные законные действия, как эффективные и полезные (с учетом их влияния на положение подзащитного). Так, 7 % из общего числа опрошенных (было опрошено 148 адвокатов Адвокатской палаты Красноярского края) заявили, что указанные действия со стороны адвоката только усугубляют положение подзащитного (Gorelik, Nazarov, Stoiko, 2000). Приведенные данные опроса свидетельствуют о том, что кроме процессуально-деловых отношений адвокаты учитывают возможные последствия своих действий, принимая во внимание личностную реакцию представителей стороны обвинения на законные действия стороны защиты.

Все остальные действия стороны обвинения, осуществляемые в рамках правового поля и ведущие к ухудшению положения подзащитного, не должны становиться причиной прекращения или приостановления сотрудничества со стороны защиты.

Стратегия и тактика взаимодействия между сторонами обвинения и защиты являются основным содержанием процесса, направленного на соблюдение прав и законных интересов подзащитного.

Отдельным частным направлением в деятельности адвоката следует считать его взаимодействие с доверителем. Позиция адвоката зависит от позиции доверителя, «за исключением случаев, когда адвокат убежден в наличии самооговора доверителя» (Federal'nyi zakon, 2002). При наличии достаточных данных о самооговоре адвокат должен противодействовать позиции доверителя, выбирая при этом стратегию и тактику сотрудничества со стороной обвинения при условии, если сторона обвинения не использует самооговор подзащитного для решения своих эгоистических, неправовых целей. В противоположной ситуации сторона защиты должна отказаться от сотрудничества со стороной обвинения и одновременно противодействовать позиции подзащитного.

Анализ законодательства, теоретических положений и адвокатской практики в стадии досудебного производства по уголовным делам позволяет выделить следующие основные виды линии защиты:

1. Полное сотрудничество с дознанием и следствием, в том числе и в рамках заключенного досудебного соглашения о сотрудничестве.

2. Частичное сотрудничество с дознанием и следствием, направленное на поддержку решений, обеспечивающих соблюдение прав и законных интересов подзащитного, и отказ от сотрудничества при наличии отдельных фактов нарушения прав и законных интересов подзащитного.

3. Полный отказ от сотрудничества с дознанием и следствием в случаях постоянного нарушения прав и законных интересов подзащитного.

4. Противодействие позиции подзащитного при достоверно установленных фактах самооговора и сотрудничество с дознанием и следствием для устранения причин и факта самооговора.

Вторая сторона линии защиты представлена совокупностью внешних действий, которые направлены на реализацию выбранной стратегии и тактики защиты. Действия адвоката, с помощью которых реализуется стратегия и тактика защиты, могут быть объединены в две группы: действия, предусмотренные законодательством, регулирующим деятельность адвоката, и иные действия, не противоречащие законодательству Российской Федерации. Перечень действий, разрешенных законодательством, предусмотрен в Уголовно-процессуальном законе (статья 53 УПК РФ) и в Федеральном законе «Об адвокатской деятельности и адвокатуре в Российской Федерации» (статья 6). Что касается иных

действий, не противоречащих законодательству, то совокупность последних (приемы, рекомендации, операции) составляет подсистему криминалистической и адвокатской тактики, состоящую из тактики уголовного преследования и тактики профессиональной защиты от подозрения или обвинения в совершении преступления (Baev, 2003). В юридической литературе можно встретить описание достаточно сложных способов, направленных на реализацию выбранной тактики защиты. В качестве примера можно назвать тактическую операцию по «круглосуточному сопровождению подзащитного» (Chashchin, 2008).

Линия защиты по уголовному делу формируется и реализуется конкретными адвокатами, обладающими определенными профессиональными навыками, авторитетом в юридическом сообществе и индивидуальными чертами характера и поведения. Под воздействием этих факторов вырабатывается индивидуальный стиль и манера взаимодействия адвоката с другими участниками уголовного судопроизводства, в первую очередь со стороной обвинения. Стиль и манеры поведения адвоката характеризуют внешнюю (поведенческую) сторону линии защиты.

Стиль линии защиты служит проявлением общей и профессиональной вербальной и отчасти невербальной культуры адвоката. Он отражается в способности адвоката вступать в общение с другими участниками уголовного процесса и коллегами, в умении вести диалог, убеждать, отстаивать свою позицию, демонстрировать уважение и внимание к собеседнику и т.п. Стиль может проявляться и в формировании внешнего облика адвоката.

В манере отражаются только невербальные формы поведения адвоката: мимика, жесты, телодвижения, темп, уровень громкости и эмоциональность речи и т.п. Манера поведения адвоката может быть различной: сдержанной (сухой) и эмоциональной, замедленной и быстрой и т.п., но она, как и стиль, должна соответствовать стандартам делового общения (Kodeks, 2003). Выбор манеры поведения в значительной степени зависит от поведенческих особенностей партнера по общению и его процессуального статуса. При взаимодействии с дознавателем и следователем необходимо учитывать их манеру поведения и в определенном отношении к ней приспосабливаться. Разница в манерах поведения не будет способствовать установлению деловых отношений, а излишняя открытость и эмоциональность со стороны адвоката будет рассматриваться как невыдержанность и несерьезность, а иногда и как агрессивность.

Стиль и манера поведения адвоката играют значительную роль в реализации линии защиты. Правильно выбранная стратегия и тактика защиты могут оказаться неэффективными и нерезультативными в том случае, если стиль и манеры не будут соответствовать нравственным критериям и традициям адвокатуры и не будут учитывать поведенческие особенности субъектов, с которыми взаимодействует адвокат.

Заключение

Таким образом, линию защиты можно рассматривать как комплексное и сбалансированное средство, обеспечивающее достижение целей стороны защиты по уголовному делу, состоящее из совокупности взаимосвязанных задач, процессуальных и иных не запрещенных законодательством Российской Федерации действий, учитывающее обязанности, права и интересы участников уголовного судопроизводства с выраженным приоритетом в обеспечении прав и законных интересов подзащитного.

Построение линии защиты, направленной на достижение позиции по уголовному делу, предполагает не только учет всех ее составляющих частей и элементов, но и наполнение их конкретным содержанием, основанным на особенностях сложившейся защитительной ситуации и возможных перспективах ее изменения. При соблюдении всех рекомендаций к построению линии защиты она может обеспечить оптимальную защиту прав и законных интересов доверителя и гарантировать максимально возможный результат.

Список литературы / References

Apelliatsionnoe opredelenie Sudebnoi kollegii po ugolovnym delam Verkhovnogo Suda Rossiiskoi Federatsii ot 20 November 2017 goda № 50-APU 17–6 [Appeal ruling of the Judicial Collegium for Criminal Cases of the Supreme Court of the Russian Federation dated November 25, 2017 No. 50-APU 17–16] (2017), available at: http://www.consultant.ru/ (accessed 29 November 2021).

Baev, O. Ia. (2003). *Taktika ugolovnogo presledovaniia i professional'noi zashchity ot nego [Tactics of criminal prosecution and professional protection against it].* Moscow, Ekzamen, 432.

Barabash, A.S. (2017). *Osnovnoi, dopolnitel'nye i vspomogatel'nye protsessy dokazyvaniia v stadiiakh predvaritel'nogo rassledovaniia i sudebnogo razbiratel'stva [Main, additional and auxiliary processes of evidence in the stages of preliminary investigation and trial]*. Moscow, Iurlitinform, 272.

Chashchin, A.N. (2008). *Strategiia i taktika advokatskoi deiatel'nosti [Strategy and tactics of advocacy]*. Moscow, Delo i servis, 272.

Federal'nyi zakon (2002). «Ob advokatskoi deiatel'nosti i advokature v Rossiiskoi Federatsyi» [Federal Law. On advocacy and the legal profession in the Russian Federation], available at: http://www.consultant.ru/document/cons_doc_LAW_36945/ (accessed 29 November 2021).

Garmaev, Iu.P. (2019). *Nezakonnaia deiatel'nost' advokatov v ugolovnom sudoproizvodstve, sredstva preduprezhdeniia i neitralizatsyi [Illegal activities of lawyers in criminal proceedings, means of prevention and neutralization]*. Moscow, Til Kom, 492.

Gavrilov, B. Ia, Lavrov, V.P. (2017). *Protivodeistvie passledovaniiu prestuplenii i mery po ego preodoleniiu [Countering the investigation of crimes and measures to overcome it]*. Moscow, Iurait, 205.

Gorelik, A.S., Nazarov, A.D., Stoiko, N.R. (2000). *Spravedlivost' sudebnogo razbiratel'stva i obespechenie prava na zashchitu v ugolovnom sudoproizvodstve: doklad po monitoringu [Fair trial and ensuring the right to a defense in criminal proceedings: a monitoring report]*. Krasnoiarsk, Krasnoiarskii gosuniversitet, 153.

Kodeks (2003). «Kodeks professional'noi etiki advokata» [Code of Professional Ethics for Lawyers], available at: https://fparf.ru/documents/fpa-rf/documents-of-the-congress/the-code-of-professional-ethics-of-lawyer/ (accessed 29 November 2021).

Kudriavtsev, V.L. (2006). *Protsessual'nye i kriminalisticheskie osnovy deiatel'nosti advokata-zashchitnika v rossiiskom ugolovnom sudoproizvodstve [Procedural and forensic bases of the activities of a defense lawyer in Russian criminal proceedings]*. Moscow, Iurlitinform, 176.

Kuznetsov, S.A. (1997). *Bol'shoi tolkovyi slovar' russkogo iazyka [Great Dictionary of Russian language].* Sankt-Peterbugr, Norint, 1536.

Lomov, B.F. (1984). *Metodologicheskie i teoreticheskie problemy psikhologii [Methodological and theoretical problems of psychology]*. Moscow, Nauka, 440 p.

Stoliarenko, A.M. (2000). *Psikhologicheskie priemy v rabote iurista [Psychological techniques in the work of a lawyer]*. Moscow, Iurait, 288.

Tsarev, V.M. (1990). Organization of defense in preliminary investigation [Organizatsiia zashchity v predvaritel'nom sledstvii]. *Mezhvuzovskii sbornik nauchnykh trudov [Interuniversity collection of scientific papers]*. Krasnoiarsk, 159–168.

Verenich, I.V., Kustov, A.M., Proshin V.M. (2014). *Kriminalisticheskaia teoriia mekhanizma prestupleniia [Forensic theory of the mechanism of crime]*. Moscow, Iurlitinform, 640.

Zaitseva, I.A. (2006). *Protsessual'nye i takticheskie osobennosti doprosa podozrevaemogo i obviniaemogo, provodimogo pri uchastii zashchitnika [Procedural and tactical features of the interrogation of the suspect and the accused, carried out with the participation of the defense lawyer]*. Moscow, Iurlitinform, 232.

Journal of Siberian Federal University. Humanities & Social Sciences
2022 15(8): 1204–1214

DOI: 10.17516/1997-1370-0921
EDN: JZTWSG
УДК 172:575:342.7

Genetic Research: Ethical and Legal Aspects

Daria M. Kovba* and Yan Yu. Moiseenko
Institute of Philosophy and Law of the Ural Branch
of the Russian Academy of Sciences
Ekaterinburg, Russian Federation

Received 29.09.2021, received in revised form 14.04.2022, accepted 19.04.2022

Abstract. The present paper discusses ethical and socio-political aspects of genetic research and technologies; the readiness of the international legislation to regulate genetic interference is also within the remit of the discussion. Research methods include a discursive approach, a chronological method, as well as a number of methods applied in legal science. The paper also highlights the problems of genetics inherited from eugenics (such as reductionism and a balance between private and public spheres) and raises the problem of discrimination on genetic grounds, which requires specific laws to protect the rights in the considered area. The analysis of international legislation has shown its central ideas to be respect for human dignity, rights and freedoms, the principle of autonomy. Bioethics proves to have made a great contribution to the development of ethical principles in the field of genetic research, while the standard-setting role here belongs to UNESCO. The declarations developed by this organization have a number of weaknesses (non-binding nature, lack of practical recommendations, etc.). Despite this, the authors argue in favor of continuing the work of bioethics committees.

Keywords: genetic research, human rights, personal dignity, discrimination, ethics, eugenics, legal regulation.

Research area: law.

Citation: Kovba, D.M. and Moiseenko, Ya. Yu. (2022). Genetic research: ethical and legal aspects. J. Sib. Fed. Univ. Humanit. soc. sci., 15(8), 1204–1214. DOI: 10.17516/1997-1370-0921.

* Corresponding author E-mail address: daria_kovba@mail.ru

Генетические исследования: этические и правовые аспекты

Д.М. Ковба, Я.Ю. Моисеенко
Институт философии и права
Уральского отделения Российской академии наук
Российская Федерация, Екатеринбург

Аннотация. Статья посвящена изучению этических и социально-политических аспектов генетических исследований и технологий, а также оценке того, в какой степени международная правовая сфера в состоянии их регулировать. Методологической основой исследования выступают дискурсивный подход, хронологический метод, а также ряд методов, присущих правовой науке. Анализ научной литературы позволил выделить проблемы генетики, унаследованные ею от евгеники (редукционизм и установление баланса между частным и общественным), а также исследовать проблему дискриминации граждан по генетическим признакам. Доказано, что большой вклад в развитие этических принципов в области генетических исследований внесли представители биоэтики, именно они рассматривались как точки отсчёта при разработке международного законодательства. Одна из ведущих нормотворческих ролей в области биоэтики по праву принадлежит ЮНЕСКО. В то же время отмечено, что декларации, выработанные этой организацией, имеют слабые стороны (необязательный характер, отсутствие практических рекомендаций и др.). Несмотря на это, приведены аргументы в пользу продолжения работы комитетов по биоэтике.

Ключевые слова: генетические исследования, права человека, личное достоинство, дискриминация, этика, евгеника, правовое регулирование.

Научная специальность: 12.00.00 – юридические науки.

Introduction

In recent years, the rapid development of new technologies in the field of genetic research and genome editing has become the topic of considerable scientific interest. Numerous works have been devoted to studying the role of genes in determining the healthy life of an individual, as well as how the expression of genes can be influenced by the environment (Wastell, White, 2007: xii). A major contribution to scientific knowledge in this field was made by the Human Genome Project (HGP, 1990–2003), the world's largest genetic research project, whose most notable result was the creation of a human genetic map (NIH, 2020).

One of the reasons for the recent explosion of interest in genetic research is due to its apparent applicability for solving actual human health problems. For example, prenatal screening methods are used to identify hereditary fetal pathology in the early stages of a pregnancy. Moreover, the developing field of gene therapy involves the introduction of engineered genetic constructs into a body to restore or replace a gene identified as defective.

In addition to healthcare fields, genetic research is increasingly applicable in various legal and social contexts, e.g. to determine the biological relationship between two potentially related individuals or to discover the identity of an unknown corpse. There is a continuing strong demand for breakthroughs in therapeutic applications that could be of benefit in overcoming immune diseases, as well as prolonging life and improving its quality.

Theoretical bioethical framework

Due to having significant potential consequences for human beings, it is generally

accepted that medical applications of genetic technologies must be governed according to bioethical criteria. The interdisciplinary field of bioethics, which focuses on the moral implications of human activity in medicine and biology, has been actively developing at the intersection of law, ethics and natural sciences since the 1970s.

While the ethical consequences of applied genetic technologies comprise the proper domain of specialists working in the fields of bioethics and clinical studies, the involvement of a wider circle of disciplines (e.g. philosophy, sociology, etc.) should also be assumed due to the significant implications for future human society. Thus, the present paper will focus on the considerable interest generated by investigations into the ethical aspects of genetic technologies in relation to eugenics (Ricci, 2009; CH G., & B A., 2008; Newman, 2010) and transhumanism (Vvedenskaya, 2014; Kovba, Gribovod, 2019), as well as the consequences of emerging governmental and business practices that arise in response to advances in genetic technology (Salardi, 2014; Khen, 2003; Anomaly, 2018).

Problem statement

The rapid development of new technologies in the field of genetics poses numerous challenges both for the international community and individual nation states in terms of their regulation. Since many of these technologies have not previously been tested or widely implemented, the immediate and long-term consequences of their use remain controversial. Thus, for example, significant contemporary concern is aroused by genetic experiments on human embryos. In 2018, experiments conducted by the Chinese scientist He Jiankui, in which embryos subjected to genetic modification resulted in the birth of twins, were broadly discussed in the media and by the scientific community (Mironov, 2019). The ambivalence of the scientific and public response to this research project and its results demonstrates the current incapacity of the legal system, as well as the wider community, to arrive at a general consensus regarding genetic research.

At the same time, due to the increasingly widespread availability of such technologies, the risk of such genetic experiments leading to dangerous consequences can only be expected to increase. In addition, ethical problems arise concerning the provision of equitable access to genetic services, as well as the protection of genetic information.

Thus, the broad development of new genetic technologies, especially those involving experiments on humans, has already attracted significant attention to the possible consequences of their unregulated application. For this reason, the following objectives are formulated:

1. highlight the main ethical challenges posed by genetic research and inherited from eugenics (reductionism, balance between private and public), as well as the related problem of discrimination on genetic grounds;

2. consider the ethical problem of genome editing in terms of the present "liberal" or transhumanistic trend as against a proposed, more balanced bioethical approach;

3. summarize the historical development and contemporary state of international legislation in the field of genetic research.

Methods

The present paper discusses both Russian and foreign literature sources concerning ethical, socio-political and legal aspects of genetic research, which were selected on the basis of their transparency and examined according to a number of perspectival contexts. Among these, a discursive approach was chosen in order to study the family of ideas having developed around eugenics and genetics over the course of time. A lack of consistency revealed by the research process is addressed by taking a chronological approach to investigation of the legislation in the field of genetics, starting with the Nuremberg Code 1947 and continuing until the acts of the present day.

Discussion

1. Weaknesses of genetics: reductionism, government control and discrimination

A quick glance through post-WWII literature reminds us that one of the chief fears

still associated with the tragic events of the 20th century concerns the possibility that advances in genetic engineering will invoke the same issues that discredited the ideology and practice of eugenics. At the Third International Congress of Eugenics (New York, 1932), eugenics was defined as a "biological metascience of man, combining distinctly different disciplines like population statistics, genetics, anthropology, psychometric analysis, history and religion, into a form of preventive medicine that endeavours to define and eradicate inherited illnesses" (Ricci, 2009: 11). A number of eugenicists, such as Charles Davenport, Harry L. Laughlin and Henry G. Goddard, believed that inherited traits included not only genetic diseases, but also social vices, such as the tendency to commit crime or even simply to live in poverty (Chousou D., et. al., 2019: 145). During the early 20th century, eugenics departments were opened in prestigious universities such as University College London and Harvard. Eugenics societies founded by prominent scientists like Karl Pearson and Charles Davenport found enthusiastic worldwide support (Allen, 2011:314). However, it was under Nazi rule when the most notorious examples of eugenic practices were carried out. Fortunately, their ideas have been consistently condemned and discredited following the defeat of Nazi Germany in 1945.

Since then many of the concepts developed in such discourses appear to have been carried over into genetics (CH & B, 2008: 22). For example, from the mid-1940s onwards, the practice of genetic counseling, initially based on genealogical data, but subsequently supported by DNA analysis, became widespread. Following the 1953 discovery of the double helix DNA structure by Francis Crick and his colleagues, other breakthroughs, such as the development of an effective method for in-vitro fertilization (IVF), stimulated public interest in the wide possibilities offered by genetic science, reopening discussions about the possibilities of "improving" human beings (Kovba, 2020, p. 13). Nevertheless, some critics argue that conveniently forgotten coercive practices carried out under the banner of eugenics have been surreptitiously reintroduced under the cover of the ostensibly voluntary nature of personal genetic testing (Newman, 2010: 33).

In general, critiques of genetic research problems inherited from eugenics are focused on two specific issues:

1) reductionism and biological determinism;

2) a disbalance between private and public spheres in terms of the possibility of state intervention in the regulation of genetic selection.

Critics of the reductionism common to both eugenics and genetics generally object to the use of a set of methodological principles according to which complex phenomena can be explained in terms of observable laws applying to simpler phenomena (Ricci, 2009, p. 22). For such critics, both disciplines tend to reduce the value of a human to his or her genetic makeup by ignoring other relevant factors, e.g., cultural, emotional, spiritual or educational. Such reductionism seems to be associated with a strong desire to determine the significant parameters of human nature once and for all.

However, according to the legal framework of universal human rights, there are precedents that militate against the use of genetic information to determine the legal basis of a person. Commonly cited examples of historical mistakes feature "constitutive rules to punish individuals not for their actions, but for what they are: the punishment of witches in the Middle Ages, the penal sanctions of heretics, the persecution of Jews" (Salardi, 2014: 200).

In terms of government regulation and control, it is generally accepted in contemporary Western societies that genetic services are to be provided solely on a voluntary, properly informed and individual basis. This contrasts with eugenic practices, where coercive (or conditionally coercive) decisions to select a person for testing are taken by civil authorities. Nevertheless, issues associated with state interventions justified in terms of the health and safety of populations remain quite acute today. Thus, Jonathan Anomaly argues that "the state may (in some cases) require us to act in ways that promote social welfare when we find ourselves in collective action problems in which each of us has an incentive to act one way, but most of

us are better off if most people act in another way" (Anomaly, 2018: 29).

Although such arguments in favour of modern "liberal eugenics" remain controversial, Anomaly's opinions are not necessarily *anomalous* (pun intended). In the context of the rapid development of genetic technologies, the temptation to interfere with human genes in order to regulate human reproduction is likely to become irresistible due to the ease with which such actions may be justified in terms of the interests of society as a whole. It may therefore be concluded that only a fully developed civil society having adequate laws for protecting the legal status of individual citizens is capable of maintaining the necessary balance between individual and collective interests. In the absence of such laws, not only authoritarian, but also democratic states are likely to increase measures to control and coerce their citizens in order to achieve collective goals.

The issue of state control over the genetic structure of the population gains additional significance when discussing problems associated with passportisation carried out on the basis of genetic screening. Not a long time ago debates on this topic were opened in Russia following the signing of decree No. 97 in March 2019, according to which it is proposed to "carry out genetic certification of the population, taking into account the legal basis for the protection of data on the personal genome and the formation of a genetic profile of the population" (Kremlin, 2019). In this regard, a number of problems arise: (1) since there is no existing definition of a genetic passport in Russian normative acts, it is not clear what information the passport should include (Abrosimova, 2020: 137); (2) an algorithm for the secure communication and storage of genetic information is yet to be developed; (3) the high cost of such a passport raises serious doubts that this idea will be implemented in practice within the next five years (ibid: 140).

As seen from the above, both population-based genetic projects currently being implemented are reliant on the voluntary provision of genetic data. As screening procedures become more available and affordable, this practice will likely be introduced in many developed countries. However, public reception to the widely-discussed notion of introducing genetic passports is more ambiguous. For example, the Scientific Institute of Public Health in Belgium, called *Sciensano*, conducted a public opinion survey on the possibility of introducing a genetic passport for all citizens in 2019–2020. Among positive aspects, respondents identified the following: (1) a genetic passport will provide an understanding of human health, improve individual diagnosis, treatment and prevention; (2) more efficient patient management, since healthcare providers would access all relevant health, medical and genetic information of patients more directly; (3) wider use of genomic information for forensic purposes (e.g., in identifying criminals) (Mayeur, Saelaert, Van Hoof, 2021: 6).

At the same time, respondents who are suspicious of the idea of introducing genetic passports, or who categorically reject such a proposal, make the following objections: (1) a genetic passport would strengthen official control over the population, limiting individual freedom of action; (2) the centralization of genomic information increases the risk that educational institutions, banks, insurers, commercial companies will be able to use this information to discriminate against the population (Mayeur, Saelaert, Van Hoof, 2021: 7). The researchers note that, in order to ensure public confidence in the implementation of such a policy, health sector leaders and experts need to take into account the feelings expressed by the survey respondents (insecurity and vulnerability from government and other organizations having access to all data about a person) (ibid .: 8). It's also highly necessary to create both national and international legal frameworks for ensuring personal data protection in order to reduce the risk of discrimination based on genetic characteristics. In particular, such risk may increase in the remit of health insurance and employment.

2. Bioethical perspectives on interference with the human genome

In terms of the level of interference considered permissible, debates around the ethical aspects of genetic interventions vary consider-

ably depending on the basic approach. Generally enthusiastic attitudes presented in transhumanist discourses contrast with the strong criticism or outright categorical rejection expressed by many religious commentators. After briefly considering these diametrically opposed positions, we will dwell in more detail on the more balanced and cautious approach taken by bioethics that falls within the scope of our research.

In Russian transhumanist discourses, it has been claimed that interference with the human genome is *a priori* a moral action since the natural needs of a human being include improving his/her biological characteristics (Gerasimov, 2019: 64). Furthermore, genetic research is asserted to be ethical due to being concomitant with the "desire to create" (ibid.). Proceeding in such an attitude of scientific optimism (or blind faith in progress), researchers associated with the transhumanist movement tend to minimize concerns about the dangerous uncertainty inherent in human genome editing as present in all innovative processes. According to this ideological position, the universal aim of self-improvement should include selective tweaking of both physical and intellectual characteristics. Here, it is important to acknowledge a key distinction between eugenics and transhumanism: while eugenics envisaged the development and implementation of state-controlled programmes for improving the health and "quality" of entire populations, transhumanism is generally based on the concept of individual choice (Kovba, Gribovod, 2019, p. 43). Transhumanist ideas concerning the possibility of genetic improvements might seem to correspond to the contemporary liberal-democratic value system, in which citizens are encouraged to develop their individuality along with their personal prosperity.

Although many transhumanists (e.g. Bostrom, 2003: 504) endorse the use of both somatic and germ-line gene therapies (at least those that are medically justified), there is a significant ethical distinction between treating an individual patient's genetic disorders and changing the genome of his or her descendants (Vvedenskaia, 2014, p. 36). This may explain why the ideas of transhumanists have gained so little support in Russia. Even among young people, the social category most inclined to take risks and accept novelties, there is a tendency to reject such ideas. For example, according to an opinion poll carried out in 2016–2017, only 33.3 % of young people supported the idea of artificial reproduction, while an even smaller proportion approved more radically ambitious projects such as transferring a human mind to a computer or overcoming a person's basic biological limits (Davydov, 2018: 43).

According to the bioethical approach, gene therapy for somatic cells is generally considered to be unobjectionable if carried out in accordance with the ethical standards developed by the Council of Europe (Convention on Human Rights and Biomedicine, 1996) and UNESCO (The Universal Declaration on the Human Genome and Human Rights, 1997). However, since "some phases of the normal development of the embryo can be disturbed with severe negative consequences, and these disturbances can be passed on to subsequent generations", bioethicists typically draw the line when it comes to interventions in the germ-line (Vvedenskaia, 2014, p. 37) or programmes aimed at creating "designer babies" having genetically tweaked mental and physical parameters.

The basic principles of bioethics, which assert the autonomy, dignity, integrity and essential vulnerability of the individual human being, have been discussed by Jacob Dahl Rendtorff and Peter Kemp in terms of providing "a normative framework for the protection of the human person in biomedical development" (Rendtorff, 2002: 235). For example, the concept of autonomy corresponds with the capacity of an individual to have ideas and life goals, gain insights, make decisions and take personal responsibility for his or her actions. The principle of dignity expresses the intrinsic value of a person and fundamental equality of all people. However, according to Rendtorff, the idea of integrity is paramount due to its association with the private personal sphere, which should not be subjected to external violation. Finally, the concept of vulnerability is asserted in terms of a necessary balance "between this logic of the struggle for immortality and the finitude

of the earthly presence of human suffering" (Rendtorff, 2002: 237).

Further research on this topic has resulted in a comprehensive consideration and interpretation of these principles, as well as the proposal of additional concepts pertaining to bioethics. In particular, human dignity has been asserted as the broadest concept of human rights applying to the biotechnological context (Francioni, 2006: 14).

Despite the principles of autonomy, dignity, integrity and vulnerability being generally shared by the European community, these tenets are reflected differently in the legislation of individual EU states. In other parts of the world, the contrasts become even more striking. However, regardless of any prejudice against non-European countries, with the gathering pace of globalization, a consensus about what is considered to be normal and what should be prevented is starting to form. If this were not so, He Jiankui's announcement of the birth of genetically-modified human twins might really have demonstrated the People's Republic of China to be "a wild land where bioethics matters little" (The Hastings Center, 2018). However, almost immediately following the announcement of He's results, 122 Chinese scientists signed a public statement condemning his actions (ibid.).

To summarize this section, a number of ethical problems have been inherited by genetics from eugenics. Firstly, we can observe a trend towards reductionism and biological determinism, which implies the valuation of a person in accordance with the quality of his/her genes. Secondly, both eugenics and genetics rely on knowledge concerning the hereditary characteristics and health of individual persons, which can in principle be used to discriminate against them. In terms of affecting private life, such interventions can take various forms, including reproductive control and selection, as well as the imposition of genetic passportization, the use of genetic testing when hiring employees, etc. In reaction to this tendency, we can observe a growing concern that discrimination against individuals may disrupt the healthy balance between individual and collective interests. Thus, the contribution of bioethics to the development of principles and laws that ensure the legal status of individual citizens is significant in maintaining such a balance. In what follows, we will highlight procedural issues associated with the development of international legislation governing genetic research and manipulation.

3. The historical development and contemporary state of international legislation

The primacy of individual interests over those of science and collective society was notably asserted in the Nuremberg Code (Iudin, 1998). In the context of the present work, it is important to acknowledge its central importance, since it was here that the need for informed consent in order to protect human rights was first stated. According to researchers, the main value of the code consists in its synthesis of Hippocratic ethics and the protection of human rights (Shuster, 1997, p. 1439).

For a long time, this document was applied only to the crimes committed by the Nazis, whose excesses of brutality are widely considered to have gone beyond the bounds of all reason. However, issues concerning the health and dignity of subjects participating in medical research have frequently been ignored since the Code's publication. Nevertheless, in response to the questions raised therein, attitudes towards the conduct of medical experiments on humans started to change, especially during the mid-60s. The concept of human rights featured centrally in laws governing experimentation on human beings passed by many countries towards the end of 20th century. National laws concerning medical research are typically based on the Declaration of Helsinki (1964, by the World Medical Association, WMA; regularly updated) (Talantov, 2019: 246). Although this declaration has no legal force, it serves as a normative ethical guide. There are numerous international agreements following on the matter of genetic research, but no specific provisions appear in these documents, which may be explained in terms of the underdeveloped state of the applicable technologies at the time of their signing.

In addition, the Human Genome Project has been vigorously challenged in the scientific community since its launch in 1990 on the basis of the risks of certain negative consequences to humanity that it represents. For example, Shawn Harmon points out that scientific progress has contributed to "man, for the first time, [having] the power to transform living matter in a programmed and selective manner" (Harmon, 2005: 23). This situation prompted UNESCO to start developing an international bioethics instrument specifically concerned with human rights and genetics (ibid). The following important documents (UNESCO, n.d.) have set a high bioethical standard:

• Universal Declaration on the Human Genome and Human Rights (1997);

• International Declaration on Human Genetic Data (2003);

• Universal Declaration on Bioethics and Human Rights (2005).

Among the most important provisions of the Universal Declaration on the Human Genome and Human Rights, the following should be noted: the human genome is recognized as "the heritage of humanity" (Art. 1); any procedures affecting an individual's genome should be carried out only "after rigorous and prior assessment of the potential risks and benefits" (Art. 5); no-one "shall be subjected to discrimination" on the basis of his/her genetic characteristics (Art. 6); reproductive cloning of human beings "shall not be permitted", being contrary to human dignity (Art. 11).

Having analyzed the provisions of the Declaration, it became clear this document appeals to the principles of autonomy, equality and solidarity, along with related rights including non-discrimination, consent and confidentiality, while related obligations consist in avoiding dangerous practices and providing full information. Scholarly assessments of the provisions include "the Declaration is not a failure, but an equivocal success" (Harmon, 2005: 45) and "the most thorough global initiative to date addressing the need to protect human rights with respect to genetic advances" (Taylor, 1999: 509). However, the presence of several lacunae can be noted. For example, the Declaration can be criticised for failing to cover important issues of human embryo research, high-tech genetic methods for selecting the sex of a child, the choice of abortion for various genetic disorders or restrictions on state interference in the process of making reproductive decisions. Nevertheless, despite such criticism, UNESCO has succeeded in identifying short-term and long-term problems associated with genetic research, as well as stimulating scientific and public debate crucial for the development of bioethical thought.

Thus, the Declaration should be seen not as the final expression of an international consensus on advances in genetics, but only as a first step towards such international cooperation.

The expansion of genetic testing practices has presented the international community with the daunting challenge of protecting human genome data due to the significant amounts of such data that have already been accumulated. As a result, the 2003 UN General Conference adopted the International Declaration on Human Genetic Data. In particular, this document consolidated the special status of human genetic data (Article 4) and asserted the necessity of proper measures ensuring "accuracy, reliability, quality and security" of this data (Article 15). However, some commentators object that this document is weak in terms of its normative force and effectiveness: "the drafters of the text have carefully avoided to frame the Declaration in terms of rights of individuals (patients), except in relation to the right to decide (not) to be informed about research results (article 10)" (Abbing, 2004: 93). The 2005 Universal Declaration on Bioethics and Human Rights considers the relationship of science, freedom and ethics in terms of "how far can we possibly go in scientific research?" (UNESCO, 2005). This document appears to respond to the urgent need to establish universal standards in the field of bioethics, taking the concepts of human dignity and human rights into consideration.

Even if only 29 of them subsequently ratified it to incorporate its principles into their national legislation, the 1997 signing of the Convention for the Protection of Human Rights and Dignity by a total of 35 states (including

Russia) was a significant step in the history of genetic research legislation. According to the terms of the Convention, the interests of the individual are given priority over those of a particular society or science (Article 2): no medical intervention must be carried out until the individual patient has given his or her free and informed consent (Article 5); any form of discrimination on the grounds of genetic heritage is prohibited (Article 11); no intervention in a human genome may be undertaken other than for preventive, diagnostic and therapeutic purposes (Article 13); the creation of human embryos for research purposes is prohibited (Article 18).

Having analysed the above mentioned documents, we found their main principles to be based on respect for human dignity, rights and freedoms, as well as upholding the principle of autonomy. Since the genetic data of a person is confidential, it cannot be used as grounds for discrimination. In other words, the main ethical standards governing biomedical research are to incorporate principles of fairness, mercy and respect.

Conclusion

In this article, we have focused primarily on the ethical and socio-political issues involved in contemporary genetic research, as well as the state of the current international legislation for their regulation. The analysis has shown that some of the ethical problems faced by genetics (danger of discrimination against citizens based on genetic characteristics, genetic reductionism and determinism, dubious balance between public and personal interests) were inherited from eugenics. In this regard, we conclude that, when regulating research that entails changes in human nature, it is necessary to navigate somewhat closer to *the Scylla* of stifling regulation than the *Charybdis* of baby designing. That is, while restrictive and protective measures are needed in the form of laws, and an absolute prohibition on genomic research is not very practicable since it would impair the development of science. Our analysis has shown that such a balanced position is characteristic of bioethics discourses. The principles of individual autonomy, dignity, integrity and vulnerability proposed by bioethics became the starting point for the development of basic international norms. As genetic manipulation technology has developed over time, this set of principles has been refined and expanded.

From our study of existing legislation in the field of genomic research, we identified a continuity between earlier legal documents (1948–1949) and those that developed later. Although the earlier documents did not contain provisions directly regulating genomic research, it is there that the legal basis for the protection of human rights and non-discrimination was first laid down. It can be stated that the leading positions in establishing norms in the field of bioethics were exercised by European countries and UNESCO, the latter organization having convened an intellectual forum aimed at solving ethical problems in areas of genetic research. However, critical analysis of UNESCO documents carried out by a number of researchers has drawn attention to their normative weakness, non-binding nature, lack of practical recommendations, as well as some lacunae when it comes to certain novel genetic technologies.

Despite all this criticism, there are several reasons for defending the activities of bioethical committees. Firstly, the detailed regulation of particular activities lies outside the remit of international documents. Such specific issues are left to national legislatures, where general principles are open for interpretation due to their expression in specific laws depending on many factors such as cultural differences, market conditions, available genetic technologies, etc. If a particular state decides to adopt an international declaration or convention at the national level, it may result in the transition from *soft law* to *binding law*. Secondly, since it is not always possible to foresee the emergence of new technologies emerging from scientific research, it is quite rational to limit the purview of such declarations to general ethical principles. Thirdly, such ethics committees contribute to an emerging social consensus on complex issues to provide for the longer term influence of norms to be later enshrined in national legislation.

Acknowledgments

We would like to express our appreciation for Thomas A. Beavitt (https:/ /globalvillagebard.ru/thomas-beavitt-translator-and-singer/) whose linguistic support and guidance have been invaluable throughout this study. Many thanks to Natalya Popova who is always enthusiastic to help, offering advice with a perfect blend of encouragement, insight and humor.

References

Abbing, H. (2004). International Declaration on Human Genetic Data. In *European Journal of Health Law*, 11 (1), 93–107. DOI: https://dx.doi.org/10.1163/157180904323042399

Abrosimova, E.A. (2020). Geneticheskaja pasportizacija naselenija kak vklad v biologicheskuju bezopasnost' – ne operezhaem li my vremja? [Genetic certification of the population as a contribution to biological safety – are we ahead of our time?]. In *Pravovye osnovy biojekonomiki i biobezopasnosti: monografija [Legal Foundations of Bioeconomics and Biosafety: Monograph]*. Moscow: Prospect, 133–141.

Allen, G.E. (2011). Eugenics and Modern Biology: Critiques of Eugenics, 1910–1945. In *Annals of Human Genetics*, 75 (3), 314–325. DOI: https://dx.doi.org/10.1111/j.1469–1809.2011.00649.x

Anomaly, J. (2018). Defending eugenics. In *Monash Bioethics Review*, 35(1), 24–35. DOI: https://dx.doi.org/10.1007/s40592–018–0081–2

Bostrom, N. (2003). Human Genetic Enhancements: A Transhumanist Perspective. In *The Journal of Value Inquiry*, 37 (4), 493–506. doi:10.1023/b: inqu.0000019037.67783.d5

CH, G., & B, A. (2008). Eugenics Concept: From Plato to Present, In Human Reproduction & Genetic Ethics, 14 (2), 20–26. DOI: 10.1558/hrge.v14i2.20

Chousou, D., Theodoridou, D., Boutlas, G., Batistatou, A., Yapijakis, C., & Syrrou, M. (2019). Eugenics between Darwin's Era and the Holocaust. In *Journal of Philosophy*, 4 (2), 171–204. DOI: https://doi.org/10.12681/cjp.21061

Davydov, D.A. (2018). Obrechennyj gumanizm? Razmyshliaia nad knigami Iu. N. Kharari «Sapiens» i «Homo Deus» [Doomed humanism? Reflecting on the books of Yu. N. Harari «Sapiens» and «Homo Deus»]. In *Svobodnaia mysl' [Free thought]*, 6 (1672), 33–46.

Francioni, F. (2006). Genetic Resources, Biotechnology and Human Rights: The International Legal Framework. In *EUI Working papers, Law*, 2006/7, available at: https://cadmus.eui.eu/bitstream/handle/1814/6070/LAW200617.pdf?sequence =1&isAllowed=y (accessed 25 August 2020).

Gerasimov, A.M. (2019). Nravstvennye predely genomnykh issledovanij i biotekhnologij kak osnova formirovaniia pravovogo prostranstva innovacionnoj mediciny [The moral limits of genomic research and biotechnology as the basis for the formation of the legal space of innovative medicine]. In *Geny & Kletki [Genes & Cells]*, XIV (2), 62–67.

Harmon, S. (2005). The Significance of UNESCO's Universal Declaration on the Human Genome & Human Rights. In *SCRIPT-ed*, 2 (1), 20–46.

Iudin, B.G. (1998). Etika biomedicinskogo eksperimenta [Ethics of biomedical experiment]. In *Bioetika: principy, pravila, problemy [Bioethics: principles, rules, problems]*. Moscow, Editorial UPCC, 472.

Khen, Iu.V. (2003). *Evgenicheskij proekt: «pro» i «contra» [Eugenics project: «pro» and «contra»]*. Moscow, IF RAN, 153.

Kovba, D.M. (2020). Evgenika kak napravlenie nauchnoj mysli i praktika selekcii cheloveka v konce XIX – nachale XXI vv. [Eugenics as a direction of scientific thought and practice of human selection in the late 19th – early 21st centuries]. In *Socium i vlast' [Society and power]*, 4 (84), 7–19. DOI: 10.22394/1996–0522–2020–4–07–19

Kovba, D.M., Gribovod, E.G. (2019). Teoreticheskie aspekty fenomena transgumanizma: osnovnye napravleniya [Theoretical Aspects of the Phenomenon of Transhumanism: Main Directions]. In *Nauchnyj zhurnal «Diskurs-Pi» [Scientific Journal «Discourse-P»]*, 3 (36), 38–52. DOI: https://dx.doi.org/10.24411/1817–9568–2019–10303

Mayeur, C., Saelaert, M., Van Hoof, W. (2021). A genetic passport for all? Qualitative analysis of the Belgian online DNA debate. Available at: https://www.ipaac.eu/res/file/outputs/wp6/genetic-passport-for-all.pdf (accessed 01 August 2021).

Mironov, V. (2019). Geneticheskoe zakonodatel'stvo: kak Kitaj budet regulirovat' provedenie eksperimentov po izmeneniiu DNK [Genetic legislation: how China will regulate DNA-altering experiments], 23 Jan. Available at: https://russian.rt.com/science/article/595537-kitai-zakonodatelstvo-geneticheskii-eksperiment (accessed 1 December 2019).

Newman, S.A. (2010). The Transhumanism Bubble. In *Capitalism Nature Socialism*, 21 (2), 29–42. DOI: https://DOI.org/10.1080/10455752.2010.489667

NIH (2020). The Human Genome Project. Available at: https://www.genome.gov/human-genome-project (accessed 1 October 2020).

Rendtorff, J.D. (2002). Basic ethical principles in European bioethics and biolaw: Autonomy, dignity, integrity and vulnerability – Towards a foundation of bioethics and biolaw. In *Medicine, Health Care and Philosophy*, 5 (3), 235–244. DOI:10.1023/a:1021132602330

Ricci, M. (2009). Assisted Procreation and its Relationship to Genetics and Eugenics. In *Human Reproduction & Genetic Ethics*, 15 (1), 9–29. DOI: 10.1558/hrge.v15i1.9

Salardi, S. (2014). The genetic foundation of human nature and the legal approach. Some philosophical–legal concerns. In *Global Bioethics*, 25 (3), 195–202. DOI: 10.1080/11287462.2014.932996

Shuster, E. (1997). Fifty Years Later: The Significance of the Nuremberg Code. In *New England Journal of Medicine*, 337 (20), 1436–1440. DOI: 10.1056/nejm199711133372006

Talantov, P.V. (2019). *Dokazatel'naia medicina ot magii do poiskov bessmertiia [Evidence-based medicine from magic to the quest for immortality]*. Moscow, AST, CORPUS, 560.

Taylor, A. (1999). Globalization and Biotechnology: UNESCO and an International Strategy to Advance Human Rights and Public Health. In *American journal of law & medicine*, 25, 479–541. DOI: 10.1017/S 0098858800007267.

The Hastings Center (2018). He Jiankui's Genetic Misadventure, Part 2: How Different Are Chinese and Western Bioethics? Available at: http://www.bioethics.net/2018/12/he-jiankuis-genetic-misadventure-part-2-how-different-are-chinese-and-western-bioethics/ (accessed 25 October 2020).

UNESCO (2005). Universal Declaration on Bioethics and Human Rights. Available at: https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights (accessed 6 November 2020).

UNESCO (n.d.). Ethics of Science and Technology. Available at: https://en.unesco.org/themes/ethics-science-and-technology (accessed 5 November 2020).

Vvedenskaia, E.V. (2014). Bioeticheskij analiz protivorechij transgumanizma [Bioethical analysis of the contradictions of transhumanism]. In *Vestnik MITKhT. Seriia: social'no-gumanitarnye nauki i ekologiia [Bulletin of MITHT. Series: social sciences and humanities and ecology]*, 3, 35–40.

Wastell, D., White, S. (2017). *Blinded by Science: The Social Implications of Epigenetics and Neuroscience*. Policy Press, 304.

Journal of Siberian Federal University. Humanities & Social Sciences
2022 15(8): 1215–1225

DOI: 10.17516/1997-1370-0923
EDN: HBVNAS
УДК 342.41

Amendments to Constitutional Texts in the First Quarter of the XXI Century as a Legal Basis for Constitutional Legal Relations

Eugenia V. Lungu*
KI of the FPS of Russia
Novokuznetsk, Russian Federation

Received 10.06.2021, received in revised form 18.03.2022, accepted 19.04.2022

Abstract. The paper presents the results of a study of constitutional texts adopted in the XXI century in order to determine the impact of constitutional amendments on the emergence, modification and termination of constitutional legal relations, including the formation of general trends in the development of constitutional legal relations. The following indicators were studied in the work: the presence of constitutional amendments and new constitutions adopted by states in the XXI century, the frequency of occurrence and repetition of public relations elevated to the constitutional level, the influence of constitutional amendments on the emergence, modification and termination of constitutional legal relations.
As a result, the author comes to the conclusion that each of the states studied by us has an individual path of constitutional development. At the same time, it is possible to identify general trends in the development of constitutional legal relations. First, these are human rights and the fight against discrimination. Special attention is paid to the rights of women, children, and gender equality. Secondly, these are issues of formation and development of an independent judicial system, including constitutional courts, recognition of the jurisdiction of international judicial bodies.

Keywords: constitutional legal relations, state legal relations, amendments to the Constitution, constitutionalism, legal state.

Research area: law.

Citation: Lungu, E.V. (2022). Amendments to constitutional texts in the first quarter of the XXI century as a legal basis for constitutional legal relations. J. Sib. Fed. Univ. Humanit. soc. sci., 15(8), 1215–1225. DOI: 10.17516/1997-1370-0923.

* Corresponding author E-mail address: lungu.const.law@gmail.com

Поправки в конституционные тексты в первой четверти XXI в. как правовая основа конституционных правоотношений

Е.В. Лунгу
Кузбасский институт ФСИН России
Российская Федерация, Новокузнецк

Аннотация. В работе представлены результаты исследования конституционных текстов, принятых в XXI в. с целью определения влияния конституционных поправок на возникновение, изменение и прекращение конституционных правоотношений, в том числе формирование общих тенденций развития конституционных правоотношений. В работе были проанализированы следующие показатели: наличие конституционных поправок и новых конституций, принятых государствами в XXI в., частота появления и повторения возвышенных до конституционного уровня общественных отношений, влияние конституционных поправок на возникновение, изменение и прекращение конституционных правоотношений.
В результате автор приходит к выводу: каждое из исследованных нами государств имеет индивидуальный путь конституционного развития. При этом можно выделить общие тенденции развития конституционных правоотношений. Во-первых, это права человека и борьба с дискриминацией. Особое внимание при этом уделяется правам женщин, детей, гендерному равенству. Во-вторых, это вопросы формирования и развития независимой судебной системы, в том числе конституционных судов, признания юрисдикции международных судебных органов.

Ключевые слова: конституционные правоотношения, государственные правоотношения, поправки к конституции, конституционализм, правовое государство.

Научная специальность: 12.00.00 – юридические науки.

Введение

Поправки к Конституции 2020 г. актуализировали вопрос о наличии или отсутствии общих конституционно-правовых тенденций в развитии конституционных правоотношений. В российской науке вопросам теории конституционных (государственных) правоотношений посвящены работы Н.А. Бобровой (Bobrova, 2020), В.Н. Карташова (Kartashov, 2013), В.А. Лучина (Luchin, 1997), И.В. Мухачева (Mukhachev, 2020), Р.А. Ромашова (Romashov, 2013). При этом отдельные конституционные правоотношения комплексно исследуются значительно чаще, например, в работах А.С. Еременко (Eremenko, 2002) и Т.С. Шестаковой (Shestakova, 2009). В конституционно-правовой науке в целом отмечается тенденция к перманентному расширению общественных отношений, возвышаемых до уровня конституционно-правового регулирования. Экология, защита животных, научно-техническое развитие, защита персональных данных в Сети, расширение прав человека, включая свободу гендерного самоопределения, укрепление национального единства и национальных ценностей составляют не полный перечень таких отношений.

В зарубежной литературе внимание исследователей привлекают практические особенности реализации конституционализма в отдельных государствах (Law, 2012), например в мусульманских (Emon, 2008), и глобальные исследования отдельных видов конституционных правоотношений (Law, Versteeg, 2012). Чаще всего

исследуются конституционные нормы как формально-юридическая основа конституционных правоотношений, а также судебная практика, подтверждающая наличие или отсутствие сложившихся конституционных правоотношений. В частности, в исследовании Милы Верстег и Бенедикта Годериса обосновывается зависимость конституционных правоотношений от конституционного выбора бывшей метрополии (при наличии таковой), приоритетов сложившихся в рамках правовой семьи, доминирующей религии, требований кредиторов (Benedikt, Versteeg, 2013). Эти работы, безусловно, играют важную роль в исследовании конституционных правоотношений.

В настоящей работе ставятся следующие вопросы: возможно ли говорить об общих трендах изменения конституционных правоотношений в мире, а также рассматривать поправки к Конституции РФ как часть этих трендов или конституционным правоотношениям в Российской Федерации определен уникальный путь развития.

Концептологические основания исследования

Исследование поправок к конституционным текстам как формально-юридической основы появления новых и изменения ранее существовавших конституционных правоотношений опирается на богатую литературу по теории конституционных правоотношений, разработанную в науке конституционного права. Несмотря большой позитивный вклад советских ученых в развитие конституционных правоотношений, ни одно из проведенных исследований не позволило сформулировать достаточно точного определения. Безусловно, конституционные правоотношения традиционно рассматриваются как отношения политические. «Это особая, взятая в единстве наиболее обобщенных и социально значимых характеристик юридическая форма политических отношений», – пишет В. О. Лучин (Luchin, 2002). Сложность определения понятия конституционных правоотношений напрямую связана с постоянным расширением предмета конституционно-правового регулирования, сложностью классификации политических отношений и многоуровневостью этих отношений (Luchin, 2002; Bogdanova, 2020).

И. В. Мухачев, исследуя проблему гомеостаза конституционных правоотношений, выделил четыре подхода к определению конституционных правоотношений: во-первых, как к правоотношениям, складывающимся в процессе существования государственной власти (Mukhachev, 2020); во-вторых, как к правоотношениям, возникающим в связи с деятельностью высших органов государства (Lepeshkin, 1961); в-третьих, как к правоотношения, регулирующим все главные стороны и процессы общественной и государственной жизни страны; в-четвертых, как к правоотношениям с особым кругом участников, урегулированным конституционно-правовыми нормами и установленным на основе конституционных норм-принципов (Osnovin, 1965).

В современной конституционно-правовой науке существенных изменений в понимании конституционных правоотношений не произошло. Предпочтение отдается двум основным концепциям. Одна из них в общем и целом рассматривает конституционные правоотношения как синоним государственно-правовых отношений (с акцентом на базисном, основополагающем слое отношений, образующих предмет данной отрасли, или на отношениях по поводу формирования и функционирования органов государственной власти). Согласно второй концепции, функцию метаотрасли выполняют не все конституционные (государственно-правовые) отношения, а только базисные по содержанию и получившие «конституционную прописку» по форме (Bobrova, 2019).

Таким образом, подобный подход к пониманию конституционных правоотношений по своей сути является прагматичным. Он позволяет считать любые общественные отношения, получившие конституционное закрепление и признаваемые базисными по своему содержанию, конституционно-

правовыми отношениями. Как и любые общественные отношения, получившие нормативное закрепление в нормах уголовного закона, считать уголовно-правовыми (Uporov, Kashoida, 2005). На наш взгляд, конституционные правоотношения следует отграничить от прочих государственных правоотношений и рассматривать в качестве таковых исключительно общественные отношения, направленные на ограничение власти государства и реализацию прав человека, то есть на построение правового государства (конституционализма).

Методология

С целью выделения общих направлений конституционного развития был проведен анализ конституционных текстов, принятых в XXI в., на предмет возникновения, изменения и прекращения конституционных правоотношений. Использование выборки из 758 поправок к текстам конституций позволит нам объективно оценить изменения конституционных правоотношений и определить общие тенденции, свойственные данному процессу. В случае наличия общих тенденций это поможет выяснить, какие из общественных отношений получили преимущественное закрепление на конституционном уровне, каким образом они повлияли на объективную правовую реальность. В результате нами были исследованы такие показатели: наличие конституционных поправок и новых конституций, принятых государствами в XXI в., частота появления и повторения возвышенных до конституционного уровня общественных отношений, влияние конституционных поправок на возникновение, изменение и прекращение конституционных правоотношений. Анализ конституционных текстов для исследования осуществлялся с помощью справочно-поисковых систем, официальных сайтов органов государственной власти, заключений Совета по правам человека, Венецианской комиссии демократии через право, результатов научных исследований российских и зарубежных авторов.

Обсуждение

По состоянию на 2021 г. 188 государств, признанных ООН, приняли конституцию. В то же время государства, не имеющие писаных конституций по каким-либо внутренним причинам, фактически признают иные источники в качестве нормативной основы конституционных правоотношений, в частности Великобритания, Канада, Израиль, Сан-Марино, Новая Зеландия, Швеция и Ливия. Поэтому поправки, внесенные в неписаные конституции, также будут учтены в данном исследовании.

Наличие конституции в современном мире следует рассматривать как неотъемлемый признак государства наравне с такими общепризнаваемыми признаками, как публичная власть, административно-территориальная организация населения и суверенитет. Статус конституции как признака современного государства подтверждается стремлением не только признанных, но и непризнанных государств принять конституцию (80 % из них также приняли конституцию).

Стремление к построению конституционных правоотношений содержится в поправках к конституциям многих государств, например Индонезии (2002 г. расширение перечня прав и свобод человека, создание Конституционного суда), Италии (2007 г. признание смертной казни незаконной, 2012 г. о сбалансированности бюджетов всех уровней), Коста-Рики (2015 г. признание государства многонациональным и многокультурным). В то же время показательными являются поправки к конституционным текстам Лихтенштейна (в 2003 г. фактически закреплена неограниченная монархия), Доминиканской республики (в 2015 г. ввела запрет на однополые браки и аборты, разрешила повторное переизбрание действующему Президенту Данило Мединy), Камеруна (в 2008 г. президенту предоставлен иммунитет от судебного преследования за его действия в качестве президента и позволено главе исполнительной власти баллотироваться на неограниченное количество сроков). Нередки случаи, когда поправки к конституциям закрепляют раз-

нонаправленные стремления государства, например Латвия (в 2009 г. введена возможность для избирателей инициировать референдум для досрочного роспуска парламента, а в 2014 г. Латвия признается страной латышей), Танзания (в 2000 г. президент получил право назначать до 10 членов парламента, в то же время увеличено количество квот для женщин с 15 до 20 %), Зимбабве (в 2013 г. обнуляет сроки полномочий действующего президента, но предусматривает разработку закона о свободе слова, перераспределение полномочий в пользу органов местного управления). Конституция в современном мире – это прежде всего инструмент формализации сложившихся государственно-правовых отношений, наделенный высшей юридической силой и особым порядком внесения поправок.

В большинстве случаев поправки к конституции вносятся представительными органами (56 %) или путем референдума (36,5 %), и лишь в отдельных случаях конституционные тексты менялись решениями главы государства (7 %). Необходимо отметить, что выбранный способ внесения поправок в конституционные тексты напрямую не оказывает существенного влияния на процессы возникновения, изменения или прекращения конституционных правоотношений.

Анализ конституционных текстов показал, что они не всегда могут точно отразить фактическое состояние дел в области развития конституционных правоотношений. Конституции могут не содержать положения, которые поддерживаются на практике, в том числе в связи с фиктивностью отдельных конституционных норм или реализацией большего количества конституционных правоотношений, чем это предусмотрено конституционными текстами. В таких случаях конституция может не давать возможности установить все изменения, произошедшие в конституционных правоотношениях. Поэтому исследование конституционных текстов на предмет наличия конституционной основы возникновения, изменения и прекращение конституционных правоотношений позволяет выяснить только формально-юридическую сторону исследуемой проблемы.

64,6 % государств (126 из 195 исследованных) как минимум предприняли попытку создать, изменить или прекратить конституционные правоотношения в XXI в. При этом 13 % из них приняли новые конституции. С формально-юридической точки зрения каждая из этих поправок могла служить основанием для такой трансформации. В государствах с неписаными конституциями этот процесс носит не всегда прозрачный характер, так как поправки, вносимые в конституционные тексты, не всегда находят отражение на общедоступных ресурсах. В то же время подавляющее большинство некодифицированных конституций подвергались поправкам в XXI в. Они включают два основных направления: это совершенствование системы организации государственной власти, прежде всего судебного контроля (Новая Зеландия, Сан-Марино, Израиль), а также область расширения прав человека и гарантий реализации (Великобритания, Израиль, Сан-Марино).

Исследование поправок к конституционным текстам позволило выяснить, что процесс изменения конституций охватил все части света. В большей степени процесс создания, изменения и прекращения государственных, в том числе конституционных, правоотношений затронул Африканский континент (72,2 % конституционных текстов подверглись изменениям) и Европу (72,7 %). В относительно наименьшем объеме (33,3 %) поправки затронули Южно-Американский континент. При этом остальные регионы демонстрируют незначительный разброс в показателях: Азия – 64,5 %, Северная Америка – 52 %, Австралия и Океания – 57,1 %.

Бурный процесс конституционного нормотворчества, охвативший большинство государств мира, вовсе не свидетельствует о столь же успешном развитии конституционных правоотношений. Анализ материалов Венецианской комиссии демократии через право, конституционных текстов, информации, размещенной

в средствах массовой информации, позволил сделать вывод о том, что положительная динамика в становлении и изменении конституционных правоотношений среди государств, внесших поправки, прослеживается в 90,6 % государств Европы, 67,7 % государств Азии, 66,6 % государств Северной Америки, 100 % государств Южной Америки, 100 % государств Австралии и Океании, 69,2 % государств Африки. Безусловно, данные цифры уже свидетельствуют о потребности примерно 77,7 % государств мира выстраивать конституционные правоотношения и вносить поправки к конституционным текстам с целью их дальнейшего развития.

Однозначно позитивными можно признать порядка 26,7 % конституционных поправок, принятых представительными органами, 34 % поправок к конституционным текстам, принятых путем референдума, а также 40 % конституционных поправок, принятых актами глав государств. Такая тенденция дает возможность предположить, что способ внесения поправок через представительные органы чаще позволяет принимать противоречивые поправки. С одной стороны, они чаще всего расширяют возможности для реализации конституционных правоотношений, а с другой – содержат положения, направленные на увеличение дисбаланса государственной власти. Внесение изменений в конституционные тексты путем референдума позволяет создать несколько лучшие условия для появления и дальнейшего развития в государстве конституционных правоотношений. Несмотря на финансовые и организационные сложности организации и проведения референдума, он может быть рассмотрен как более надежный способ формирования конституционных правоотношений.

Анализ конституционных текстов выявил законодательную деятельность, направленную на создание новых конституционных правоотношения. Эта тенденция отмечается на примере как Российской Федерации, так и зарубежных государств. Изучение вновь созданных конституционных правоотношений позволяет выделить несколько существенных моментов.

Во-первых, на конституционные правоотношения заметное влияние оказала потребность присоединения к межгосударственным союзам, прежде всего ЕС, КАРИКОМ, ВТО. Они способствовали не только дальнейшей конституционализации общественных отношений, но и в немалой степени унификации национальных, в том числе конституционных, норм.

Во-вторых, конституционные институты и конституционные ценности, получившие признание в XX в., продолжают оставаться актуальными для рецепции. К наиболее популярным объектам рецепции относятся Конституционный суд, институты прокуратуры и омбудсмена, права человека, независимость судебной власти и разделение властей.

В-третьих, в качестве тренда современных конституционных правоотношений следует выделить повышенное внимание к вопросам равенства прав мужчин и женщин (не менее 14 государств в мире приняли нормы, направленные на защиту политических прав женщин, преимущественно в государствах Европы, Азии и Африки). Современный каталог прав человека расширяется, прежде всего, за счет признания прав человека в наиболее актуальных для современного общества отношениях (сохранение традиционной семьи, признание сексуальной ориентации и гендерной идентичности, право на доступ к питьевой воде, право на питание, права экосистемы, защита животных).

В-четвертых, до конституционного уровня возвышаются отношения в области бюджетного планирования как основы реализации всех государственных задач.

Возвышение данных общественных отношений до конституционного уровня указывает на основные тенденции в развитии современного общества, а также на характер имеющихся социальных проблем. При этом необходимо отметить, что ни одно государство в данном случае не определяет главные направления конституционного развития, ни один из конституционных

текстов, принятых в XXI в., не может считаться образцом для всеобщего подражания (по образцу Конституции США в первой половине XX в.). Появление новых конституционных правоотношений в практике отдельно взятого государства обусловлено как положительным коллективным опытом развития конституционных правоотношений, например, конституционного суда, прокуратуры, омбудсмена, так и внутренними потребностями в международной интеграции, как в случае с вхождением в ЕС и другие международные организации. Расширение каталога прав человека обусловлено общими экологическими проблемами, в том числе потребностями в питьевой воде, качественном и безопасном питании, а также новыми взглядами на традиционные институты (роль женщины в обществе, институты семьи и брака, гендерную принадлежность).

Однако далеко не все возникшие в исследуемый период правоотношения следует рассматривать как конституционные. В мире не менее 17 % государств, которые, создавая конституционные основы для развития правоотношений, закрепили в своих конституциях приоритетное значение отдельных лиц или политических учений, например статус экс-президента, признание главы государства «отцом нации», основателем мира и национального единства – Лидером нации.

Трансформация конституционных правоотношений в XXI в. носит разнонаправленный характер. В значительной части государств изменения касались расширения полномочий главы государства и усиления исполнительной власти (более чем в 28 % случаев), и только в 6 % случаев приняты нормы, направленные на укрепление судебной системы. Усиление статуса главы государства, прежде всего, характерно для государств Азии и Африки (в 80 %), в отдельных случаях данный процесс наблюдается в Европе (Испания, Лихтинштейн, Россия, Чехия). На наш взгляд, данная тенденция является региональной и обусловлена традициями государственного управления в государствах Азии и Африки.

Заметно менее популярной формой развития правоотношений выступает прекращение конституционных правоотношений, что, безусловно, свидетельствует об их стабильности. Отсутствие значительного количества прекращенных конституционных правоотношений вполне ожидаемый результат нашего исследования, он лишь подтверждает, что признаки, указанные для данного вида правоотношений, актуальны и для современных конституционных правоотношений в объективной правовой реальности первой четверти XXI в. Прекращение конституционных правоотношений связано, во-первых, с устареванием некоторых конституционных положений. Например, в Австрии отмене подлежало свыше 1000 конституционных положений, принятых в различные исторические периоды и нуждавшихся в модернизации; во-вторых, в связи с изменением политической системы государства (Бангладеш, Ангола, Венесуэла, Греция, Зимбабве, Иордания, Мавритания и др.); в-третьих, в связи со снятием ограничений отдельных прав и свобод, например запретом смертной казни (ДР Конго, Ирландия, Италия, Мадагаскар, Мексика, Молдавия).

В первой четверти XXI в. конституционные правоотношения получили новый виток развития, прежде всего, за счет создания новых и изменения ранее существовавших правоотношений. Проведенный анализ внесенных в конституционные тексты поправок показал, что большинство из них вносилось с целью фактической трансформации конституционных правоотношений. Только в 9,5 % случаев полностью отсутствует информация о хоть каких-либо изменениях правоотношений. В 50 % поправки к конституционным текстам можно считать в целом реализованными.

На наш взгляд, это достаточно высокий показатель, свидетельствующий в целом о прямых намерениях законодателей создавать новые, вносить изменения в действующие правоотношения или прекратить правоотношения, утратившие свою общественную значимость. При ближайшем рассмотрении реализованных конституци-

онных текстов становится очевидным, что чаще всего в полном объеме реализуются тексты, направленные на трансформацию государственного механизма. Как минимум возможно говорить о попытке наделения государственных органов конституционными полномочиями. Например, Германия, Грузия, ДР Конго, Таджикистан, Казахстан, Россия, по данным профильных комиссий ООН, продолжают испытывать определенные трудности с реализацией принципа независимости судебной власти несмотря на проведенные в исследуемый период изменения в судебной системе. Тем не менее поправки, связанные с изменениями механизма государства, на практике оказываются наиболее простыми для реализации. Такого рода поправки были успешно реализованы в таких государствах, как Белиз, Белоруссия, Бельгия, Болгария, Индонезия, Йемен, Камерун, Канада, Киргизия, Кирибати, КНДР, Коморские Острова, Коста-Рика, Кот-д'Ивуар, Куба, Латвия, Лесото, Либерия, Ливия, Лихтенштейн, Маврикий, Мавритания, Мальдивские Острова и др.

Конституционные правоотношения статуса человека расширяются заметно сложнее. В первую очередь реализуются положения, не требующие от государства значительных финансовых затрат, то есть запреты. Например, запрет смертной казни был успешно реализован во всех государствах, внесших соответствующие поправки к конституционным текстам (Молдавия, Мексика, Мадагаскар, Италия, Ирландия, ДР Конго). По данным исследований, проведенных Бенедиктом Годерисом и Милой Верстег, реализация обязательств, связанных с воздержанием от каких-либо действий со стороны государства, реализуется в 100 % случаев (Goderis, Versteeg, 2013). Тем более когда выполнение этого обязательства контролируется Советом по правам человека.

В целом нужно отметить, что государствам удается значительно быстрее устанавливать и/или вводить новые запреты, например понятие «раса» (Германия); однополые браки и аборты (Доминиканская Республика); освобождение от призыва в армию для учащихся (Израиль); требование о раздельном проживании до возбуждения дела о разводе (Ирландия); ограничения гражданских прав мужским представителям Савойского дома (Италия); автоматическое прекращение гражданства (Мозамбик); склонение к смене религиозных убеждений (Непал); двойное гражданство (Республика Конго); воинская повинность (Румыния); расовый избирательный ценз (Фиджи); экспроприация земли без компенсации (ЦАР); минареты (Швейцария).

В свою очередь, конституционные правоотношения, связанные с созданием гарантий реализации прав человека, устанавливаются наиболее сложно. Буркина-Фасо, Вьетнам, Греция, Ирландия, Италия, Кения, Кувейт, Мальта, Марокко, Молдавия, Нигерия, Новая Зеландия, Португалия, Россия, Самоа, Саудовская Аравия, Танзания, Уругвай, Фиджи, Франция, Швейцария, Эквадор, Эсватини несмотря на имеющийся прогресс в области реализации прав человека испытывают трудности с искоренением дискриминации по полу, расе, национальности, гендерной принадлежности, реализацией политических прав, прав женщин, права на питание и питьевую воду, в том числе в связи с недостатком денежных средств, а также внутренними национальными, культурными и религиозными особенностями.

Заключение

Таким образом, конституционные поправки имеют существенное влияние на процесс возникновения, изменения и прекращение конституционных правоотношений в большинстве государств мира. В то же время необходимо отметить, что далеко не все поправки к конституционным текстам приводят к возникновению, изменению или прекращению именно конституционных правоотношений как правоотношений, направленных на реализацию прав и свобод человека, построение конституционализма как явления, основанного на верховенстве закона и разделении властей. Нередко они носят прямо противоположный характер и связаны с нарушением

равновесия властей, ограничением прав человека, обнулением сроков полномочий глав государств. В целом, поправок к конституционным текстам, не содержащих правовых основ для развития конституционных правоотношений, порядка четверти в общем списке конституционных поправок. На практике они значительно быстрее находят реализацию в правоотношениях. В то же время нормы, направленные на становление или развитие конституционных правоотношений, проходят достаточно сложный путь развития и сталкиваются с культурными, религиозными и иными традиционными явлениями, которые не позволяют эффективно развиваться конституционным правоотношениям.

Развитие конституционных правоотношений в государствах, вносивших поправки к конституционным текстам в первой четверти XXI в, очень различно. С одной стороны, отдельные государства стоят в начале пути (Бахрейн, Саудовская Аравия, Сомали), а с другой – речь идет о совершенствовании сложившихся конституционных правоотношениях (Великобритания, Италия, Канада, Нидерланды, Новая Зеландия, Норвегия). На сложность и длительный характер построения конституционных правоотношений указывает тот факт, что даже в государствах, давно предпринимающих усилия по построению конституционных правоотношений до сих пор не преодолены проблемы дискриминации по полу (Великобритания), расе (Нидерланды, Германия), национальности (Новая Зеландия, Израиль), ограничению политических прав (Франция, Испания). Следовательно, процесс построения конституционных правоотношений может занимать годы и даже сотни лет (английский конституционализм ведет свой путь развития с XVII в.). На наш взгляд, это не повод отрицать успехи отдельных государств в построении конституционных правоотношений.

Такой подход получил поддержку в работах целого ряда зарубежных авторов: Ларри Ката Бэкер «Теократический конституционализм: введение в новый глобальный правовой порядок» (Backer, 2008); Том Гинзбург «Конфуцианский конституционализм: глобализация и судебный контроль в Корее и Тайване» (Ginsburg, 2001); Анвер М. Эмон «Пределы конституционализма в мусульманском мире: история и идентичность в исламском праве» (Emon, 2008); Варша Мансингх Раджора «Сравнительный анализ верховенства права в Великобритании и Индии» (Rajora, 2010).

Каждое из исследованных нами 126 государств имеет свои особенности общественного развития, которые позволяют говорить об индивидуальном пути конституционного развития. В то же время можно ответить на один из главных вопросов нашего исследования. А именно, объединяют ли конституционные поправки первой четверти XXI в. общие тренды. Таким образом, можно говорить о наличии общих трендов конституционного развития. Во-первых, это права человека и борьба с дискриминацией. Это главный тренд, объединяющий 53 государства из 126. Особое внимание при этом уделяется правам женщин, детей, гендерному равенству. Расширение национального каталога прав человека и гарантии реализации этих прав во многом осуществляется под патронажем Совета по правам человека, а также иных специализированных комиссий, которые регулярно проводят анализ состояния реализации прав человека в отдельно взятых государствах и целых регионах и выносят свои рекомендации, направленные на улучшение ситуации с правами человека в мире. Во-вторых, это вопросы создания независимой судебной системы, в том числе конституционных судов, признания юрисдикции международных судебных органов (39 государств из 126).

Список литературы / References

Backer, L. C. (2008). Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering. In *Indiana Journal of Global Legal Studies*, 16 (1), in *Islamic Law and Law of the Muslim World Paper,* 08–44. Available at SSRN: https://ssrn.com/abstract=1184382 (accessed 04 June 2021).

Emon, A. M. (2008). The Limits of Constitutionalism in the Muslim World: History and Identity in Islamic Law. In *Islamic Law and Law of the Muslim World Paper,* 08–09. Available at SSRN: https://ssrn.com/abstract=1086767 (accessed 04 June 2021).

Ginsburg, T (2001). Confucian Constitutionalism: Globalization and Judicial Review in Korea and Taiwan. In *Illinois Public Law Research Paper,* 00–03. Available at SSRN: https://ssrn.com/abstract=289255 or http://dx.doi.org/10.2139/ssrn.289255 (accessed 04 June 2021).

Goderis, B., Versteeg, M. (2013). Transnational Constitutions, *In 6th Annual Conference for Empirical Legal Studies Paper (2011), Rational Choice and Constitutional Law Workshop Paper (2010), CentER Discussion Paper Series,* 2013–010, 39. In *International Review of Law and Economics* 1 (2014); appeared under title "The Diffusion of Constitutional Rights". Available at SSRN: https://ssrn.com/abstract=2216582 or http://dx.doi.org/10.2139/ssrn.2216582 (accessed 06 June 2021).

Law, D. S., Versteeg, M. (2013). Sham Constitutions, *In California Law Review*, 863, *In Washington University in St. Louis Legal Studies Research Paper*, 12–09–03. In *Virginia Public Law and Legal Theory Research Paper*, 2012–55. Available at SSRN: https://ssrn.com/abstract=1989979 or http://dx.doi.org/10.2139/ssrn.1989979 (accessed 1 June 2021).

Law, D. S., Versteeg, M. (2012). The Declining Influence of the United States Constitution, *In New York University Law Review*, 87, 3, 762–858. In *Washington University in St. Louis Legal Studies Research Paper*, 11–09–01, *In Virginia Public Law and Legal Theory Research Paper,* 2011–39. Available at SSRN: https://ssrn.com/abstract=1923556 (accessed 05 June 2021).

Rajora, Varsha Mansingh, Comparative Analysis of Rule of Law in UK & India (January 8, 2010). Available at SSRN: https://ssrn.com/abstract=1533265 or http://dx.doi.org/10.2139/ssrn.1533265

Avak'ian S. A. (2017). Konstitutsionnoe pravo Rossii. Uchebnyi kurs [Constitutional Law of Russia. Training course]. Moscow, Norma: INFRA-M, 864.

Bobrova N. A. (2020) Konstitutsionnye i gosudarstvenno-pravovye otnosheniia: odna i dve otrasli prava? [Constitutional and state-legal relations: one and two branches of law?]. In *Vestnik Tomskogo gosudarstvennogo universiteta.* Pravo [Bulletin of Tomsk State University. Right], 36, 16–29.

Bobrova N. A. (2019). Osobennosti predmeta konstitutsionnogo prava kak metaotrasli [Features of the subject of constitutional law as a meta-branch]. In *Konstitutsionnoe i munitsipal'noe pravo [Constitutional and municipal law]*, 4, 3–9.

Eremenko A. S. (2002). Tolkovanie pravovykh norm Konstitutsionnym Sudom Rossiiskoi Federatsii (voprosy teorii konstitutsionnogo pravootnosheniia) / dissertatsiia na soiskanie uchenoi stepeni kand. iurid. nauk po spetsial'nosti 12.00.02. [Interpretation of legal norms by the Constitutional Court of the Russian Federation (questions of the theory of constitutional legal relations) / Dissertation for the degree of Candidate of Sciences. yurid. of sciences in the specialty 12.00.02.]. Moscow, 163.

Kartashev V. N. (2013). Innovatsionnye i traditsionnye podkhody k issledovaniiu konstitutsionnykh pravootnoshenii [Innovative and traditional approaches to the study of constitutional legal relations. In *Konstitutsionnoe i munitsipal'noe pravo [Constitutional and municipal law]*, 3, 12–16.

Kazannik A. I., Kostiukov A. N. (2021). Konstitutsionnoe pravo: akademicheskii kurs [Constitutional Law: an academic course]. Moscow, Prospekt, 504.

S. V. Arbuzov, T. V. Berezhnaia, I. A. Volod'ko (2015). Konstitutsionnoe pravo: universitetskii kurs: uchebnik [Constitutional law: university course: textbook]. Moscow, Prospekt, 428.

Lepeshkin A. I. (1961). Kurs sovetskogo gosudarstvennogo prava [Course of Soviet State Law]. Moscow, 559.

Luchin V. O. (1997). Konstitutsionnye normy i pravootnosheniia: Uchebn. posobie dlia vuzov [Constitutional norms and legal relations: A textbook]. Moscow, Zakon i pravo, IUNITI, 159.

Luchin V. O. (2002). Konstitutsiia Rossiiskoi Federatsii. Problemy realizatsii [The Constitution of the Russian Federation. Implementation problems]. Moscow, IUNITI-DANA, 687.

Mukhachev I. V. (2020). Garantiruiushchie konstitutsionnye normy i otnosheniia [Guaranteeing constitutional norms and relations]. In *Konstitutsionnoe i munitsipal'noe pravo [Constitutional and municipal law]*, 1, 17–21.

I. V. Uporov, V. V. Kashoida, A. Z. KHun (2005). Ob"ekt ugolovno-pravovykh otnoshenii: voprosy teorii i pravoprimenitel'noi praktiki [The object of criminal-legal relations: questions of theory and law enforcement practice]. Krasnodar, Krasnodarskaia akademiia MVD Rossii, 174.

Osnovin V. S. (1965). Sovetskie gosudarstvenno-pravovye normy i otnosheniia. Avtoreferat dissertatsii doktora iuridicheskikh nauk [Soviet state-legal norms and relations. Abstract of the dissertation of the Doctor of Law]. Leningrad, 40.

Romashov R. A. (2016). Teoriia konstitutsionno-pravovogo otnosheniia [Teoriya konstitutsionno-pravovogo otnosheniya]. In *IUridicheskaia nauka: istoriia i sovremennost' [Theory of constitutional and legal relations],* 9, 25–32.

SHestakova T.S. (2009). O prezumptsii dobrosovestnosti uchastnikov konstitutsionnykh pravootnoshenii [On the presumption of good faith of participants in constitutional legal relations]. In *Vestnik iuridicheskogo fakul'teta Kolomenskogo universiteta (filiala) GOU VPO MGOU [Bulletin of the Faculty of Law of the Kolomna University (branch) GOU VPO MGO],* 4, 56–62.