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CONTENTS

CORROBORATION IN SEXUAL VIOLENCE CASES, CONTEMPORARY INTERNATIONAL LAW AND TRANSITIONAL JUSTICE

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Abstract

Specific nature of sexual violence cases requires different approach to evidentiary requirements in gender-based violence cases, especially in transitional justice. Throughout human history misconceptions on women's credibility in cases of sexual violence and rape prevailing in societies found their reflection in relevant laws as well and imposed evidentiary burdens on the victims of sexual violence, including rape. Under contemporary international law, corroboration is not a legal requirement for proving crimes of sexual violence. It means that a victim's own testimony is sufficient evidence and no additional evidence to support a victim's own testimony is required in cases of sexual violence in the absence of any other corroboration from witnesses, documents, medical reports, photos, or any other potentially corroborative evidence. It is important that the contemporary international law supports this approach through its relevant mechanisms and emphasises that a victim's testimony is not less credible and no need for corroboration to establish credibility. This paper reviews the corroboration rule in common law systems and existence of its some elements in civil law systems, investigates major developments of contemporary international law concerning evidence requirements in sexual violence cases in times of peace and during armed conflicts as well as specific approach needed to develop and implement progressive models of transitional justice on this.

Keywords: H*uman rights, national legal system, international humanitarian law, international criminal law, sexual violence, CEDAW Committee, psychological harm.*

Throughout human history sexual violence against women has been under-reported and under-documented both in times of peace and during armed conflicts. It is still one of the hidden forms of violence against women and pervasive all over the world. Compared to other forms of violence against women, sexual violence is often associated with stigma, victims rarely talk about it in public or report to the law-enforcement officials, while perpetrators are punished in an extremely small number of cases due to an ineffective legal system [20, p. 8]. Sexual violence is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men [23].

Rape and other forms of sexual violence have long been prohibited by international humanitarian law and are now recognised as prohibited as a matter of customary international law at all times [6]. Sexual violence is also prohibited under main international human rights treaties through the prohibition of discrimination and the prohibition of torture and cruel, inhuman or degrading treatment or punishment, and under international criminal law.

Specific nature of sexual violence cases requires specific approach to evidentiary requirements in the relevant cases. Victims of sexual violence against women and girls face significant barriers in their access to justice, especially in the context of evidentiary rules. Throughout human history misconceptions and stereotypes on women's credibility in sexual violence cases, including rape, prevailed in societies and found their reflection in national laws, which imposed evidentiary burdens on the victims of sexual violence through corroboration requesting independent evidence in addition to a

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victim's testimony. Historically, certain categories of witnesses were regarded as unreliable, and the common law required the trial judge to warn the jury about the dangers of relying on such evidence where it was uncorroborated. These categories included: complainants in sexual assault cases [11], accomplices, and child witnesses [1]. One particular barrier – the "corroboration rule" – stands out of discriminatory and onerous roadblock for women and girls who seek justice as victims of sex crimes [12, p. 408]. It is a common law rule of evidence and criminal procedure that requires prosecutors trying sex offence cases to have independent evidence in addition to a victim's testimony, even if that testimony is credible and shows beyond a reasonable doubt that the defendant committed the sex crime [12]. This heightened evidentiary standard for victims of sex crimes is based on the stereotype that women and girls are apt to lie about being raped and that their word alone – no matter how clear, convincing, or credible – should not be enough to put a rapist behind bars [12].

The corroboration rule itself requires that prosecutors who are trying a sexual offence case in court provide independent evidence, form a source other than the victim's statement, which substantiates a victim's testimony [13]. In nearly every other type of criminal case, the credible testimony of a single witness can be sufficient to convict an accused. But under the corroboration rule, a victim's credible testimony alone is not enough to put an accused sex offender behind bars in sexual offence cases [12, p. 414]. In its strictest application, corroborative evidence is required for each element of a sex crime. For example, without corroborative evidence for all three elements of the crime of rape (i.e., penetration, lack of consent, and identity of the accused), a defendant's criminal charge will almost certainly be downgraded to a lesser criminal offence or dismissed entirely [12].

According to expert studies, the consequences of sexual abuse may include both short and long term physical and psychological harm to the victim, including but not limited to unwanted pregnancies, genital lesions, sexually transmitted infections, post-traumatic stress disorder, fear, lack of trust, shame, guilt, anxiety, depression, drug abuse, self-harm, and suicidal behaviour. Therefore, the importance of obtaining a just result for victims of sexual abuse cannot be overstated [12, p. 429]. Sexual violence typically has long-term and life-threatening physical and psychological consequences, as well as social, economic and legal repercussions, and results in increased risk and vulnerability for survivors. Communities and communal structures can be damaged or destroyed at their core by the commission of sexual violence against their members [8, p. 25].

The corroboration rule, as a barrier to justice for survivors of sexual abuse, not only violates the rights of individual survivors, but also perpetuates a climate of fear for women and girls [12, p. 441]. A corroboration rule disproportionately impacts women and girls because women and girls comprise the majority share of victims of sexual abuse and because such abuse is rampant [12, p. 445].

The corroboration rule is based on an unfounded stereotype that women and girls will lie about sex, and the rule is applied to the detriment of survivors who are predominantly female. The stereotype that women and girls are apt to lie about sex is empirically invalid, and a rule borne out of a baseless assumption that women and girls lie about sex is sex-stereotype discrimination that violates international law [12, p. 443]. Empirical research has been done refuting the notion that women lie more easily or frequently than men, or that they are intrinsically unreliable witnesses. A US study found that the incidence of false reports for rape is exactly the same as that for other

felonies – about two per cent. There is no evidence to suggest that these statistics have changed significantly over the last twenty years [12, p. 426-427].

The corroboration requirement prohibits convictions based solely on the testimony of the victims and imposes a legal requirement that the victim's testimony must be corroborated by other evidence. This imposes a higher burden of proof on victims of sexual violence in comparison with other violence crimes [21].

It is also important to note that although the corroboration rule is characteristic to common law systems, related provisions on evidence in sexual violence cases under civil law systems might be interpreted as containing main elements of the corroboration rule. Women's right to equality before the law is frequently violated in national criminal jurisdictions because their evidence is distrusted. Women, therefore, have been treated unequally in that their right to freedom from sexual coercion by a perpetrator is extremely limited. In national jurisdictions, rape and sexual assault laws have often put people in terms of a 'proposer' of sexual acts, and the 'acceptor' is deemed to consent to the act unless their resistance is made clear, especially by using physical resistance. This is contrary to an approach to the criminal law which incorporates the human right to equality [18, p. 13].

Under the corroboration rule evidence establishing lack of consent and existence of force play a crucial role in sexual violence cases. International human rights and international criminal law standards indicate how lack of consent should be interpreted and what circumstances should be taken into account to that end. The concept of 'consent' as used in national criminal law imports a notion of individual choice, typically without a consideration of the reality of abuse of power (whether evidenced through physical force, or other forms of coercion) and other factual conditions that may prevail before, during and perhaps after the sexual acts in question. A consideration of whether an individual was able to exercise sexual autonomy, by contrast, takes into account the overall dynamic and environment surrounding those sexual acts and how these had an impact on the victim's ability to make a genuine choice [18].

The definitions of sexual violence derive from the jurisprudence of the ad hoc International Criminal Tribunals for Rwanda (ICTR) and the Former Yugoslavia (ICTY) according to which elements of rape exist when the perpetrator uses force, the threat of force or coercion, and also when the perpetrator exploits coercive circumstances.

The Rules of Procedure and Evidence of ICTR and ICTY established the following key protection for victims of sexual violence:

- Corroboration of victim testimony is not required;
- Information about the victim's prior sexual conduct cannot be admitted as evidence;
- Lack of consent can be inferred from the environment of coercion that charaterises war, mass violence, and detention [5].

ICTY made clear that force or threat of force provides clear evidence of non-consent, but force is not an element per se of rape. In particular, the Trial Chamber wished to explain that there are "factors 'other than force' which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim". A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force [15, para. 129].

In the case of *Kunarac, Kovač and Vuković*, the ICTY noted that in practice, the absence of genuine and freely given consent or voluntary participation may be

evidenced by the presence of the various factors specified in other jurisdictions – such as force, threats of force, or taking advantage of a person who is unable to resist. A clear demonstration that such factors negate true consent is found in those jurisdictions where absence of consent is an element of rape and consent is explicitly defined not to exist where factors such as use of force, the unconsciousness or inability to resist of the victim, or misrepresentation by the perpetrator [16].

According to the International Criminal Court (ICC), victim's consent for a sexual act may not be taken into account if the existing circumstances "undermined the victim's ability to give voluntary and genuine consent" [7, Rule 70 (a); 16]. The silence of the victim or lack of resistance does not mean the victim's consent [7, Rule 70 (c)]. Additionally, corroboration is not required to prove any crime within the jurisdiction of the ICC [7, Rule 63]. The ICC Elements of Crimes and Rules of Procedure and Evidence procedure and evidence clearly states that a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence [7, Rule 63(4)]. All references to the term 'consent' within the Elements of Crimes must be interpreted consistently with a fuller, more accurate and human-rights based understanding of the word consent – that a consensual decision is a decision made without force, threat of force, coercion, or taking advantage of a coercive environment. Where evidence of force, threat of force or coercion is present, there should absolutely be no additional element of law of consent for the prosecution to prove [18, p. 6].

The scope of definitions of rape and sexual violence in the ad hoc International Criminal Tribunals for Rwanda and Yugoslavia have been the subject of intense scholarly attention and significant jurisprudence, mainly on the central question of how rape should be defined, whether by reference to the victim's lack of consent, or whether the perpetrator used coercion, force, or threat of force, or took advantage of coercive circumstances. However, the way that international human rights law and standards relating to rape and other sexual crimes affect this central question of the definition of rape has so far not received a similar level of attention, even though Article 21(1)(c) and Article 21(3) of the Rome Statute of the ICC require that the decisions of the Court must be consistent with "internationally recognized human rights law [18, p. 8-9].

The issue of closing a rape investigation on the premise of insufficient proof of physical force was considered by the European Court of Human Rights in the case of M.C. v Bulgaria. The Court considered that, while in practice it may sometimes be difficult to prove lack of consent in the absence of "direct" proof of rape, such as traces of violence or direct witnesses, the authorities must nevertheless explore all the facts and decide on the basis of an assessment of all the surrounding circumstances. The investigation and its conclusions must be centred on the issue of non-consent [3, para.181].

As to whether M.C. consented to the sexual intercourse, the Court opined that historically in rape cases domestic law and practice required proof of the use of physical force by the perpetrator and physical resistance on the part of the victim. It noted, however, that now, many European countries, including common-law jurisdictions, had removed references to physical force from their legislation. The Court held that lack of consent, via assessment of the surrounding circumstances, not a sine qua non of resisting force, had become the critical assessment in defining rape. In general, the Court recognized that the State's positive obligation to adopt measures to secure respect for private life must be in conformity within the wider requirements of non-

discrimination within the Convention. The M.C. case is the first to raise sexual autonomy and equality as relevant to the State's obligation to investigate and prosecute sexual violence, in order to comply with substantive and procedural obligations Article 3 of the European Convention of Human Rights. The Court also observed that law and legal practice reflect the changing social attitudes requiring respect for the individual's sexual autonomy and equality.

How sexual autonomy and equality were examined in the non-war context might be of relevance to conflict-related prosecutions. The ICC could glean support from the M.C. holding [14, p. 33].

Unlike in international and hybrid courts, corroborating evidence is often required in national jurisdictions. Medical or forensic evidence may be a formal or informal requirement in order for a case to go forward in court. Often such evidence is unlikely to be available, foreclosing victims' access to justice. Further, forensic evidence and clinical findings may be undetectable even when rape is known to have occurred, depending in part on the nature of the violence, the likely delay between the assault and medical evaluation, and the availability of forensic evidence collection techniques. The absence of such evidence may, in effect, prevent prosecution and serve as a barrier for victims who seek access to justice [8, p. 145]. In most European countries influenced by the continental legal tradition, the definition of rape contains references to the use of violence or threats of violence by the perpetrator. It is significant, however, that in case law and legal theory lack of consent, not force, is seen as the constituent element of the offence of rape [3, para. 159].

The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) states that consent in sexual violence cases, including rape must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances [23]. Prosecution of this offence will require a context-sensitive assessment of the evidence in order to establish on a case-by-case basis whether the victim has freely consented to the sexual act performed. Such an assessment must recognise the wide range of behavioural responses to sexual violence and rape which victims exhibit and shall not be based on assumptions of typical behaviour in such situations. It is equally important to ensure that interpretations of rape legislation and the prosecution of rape cases are not influenced by gender stereotypes and myths about male and female sexuality [4, para. 192].

It is also important to highlight that the criminal offences of sexual violence and rape established in accordance with the Istanbul Convention are applicable to all non-consensual sexual acts, irrespective of the relationship between the perpetrator and the victim [4, para. 194]. The Council of Europe Recommendation (2002)5 of the Committee of Ministers on the Protection of Women against Violence states that national law should penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance; penalise sexual penetration of any nature whatsoever or by any means whatsoever of a nonconsenting person [4, para. 35].

The UN Handbook for Legislation on Violence against Women provides further clarifications by specifying that sexual abuse legislation should include a broad range of coercive circumstances and it should not emphasise the use of force because rape in itself is violent act. In the case of violence, it should be used as an aggravating circumstance. According to the Handbook, sexual violence is not criminalised in some countries when it occurs in a marriage or intimate relationships. However, in countries

where such action are criminalised, such crimes are rarely investigated and the perpetrators are rarely punished [24, p. 26].

And most recently, the Special Rapporteur on violence against women (SRAW) in her Report to the Human Rights Council (2021) recommends that states should explicitly include lack of consent at the centre of their definition of rape. Force or threat of force provide clear evidence of non-consent, but force is not a constituent element of rape. States must specify that consent must be given freely, as a result of the person's free will, assessed in the context of the surrounding circumstances. Intercourse without consent should be criminalized as rape in all definitions. The SRAW further recommends that criminal provisions on rape should specify the circumstances in which determination of lack of consent is not required or consent is not possible, for example, when the victim is in an institution such as a prison or detention centre, or is permanently or temporarily incapacitated owing to the use of alcohol and drugs [19, para. 85].

The CEDAW Committee also plays an important role on avoiding corroboration rule in sexual violence cases. In its General Recommendation No 33 on Women's Access to Justice, the CEDAW Committee established that "corroboration rules that discriminate against women as witnesses, complainants and defendants by requiring them to discharge a higher burden of proof than men in order to establish an offence or to seek a remedy are discriminatory barriers to access to justice." It stressed that "stereotyping also affects the credibility given to women's voices, arguments and testimony as parties and witnesses. Such stereotyping can cause judges to misinterpret or misapply laws. This has far reaching consequences, for example, in criminal law, where it results in perpetrators not being held legally accountable for violations of women's rights, thereby upholding a culture of impunity." Indeed, the corroboration rule, though used as a rule of evidence in the courtroom, has far reaching impacts and consequences.

The CEDAW Committee reiterated several times that stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general (Verdito v. the Philippines case; R.P.B. v. the Philippens). The CEDAW Committee highlighted the importance to remove any requirement that sexual assault be committed by force or violence, and any requirement of proof of penetration, so as to place the lack of consent at its centre. The CEDAW Committee also affirms that a definition of sexual violence crimes including marital and acquaintance/partner rape should be based on the lack of freely consent and take into account the coercive environment [2]. In its communication No 18/2008 Karen Tayag Verdito v. the Phippines, the CEDAW Committee highlighted that review of the definition of rape in the legislation so as to place the lack of consent at its centre. Further the CEDAW Committee specifies that the national legislation should remove any requirement that sexual assault be committed by force or violence, and any requirement of proof of penetration, and minimise secondary victimisation of the complainant/survivor in proceedings by enacting a definition of sexual assault that either:

- requires the existence of "unequivocal vocal and voluntary agreement" and proof by the accused of steps taken to ascertain whether he complainant /survivor gave consent; or
- requires that the act take place in "coercive circumstance" and includes a broad range of coercive circumstances [2, para. 8.9].

The CEDAW Committee in its Karen Tayag Verdito v. the Philippines communication held that there should be no presumption that the victim consents if she does not physically resist unwanted sexual conduct, "regardless of whether the perpetrator threatened to use or used physical violence" [10, para. 8.5]. The Committee noted a reference in the judgment of the local court to three general guiding principles used in reviewing rape cases. It was its understanding that those guiding principles, even if not explicitly referred to in the decision itself, have been influential in the handling of the case. The Committee found that one of them, in particular, according to which "an accusation for rape can be made with facility", reveals in itself a gender bias [10]. With regard to the alleged gender-based myth and stereotypes spread throughout the judgment, the Committee, after a careful examination of the main points that determined the judgment, noted the following issues. First of all, the judgment refers to the principles such as that physical resistance is not an element to establish a case of rape, that people react differently under emotional stress, that the failure of the victim to try to escape does not negate the existence of the rape as well as to the fact that "in any case, the law does not negate the existence of the rape as well as to the fact that "in any case, the law does not impose upon a rape victim the burden of proving resistance" [10]. The Committee noted that the Court did not apply the principle that "the failure of the victim to try and escape dos not negate the existence of rape" and instead expected a certain behaviour from the author, who was perceived by the court as being not "a timid woman who could easily be cowed."

The CEDAW Committee in its R.P.B v. the Phillippines communication recommended to the state to review its rape law to place lack of consent at its centre by removing any requirement that sexual assault be committed by force or violence and any requirement of proof of penetration and ensure all proceedings involving rape and other sexual offences are conducted impartially and fairly and free form prejudices and stereotypes related to gender, age and disability [17].

CEDAW Committee in its Karen Tayag Vertido v. Philippines communication [10] stated that with regard to the definition of rape, the Committee notes that the lack of consent is not an essential element of the definition of rape in the Philippines Revised Penal Code. The Committee recalled its General Recommendation No. on violence against women, where it made clear that states parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity [10, para 24]. Through its consideration of States parties' reports, the Committee reiterated that rape constitutes a violation of women's right to personal security and bodily integrity, and that its essential element is lack of consent.

In its General Recommendation No 33, The CEDAW Committee recommends to review rules of evidence and their implementation, especially in cases of violence against women, and adopt measures with due regard to the fair trial rights of victims and defendants in criminal proceedings, to ensure that the evidentiary requirements are not overly restrictive, inflexible or influenced by gender stereotypes [10, para. 51(h)]. It also recommends to revise the rules on the burden of proof in order to ensure equality between the parties in all fields where power relationships deprive women of fair treatment of their cases by the judiciary [10, para. 15(g)].

Evidentiary rules can have both de jure and de facto discrimination effect on access to justice by women who are victims of violence. Under the Istanbul Convention,

for instance, "evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary" [9].

It is a long-settled principle of international law that judges may rely on the evidence of a single witness/victim to enter a conviction without the need for corroboration, even though corroborative evidence remains valuable in any criminal prosecution and it will almost always come to light from comprehensive investigation [22].

Concerning the use of stereotypes in sexual violence cases, it should be noted that in the communication Karen Tayag Vertido v. The Philippines, the CEDAW Committee determined that the claimant had been denied an effective remedy by the state due in part to numerous gendered stereotypes and myths relied upon throughout the trial court's decision. The judge, in that case, had acquitted the accused, finding that the victim should have fought him off once she had regained consciousness and while he was raping her. In its decision, the Committee stressed that: " Stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence." The CEDAW concluded that the complainant suffered "re-victimisation through the stereotypes and gender-based myths relied upon in the judgement" [10, para. 8.8].

Conclusion

In spite the corroboration rule is not in line with contemporary international human rights and criminal law norms, it still exists in several national jurisdictions. The corroboration rule is an offensive and discriminatory legal relic that has no place in today's criminal justice system. It obstructs justice for survivors at all stages of the criminal process, leaving women and girls without an effective remedy for the sexual abuse that they have suffered and leading to a climate of impunity. It also treats female survivors of sex abuse as a suspect class of witnesses based on an unfounded stereotype about women and girls. The relevant international human rights instruments should strengthen their efforts and take further steps for removal of the corroboration rule in common law systems as well as any related elements of this rule existing in civil law systems in national jurisdictions. Specific approach should be addressed in transitional justice highlighting issues of corroboration and evidentiary requirements in gender-based violence cases during armed conflict and its aftermath.

References:

1. Australian Law Reform Commission. Uniform Evidence Law (ALRC Report 102. Warnings about unreliable evidence. Available at: https://www.alrc.gov.au/publication/uniform-evidence-law-alrc-report-102/18-comments-warnings-and-directions-to-the-jury/warnings-about-unreliable-evidence/, last access – 09.02.2024.
2. CEDAW GR 35
3. European Court of Human Rights. The case of M.C. v Bulgaria. Application no. 39272/98.
4. Explanatory Report to Istanbul Convention. Available at: https://rm.coe.int/ic-and-explanatory-report/16808d24c6, last access – 11.02.2024.

5. ICTR, Rules of procedure and evidence, Rule 96; ICTY, Rules of procedure and evidence, Rule 96. Available at: https://unictr.irmct.org/en/documents/rules-procedure-and-evidence, last access – 18.03.2024.

6. International Committee of the Red Cross, Customary International Humanitarian Law Database, Rule 93, 'Rape and other forms of sexual violence are prohibited'. Available at: https://ihl-databases.icrc.org/en/, last access – 12.01.2024.

7. International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence, ICC-ASP/1/3, 2002.

8. International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, 2017. P. 145

9. Istanbul Convention, Article 54.

10. Karen Tayag Verdito v. the Philippines, CEDAW/C/46/D/18/2008, 2010.

11. Kelleher v The Queen (1974) 131 CLR 534.

12. M. Xiao Liu & A.K.Creel Benton. Beyond belief: How the "corroboration rule" in Malawi obstructs justice for victims of sex crimes and discriminates against women and girls on the basis of sex- a call for legislative change. Columbia Journal of Gender and Law. 40.3, 2020.

13. Mariette v. Republic (1966) 4 ALR Malawi Series 119,134 (lines 28-30) (High Ct.)(Malawi) (defining "corroboration" as "independent testimony coming from a source other than the complainant implicating an accused which supports the testimony of the complainant").

14. P. Viseur Sellers. The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation. P. 33

15. Prosecutor v. Kunarac, Kovač and Vuković, Appeal Judgment, 12 June 2002, para. 129

16. Prosecutor v. Kunarac, Kovač and Vuković, case no. IT-96-23, Judgment, 22 February 2001

17. R.P.B. v. the Philippines, CEDAW Committee, 34/2011.

18. Rape and sexual violence: Human rights law and standards in the International Criminal Court. Amnesty International. 2008.

19. Report of the Special Rapporteur on violence against women, its causes and consequences, Dubravka Šimonović (UN Doc A/HRC/47/26), 19 April 2021 Para. 85.

20. Roadblocks to Justice, How the law is failing survivors of sexual violence in Eurasia, 2019, Equality Now, p. 8.

21. Sh.Choudhry. Women's access to justice: A guide for legal practitioners, 2018.

22. The Administration of Justice on sexual violence crimes against women in Georgia. CoE, December 2020. Available at: https://rm.coe.int/sexual-violence-research-eng/1680a13604, last access – 06.03.2024.

23. The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), 2011. Available at: https://rm.coe.int/168008482e, last access – 04.03.2024.

24. UN Handbook for Legislation on VaW, UN, 2010, ST/ESA/329, p. 26.

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THEORETICAL AND PRACTICAL PROBLEMS OF IMPLEMENTATION OF INTERNATIONAL LEGAL NORMS INTO THE LEGAL SYSTEM OF THE REPUBLIC OF AZERBAIJAN IN THE FIELD OF PROTECTION OF CULTURAL HERITAGE

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Abstract

The article extensively analyzes the theoretical and practical problems of the implementation of international legal norms in the field of cultural heritage protection into the legal system of the Republic of Azerbaijan. By analyzing the constitutional norms of a number of states, the attitude towards these or other international legal norms is reported, the role of the generally recognized principles of international law and international customary norms in the protection of cultural heritage is analyzed. In addition, the issue of interaction between general and special norms of the Constitution of the Republic of Azerbaijan and then sectoral legislative acts and international and national legal norms in the field of cultural heritage protection is considered. In the article, a number of proposals are put forward in the direction of the development of international and national legal norms in the Constitution of the Republic of Azerbaijan, as well as in sectoral legislative acts. It is believed that the implementation of international legal norms in the sphere of cultural heritage protection to the domestic legal systems of states differs in a number of specific features, where the human rights factor occupies a special place.

Keywords: *human rights, protection of cultural heritage, international legal norms, national legislation, legal system, generally recognized principles of international law, international customary norms, international obligations, sectoral legislative acts.*

I. Introduction

In the sphere of cultural heritage protection, the implementation of international legal norms into the domestic legal systems of states is relevant, as in other fields, but also differs in its specific features. In this case, the specific characteristics of the adopted international legal norms must also be taken into account. Thus, the characteristics of those norms, such as "hard" and "soft" legal norms, also show an important position here. In addition, international obligations addressed to the states are also considered important factors.

Taking into account what has been mentioned, the relevance of the issue put forward for discussion requires extensive analyzes in a number of directions.

First of all, it is necessary to define important elements in this field in the Constitution, which is the main Law of the state. In addition to being the basis for the adoption of the main laws and other normative-legal acts, the Constitution also reflects important principles. In addition to having the highest legal force, the Constitution regulates the relations between people, society and the state. One of the main points here is the attitude towards international legal norms and the regulation of human rights and fundamental freedoms. Taking into account the above, the statement of attitude to international legal norms in the constitutions is not only a general approach, but also has a guiding nature for other normative-legal acts. Article 147 of the Constitution of the

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Republic of Azerbaijan, which is called "Legal force of the Constitution of the Republic of Azerbaijan", consists of 3 important interrelated clauses:

- The Constitution of the Republic of Azerbaijan has the highest legal force in the Republic of Azerbaijan.
- The Constitution of the Republic of Azerbaijan has direct legal force.
- The Constitution of the Republic of Azerbaijan is the basis of the legislative system of the Republic of Azerbaijan [4].

Then, a general approach and a special approach are also distinguished. Here, too, the adopted special normative-legal acts are distinguished, and the mentioned ones combine the national normative-legal acts in the field of cultural heritage protection that we are analyzing. The main feature of the international obligations assumed by the international agreements to which the Republic of Azerbaijan is a party is implemented in practice, where the adopted special normative-legal acts play an important role.

At this time, domestic normative-legal acts, which include areas close to the sphere of cultural heritage protection, occupy a special place. Normative-legal acts adopted in the field of human rights, including those adopted in other areas (for example, the Criminal Code of the Republic of Azerbaijan, the Civil Code of the Republic of Azerbaijan, etc.) become the object of analysis here.

When talking about the implementation of international legal norms in national legal systems, the analysis of the practice of states shows that the approaches here are different. The difference in approach is reflected in the end result. Thus, states that have sufficient experience in the application of international legal norms also achieve efficiency in this direction, which combines a number of features. At this time, it is interesting to apply directly to the norms of international law or to implement the process through domestic normative-legal acts adopted for the purpose of the implementation of international obligations. Of course, the long-term or efficiency of the experience of the states must be taken into account here.

It should also be noted that although there are enough studies on the implementation of international legal norms in national legal systems in the Azerbaijani legal literature, almost no studies have been conducted on the implementation of international legal norms in national legal systems in the field of cultural heritage protection. This increases the importance of current scientific research.

II. Attitude to international law with the analysis of constitutional provisions and protection of cultural heritage

As mentioned, when discussing the issue of application of international legal norms in separate legislative acts, it is necessary to refer to the constitutional norms first.

For this reason, it should be considered important to make a distinction in the norms of international law.

First of all, in the Preamble of the Constitution of the Republic of Azerbaijan, as one of the important intentions of the Azerbaijani people, it should be specifically mentioned "to live in friendship, peace and tranquility with all the peoples of the world, in accordance with universal values, and to interact for this purpose" [4].

It can be considered that as a continuation of the intention defined in the Preamble, it is the attitude towards the generally recognized principles of international law as one of the important norms of international law. The main difference between the generally recognized principles of international law and other norms of international law is that it

has special legal force. We believe that this feature does not make the discussion of the issue of the implementation of those universal principles into domestic normative-legal acts relevant. Thus, these principles form the basis of interstate relations and are the basis for the adoption of other international norms. The international law subjectivity of states is sufficient for them to follow the generally recognized principles of international law. These principles, which act as the basis of interstate relations, form the basis of the international normative system.

Important international obligations are also reflected in generally recognized principles of international law. In this sense, the attitude of the state itself to the generally recognized principles of international law should be considered very necessary. Article 10 of the Constitution of the Republic of Azerbaijan states that the Republic of Azerbaijan establishes its relations with other states on the basis of the principles provided for in universally accepted international legal norms [4].

In this regard, it would be important to refer to the practice of world states. Thus, Article 10 of the current Italian Constitution states that the Italian legal system conforms to the generally acknowledged provisions of international law [14].

Clause 4 of Article 15 of the Constitution of the Russian Federation states that the universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied [5].

Article 4, Part 5 of the Constitution of Georgia states that the legislation of Georgia shall comply with the universally recognized principles and norms of international law. An international treaty of Georgia shall take precedence over domestic normative acts unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia [6].

Article 25 of the Constitution of the Federal Republic of Germany ("Primacy of international law") states that the general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory [7].

Although there are no direct norms related to this in the Constitution of the Republic of Turkey, a general attitude towards international law has been expressed in the practice of international agreements. Thus, in Clause 5 of Article 90 of the Constitution, it is stated that international agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail [8]. It can be considered that this norm was able to express sufficient accuracy.

The constitutions of some states (for example, USA, France) do not directly address the principles of international law.

The Constitution of Kazakhstan even approached the issue somewhat broadly and specifically mentioned some universally recognized principles of international law. Thus, Article 8 of the Constitution states that the Republic of Kazakhstan shall respect principles and norms of international law, pursue the policy of co-operation and good-neighborly relations between states, their equality and non-interference in each other's

domestic affairs, peaceful settlement of international disputes and renounce the first use of the military force [9].

It can be considered that despite the fact that the attitude to the principles of international law is expressed in different ways in the constitutions of different states, in accordance with the UN Charter, the features of the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States should be unambiguously taken as a basis. Thus, the Declaration (General part) declares that in their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles. Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member States under the Charter or the rights of peoples under the Charter, taking into account the elaboration of these rights in this Declaration. Declares further that: the principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles [12].

Taking these into account, it should be considered necessary to express the attitude to the main principles of international law in a more precise form. In this sense, it should be considered more appropriate to use the phrase "generalized principles of international law" rather than the phrase "principles stipulated in international legal norms" expressed in the Constitution of the Republic of Azerbaijan.

It should be taken into account that international obligations are determined not only by international legal norms, but also by generally recognized principles of international law and international customary norms. In this sense, it is necessary to determine the normative content of individual principles of international law.

According to the main content of the the principle of not using force or threatening to use force reflected in Clause 4 of Article 2 of the UN Charter, all Members of the UN shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any manner incompatible with the objectives of the UN [10]. As important documents in this field, the 1928 Briand-Kellogg Pact on the Renunciation of War as an Instrument of National Policy, the 1974 Resolution adopted by the UN General Assembly on the Definition of Aggression, provisions mentioned in the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations were further developed. The principle of not using force or threatening to use force does not unambiguously allow such actions to be directed against cultural heritage. In other words, any actions expressed by aggression can be directed against the cultural heritage. Actions expressed as aggression were defined by the 1974 Resolution adopted by the UN General Assembly on the Definition of Aggression. And aggression is considered an international crime by the Rome Statute of the International Criminal Court and causes international responsibility. In the decisions of the International Criminal Court, as well as ad hoc international tribunals, it has been noted that the acts expressed as aggression are closely related to direct cultural heritage.

The principle of peaceful settlement of international disputes, which acts as the next principle and is reflected in Clause 3 of Article 2 of the UN Charter, envisages the peaceful settlement of disputes between subjects of international law, including cultural heritage. Thus, states must resolve all disputes or conflicts arising between them,

regardless of their nature and origin, only through peaceful means, including issues related to joint cultural heritage objects. This principle calls for the peaceful settlement of any interstate dispute, which requires states to resolve their disputes, regardless of their nature and origin, only by peaceful means, refraining from actions that may lead to escalation of disputes between states, including that they should resolve their disputes based on international legal norms. What was mentioned was also developed by the 1988 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field. Issues arising from international disputes may also include the sphere of cultural heritage and integrate these different spheres. For example, protection of cultural heritage samples located on the border of two states, protection of historical cultural heritage samples located in one state and belonging to other nations, and determination of responsibility for damage caused to them. So, currently there are examples of movable and immovable cultural heritage belonging to the people of Azerbaijan in the territory of the Republic of Armenia. Although the Republic of Armenia is responsible for the protection of those cultural heritage samples, the Republic of Azerbaijan is also responsible for their protection to its people. Taking this into account, it is of particular importance to constantly raise the mentioned issues before the international community.

According to the content of the principle of sovereign equality of states expressed in Article 2, Clause 1 of the UN Charter, states are obliged to respect each other's sovereign equality, as well as all rights inherent in sovereignty, including legal subjectivity [10]. At the same time, states have the right to freely choose and develop their political, social, economic and cultural system, and to determine their laws and administrative rules, fulfilling their international obligations. The mentioned reflect the respective rights of the states in the protection of cultural heritage. Those provisions are complemented by the principle of non-interference in the internal affairs of states expressed by Article 2, Clause 7 of the UN Charter [10]. The territorial integrity of states and the inviolability of borders, which act as one of the main principles, also have an important basis in the formation of important elements of cultural heritage protection.

The principle of legal equality and self-determination of peoples is also one of the important principles, and in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, it was also stated that peoples have the right to choose their own social, economic and cultural development path without hindrance. This includes the right of every nation to preserve and develop its cultural heritage. However, the mentioned cannot be directed against the territorial integrity of any state. In this sense, the protection of cultural heritage, which is part of cultural development, determines the mutual relations of nations with the international society and states.

The principle of co-operation of the states, which acts as one of the important principles, includes not only the implementation of peace and security protection measures, but also the expansion of the field of economic, scientific-technical, cultural and other interstate relations. According to Clause 3 of Article 1 of the UN Charter, states are tasked with "implementation of international co-operation in solving international problems of an economic, social, cultural and humanitarian nature". Articles 55 and 56 of the UN Charter are dedicated to the co-operation of states in social, economic and cultural fields [10]. Based on the principle of co-operation, states should behave in their international relations in such a way that they do not hinder co-

operation, but instead develop it further. The specific forms of co-operation of the states depend on the states themselves, their needs, resources, domestic legislation and the international obligations they undertake. International co-operation of states should also include cultural heritage, and it covers a number of spheres. For example, participation in existing international agreements in the sphere of cultural heritage, co-operation with various mechanisms within the framework of international organizations, joint international events with various states, other activities involving joint activities in the field of cultural heritage protection, etc.

The principle of conscientious fulfillment of international obligations, which acts as one of the important principles, is known as the principle of pacta sunt servanda ("agreements must be respected"). Ensuring the stability and efficiency of the international legal order, peaceful relations and interstate co-operation depends very much on the compliance of the states with the norms of international law and the honest fulfillment of the obligations they have undertaken. It is rightly considered in legal literature that international law would have lost its legal character without the principle of honest fulfillment of obligations under international law. This principle is the source of legal force of international law. In the 1969 Vienna Convention on the Law of Treaties, this principle is expressed as "every treaty in force is binding on its participants and must be performed by them in good faith". Participation in international agreements is reflected in the fulfillment by states of all terms of the obligations arising from them.

Finally, according to the content of the principle of respect for human rights and basic freedoms, which acts as an important principle, all states are obliged to respect the basic rights and freedoms of all persons located in their territory. Apart from that, all states undertake the duty of non-discrimination on the basis of race, gender, language, religion, etc. All states have an obligation to respect human rights and fundamental freedoms and to help co-operate with each other in achieving these goals [1, p. 27]. As one of the important human rights, cultural rights include the right to cultural heritage. In this regard, important rights are also reflected in international and national legislations. For example, in the International Covenant on Economic, Social and Cultural Rights of 1966, in the European Cultural Convention. In addition, the first Clause of Article 40 of the Constitution of the Republic of Azerbaijan states that everyone has the right to participate in cultural life, to use cultural institutions and cultural resources. In addition, Clause 2 of that Article states that everyone should respect historical, cultural and spiritual heritage, take care of it, and protect historical and cultural monuments.

As can be seen, rights in the sphere of cultural heritage also include corresponding duties. The normative bases of this are also established in international documents. Thus, Article 15 of the International Covenant on Economic, Social and Cultural Rights dated 1966 states that the states participating in this Covenant recognize the right of every person to participate in cultural life [13]. Then, Article 4 of the European Cultural Convention dated 1954 states that each Contracting Party shall, insofar as may be possible, facilitate the movement and exchange of persons as well as of objects of cultural value so that Articles 2 and 3 may be implemented. Article 5 of that Convention states that each Contracting Party shall regard the objects of European cultural value placed under its control as integral parts of the common cultural heritage of Europe, shall take appropriate measures to safeguard them and shall ensure reasonable access thereto [11].

III. Protection of cultural heritage and international customary norms

International customary norms are also the basis of interstate relations, they define important international obligations, we believe that the protection of cultural heritage should be among these obligations. We believe that the main features of the protection of cultural heritage during military conflicts are derived from this. The protection of cultural heritage is one of the main goals of international humanitarian law, taking this into account, the Martens clause should be mentioned here. Its essence is that while a more complete Code of the Laws of War is being formed, the High Contracting Parties deem it appropriate to declare that, in cases not included in the regulatory provisions adopted by them, the populations and belligerents remain under the guarantee and regime of the principles of the Law of Nations advocated by the practices established among civilized nations, by the laws of humanity and by the demands of public conscience [3].

One of the most characteristic cases in the modern era is the existence of states withdrawing from general international obligations that are important for the international community by not ratifying international agreements. At this time, it should be noted that determining international obligations by referring to international customary norms should be considered one of the most effective tools of international law, and the role of international customs in international society should be strengthened. The role of absolute rights should be especially mentioned here. Then, we believe that the international custom can have an important role in eliminating the existing gaps between the international law and the international obligations of the states. Considering that the protection of cultural heritage is carried out for the sake of human interests and public interests, and public conscience takes an important place here, the formation of important customary norms in the field of cultural heritage protection should be one of the main directions facing the international community. These features were reflected in the Hague Conventions adopted at the end of the 19th century and the beginning of the 20th century.

Currently, the importance of Martens clause in the development of norms in this direction is characterized by its serious effects. Apparently, by defining the entire scope of the law of armed conflict, the Martens clause allows one to go beyond ordinary law and custom, to appeal to the principles of humanity and the dictates of public conscience. We believe that the Martens clause is very important. The formation of advanced laws and customs in wars is still almost impossible, this concept itself is broad, and at the same time, the invention of new weapons can lead to unimaginable consequences. In this regard, UN General Assembly resolution 38/75 (December 15, 1983) should be noted, as "resolutely and unconditionally condemns nuclear war in all circumstances as contrary to human conscience and reason" [17]. It seems that by defining the entire scope of the law of armed conflict, the Martens clause allows us to go beyond ordinary law and custom and appeal to the principles of humanity and the dictates of public conscience.

In general, the reservation made by the well-known scientist F. Martens to the Hague Conventions should be specially noted. Thus, in his work entitled "Modern international law of civilized nations", a number of important norms in this field were defined, and the necessity of protecting cultural heritage was also put forward [2, p. 43-44]. One of the main features of this reservation put forward by F. Martens is the substantiation of the importance of customary law and international customary norms, and laying the foundation for applying these norms to the protection of cultural heritage in the future. The 13 Hague conventions of 1907, which set a new direction for the Hague

conventions of 1899, led to further strengthening of international humanitarian law norms and international customary norms.

Subsequently, international custom, including international humanitarian law norms, led to the adoption of a number of important international documents in this field, including: Geneva Conventions for the Protection of War Victims of 1949, Protocols No. 1 and No. 2 of 1977 to those international conventions, Protocol No. 3 of 2005, Hague Rules of 1923 for the Air Warfare, the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, the Briand-Kellogg Pact of 1928, which formally prohibits use of war as an instrument of national policy, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Additional Protocols of 1954 and 1999, the 1977 Convention on the Prohibition of the Military or Any Other Hostile Use of Environmental Modification Techniques, the Convention dated 1980 on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects and 5 Additional Protocols to it, etc.

IV. Special norms reflected in the Constitution and the problem of cultural heritage protection

Let's continue the analysis of the interaction between the Constitution of the Republic of Azerbaijan and international and national legal norms in the field of cultural heritage protection. For this matter, the provisions reflected in Article 7 of the Constitution should be specially mentioned. Part 2 of that Article, which gives an important place to the role of international legal norms in the regulation of intra-state relations, states that the state power in the Republic of Azerbaijan is limited only by law in internal matters, and in foreign matters only by the provisions arising from international agreements to which the Republic of Azerbaijan is a party [4]. We believe that this norm expresses a very important position of the Republic of Azerbaijan on its obligations arising from international agreements and international customary norms.

It is also very necessary for states to express their attitude to international agreements. The legal force of international agreements to which the states are parties is also important at this time. The aspects defined here are related to Clause II of Article 148 of the Constitution of the Republic of Azerbaijan. Thus, it is noted that the international agreements that the Republic of Azerbaijan is a party of are an integral part of the legislative system of the Republic of Azerbaijan [4].

Then, the determination of mutual relations between international agreements and national legislative norms is also of particular importance. In this regard, Article 151 of the Constitution of the Republic of Azerbaijan can be mentioned. In that article, it is noted that if there is a conflict between the normative legal acts included in the legislative system of the Republic of Azerbaijan (with the exception of the Constitution of the Republic of Azerbaijan and the acts adopted by referendum) and the interstate agreements to which the Republic of Azerbaijan is a party, those international agreements shall be applied [4].

Protection of cultural heritage is directly related to human rights. The human rights approach requires specificity. Taking this into account, Article 71, Clause V of the Constitution of the Republic of Azerbaijan states that no provision of this Constitution can be interpreted as a provision aimed at abolishing human and civil rights and

freedoms [4]. Later, in paragraph VI of the same article, it is stated that human and civil rights and freedoms have directly force in the territory of the Republic of Azerbaijan [4].

A special approach to human rights is directly derived from the supreme purpose of the state. Thus, Article 12, Clause I of the Constitution of the Republic of Azerbaijan states that ensuring human and civil rights and freedoms, a decent standard of living for the citizens of the Republic of Azerbaijan is the supreme goal of the state [4]. Then, according to Clause II of that Article, the human and civil rights and freedoms listed in this Constitution are applied in accordance with the international agreements to which the Republic of Azerbaijan is a party [4].

V. Interrelation of international and national legal norms in the field of cultural heritage protection with sectoral legislative acts

After the Constitution of the Republic of Azerbaijan, the recognition of the primacy of international legal norms in matters of reciprocity was directly determined in the field legislative acts. Thus, Article 30 of the Law of the Republic of Azerbaijan dated April 10, 1998 "On the Protection of Historical and Cultural Monuments" states that, according to Article 151 of the Constitution of the Republic of Azerbaijan, if there is a conflict between this Law and the interstate agreements to which the Republic of Azerbaijan is a party, those international agreements apply [15]. In addition, it is stated in part 1 of Article 6 of the Law of the Republic of Azerbaijan dated December 21, 2012 "On Culture" entitled "Guarantee of Rights and Freedoms" that the rights and freedoms of everyone in the field of culture in the Republic of Azerbaijan, are ensured by being guided by the norms and principles of international law. The state ensures that every person can exercise their rights and freedoms in the field of culture, regardless of their gender, race, language, religious and political beliefs, nationality, social status, social origin, health conditions, and membership in public associations [16].

We believe that constitutional norms have been able to define an important basis in this field, even if no direct relationship is stated in the sectoral legislative acts. In spite of all this, in the field of cultural heritage protection, the attitude towards the interrelationship of international and national legal norms in the sectoral legislative acts of the Republic of Azerbaijan is highly appreciated and reflects a more realistic manifestation of the application of constitutional norms.

VI. Conclusion

Thus, by analyzing the theoretical and practical problems of the implementation of international legal norms in the field of cultural heritage protection into the national legal systems of states, a number of important conclusions are reached:

- Norms defined in all generally recognized principles of international law lead to the internationalization of states in the field of cultural heritage protection. From this point of view, regardless of the participation of states in some international agreements in the field of cultural heritage protection, their respective international obligations exist, thus it is necessary to form certain international control mechanisms over the fulfillment of those international obligations.

- Taking into account the above, the declaration of a direct attitude to the generally recognized principles of international law in the constitutions of the states is also important in the field of cultural heritage protection.

- International customary norms have determined the initial basis for the protection of cultural heritage, and are currently of great importance in this sphere. The role of international customary norms in the sphere of protection of cultural heritage in the period of military conflicts should be specially noted, where the Martens clause has a special place.

-Statement of human rights in the state constitutions is also important in the protection of cultural heritage. So, in terms of protection of cultural rights, this relationship is directly important, and with the development of human rights, it is necessary to make certain positive changes in this sphere.

- Despite the fact that important provisions on the mutual relations of international and national legal norms are defined in the constitutions of the states, it should be considered necessary to express a direct attitude in the field legislative acts in this sphere. So, in the field of cultural heritage protection, the attitude to the issues of mutual relation of international and national legal norms in the sectoral legislative acts should be considered important from the point of view of expressing specific features.

References:

1. Aliyev A.I. Human rights. Textbook. Baku, Nurlar, 2019, 352 p. (in Azerbaijani)
2. Lukashuk I.I. Law of international liability. Moscow, Wolters Kluwer, 2004, 432 p. (in Russian)
3. Rupert Ticehurst. The Martens clause and the law of armed conflict. https://www.icrc.org/es/doc/resources/documents/misc/5tdlcy.htm, last access – 06.07.2023.
4. The Constitution of the Republic of Azerbaijan - https://e-qanun.az/framework/897 (in Azerbaijani), last access – 06.04.2023.
5. The Constitution of the Russian Federation - http://www.constitution.ru/en/10003000-02.htm, last access – 03.06.2023.
6. The Constitution of Georgia - https://matsne.gov.ge/en/document/view/30346?publication=36, last access – 14.05.2023.
7. The Constitution of the Federal Republic of Germany – https://www.btg-bestellservice.de/pdf/80201000.pdf, last access – 10.07.2023.
8. The Constitution of the Republic of Turkey - https://www.anayasa.gov.tr/media/7258/anayasa_eng.pdf, last access – 21.08.2023.
9. The Constitution of Kazakhstan – https://www.constituteproject.org/constitution/Kazakhstan_2017, last access – 15.07.2023.
10. The Charter of the United Nations - https://treaties.un.org/doc/publication/ctc/uncharter.pdf
11. The European Cultural Convention - https://rm.coe.int/168006457e, last access – 28.09.2023.
12. The Declaration on principles of international law friendly relations and cooperation among states in accordance with the Charter of the United Nations – https://www.refworld.org/legal/resolution/unga/1970/en/19494, last access – 11.10.2023.
13. The İnternational Covenant on Economic, Social and Cultural Rights – https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights, last access – 17.11.2023.

14. The Italian Constitution –
https://www.quirinale.it/allegati_statici/costituzione/costituzione_inglese.pdf, last access – 17.11.2023.
15. The Law of the Republic of Azerbaijan On the protection of historical and cultural monuments - https://e-qanun.az/framework/3526, last access – 21.11.2023.
16. The Law of the Republic of Azerbaijan on Culture - https://e-qanun.az/framework/25303, last access – 05.12.2023.
17. The Rezolution of the General Assembly United Nations 38/75 (December 15, 1983) of the Condernnation of nuclean war –
https://documents.un.org/doc/resolution/gen/nr0/444/67/img/nr044467.pdf?token=iqEX4NuUhTkE83S5hT&fe=true, last access – 06.09.2023.

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DEFAMATORY EXPRESSIONS IN THE VIRTUAL SPACE V. THE PROTECTION OF HONOR AND DIGNITY

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Abstract

The formation of virtual space is not analyzed in a positive way. In the digital age, serious changes are observed in the nature of legal violations through the opportunities provided by new technologies. Violations, which are no longer on the physical plane, but on the virtual plane, cause serious concerns for the modern world population. The problem of defamation, which has a special weight among such violations, is one of the current problems of the time. Due to the lack of clear borders and the possibility of anonymity in the virtual space, it has become possible to easily share and spread defamatory statements insulting the honor and dignity of others. This has resulted in the actualization of the problem of defamation. In the article, the types of expressions historically accepted as defamatory expressions were analyzed in a form interrelated with the protection of honor and dignity, and suggestions were made regarding the legislation of the Republic of Azerbaijan on Media.

Keywords: *defamation, honor, dignity, freedom of expression, judicial practice, insult, slander.*

1.1. Introduction

Defamation poses particular challenges for media reporting and commenting on people and events, both past and present. Three factors in defamation pose a problem for the media. First, the costs of defending an action and the damages payable in the event of failure to defend it can be high. Second, liability for a defamatory statement lies not only with the author, but also with the editor, publisher, and anyone involved in its dissemination. Third, two presumptions are drawn by the court from the fact that the statement is defamatory: the defamatory statement is not true and the onus is on the person defending the action to prove its truth. Therefore, the media has a duty to prove the truth of a statement. The second presumption is that the statement was made in bad faith, which usually cannot be rebutted. A newspaper article or television program can therefore inadvertently defame a person by making a simple mistake and still incur liability [1, p. 59].

Defamation is considered as a behavior directed against human honor and dignity. Honor and dignity, defined as the moral value given to a person by society, are values acquired by birth as a natural consequence of being human. A person's position in society is formed in two ways: by birth and by achievements in life. Being born with this ability is associated with common honor and dignity. In fact, the only reason for a person to gain honor and dignity is because he/she was born as a human. As a result, a person earns the dignity of being a person regardless of whether he is useful or not in the eyes of society. The moral values given to a person by the society are characterized objectively, not subjectively. In other words, it does not matter whether a person himself perceives values that are not considered degrading by society as degrading or not. Similarly, a person's self-worth constitutes a subjective quality. Objective evaluation means that value judgments related to honor and dignity differ depending on a person's position in society and the structure of the society in which he lives. In

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this sense, honor and dignity can be considered as personal values that are changeable and relative in nature.

Since the protection of honor and dignity is an absolute right, any attack on honor and dignity is against the law. Legal systems recognize that honor and dignity must be protected, albeit to varying degrees, by different legal arrangements. Legal systems adopt different approaches to freedom of expression where the law is conflicting. This situation leads to different court decisions. Disputes regarding conflicting rights are resolved by ruling in favor of one right. In case of violation of honor and dignity in virtual space, legal systems must find a common ground for the protection of rights. This denominator can be achieved by harmonizing the substantive legal norms of the states. However, harmony is not easy to achieve in such disputes where conflicting rights exist. Because both rights are protected taking into account the historical and cultural sensitivities of the states. While some states consider the protection of honor and dignity to be a priority, some states have legal regulations in favor of freedom of expression. This situation also shows its influence in the field of international private law. States consider the conflict between the two values when regulating conflict of laws rules.

1.2. Legal basis for classification of defamatory statements

In order for a statement or opinion to be defamatory, it must include the following elements:

- The idea must be false, that is, it must have a character that is not based on truth;
- The opinion should be related to the facts, the reasoning should not be specific;
- As a result of the expression of the opinion, real damage must be caused, that is, it must cause concrete material or moral suffering;
- The idea must be widely disseminated, that is, it must be disseminated in an open form in any form to one or more third parties (group of persons) (except for the person who disseminated the idea and to whom the idea belongs) [11, p. 11-12].

D.Maule and Z.Niu provide a different explanation and define the following signs of defamation:

- not true;
- there is a sign to inform and refer to the pursuer;
- defamatory;
- committed intentionally to cause harm to a person [1, p. 61].

Regarding defamation, Article 10 of the European Convention on Human Rights should be taken into account. The article in question provides for the freedom of thought and speech based on various restrictions, one of which is the protection of the reputation or rights of others. Therefore, the media's freedom of speech is limited to the right to appeal to the court in cases where it harms a person's honor and dignity. The impact of Article 10 on the courts is significant and can be seen particularly in the extension of special privileges to media reports of public interest. In Reynolds v. Times Newspapers, Lord Nicholls commented on this issue in a very interesting way: Exceptions to freedom of thought and speech must be justified as necessary in a democracy. In other words, freedom of expression is the law, and regulation of speech is an exception requiring justification. The existence and extent of any exception can be justified only if it is supported by a pressing social need. These are the basic principles governing the balance between freedom of expression and defamation [8].

Not all defamatory allegations are immediately apparent. At first glance, seemingly innocuous phrases can actually have a special meaning. In the case of Morrison v. Ritch, the Scotsman published news of the birth of twins to a couple, Mr. and Mrs. Morrison. Anyone who doesn't know Mrs. Morrison can tell there's nothing defamatory about the notice. But those who knew her knew that she was only a month away from getting married. Thus, she was able to successfully sue the newspaper for defamation [7].

In Tolley v JS Fry and Sons Ltd, an advertisement for Fry's chocolate featured an amateur golfer. For most people, it wouldn't matter. However, to people familiar with golf, this meant that even though he was an amateur, he would get paid to advertise chocolate, violating his status as an amateur [9].

Certain types of statements have historically been considered defamatory, and this is the basis for the classification of defamatory statements. However, what was considered defamatory in years gone by can change over time, especially regarding moral conduct. Let's look at the types of defamatory statements.

Statements that a person is guilty of a crime. We can consider that criminal behavior is always condemned in society because it is antisocial in nature. Therefore, if any article contains statements that a person is a criminal, this article can be considered defamatory. For example, in a court case taken from the national experience, a store called X store, that is, the defendant, posted a video on his Instagram page that A. allegedly stole from that store, and the mass media using it spread the news that he allegedly stole from that store. The plaintiff states that he has been a teacher, scientist, and intellectual for many years. The mentioned and published news are absolutely not true and do not reflect the truth. Not only had he never stolen from a store, he had never even thought of such a thing. Also, his financial situation is not bad. In a word, he is not in a moral and social state to allow the said action. He believes that the defendant, by sharing such news, humiliated his honor and dignity and damaged his business reputation. For this reason, the defendant should officially apologize to him and refute that information on his page (from the experience of the Baku City Nasimi District Court).

Statements that a person has acted immorally. For example, if an article published on the Internet indicates that a person is in a de facto marriage relationship with someone, that he is homosexual, and other cases where a person is associated with such forms of immoral behavior, we can talk about the existence of defamation. This also applies to statements about situations in which the person did not behave in accordance with his profession. For example, writing about a doctor offering contraceptives to girls under the age of 16 both damages the doctor's business reputation and suggests that he is accused of immoral behavior.

Defamatory statements about a person's profession and position. Falsely accusing a person of being unfit for their profession or position is defamation. For example, accusing a doctor or lawyer of negligence can be considered defamation. However, the statement need not allege incompetence, but rather may reflect the manner in which a person performs a particular task or task.

Sometimes statements contain defamatory information of a mixed nature. For example, a person posted untrue information on his social network account that A. (A is an official) used his position to influence the courts and was also a drug user.

The case law of England on defamation is very interesting. Here, whether a statement is defamatory is not a question of fact, but of law. The test was first set out in

Russell v. Stubbs (1913): Would the writing, in the circumstances in which it was published, be understood by reasonable persons to whom it was published as defamatory? In Lord Atkins v. Sim Stretch, this test was further refined: Are words and expressions likely to lower the plaintiff's standing in the estimation of right-thinking members of society? [1, p. 62] - In general, it is important what the person giving the statement thinks the meaning is. What is important is whether or not an ordinary, logical, right-thinking person would consider this statement to harm a person's honor, dignity, and reputation. One of the factors a court must consider in determining whether a statement is defamatory is whether the information has the defamatory meaning attributed to it. In an action, the pursuer must clearly set forth the meaning of the defamation intended by the statement. The court must then determine whether an ordinary, reasonable person would agree that the words could have the meaning attributed to them by the pursuer. A statement must be taken in the context and circumstances in which it is made. For example, it can mean to be taken seriously or have some other completely innocent meaning. A common example of this is where the statement is made in fun or jokingly. In Macleod v Newsquest (Sunday Herald) Ltd, a newspaper published a humorous article suggesting an award for the prestigious Tartan Bollocks Award given to the Holyrood hack who committed the biggest gaffe of the year. McLeod, one of the journalists competing for the award, is known for his inventiveness. He sued for defamation, claiming that the description showed that what he had written was fictitious and that he was a disreputable journalist. The court held that the article must be viewed as a whole, and that an ordinary, reasonable reader would have understood it not as defamatory, but as a light-hearted post intended not to be taken seriously. Therefore, the article could not bear the defamatory meaning McLeod attributed to it [6].

The famous John Doe case can be mentioned. John Doe is a day trader. Trading stocks is a hobby that borders on an obsession, and like many other day traders, John Doe prefers to exchange information about stocks through online message boards. But as Doe recently learned, free speech on the Internet may not be as free as he thought. John Doe faced a defamation lawsuit after sending a scathing message accusing the Net Company of defrauding its investors and accusing its CEO of being a liar and fraud. Following the case of Net Company v. John Doe, a new and rapidly expanding category of Internet defamation lawsuits emerged. The thing is, unlike most defamation lawsuits, it's clear from the start that the defendant doesn't have that much money to pay for damages. But why are so many wealthy corporations resorting to such lawsuits? – The goals of this new defamation action are largely symbolic, the primary goal being to silence John Doe and others like him [5, p. 860].

Jurisdiction of courts in disputes arising from defamation via the Internet is an issue in comparative international procedural law. The first reason for this problem stems from the unique nature of the internet, which is not available anywhere but can be accessed from anywhere. The existing difficulties in determining the issue of jurisdiction in the cases of insults and defamation in the virtual space have formed defamation (libel) tourism as one of the problems that are characteristic and relevant for the modern era.

In disputes with a foreign element, the plaintiff's choice of the court that best suits his interests among the courts of more than one state that has jurisdiction over the said dispute is called "forum shopping" in Anglo-Saxon law. The equivalent of forum shopping in defamation disputes via online media is defamation tourism. Libel tourism

is when a person is sued for defamation in a foreign jurisdiction with weak defamation laws. For example, the United Kingdom has been a favorite destination for a defamation tourist to sue for defamation, as traditionally the burden of proof under British law rests with the defendant (the party sharing the content) [4].

In disputes arising out of insults to honor and dignity carried out through mass media, the plaintiff's choice of the court of the country that suits his interests, unlike other disputes, creates the risk of restricting freedom of expression and press around the world. It is reported that this problem will create a chilling effect for media subjects and internet providers [2, p. 90].

Although cases of defamation tourism have been encountered since the 1980s, the number of cases of defamation tourism increased and accelerated after the September 11, 2001 terrorist attack in New York City, USA, with the widespread use of the Internet in the 1990s. After the terrorist act, more books were written by American authors that created a connection between terrorist organizations and Muslim businessmen who are alleged to be financial supporters, published by American publishers in many countries, and some books were even partially read on websites that can be accessed from anywhere. Due to the provisions of the US law protecting freedom of expression, American authors and publishers began to be preferred to file lawsuits in English and London courts. That is why English law is called a plaintiff's friend, and London is called the capital of defamation tourism [3, p. 2463].

Threats and blackmail are acts of intimidation used to intimidate someone. People who are threatened and blackmailed can suffer lifelong anxiety and loss of self-confidence. This is because their freedom is limited in a certain sense due to the restriction of their behavior, behavior, and decision-making mechanisms in their natural lives. These and similar violations can be considered as the cause of the crime against emotional personality values, because they have a personal psychological impact [10, p. 81]. In this regard, anti-defamation measures should always be the focus of the states.

1.3. Conclusion

The article analyzed the types of defamatory statements and determined that some types of statements are characterized by their defamatory nature in each case: statements that a person is guilty of a crime; statements that a person has acted immorally; defamatory statements about a person's profession and position.

As a result, it was concluded that there is no need for ranking and enumeration in Article 14 of the Law on Media. During the research, the information in that Article was compared with Article 13-2.3 of the Law on Informatization and Information Protection, and it was concluded that since clause 1.16 of the said Article of the Law on Media refers to the Law on Informatization, the information specified in the previous clauses creates repetition and confusion at application time. Therefore, it is more appropriate to remove most of those clauses from Article 14.

References:

1. Douglas Maule and Zhongdong Niu. Media Law Essentials. Edinburgh University Press, 2010. – 200 p.

2. Elmasulu, D.E. International jurisdiction in Turkish and United States law in liability cases arising from attacks on honor and dignity via the internet / Master's thesis / - Kocaeli, 2018, 197 p. (in Turkish)

3. Feldman, Michelle. Putting the Brakes on Libel Tourism: Examining the Effects Test as a Basıs for Personal Jurisdiction Under New York's Libel Terrorism Protection Act // Cardozo Law Review, 2010. Vol. 31, pp. 2457-2463.

4. https://www.dictionary.com/browse/libel-tourism, last access – 07.01.2024.

5. Lyrissa, Barnett Lidsky. Silencing John Doe: Defamation & Discourse in Cyberspace // - Duke Law Journal, 2000. Vol. 49, No. 4, pp. 855-946.

6. Macleod v Newsquest (Sunday Herald) Ltd (2007). https://www.bailii.org/scot/cases/ScotCS/2007/CSOH_04.html, last access – 14.03.2024.

7. Morrison v Ritchie and Co: SCS 12 Mar 1902. https://swarb.co.uk/morrison-v-ritchie-and-co-scs-12-mar-1902/, last access – 21.02.2024.

8. Reynolds v Times Newspapers Ltd and others: HL 28 Oct 1999. https://swarb.co.uk/reynolds-v-times-newspapers-ltd-and-others-hl-28-oct-1999/#google_vignette, last access – 21.02.2024.

9. Tolley v J S Fry and Sons Ltd: HL 1931. https://swarb.co.uk/tolley-v-j-s-fry-and-sons-ltd-hl-1931/, last access – 18.01.2024.

10. Ural, S. Violation of privacy of private life and its punishment (Comparison with Modern Law) / Master's Thesis / - İsparta, 2019. – 104 p. (in Turkish)

Walker T. Reputation Matters: A Practical Legal Guide to Managing Reputation Risk. New Zealand: Simpson Grierson, 2012, pp. 11-18.

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LEGAL PROTECTION OF STATELESS PERSONS IN MODERN INTERNATIONAL LAW: THEORETICAL AND PRACTICAL ISSUES

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Abstract

In the article, the theoretical and practical issues of legal protection of stateless persons in modern international law are extensively analyzed based on the existing diversity of opinions in the legal literature, international and domestic normative-legal acts. It is noted that stateless persons are a special category of people whose legal status is regulated by slightly different rules and requires special treatment. The need to adopt special international agreements in this field has confirmed this once again. In general, stateless persons have practically the same rights, freedoms and obligations as foreigners, except for some differences. It is concluded that in order to achieve a more effective regulation, the legal status of stateless persons and the provisions of the international agreement on the elimination of statelessness should be created in the national legislation of the states. At the same time, all the circumstances that can lead to the state of statelessness should be completely eliminated in the national legislation of the states.

Keywords*: modern international law, stateless persons, human rights, legal status, cases of statelessness, personal status, international documents, domestic legislation.*

Stateless persons are persons who live in the territory of a certain state, but are not its citizens, and at the same time do not have proof of citizenship of a foreign state.

David Weissbrodt, a renowned expert on international human rights, notes that one of the ways to ensure that stateless persons can realize their right to citizenship (as stipulated in Article 15 of the Universal Declaration of Human Rights) is through the doctrine of genuine and effective link. According to this doctrine, a person should be entitled to citizenship from states with which he has a real and effective relationship. At the very least, a person should be entitled to the citizenship of the country with which he is most closely related. A significant connection with the state may arise, for example, from living in the territory of the state for a long time, being born in the territory of the state, etc. The doctrine of genuine and effective link is a very important method of addressing the problem of statelessness. Indeed, it is difficult to find a person without real and effective link with the state. However, as a practical matter, a sovereign state has the right to determine who acquires its citizenship. However, this right must be in accordance with relevant international standards and laws. At a minimum, these standards impose an international obligation on states to reduce statelessness, to respect the human rights of the stateless, and to grant citizenship to all children born within state borders [1].

In scientific literature, most authors note the following cases of statelessness: if a person has lost the citizenship of his country and has not yet accepted the citizenship of another country; If a woman who is a citizen of a country based on the principle of "the wife must be accepted into the citizenship of the husband" has entered into marriage with a citizen of a foreign country (if the legislation of the country of which that foreigner is a citizen does not automatically grant this woman her own citizenship).

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Due to the different regulation of the conditions for obtaining the citizenship of one state and the loss of the citizenship of another state, as well as due to the existence of different criteria and principles for obtaining and losing citizenship, such a situation arises that a certain natural person does not fulfill the conditions for obtaining the citizenship of any of the states and no state considers that person as its citizen, as a result of which this person acquires the status of stateless person [2].

The problem of regulating the status of stateless persons in the institution of citizenship is one of the most complex problems. Statelessness is undesirable for states and may even create conditions for international disputes and conflicts regarding the regulation of entry and exit of stateless persons (especially regarding their deportation to other states).

Within the framework of statelessness, two types of stateless persons are defined: "absolute" and "relative" statelessness. Absolute statelessness arises by birth (for example, a person's parents are stateless, and because the person was born on the territory of a "right of blood" state, he does not acquire any citizenship). Relative statelessness occurs as a result of loss of citizenship. A distinction is also made between "de jure" and "de facto" statelessness [3]. Refugees are de facto stateless if not recognized as de jure stateless.

There may be different reasons for the emergence of statelessness. This situation may also arise when a person loses the citizenship of one country and cannot acquire another citizenship. Statelessness can also arise as a result of marriage. For example, if a woman who marries a foreigner loses her citizenship, and her husband's state does not grant her citizenship automatically, then that woman becomes a stateless person. Also, in the preamble of the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, it is emphasized that one of the main sources of statelessness is related to the legal succession of states [4].

Stateless persons have fewer rights and freedoms in their country of residence. As a rule, their use of civil and political rights is restricted, and they are deprived of the opportunity to apply for diplomatic protection.

Differences in the legal status of citizens and stateless persons are quite important. This issue has been repeatedly paid attention to in the legal literature and in the activities of international organizations. For example, in 1980, Baroness Ellis, the special rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, prepared the study "International Provisions Protecting the Human Rights of Non-Citizens". A number of current directions for solving the problems mentioned in that study were determined.

In general, for national minorities in Europe, as well as within the international community as a whole, the problem of citizenship or dual citizenship is part of a more global problem, that is, the problem of identity. The identity problem is related to the right to self-determination and decision-making. When it comes to citizenship, there are and should be several areas that national minorities should explore. The most optimal way to protect people belonging to minorities is to leave the solution of that issue to the relevant minorities, to give them the opportunity to choose [5].

The socio-economic situation of stateless persons in terms of education, employment and housing is very weak. Even immigrants who have the right to work and live at the same level as citizens (those with stateless status) are deprived of finding a job in the public sphere of activity. For example, in some states of the United States,

jobs in administrative and judicial bodies are valid only for citizens of the United States, because they have the right to participate in the administration of the state. Such restrictions exist in most countries.

However, it should be noted that for the attraction of foreign capital, cheap labor and other purposes, in a number of countries, taking into account the state interests, exceptions to the rules on technical and working personnel are provided [6]. In the field of entrepreneurial activity, basically all countries are based on the principle of legal equality of citizens and persons with other legal status. But in some countries, a special permit is required for this type of activity for stateless persons, who have an insufficient period of residence. For example, in Germany, it is necessary to have the right of permanent residence for 8 years. All this shows that stateless persons need special social protection from the state.

Stateless persons have the right to work according to their abilities, choose the type of activity and profession, have the right to rest, social security, health protection, get an education, own an apartment, and become an entrepreneur. They enjoy the freedoms granted to citizens (speech, opinion, conscience, etc.) and their rights to personal integrity and housing are guaranteed.

However, the political and legal status of this category of persons has its own characteristics in different states. They do not have the right to vote and be elected, they are not called to serve in the armed forces, their right to choose the type of occupation is somewhat limited, stateless persons cannot hold a number of positions, if according to the law it is related to the presence of the criterion of citizenship.

We can agree with such an idea that statelessness manifests itself from a negative point of view in human rights. For this reason, states at the level of national legislation, and the international community, through the conclusion of international conventions, carry out important activities to increase the number of stateless persons and reduce statelessness in general.

Many states, including AR, are interested in reducing statelessness. The legislation of most states provides mechanisms for obtaining citizenship by foreign nationals and stateless persons. In addition, states also establish a number of rules and procedures that prevent the emergence of statelessness. As a rule, those rules touch on the issues of acquisition and loss of citizenship as a result of birth, entering into marriage. Those rules and procedures often do not regulate issues related to the deprivation of citizenship of persons who voluntarily cut off actual link with the relevant state or engaged in activities directed against the sovereignty of that state.

The possibility of becoming stateless at the time of marriage is denied in the legislation of a number of states: either it is determined that the marriage does not affect the citizenship of the spouses, or a new citizenship is granted to a woman who loses her citizenship at the time of marriage.

States usually eliminate existing cases of statelessness by applying the following rules: granting the right to citizenship to stateless persons; refusal to remove citizenship; to enact laws of a general or special nature aimed at eliminating statelessness.

Until the collapse of the USSR, there was a steady trend of reducing the number of stateless persons within the Union, and both domestic and international legislation had an unambiguous position in this direction. Currently, this process has weakened enough and even in the CIS countries there is an increase in the number of stateless persons. The main reason for this phenomenon is, first of all, the denial of dual

citizenship in the legislation of the former allied republics, and the existence of various barriers at the time of citizenship.

Thus, certain differences between the rights and duties of citizens and stateless persons automatically arise. For example, the Latvian Human Rights Office prepared a list of 68 differences between the rights and duties of citizens and stateless persons [7].

International legal norms on the reduction of statelessness are reflected in a number of international conventions. In the preamble of the Hague Convention Relating to the Conflict of Nationality Laws of June 12, 1930, it is stated that all mankind should try as an ideal to completely abolish statelessness within the framework of the matter of citizenship [8]. According to Article 7 of the Convention, a person who has lost the citizenship of one country shall not lose his original citizenship until he acquires the citizenship of another country. Marriage of a woman with a foreigner or change of her citizenship by her husband should not be grounds for her to become stateless.

A very important point is clarified in the Hague Convention. Children of unknown persons must acquire citizenship at the place of birth or at the place where they were found (art. 14, 15). If the adoption of a child leads to the loss of the child's previous citizenship, then such loss can occur only if the child acquires the citizenship of the adopters at the same time (art. 16, 17) [9].

The Universal Declaration of Human Rights of 1948 declares the right to citizenship (Article 15.1). Part 2 of that Article states that no one can be deprived of his citizenship and the right to change his citizenship. International law has contributed significantly to the improvement of the legal status of stateless persons, which brings them closer to the status of foreigners, particularly as reflected in the 1954 Convention relating to the Status of Stateless Persons. The Convention emphasizes that every stateless person has obligations towards the country of his/her residence, which includes compliance with the laws and regulations in force for the establishment of public order (Art. 2). The Convention also states that the Contracting States shall apply the provisions of the present Convention to stateless persons without regard to race, religion or their origin. At the same time, the Convention does not prohibit granting other rights to stateless persons, other than the rights and freedoms provided by the Convention (Article 5). The Convention imposes an obligation on states to equate the status of foreigners with the status of stateless persons, where we are talking about the status under domestic law (art. 7) [10]. It does not include rights to diplomatic protection by the home state, which foreigners have, nor does it extend to rights provided by treaties with their country. Every stateless person has the right of free access to the courts in the territories of the Contracting States (art. 16). Contracting States shall grant to stateless persons lawfully resident in their territory more favorable treatment than that enjoyed by aliens in obtaining employment.

Stateless persons, under certain conditions, enjoy rights and benefits as an exception to the principle of reciprocity. The exceptional measures applied to nationals or former nationals of a foreign state cannot be applied to stateless persons on the ground that they previously held the citizenship of that state. But in emergency situations, the state can apply such temporary measures to them, which it considers necessary from the point of view of national security.

Only de jure stateless persons are covered by the 1954 Convention, de facto stateless persons are not covered. Refugees fall within the scope of this Convention only if they are considered de jure stateless persons. The 1954 Convention establishes a certain legal

regime for stateless persons in the territory of the participating states. The Convention protects their personal status, property rights, provides some concessions in the field of education, entrepreneurship, employment, etc. This Convention mandates the States Parties to provide stateless persons with a legal regime no less than that enjoyed by foreign nationals residing in their territory. Stateless persons enjoy the full range of rights in the territory of the state where they have their permanent residence.

The 1961 Convention on the Reduction of Statelessness mandates States Parties to grant citizenship to any person born on its territory who would otherwise be stateless. In such cases, citizenship is granted either at birth in accordance with the law or at the request of the person or his representative. Children of unknown parents found on the territory of the state also acquire citizenship by "right of the soil". In connection with this issue, it should be noted that today very few states give preference to one of the parents when determining the child's citizenship. Presumably, this issue is resolved with the consent of the parents.

The Convention considers renunciation of citizenship possible and rejects the principle of depriving a person of citizenship (if as a result he becomes a stateless person). However, the cancellation of illegally obtained citizenship or the deprivation of such citizenship is considered legal. It should be noted that some countries require the relinquishment of their previous citizenship and the submission of relevant documents proving this fact for the granting of citizenship. The Convention also specifies the obligations of the contracting states to reduce the number of stateless persons and when the sovereignty of a certain territory changes.

The goal of this Convention is to create a favorable regime for stateless persons to acquire the citizenship of the country of their permanent residence and to prevent cases of a person becoming stateless during expatriation. Also, the Convention unifies the procedures for acquiring and losing citizenship in order to reduce the number of stateless persons.

In addition, another important feature of the Convention is that it includes the provisions that provide for the establishment of an international body with the authority to consider appeals by stateless persons regarding non-fulfillment of its provisions. By the Resolution of the UN General Assembly dated November 30, 1976, the functions of such a body were assigned to the UN High Commissioner for Refugees.

The Convention on the Nationality of Married Women dated 1957 established the provisions to eliminate cases of statelessness arising as a result of a woman's marriage.

The 1997 European Convention on Nationality contains a number of principles and provisions aimed at reducing statelessness. The principles of citizenship established in Article 4 of the Convention are mainly derived from generally accepted principles of international law and the basic norms of international law in the field of human rights protection. For example, the following norms are established in this Convention: everyone's right to citizenship; the obligation to avoid statelessness; inadmissibility of arbitrary deprivation of citizenship; entry into marriage or its dissolution, as well as the change of citizenship by one of the spouses, does not affect the citizenship status of the spouses [11].

The list of grounds for deprivation of citizenship is specified in Article 7 of the Convention. The European Convention on Nationality prohibits states from depriving a person of their nationality if this action would result in the status of a stateless person. However, cases of obtaining citizenship by false or other illegal means are an exception.

The Convention provides that a state party may allow a person to renounce their nationality, but such renunciation shall not render the person stateless.

The 1997 Convention also states that each State Party must provide for rules in its domestic law that facilitate the acquisition of its nationality by stateless persons. However, the Convention does not provide for any specific obligations towards stateless persons. This is due to the fact that the participating states are not yet fully prepared to define specific obligations in their legislation towards stateless persons.

Within the framework of the CIS, at the regional level, there is also a process of creating norms aimed at regulating issues related to the status of stateless persons. On December 29, 1992, the Interparliamentary Assembly of Member Nations of the CIS developed a recommendatory Act on the harmonized principles of citizenship regulation. This document focuses on the protection of human rights and the reduction of statelessness in the CIS countries. This document emphasizes the importance of the following principles: every person's right to citizenship and its replacement, equality of citizenship, inadmissibility of deprivation of citizenship due to social origin, property status, race and nationality, gender, education, language, religion, political and other views, nature of occupation. The aforementioned document encourages the acquisition of citizenship by stateless persons [12].

Most states view statelessness as a negative phenomenon and try to eliminate it in their domestic and international legal practice. However, the issue of statelessness remains one of the most acute problems in the internationalization of citizenship. This is explained by the fact that few states participate in those international agreements, or even if they do, they do not take appropriate measures to implement those international norms. Today, the leading role in the prevention of statelessness still belongs to domestic legislation. For this reason, it is necessary to include international legal principles on citizenship in the laws on citizenship in order to solve the issues of statelessness. At the same time, uniform norms and principles should be formed in matters of acquisition and loss of citizenship. The European Convention on Nationality dated 1997 can be mentioned as one of the important steps in this sphere.

Thus, stateless persons are a special category of people whose legal status is regulated by slightly different rules and requires special treatment. The need to adopt special international agreements in this field has confirmed this once again. In general, stateless persons have practically the same rights, freedoms and obligations as foreigners, except for some differences. In order to achieve more effective regulation, the legal status of stateless persons and the provisions of the international agreement on the elimination of statelessness should be created in the national legislation of the states. At the same time, all the circumstances that can lead to the state of statelessness should be completely eliminated in the national legislation of the states.

References:

1. Weissbrodt D. The Human Rights of Stateless Persons // Human Rights Quarterly, 2006, N 28, p. 276.
2. Bendevsky T. International private law. Moscow, 2005, c. 85 (in Russian).
3. Rhoda E. Howard-Hassmann, Margaret Walton-Roberts. The Human Right to Citizenship: A Slippery Concept. University of Pennsylvania Press, 2015, p. 31-45.
4. Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR. United Nations Publications, 2007, p. 1431.

5. Turp D. Dual Nationality in International, European and Constitutional Law // Europa Ethnica, 2016, Vol.73(1/2), p. 7.

6. Martindale H. International Law Digest (Argentina - Venezuela). Law-Digests: Selected International Conventions. London WC2A 1EL, England, 1995, – p. 5.

7. Latvian Human Rights Office: Activity report for the 2nd quarter of 1996 (01.04.1996 -30.06.1996). Riga: LV 1011. p. 11.

8. Aleinikoff, A. Citizenship Today: Global Perspectives and Practices. – New York: Brookings Institution Press, 2010. p. 100.

9. The Hague Convention on Nationality:
https://www.refworld.org/docid/3ae6b3b00.html, last access – 18.09.2023.

10. The Convention Relating to the Status of Stateless Personshttps: // www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf, last access – 23.12.2023.

11. Vonk O. Dual Nationality in the European Union: A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States. – Leiden: Martinus Nijhoff Publishers, 2012, p. 46.

12. Interparliamentary Assembly of Member Nations of the CIS // Information Bulletin, 1993, No. 2, pp. 20-21 (in Rissian)

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BALANCING ACT: FREEDOM OF EXPRESSION VERSUS PROTECTION OF HONOR IN THE DIGITAL WORLD

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Abstract

In the digital age, the interplay between freedom of expression and the protection of honor has become a critical issue, as the internet facilitates both the free exchange of ideas and the potential for harm to personal dignity. This article examines the historical evolution of these rights and their contemporary challenges in the online environment. While freedom of expression is foundational to democratic societies, enabling individuals to voice opinions and participate in public discourse, it often clashes with the right to protect one's honor from defamation, harassment, and privacy invasion. The European Court of Human Rights (ECtHR) plays a pivotal role in balancing these rights, particularly in cases involving public figures where the limits of acceptable criticism are broader. However, the rapid spread of misinformation and the anonymity afforded by the internet complicate efforts to protect individuals' reputations. The article highlights and illustrates these tensions and proposes legal frameworks to better align the protection of honor with freedom of expression in the digital realm. Ultimately, the article advocates for a nuanced approach that considers both national and international legal precedents while promoting digital literacy and responsible online behavior to foster a more respectful and inclusive digital public sphere.

Keywords: *freedom of expression, protection of honor, human rights, cyberbullying, defamation, digital communication, public discourse, online privacy, misinformation, digital literacy, social media regulation, ECtHR, ECHR.*

Introduction

In the age of digital communication, the clash between freedom of expression and the protection of honor has reached unprecedented heights. The internet, with its boundless potential for connectivity and discourse, has become the base of both free speech and a battleground for the preservation of personal dignity. As individuals navigate the vast expanse of online platforms, they encounter a complex web of rights and responsibilities, where the right to express oneself freely must be balanced against the need to safeguard one's reputation and integrity. From the vibrant exchanges of ideas on social media to the darker corners of cyberbullying and defamation, the digital world presents a mass of challenges and opportunities for upholding these fundamental rights. On one hand, freedom of expression stands as a pillar of democratic societies, empowering individuals to voice their opinions, challenge authority, and participate in public discourse. On the other hand, the right to protection of honor and dignity ensures that individuals are shielded from harm, defamation, and invasion of privacy. In this balancing act between freedom and protection, individuals, and lawmakers grapple with complex questions about where to draw the line. How do we foster a vibrant digital public sphere while also safeguarding individuals from online abuse? And how can we ensure that the principles of freedom of expression and protection of honor remain steadfast in the face of ever-evolving digital landscapes?

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Why is there a clash between freedom of expression and the right to protection of honor and dignity?

In the dynamic landscape of digital communication, the dispute between freedom of expression and the right to protection of honor and dignity has reached new heights. As online platforms become the battleground for ideas, opinions, and interactions, navigating the delicate balance between these fundamental rights poses significant challenges for lawmakers, internet users, and content moderators alike. At the heart of this balancing act lies the tension between two core principles: *the right to express oneself freely and the right to be protected from defamation, harassment, and invasion of privacy*. While freedom of expression is enshrined as a fundamental human right in many legal systems, it is not an absolute right and must be balanced against other rights, including the right to dignity and reputation. In the digital world, where opinions can spread like wildfire and misinformation can go viral in an instant, maintaining this balance is not easy. On one hand, the internet provides a platform for individuals to express themselves, engage in public discourse, and hold those in power accountable [9]. On the other hand, it also opens the door to abuse, harassment, and the dissemination of false or harmful information that can tarnish reputations and cause irreparable harm to individuals' dignity. While freedom of expression is a fundamental right, it is not absolute, and there are legitimate concerns about the impact of online abuse on individuals' mental health, reputation, and democratic discourse. Balancing these competing interests requires a nuanced approach that takes into account the unique challenges of the digital world while upholding core principles of human rights and dignity. Freedom of expression and the right to honor are both essential rights, holding equal importance. They are recognized as human rights, intrinsic to everyone, and protected by various international human rights agreements [9]. When these fundamental rights clash, conflicts should be resolved by considering both national and international laws and precedents to determine which right takes precedence or should be limited in each specific situation [9]. Except for the right to life, all fundamental rights are relative and have boundaries, as the exercise of one right must respect the exercise of another [9].

Historical context of freedom of expression and protection of honor and dignity

To understand the clash between freedom of expression and protection of honor in the digital world, it's essential to examine their historical evolution and how they intersect in different contexts.

Since *ancient civilizations* period, freedom of expression historically developed whereas in Greece philosophers like Socrates defended the right to speak freely. During the *Middle Ages*, freedom of expression was often constrained by religious and political authorities. However, the *Renaissance* saw a revival of interest in classical ideas of free speech and intellectual inquiry [8]. *The Enlightenment of the 17th and 18th centuries* marked a watershed moment for the concept of freedom of expression. Philosophers such as Voltaire, Montesquieu, and Rousseau advocated for the importance of free speech as a cornerstone of liberal democracy [8]. The emergence of the printing press facilitated the dissemination of ideas and fueled debates about censorship, leading to calls for greater tolerance and freedom of the press. *The American and French Revolutions of the late 18th century* enshrined freedom of expression as a fundamental human right. The First Amendment to the United States Constitution, adopted in 1791, guarantees freedom of speech, press, assembly, and petition. Similarly, the French Declaration of the Rights of Man and the Citizen indicated the freedom of speech and the press as natural and inalienable rights. *The 19th and 20th*

centuries saw the expansion and codification of freedom of expression in international law. The fundamental right to freedom of expression was established in documents like the International Covenant on Civil and Political Rights (1966) and the Universal Declaration of Human Rights (1948). However, this period also witnessed challenges to free speech, including censorship during times of war and political repression under authoritarian regimes. The advent of the internet and digital communication technologies has revolutionized the landscape of freedom of expression in the *21st century* [8].

The notion of protecting honor and dignity also has a long history, rooted in cultural and religious traditions that emphasize the importance of preserving one's reputation and integrity. Ancient cultures including Mesopotamia, Egypt, Greece, and Rome were woven together largely by ideas of honor and dignity [10]. In these communities, reputation, family history, and conformity to social norms were frequently considered indicators of honor. Violations of honor, such as defamation or betrayal, were met with social ostracism or legal repercussions. During *Medieval Europe*, the idea of honor took on new dimensions, particularly in the context of chivalry and feudalism. Knights were expected to uphold codes of conduct that emphasized courage, loyalty, and integrity [11]. The notion of personal honor became intertwined with notions of nobility and virtue. *The Renaissance* witnessed a resurgence of interest in classical ideals of honor and virtue. Renaissance humanists such as Petrarch and Castiglione explored the concept of the "gentleman" as someone who embodied both intellectual and moral excellence. Similarly, Enlightenment thinkers like Immanuel Kant and Jean-Jacques Rousseau emphasized the importance of individual dignity and autonomy. *The modern concept* of protecting honor and dignity finds expression in legal frameworks that safeguard individuals' rights and reputations. For example, defamation laws emerged in the 17th and 18th centuries to protect individuals from false statements that harm their reputation [11]. Similarly, privacy laws have evolved to safeguard individuals' dignity and autonomy, particularly in the context of intrusive media practices and technological advancements. Human rights movements that promoted the defense of honor and dignity as essential rights came into being in the 20th century. The right to privacy, reputation, and dignity are fundamental elements of human dignity, also as stated in documents like the European Convention on Human Rights (1950) and the Universal Declaration of Human Rights (1948) [11].

As mentioned before, with the advent of the internet and digital communication technologies, the intersection between freedom of expression and protection of honor has become more pronounced. The internet has democratized access to information and provided a platform for individuals to express themselves freely. However, it has also facilitated the spread of harmful content, such as hate speech, cyberbullying, and false information, which can tarnish reputations and damage individuals' dignity.

The rise of social media platforms in the early 2000s further complicated this dynamic. Social media offers unprecedented opportunities for individuals to share their thoughts, connect with others, and participate in public discourse. However, it also created new challenges in moderating content and protecting users from abuse. The anonymity and reach of social media enabled malicious actors to engage in cyberbullying, harassment, and defamation with impunity.

Governments and policymakers have responded to these challenges by enacting laws and regulations aimed at protecting individuals' rights online. These include laws against cyberbullying, defamation, and hate speech, as well as data privacy regulations

aimed at safeguarding individuals' personal information. However, enforcing these laws in the digital realm presents unique challenges, such as jurisdictional issues and the role of intermediaries like social media companies in moderating content.

Case study

Freedom of expression can impact the reputation and dignity of politicians in various ways. This topic is sensitive concerning the equality of citizens, regardless of their societal position. However, it's important to consider the unique actions and characteristics of individuals in this context. For instance, ECtHR ruled that the limits of acceptable criticism are wider for politicians than for ordinary individuals [1]. Unlike ordinary individuals, politicians must inevitably and consciously accept the rigorous scrutiny of their every word and deed by journalists and the general public. Consequently, they must show a greater degree of tolerance [1]. Mr. Lingens, a journalist, had published several articles describing the Austrian Chancellor as being "immoral" and "undignified," displaying "the most detestable opportunism" [1]. Following a complaint by the Chancellor, Lingens was fined by the Austrian courts for insult, as they determined that the Chancellor's reputation had been damaged [Lingens v. Austria]. ECtHR examined the context, noting that the articles were written after a general election and before the formation of a governing coalition [1]. In such circumstances, politicians are expected to tolerate a higher degree of scrutiny and criticism regarding matters of public interest conveyed through the media [1]. In the case of Oberschlick v. Austria, the analysis centered on a term used by a journalist "idiot" to describe a political speech by an Austrian politician [1]. While the term "idiot" might seem like a personal attack and gratuitously offensive on its own, the court must examine the entire context in which it was used when a complaint is filed [1]. In this instance, the ECtHR determined that the term, though insulting, was used to critique a political speech by Mr. Haider, a political party leader [Oberschlick v. Austria]. The court recognized it as a value judgment of the politician's speech, albeit disproportionate to the message. Thus, the protection of freedom of expression extends even to words that may shock, offend, or disturb [1].

Exercising certain personal rights can often interfere with the rights of others, leading to conflicts. For example, using the right to freedom of expression might harm someone's dignity, honor, public image, and reputation. Protecting these aspects is a common reason for limiting freedom of expression, creating a clash between fundamental democratic values [7, p.114-126]. The European Convention on Human Rights (ECHR) doesn't specify how states should protect the right to honor and reputation, so different countries use both civil and criminal laws. However, ECtHR stresses that sanctions on freedom of expression shouldn't have a chilling effect. In some cases, ECtHR has found even minor, non-criminal penalties to be disproportionate when the restriction on freedom of expression isn't well-justified [7, p.114-126].

ECtHR balances reputation protection and freedom of expression by evaluating whether a publication contributes to a debate of public interest [5]. Public interest information includes topics like national security, public order, human rights, and factors affecting societal welfare [5]. Information that significantly impacts society and is of legitimate public interest is protected. Certain criteria are used by ECtHR [1]:

1. Contribution to public interest discussion.
2. Publicity of the person involved.

3. Topic of publication.
4. Previous behavior of the person.
5. Method of obtaining information.
6. Form, content, and consequences of the publication.
7. Degree of punishment.

Distinguishing between facts and value judgments is crucial, as facts can be proven, but value judgments should be based on factual components [1]. The purpose of the publication is also important, differentiating between information meant to foster public debate and that aimed at defamation or satisfying unhealthy curiosity. The judiciary may use linguistic expertise to make these determinations [1].

Changes in criminal legislation are needed to balance media freedom with protecting individuals' honor and reputation. Simply abolishing defamation laws doesn't solve the issue, as every criminal act against honor and reputation can restrict media freedom [6]. Instead, aligning criminal penalties with European standards, focusing on banning "hate speech" and incitement to violence, could be more effective [6]. ECtHR advises against criminal proceedings for defamation but allows for appropriate measures against baseless or malicious accusations. ECtHR's rulings suggest that compensation for non-material damages can sometimes excessively restrict freedom of expression [6]. National courts should follow these guidelines, avoiding punitive damages that could deter freedom of expression. Judges in Serbia are cautious about awarding non-material damage compensation for harm to honor and reputation, influenced by the country's economic situation [6]. Overall, there seems to be a current emphasis on protecting freedom of expression over personal rights protection [6].

Challenges and opportunities of two fundamental rights working together

Having both freedom of expression and protection of honor in the digital age leads us to discuss the opportunities and challenges of these fundamental rights working together. The internet democratizes access to information, empowering marginalized communities and amplifying voices that may have been historically silenced. Online platforms serve as powerful tools for activism and advocacy, enabling individuals and organizations to mobilize support, raise awareness, and effect change on a global scale. Conversely, the swift dissemination of misinformation and fake news on social media erodes trust in information sources and threatens public discourse and democratic processes. The anonymity and reach of the internet can facilitate *cyberbullying and harassment*, causing psychological harm and infringing on individuals' right to dignity and safety. The gathering and utilization of personal data by technology companies spark concerns about privacy breaches and surveillance, jeopardizing individuals' autonomy and their right to privacy. The challenge of effectively *moderating content* on online platforms raises questions about censorship, freedom of speech, and the role of intermediaries in regulating online discourse.

To solve these challenges of balancing freedom of expression with the protection of honor in the digital world, there are a few proposals. Introducing legislation that clearly defines and prohibits online defamation, providing legal recourse for individuals whose reputation has been harmed by false or defamatory statements made online. There can be a *Social Media Responsibility Act*, to hold social media platforms accountable for their role in facilitating harmful online behavior by imposing legal obligations to prevent and address harassment, defamation, and other forms of abuse on their platforms. Implement penalties for platforms that fail to comply with these obligations. Creating *Digital*

Citizenship Education Law, and integrating digital citizenship education into school curricula to teach students about their rights and responsibilities as digital citizens, including respect for others' rights to dignity and privacy online. Provide resources and training for educators to deliver effective digital citizenship education

By implementing these law proposals, policymakers can help mitigate the challenges posed by the digital world while upholding the principles of freedom of expression and protecting individuals' honor and dignity online.

Conclusion

As we navigate the complexities of the digital world, the tension between freedom of expression and protection of honor remains ever-present. While the internet has democratized communication and expanded the reach of free speech, it has also exposed individuals to unprecedented risks and vulnerabilities. As we move forward, it is imperative that we strike a delicate balance between these competing rights, fostering an online environment that is both inclusive and respectful.

This requires a multi-faceted approach that involves collaboration between governments, tech companies, civil society, and users themselves. Legal frameworks must be strengthened to address online abuse and protect individuals' rights, while technological innovations can help empower users to control their online experiences. At the same time, fostering digital literacy and promoting responsible online behavior is essential for creating a culture of respect and dignity in the digital age.

Ultimately, by upholding the principles of both freedom of expression and protection of honor, we can create a digital world that reflects the values of democracy, equality, and human dignity. As we navigate the challenges ahead, let us remain vigilant in our commitment to preserving these fundamental rights for generations to come.

References:

1. Alforova, T. M., Koba, M. M., Lehka, . O. V., & Kuchuk, A. M. (2022). Right to Freedom of Expression v. Reputation Protection (Based on ECtHR Practice Materials). The Age of Human Rights Journal, 18, 311-330. https://doi.org/10.17561/tahrj.v18.6527, last access – 16.07.2023.

2. Case of Lingens v. Austria, App. No. 9815/82, 8 ECHR 103 (1986). https://hudoc.echr.coe.int/eng?i=001-57523, last access – 12.09.2023.

3. Case of Oberschlick v. Austria, App. No. 11662/85, 19 ECHR 389 (1991). https://hudoc.echr.coe.int/tur?i=001-57716, last access – 08.10.2023.

4. Erdos, D. (2021). Special, Personal and Broad Expression: Exploring Freedom of Expression Norms under the General Data Protection Regulation. Yearbook of European Law, 40, 398-430. https://doi.org/10.1093/yel/yeab004, last access – 16.09.2023.

5. European Convention on Human Rights, Nov. 4, 1950, ETS No. 5. https://www.echr.coe.int/documents/convention_eng.pdf, last access – 10.11.2023.

6. Mrvic, P., & Natasa. (2013). Decriminalization of defamation supremacy the freedom of expression to the right of honor and dignity. Strani Pravni Zivot (Foreign Legal Life), 2013(2), 43-58.

7. Salome, P. (2016). The right to freedom of expression with regards to the personality rights to honor and reputation. Journal of Law (TSU), 2016(1), 114-126.

8. Roşu, C. (2023). Freedom of Expression - Aspects of Judicial Practice Regarding Expression in a Political Context and Relation to the Right of Politicians to Dignity and Honor. Perspectives of Law and Public Administration, 12(1), 36-40.

https://ada.idm.oclc.org/login?url=https://www.proquest.com/scholarly-journals/freedom-expression-aspects-judicial-practice/docview/2801306987/se-2, last access – 22.11.2023.

9. Silvana, E. B., & Tania, V. G. (2018). Freedom of expression and the right to honor. Do these fundamental rights collide? Dilemas Contemporáneos: Educación, Política y Valore, I(1)
https://ada.idm.oclc.org/login?url=https://www.proquest.com/scholarly-journals/freedom-expression-right-honor-do-these/docview/2247182149/se-2, last access – 09.01.2024.

10. Müller, S. (2020). Concepts and Dimensions of Human Dignity in the Christian Tradition. Interdisciplinary Journal for Religion and Transformation in Contemporary Society, 6(1), 22-55. https://doi.org/10.30965/23642807-00601003, last access – 19.12.2023.

11. Lewis, M. (2007). A Brief History of Human Dignity: Idea and Application. In: Malpas, J., Lickiss,N. (eds) Perspectives on Human Dignity: A Conversation. Springer, Dordrecht.

https://doi.org/10.1007/978-1-4020-6281-0_8, last access – 17.01.2024.

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SUBSIDIARITY IN LOCAL SELF-GOVERNMENT

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Abstract

The concept of subsidiarity is closely linked to local self-governance within the legal state. Subsidiarity dictates that issues should be resolved by the smallest, lowest, or least centralized competent authority. Local self-governance within the institutions of the legal state plays a decisive role in upholding the principle of subsidiarity. Subsidiarity is the fundamental principle of governance, dictating that issues should be resolved by the smallest, lowest, or least centralized competent authority capable of effectively addressing them. Subsidiarity is the main principle in the organization and operation of local government. This principle suggests that tasks should be carried out at the lowest level of governance with the necessary authority before being delegated to higher levels. Within the context of local governance, subsidiarity proposes that decisions should be made at the most efficient and effective level possible - at the level of municipalities and even at the level of communities. Local self-governance institutions play a crucial role as the primary mechanism for implementing the principle of subsidiarity, as they are closest to the citizens and are best positioned to understand and respond to their needs.

Keywords: *local self-government, democracy, decentralization, subsidiarity, municipality, community.*

1. Introduction

The principle of subsidiarity plays a fundamental role in establishing more responsible, participatory, and sustainable local governance. By allowing residents to have more direct involvement in decisions that directly impact their lives, it strengthens democratic processes. In addition, subsidiarity assists in achieving more efficient resource allocation and more adaptive governance by taking into account local characteristics and needs.

This introduction will explore the meaning of subsidiarity in the context of local governance and its impact on improving the quality of governance, enhancing community participation, and achieving sustainable development goals at the local level.

How does local self-governance within the legal state reflect and promote subsidiarity?

2. Decentralization of authority

Local self-governance entails the decentralization of decision-making authority from the central government to local authorities such as municipalities, localities, or districts. By transferring authority to the local level, subsidiarity ensures that governance responsibilities are entrusted to the most appropriate and competent authority, which is closest to the citizens affected by the decisions. This decentralization allows local authorities to address local issues and concerns more effectively because they possess intimate knowledge of their communities' specific needs, priorities, and conditions [1, p. 137].

Local self-governance exemplifies the principle of subsidiarity through the decentralization of authority within the structure of legal state institutions. Subsidiarity

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affirms that governance functions should be managed by the smallest competent authority capable of addressing them effectively. Local self-governance, through the decentralization of authority, reflects this principle as follows:

- Delegation of decision-making authority: Local self-governance envisages the transfer of decision-making authority and responsibilities from the central government to local authorities such as municipalities, localities, or districts. This transfer of authority allows local governments to make independent decisions within their jurisdictions that reflect the specific needs, priorities, and conditions of their communities. Subsidiarity decentralizes decision-making, ensuring that governance responsibilities are assigned to the government level closest to the citizens affected by the decisions.

- Individual governance solutions: Decentralization of authority enables local self-governance institutions to develop governance solutions tailored to local issues and opportunities. Local authorities possess intimate knowledge of their communities and can formulate policies, programs, and services that respond to local needs and priorities. This localized approach to governance ensures the efficient distribution of resources, enhances their impact, and increases relevance for local residents.

- Effective community representation: Decentralization of authority ensures effective representation of the community in the decision-making process. Local officials are elected by the residents of their communities and are accountable to them, creating direct communication between the governed and the government. This direct representation strengthens the democratic legitimacy of local governance institutions and ensures that decisions are made with the participation and consent of the local population [2, p. 155].

- Efficiency and accountability: Decentralization of authority enhances efficiency and accountability in governance by allowing decisions to be made at the level where they can be most effectively addressed. Local government authorities are better positioned to provide prompt and agile responses to local needs and concerns because they operate on a smaller scale and are closer to the communities they serve. This decentralized decision-making process reduces bureaucratic inefficiencies and improves the delivery of government services.

- Preservation of local autonomy: Decentralization of authority respects and preserves the autonomy of local self-governance institutions. Subsidiarity acknowledges the importance of local governance bodies in managing local affairs by decentralizing decision-making, ensuring they have the necessary authority to do so. This respect for local autonomy enhances trust and cooperation among various levels of government, promoting a more harmonious and balanced governance framework.

In summary, decentralization of authority in local self-governance institutions exemplifies the principle of subsidiarity within the legal state institutions system. By entrusting decision-making authority to the local level, local self-governance institutions ensure that governance responsibilities are delegated to the smallest competent authority capable of addressing them effectively. This enhances the overall efficiency, legitimacy, and responsiveness of governance within the legal state.

3. Solutions tailored to local needs

Subsidiarity enables local self-governance institutions to develop solutions tailored to local problems and opportunities. Local government authorities are better equipped to understand the unique socioeconomic, cultural, and ecological factors

shaping their communities, allowing them to formulate policies, programs, and services that address local needs and priorities. This localized approach to governance ensures the efficient and effective distribution of resources, enhancing their impact and relevance for local residents.

Local self-governance within the framework of legal state institutions serves as the primary mechanism for implementing the principle of subsidiarity through the provision of solutions tailored to local needs. Subsidiarity dictates that issues should be addressed by the smallest competent authority capable of resolving them effectively. Local self-governance achieves this as follows:

- Community-specific policies: Local self-governance allows for the formulation of policies and regulations tailored to the needs, priorities, and conditions of each community. Local government authorities, by gaining a deeper understanding of the challenges and opportunities facing their territories, can develop policies that are specific to the local context. This ensures that governance decisions are aligned with the unique characteristics and priorities of each community, rather than being uniformly applied across the entire jurisdiction [3, p. 13].

Delivery of individual services:

- Local self-governance allows for the individualized distribution of public services to meet the specific needs of local residents. By decentralizing authority, local government authorities can tailor service delivery models to respond to the unique requirements of their communities. For example, local governments can customize healthcare, education, transportation, and social welfare services to reflect the demographic, economic, and cultural characteristics of their areas. This localized approach ensures that services are accessible, efficient, and aligned with the needs of local residents.

- Flexibility in decision-making: Local self-government gives flexibility to local authorities to make decisions according to evolving local conditions. Decentralization allows local governments to respond quickly and effectively to emerging problems, changing circumstances, and community feedback. This flexibility allows local authorities to adjust policies, programs and services in real time, ensuring that management decisions are tailored to local needs and preferences.

- Innovative solutions: Local self-government promotes innovation and experimentation in governance by empowering local authorities to test new approaches and initiatives adapted to local contexts. Decentralization encourages the exploration of innovative solutions to local problems, using the creativity and ingenuity of local leaders and stakeholders. Successful innovations can be scaled up or replicated in other jurisdictions, contributing to broader systemic improvements and advances in governance practices [4, p. 322].

- Community participation: Local self-government promotes community participation in decision-making processes, ensuring that local residents have a voice in the formulation of policies and initiatives that affect their lives. Through mechanisms such as public consultation, citizen advisory councils and participatory budgeting, local authorities engage with residents to solicit input, gather feedback and build consensus around proposed measures. This participatory approach increases the legitimacy, effectiveness and sustainability of management decisions by incorporating diverse perspectives and local knowledge into the decision-making process.

In summary, in the system of institutions of the legal state, local self-government provides conditions for providing solutions adapted to local needs in accordance with the principle of subsidiarity. By decentralizing powers and empowering local authorities, local self-government ensures that governance decisions reflect, adapt and reflect the unique characteristics and priorities of each community within the rule of law.

4. Strengthening local communities

Subsidiarity enables local communities to actively participate in decision-making processes and shape the direction of governance in their area. Through mechanisms such as local elections, public consultations and participatory budgeting, citizens have the opportunity to voice their opinions, contribute ideas and influence policy outcomes. This citizen involvement helps to make decisions in accordance with the wishes and interests of the local population, and to increase the democratic legitimacy and accountability of local self-government institutions.

In the system of institutions of the legal state, local self-government plays an important role in embodying the principle of subsidiarity by expanding the powers of local communities. Subsidiarity dictates that decisions are made at the lowest level of authority capable of effectively resolving them. Local self-government gives local communities the following powers:

- Direct representation: Local self-governance ensures the direct representation of local communities in decision-making processes. Through local elections, residents have the opportunity to elect representatives to serve in local government bodies on behalf of their communities. These representatives are accountable to their constituents and advocate for the interests and needs of the local community in governance matters [5, pp. 8-9].

- Community participation: Local self-governance encourages community participation by providing residents with opportunities to engage in democratic processes. Mechanisms such as municipal assemblies, public consultations, and citizen advisory boards enable local government authorities to solicit input from community members on issues that affect them. This engagement allows residents to express their opinions, contribute ideas, and shape governance directions within their communities.

- Decision-making body: Local self-government devolves decision-making power to the local level, empowering communities to make decisions about their own affairs. Local authorities have the autonomy to develop and implement policies, programs and services that reflect the specific needs, priorities and values of their communities. This decentralization of authority ensures that management decisions are made by those who are most familiar with local conditions and concerns.

- Allocation of resources: Local self-government allows the allocation of resources based on the priorities of the local community. Local authorities have the power to allocate budgets and resources to meet local needs and provide essential services. This authority. enables communities to invest in projects and initiatives that promote economic development, social well-being and environmental sustainability according to their preferences and priorities.

- Community cohesion: Local self-government strengthens community cohesion by encouraging cooperation and collaboration among residents. By participating in local decision-making processes, residents develop a sense of ownership and responsibility for the well-being of their community. This empowerment strengthens

social ties, builds trust among community members, and encourages collective action to solve common problems and achieve shared goals [7, p. 44].

In summary, local self-government in a system of rule of law institutions empowers local communities by providing direct representation, enhancing community participation, devolving decision-making powers, enabling resource sharing, and promoting community cohesion. Embodying the principle of subsidiarity, local self-government ensures that governance decisions are made at the level closest to the people it affects, thereby empowering communities to shape their own destiny and improve their quality of life within the rule of law.

5. Efficiency

Subsidiarity promotes efficiency and effectiveness in governance by delivering decision-making to the level where it can be managed most efficiently. Local government authorities are typically better equipped to provide prompt and agile responses to local needs, as they operate on a smaller scale and are closer to the communities they serve. This localized decision-making process enables more agile governance, reduces bureaucratic inefficiencies, and strengthens the delivery of public services [12, p. 167].

In the system of institutions of the legal state, local self-government contributes to the principle of subsidiarity by promoting efficiency in management. Subsidiarity should be taken at the lowest level of authority that can effectively handle decisions. Local self-government achieves efficiency in the following way:

- Local knowledge and expertise: Local self-governance enables decision-making to be informed by local knowledge and expertise. Local authorities intimately familiar with the needs, challenges and opportunities of their communities are well placed to make informed decisions tailored to local circumstances. This localized approach ensures that management strategies are relevant and responsive, leading to more effective results.

- Sensitive decision-making: Local self-government allows quick and flexible decision-making. Decisions can be made quickly at the local level without the delays often associated with centralized decision-making processes. This flexibility allows local authorities to respond flexibly to emerging challenges, changing circumstances and community needs, ensuring that governance remains adaptive and effective.

- Effective resource allocation: Local self-government facilitates efficient allocation of resources based on local priorities. Local authorities have the power to allocate budgets and resources in a way that reflects the specific needs and preferences of their communities. This targeted allocation ensures that resources are used efficiently to address local challenges and deliver essential services, increase the impact of investments and promote good governance.

- Simplified governance: Local self-government contributes to streamlining governance and decision-making processes. Local authorities, operating on a smaller scale, often adopt more efficient and agile governance structures. This streamlined governance reduces bureaucratic inefficiencies and administrative costs, allowing resources to be directed towards community priorities [11, pp. 33-34].

- Accountability and performance: Local self-government strengthens accountability and performance through transparent governance practices. Local authorities are directly accountable to their constituents for the decisions they make and the results they achieve.

This accountability encourages local authorities to be efficient, as they are held accountable for delivering outcomes that meet community expectations.

- Innovation and experience: Local self-government promotes innovation and experience in governance. Local authorities have the freedom to test new approaches and initiatives tailored to local needs and circumstances. This innovation fosters a culture of continuous improvement that enables local governments to identify and implement best practices that improve governance efficiency [6, p. 23].

In summary, local self-governance in a system of legal state institutions increases efficiency through local decision-making based on local knowledge, responsive management processes, targeted resource allocation, simplified governance, accountability, action and a culture of innovation. Embodying the principle of subsidiarity, local self-government ensures that governance decisions are made at the level closest to the people they affect, leading to more effective outcomes for communities within the rule of law.

6. Respect for local autonomy

Subsidiarity acknowledges and supports the necessity of preserving the sovereignty and jurisdictional integrity of local self-government institutions, thereby respecting the principle of local autonomy. By honoring the authority of local governments to make decisions within their own jurisdiction, subsidiarity helps prevent undue interference or centralization of authority by higher levels of government. This respect for local autonomy strengthens trust and cooperation among different levels of government, promoting a more harmonious and balanced governance framework [10, p. 57].

In the system of legal state institutions, local self-government embodies the principle of subsidiarity by respecting and protecting local autonomy. Subsidiarity suggests that decision-making power should be delegated to the lowest level of government capable of effectively resolving issues. Local self-government provides the following opportunities to local autonomy:

- Decision-making power: Local self-government gives local authorities decision-making power and enables them to make choices about local policies, programs and services. This decentralization of power ensures that decisions are made by officials who are closest to the community and who deeply understand local needs, priorities and values. Subsidiarity promotes management decisions that reflect local circumstances and preferences, while respecting the autonomy of local authorities.

- Legal primacy: Local self-government respects the legal primacy of local authorities within defined geographical areas. Local governments have the power to enact laws, regulations and policies within their jurisdiction, provided they do not conflict with higher-level laws and do not violate fundamental rights. This respect for local legal autonomy ensures that local authorities are empowered to manage local affairs according to the specific needs and interests of their community.

- Financial independence: Local self-government promotes the financial independence of local authorities, enabling them to increase revenues and manage finances independently. Local governments have the authority to collect taxes, fees, and charges within their jurisdiction, allowing them to generate income for financing local services and infrastructure projects. This financial autonomy empowers local authorities

to make decisions regarding resource allocation and budget priorities without undue interference from higher levels of government [9, p. 68].

- Policy Flexibility: Local self-government provides policy flexibility to local authorities to address local problems and implement local objectives. Local governments have the freedom to adopt policies and strategies tailored to the unique needs, priorities, and conditions of their municipalities. This flexibility enables local authorities to experiment with innovative approaches, adapt to changing circumstances, and effectively respond to emerging challenges at the local level while maintaining autonomy and self-determination.

- Respectful mutual relations: Local self-government fosters respectful mutual relations among various government levels by recognizing each entity's distinct roles and responsibilities. In addition to utilizing autonomy in managing local issues, local government bodies collaborate with higher-level governments on mutually beneficial or common-interest matters. This collaboration is based on partnership and respect for local autonomy principles, ensuring that governance decisions are made jointly and transparently, taking into account local perspectives and priorities [8, p. 54].

In conclusion, it can be said that local self-government in the system of legal state institutions respects local autonomy by providing the authority to make local decisions, respecting the rule of law, promoting financial independence, ensuring policy agility, and fostering respectful mutual relations among various levels of government. Local self-government, by supporting the principle of subsidiarity, ensures that governance decisions are made at the closest possible level to the people affected, empowering municipalities to manage their local affairs according to their needs, values, and preferences.

References:

1. Finnis, J. M. Subsidiarity's roots and history: Some observations. The American Journal of Jurisprudence, 61 (1), 2006, pp. 133-141.

2. Gosepath, S. The principle of subsidiarity. In A. Føllesdal and T. Pogge (Eds.), Real world justice: Grounds, principles, human rights, and social institutions. Springer Science & Business Media 2005, pp. 153-166.

3. Jachtenfuchs, M., Krisch, N. Subsidiarity in global governance. Law and Contemporary Problems 79 (1), 2016, pp. 1-26.

4. Mowbray, A. Subsidiarity and the European convention on human rights. Human Rights Law Review, 15 (2), 2015, pp. 313-341.

5. Spicker, P. The principle of subsidiarity and the social policy of the European community. Journal of European Social Policy 1 (1), 1991, pp. 3-14.

6. Shahin, U. An evaluation on the principle of subsidiarity and Turkish public administration within the scope of effective provision of services closest to the public. Journal of Aksaray University Faculty of Economics and Administrative 10 (3), 2018, pp. 19-30. [in Turkish]

7. Tsvetkov, V. Subsidiarity management. European Journal of Economic Studies, 7 (1), 2018, pp. 42-47.

8. Ulusoy, A., Akdemir, T. Local Administrations, Distinguished, Ankara 2019.

9. Alexandrov, A.A. Civic participation in local government / Alexandrov, A.A, Tarbeev I.S. // Management consulting -2016, № 12, pp. 63-71. [in Russian]

10. Vydrin, I.V. On the right of citizens to local self-government in the context of reforming urban districts reform / I.V. Vydrin // Current problems of Russian law No. 11, 2015, pp. 54-61 [in Russian].

11. Rodkina, V.A. New forms of direct public participation local self-government / V.A. Rodkina, N.A. Mikhailova // Bulletin of Volgograd State University. Series 3, Economics. Ecology. 2017, № 4, pp. 31-39. [in Russian]

12. Shalaginov, P.D. Meetings and conferences of citizens as forms of public participation in the implementation of local self-government / P.D. Shalaginov // Legal science and practice: Bulletin of the Nizhny Novgorod Academy of the Ministry of Internal Affairs of Russia. - 2013. - No. 21. - pp. 165-169. [in Russian]

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THE ROLE OF LEGAL FRAMEWORKS IN SHAPING ETHICAL ARTIFICIAL INTELLIGENCE USE IN CORPORATE GOVERNANCE

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Abstract

This article examines the evolving role of legal frameworks in shaping ethical artificial intelligence (AI) use in corporate governance. As AI systems become increasingly prevalent in business operations and decision-making, there is a growing need for robust governance structures to ensure their responsible development and deployment. Through analysis of recent legislative initiatives, industry standards, and scholarly perspectives, this paper explores key legal and regulatory approaches aimed at promoting transparency, accountability, and fairness in corporate AI applications. It evaluates the strengths and limitations of current frameworks, identifies emerging best practices, and offers recommendations for developing more comprehensive and effective AI governance regimes. The findings highlight the importance of adaptable, principle-based regulations coupled with sector-specific guidance to address the unique challenges posed by AI technologies in the corporate sphere.

Keywords: *artificial intelligence, corporate governance, AI ethics, AI regulation, algorithmic accountability, legal frameworks, data protection, corporate law, technology policy, regulatory compliance, risk management, digital transformation.*

I. Introduction

The rapid advancement and integration of artificial intelligence (AI) into corporate operations has fundamentally altered the landscape of business decision-making and governance. As AI systems increasingly influence critical aspects of corporate function, from strategic planning to operational execution, the need for robust legal frameworks to guide their ethical development and deployment has become paramount. This article examines the complex interplay between emerging AI technologies, corporate governance structures, and legal regulatory frameworks.

The proliferation of AI in corporate settings presents both unprecedented opportunities and significant challenges. On one hand, AI technologies offer the potential for enhanced efficiency, data-driven insights, and innovative business models. On the other, they raise profound questions about accountability, transparency, and the potential for unintended consequences or biases that could significantly impact individuals and society at large.

The central question this paper addresses is: How can legal and regulatory frameworks effectively promote ethical AI use in corporate governance while fostering innovation? To explore this issue, we will examine several interconnected themes:

1. The evolving landscape of AI-specific regulations and their impact on corporate practices, including an analysis of the contrasting approaches taken by major jurisdictions such as the European Union and the United States.

2. The role of existing legal frameworks, particularly in areas such as data protection, antitrust, and corporate law, in governing AI applications and their adequacy in addressing novel challenges posed by AI technologies.

3. Industry-led initiatives and self-regulatory efforts to establish AI governance standards, evaluating their effectiveness and limitations in promoting responsible AI development and use.

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4. The challenges in balancing innovation with responsible AI development, exploring the tension between fostering technological progress and mitigating potential risks.
5. Emerging best practices and recommendations for comprehensive AI governance, drawing insights from current initiatives and scholarly perspectives.

By analyzing these topics, this paper aims to provide insights into the complex relationship between legal frameworks, corporate governance structures, and ethical AI development. The findings will contribute to ongoing discussions on how to design adaptive and effective governance regimes for rapidly evolving AI technologies in the business world.

As AI continues to transform corporate landscapes, the legal and regulatory frameworks governing its use must evolve in tandem. This article seeks to illuminate the current state of AI governance, identify key challenges and opportunities, and offer pathways for developing more robust and effective legal approaches to ensuring ethical AI use in corporate settings. In doing so, it aims to contribute to the crucial dialogue on how best to harness the transformative potential of AI while safeguarding fundamental rights, ethical principles, and the broader public interest.

II. Legal Frameworks and Corporate AI Governance: Current Landscape and Emerging Approaches

The rapid advancement and integration of artificial intelligence (AI) into corporate operations has necessitated a fundamental reevaluation of existing legal and regulatory frameworks. This section examines the evolving landscape of AI governance, focusing on key jurisdictions' approaches, the application of existing legal structures, and the emergence of industry-led initiatives. The complex interplay between these various elements presents both challenges and opportunities for the development of comprehensive and effective AI governance regimes.

1. The European Union's Comprehensive Strategy

The European Union has positioned itself at the forefront of AI regulation with its proposed Artificial Intelligence Act [1]. This legislation represents a significant departure from previous regulatory approaches, adopting a risk-based framework that categorizes AI systems based on their potential impact on individuals and society. The Act delineates four risk categories: unacceptable risk, high risk, limited risk, and minimal risk.

Systems deemed to pose unacceptable risks, such as those involving subliminal manipulation or social scoring by public authorities, are prohibited outright. This categorical prohibition reflects a strong precautionary approach, prioritizing the protection of fundamental rights over potential technological benefits. However, it also raises questions about the potential stifling of innovation in these areas and the challenges of defining and identifying "unacceptable" risks in a rapidly evolving technological landscape.

High-risk AI systems, which include applications in critical infrastructure, education, employment, and law enforcement, are subject to stringent requirements. These requirements encompass the implementation of risk management systems, high-quality data governance, detailed documentation and record-keeping, transparency and provision of information to users, human oversight, and robustness, accuracy, and cybersecurity measures. The comprehensive nature of these requirements reflects an attempt to address the multifaceted challenges posed by AI systems, but also raises

concerns about the potential regulatory burden on businesses, particularly small and medium-sized enterprises.

The Act's extraterritorial scope means that it will impact any entity providing AI systems or services within the EU market, regardless of their geographical location. This broad reach could potentially lead to a "Brussels effect," whereby EU standards become de facto global norms for AI governance. The extraterritorial application of the Act raises complex questions of international law and regulatory jurisdiction, potentially leading to conflicts with other regulatory regimes and challenges in enforcement.

While the EU's approach provides a comprehensive framework for AI regulation, it is not without criticism. Some argue that the stringent requirements could stifle innovation, particularly for smaller companies that may struggle with compliance costs. Additionally, the categorization of risk levels may prove challenging in practice, given the rapidly evolving nature of AI technologies. The Act's focus on ex-ante regulation also raises questions about its ability to adapt to unforeseen technological developments and its potential impact on the EU's competitiveness in the global AI market.

2. The United States' Sectoral Approach

In contrast to the EU's comprehensive strategy, the United States has thus far favored a more fragmented, sector-specific approach to AI regulation. This approach reflects the US's traditionally more market-driven regulatory philosophy and its emphasis on fostering innovation. The absence of overarching federal AI legislation has resulted in a patchwork of regulations and guidelines, with existing laws in areas such as consumer protection, antitrust, and civil rights being applied to AI-related issues.

The Federal Trade Commission (FTC) has emerged as a key player in AI governance in the US, asserting its authority to address unfair or deceptive practices involving AI under Section 5 of the FTC Act [5]. This approach leverages existing consumer protection frameworks to address AI-related issues, but it may be limited in its ability to comprehensively address the unique challenges posed by AI technologies.

The recent White House Executive Order on AI, issued in October 2023, marks a significant step towards a more coordinated national strategy [19]. The Order addresses various aspects of AI governance, including safety and security, privacy protection, equity and civil rights, consumer and worker protection, and the promotion of innovation and competition. It directs federal agencies to develop AI risk management frameworks, establishes new standards for AI safety and security, and aims to strengthen privacy guidance for federal agencies.

Key provisions of the Executive Order include:

1. Requiring developers of powerful AI systems to share safety test results with the U.S. government. This provision raises important questions about the balance between transparency and the protection of proprietary information, as well as potential challenges in defining and measuring "safety" in the context of AI systems.
2. Directing the National Institute of Standards and Technology (NIST) to develop guidelines for extensive red team testing of AI systems. While this approach aims to enhance the robustness and security of AI systems, it also raises questions about the standardization of testing methodologies and the potential for such tests to be gamed or circumvented.
3. Evaluating how agencies collect and use commercially available information containing personal data. This provision reflects growing concerns about data privacy

in the age of AI, but its effectiveness will depend on the development of clear guidelines and enforcement mechanisms.

4. Providing guidance to landlords, Federal benefits programs, and federal contractors to prevent AI algorithms from exacerbating discrimination. This approach recognizes the potential for AI systems to perpetuate or exacerbate existing societal biases, but its success will depend on the development of effective methods for detecting and mitigating algorithmic bias.

5. Developing principles and best practices to mitigate the negative impacts and maximize the benefits of AI for workers. This provision acknowledges the potential disruptive effects of AI on the labor market, but the development of effective policies in this area will require careful balancing of worker protection with the need for economic innovation and competitiveness.

6. Catalyzing AI research through a pilot of the National AI Research Resource. While this initiative aims to democratize access to AI research resources, it also raises questions about the appropriate role of government in driving technological innovation and the potential for such resources to be misused or exploited.

The US approach offers greater flexibility and potentially allows for faster adaptation to technological changes. However, it also risks creating regulatory gaps and inconsistencies across sectors and states. This fragmented landscape poses challenges for corporations operating nationwide, as they must navigate varying requirements and standards. The lack of a comprehensive federal AI law may also put the US at a disadvantage in shaping global AI governance norms, potentially ceding this role to other jurisdictions with more cohesive regulatory approaches.

3. Comparative Analysis of EU and US Approaches

The contrasting approaches of the EU and US to AI regulation reflect fundamental differences in regulatory philosophy and risk assessment. Smuha [17] highlights several key distinctions:

1. Scope: The EU's approach is comprehensive and applies across sectors, while the US approach is more fragmented and sector-specific. This difference reflects broader divergences in regulatory philosophy between the two jurisdictions, with the EU favoring a more centralized, harmonized approach and the US preferring a more decentralized, market-driven model.

2. Risk Assessment: The EU explicitly categorizes AI systems based on risk levels, while the US approach is more implicit in its risk assessment. The EU's approach provides greater clarity and predictability for businesses but may be less flexible in dealing with novel AI applications that don't fit neatly into predefined risk categories.

3. Prescriptiveness: The EU AI Act provides detailed requirements for high-risk AI systems, whereas the US approach generally relies on broader principles and existing legal frameworks. This difference raises questions about the relative merits of rules-based versus principles-based regulation in the context of rapidly evolving technologies.

4. Innovation Focus: The US approach places a stronger emphasis on fostering innovation, while the EU approach prioritizes risk mitigation. This reflects different societal values and priorities, with the US traditionally favoring a more laissez-faire approach to technological development and the EU placing greater emphasis on precautionary principles.

5. Enforcement: The EU proposes a dedicated enforcement mechanism for AI regulation, while the US relies more on existing regulatory bodies and their enforcement powers. The effectiveness of these different enforcement approaches in ensuring compliance and protecting individual rights remains to be seen.

These differences create challenges for multinational corporations, which must navigate varying regulatory requirements across jurisdictions. The potential for regulatory arbitrage and forum shopping by AI developers and users is a significant concern, as is the risk of conflicting compliance obligations for companies operating in both markets.

However, these divergent approaches also provide opportunities for regulatory learning and potential future harmonization of approaches. The coexistence of different regulatory models allows for comparative analysis of their effectiveness, potentially informing the development of more refined and universally applicable AI governance frameworks in the future.

The global nature of AI development and deployment underscores the need for international cooperation and coordination in AI governance. Efforts towards developing common principles and standards, such as those undertaken by the OECD and other international organizations, will be crucial in bridging the gaps between different regulatory approaches and fostering a more coherent global AI governance regime.

4. Industry-Led Initiatives and Self-Regulation

In response to the evolving regulatory landscape and the need for flexible governance mechanisms, many corporations and industry groups have launched self-regulatory initiatives. These efforts aim to establish voluntary standards and best practices for ethical AI development and use, reflecting a recognition of the potential reputational and operational risks associated with unethical or irresponsible AI practices.

Notable examples include the Partnership on AI, which brings together leading tech companies, academic institutions, and civil society organizations to collaborate on responsible AI practices. This multi-stakeholder approach reflects an understanding of the complex and interdisciplinary nature of AI governance challenges, but also raises questions about potential conflicts of interest and the ability of industry-led initiatives to adequately protect public interests.

The OECD Principles on Artificial Intelligence, adopted in 2019, represent a significant multilateral effort to establish guidelines for responsible AI development [14]. These principles emphasize:

1. Inclusive growth, sustainable development, and well-being
2. Human-centered values and fairness
3. Transparency and explainability
4. Robustness, security, and safety
5. Accountability

These principles have been influential in shaping both corporate practices and national AI strategies. However, their voluntary nature raises questions about enforceability and consistency. The lack of binding mechanisms to ensure compliance with these principles may limit their effectiveness in driving meaningful change in corporate AI practices.

Floridi et al. [10] propose seven essential factors for designing AI for social good:

1. Falsifiability and incremental deployment

2. Safeguards against the manipulation of predictors
3. Receiver-contextualized intervention
4. Receiver-contextualized explanation and transparent purposes
5. Privacy protection and data subject consent
6. Situational fairness
7. Human-friendly semanticisation

These factors provide a framework for corporations to consider when developing and deploying AI systems, particularly in contexts where the social impact of AI is significant. However, the practical implementation of these factors in complex AI systems remains challenging, and there is a need for more concrete guidance on how to operationalize these principles in diverse organizational contexts.

Other significant industry-led initiatives include the IEEE Global Initiative on Ethics of Autonomous and Intelligent Systems, the AI Now Institute, OpenAI, and AI4People. While these initiatives demonstrate a commitment to responsible AI development, their voluntary nature raises questions about enforceability and consistency. Critics argue that self-regulation alone is insufficient to address the full scope of AI governance challenges, highlighting the need for complementary regulatory frameworks.

The effectiveness of industry-led initiatives in promoting ethical AI use varies. While some corporations have made significant strides in implementing robust AI governance frameworks, others have been criticized for paying lip service to ethical principles without substantive changes to their practices [16]. This variability in implementation raises questions about the reliability of self-regulatory approaches and the need for external oversight and enforcement mechanisms.

The strengths of industry-led initiatives include flexibility to adapt quickly to technological changes, leveraging of industry expertise, and the potential to foster innovation while addressing ethical concerns. However, they also face weaknesses such as lack of enforcement mechanisms, potential conflicts of interest, and the risk of fragmentation leading to inconsistent standards across the industry.

The relationship between industry-led initiatives and formal regulatory frameworks is an area of ongoing debate. While some argue that self-regulation can complement and inform formal regulation, others contend that it may be used as a means to preempt or weaken more stringent regulatory measures. The appropriate balance between self-regulation and formal regulation in AI governance remains a key challenge for policymakers and industry leaders alike.

5. Application of Existing Legal Frameworks

While AI-specific regulations are still evolving, existing legal frameworks play a crucial role in governing corporate AI practices. Data protection regulations, particularly the EU's General Data Protection Regulation (GDPR), have emerged as key tools for governing AI systems [8]. The GDPR's principles of data minimization, purpose limitation, and the right to explanation for automated decisions have significant implications for AI development and deployment.

The GDPR includes several key provisions relevant to AI governance:

1. Data Minimization (Article 5(1)(c)): Personal data must be adequate, relevant, and limited to what is necessary in relation to the purposes for which they are processed. This principle poses significant challenges for AI systems that often require large datasets for training and operation. The tension between data minimization and

the data-intensive nature of many AI applications raises questions about the compatibility of current data protection frameworks with the realities of AI development.

2. Purpose Limitation (Article 5(1)(b)): Personal data must be collected for specified, explicit, and legitimate purposes and not further processed in a manner that is incompatible with those purposes. This principle can be problematic for AI systems that may find new, unforeseen patterns or uses for data. The inherent unpredictability of some AI systems, particularly those using machine learning techniques, challenges traditional notions of purpose specification in data protection law.

3. Right to Explanation (Articles 13-15, 22): Individuals have the right to meaningful information about the logic involved in automated decision-making. This right poses challenges for complex AI systems, particularly those using deep learning techniques, where the decision-making process may not be easily interpretable. The practical implementation of this right remains a subject of debate, with questions about what constitutes a "meaningful" explanation in the context of complex AI systems.

4. Data Protection Impact Assessments (Article 35): Organizations must conduct impact assessments for high-risk data processing activities, which would include many AI applications. The application of DPIAs to AI systems raises questions about the appropriate methodologies for assessing AI-specific risks and the capacity of organizations to conduct meaningful assessments of complex AI systems.

5. Data Protection by Design and by Default (Article 25): Organizations must implement appropriate technical and organizational measures to implement data protection principles and safeguard individual rights. This principle aligns with the concept of "AI ethics by design," but its practical implementation in AI development processes remains challenging.

The application of GDPR principles to AI systems raises complex legal questions. For instance, the requirement to provide "meaningful information about the logic involved" in automated decisions poses particular challenges for deep learning systems whose decision-making processes may not be easily interpretable [5]. The tension between the GDPR's data minimization principle and the data-hungry nature of many AI systems presents another challenge for corporate compliance [7].

In the United States, sector-specific laws have implications for AI systems:

1. Fair Credit Reporting Act (FCRA): Regulates the collection, dissemination, and use of consumer information, including in automated decision-making systems used in credit, employment, and insurance contexts. The application of FCRA to AI-driven credit scoring systems raises questions about the adequacy of traditional notions of "credit worthiness" in the age of big data and machine learning.

2. Equal Credit Opportunity Act (ECOA): Prohibits discrimination in credit transactions, which has implications for AI systems used in lending decisions. The use of AI in credit decisions raises complex questions about algorithmic bias and the potential for AI systems to perpetuate or exacerbate existing patterns of discrimination in lending practices.

3. Americans with Disabilities Act (ADA): Requires equal access to public accommodations, which could apply to AI-powered services and platforms. The application of the ADA to AI systems raises novel questions about what constitutes "reasonable accommodation" in the context of AI-driven services and the potential for AI to both enhance and hinder accessibility for individuals with disabilities.

4. Title VII of the Civil Rights Act: Prohibits employment discrimination, which is relevant to AI systems used in hiring and promotion decisions. The use of AI in employment decisions raises concerns about algorithmic bias and the potential for AI systems to perpetuate or exacerbate existing patterns of workplace discrimination.

These laws prohibit discrimination and often require explanations for adverse decisions, principles that are directly relevant to AI-driven decision-making processes. However, their application to complex AI systems raises questions about the adequacy of traditional anti-discrimination frameworks in addressing the unique challenges posed by algorithmic decision-making.

Antitrust law is another area where existing legal frameworks are being applied to AI-related issues. The concentration of AI capabilities among a few large tech companies has raised concerns about market dominance and potential anti-competitive practices. Key issues include:

1. Data Monopolies: The vast amounts of data held by large tech companies can create barriers to entry for new competitors in AI markets. This raises questions about the adequacy of traditional antitrust frameworks in addressing data-driven market power and the potential need for new approaches to data regulation and competition policy.

2. Network Effects: AI-powered platforms can benefit from strong network effects, potentially leading to winner-take-all markets. The self-reinforcing nature of AI-driven network effects challenges traditional antitrust analysis and may require new approaches to market definition and assessment of market power.

3. Algorithmic Collusion: There are concerns that AI systems could potentially engage in tacit collusion, even without explicit instructions to do so. This raises novel questions about the application of antitrust laws to autonomous systems and the potential need for new legal frameworks to address AI-driven market manipulation.

4. Merger Control: The acquisition of AI startups by large tech companies has raised questions about how to assess the competitive implications of such mergers. Traditional merger analysis frameworks may be inadequate in capturing the long-term competitive impacts of AI-related acquisitions, particularly given the rapid pace of technological change in the AI field.

Traditional antitrust frameworks may need to be adapted to address these unique characteristics of AI markets [15]. The intersection of AI and antitrust law represents a rapidly evolving area of legal scholarship and practice, with significant implications for corporate strategy and regulatory policy.

6. Corporate Governance and AI

The integration of AI into corporate decision-making processes raises novel questions in corporate law and governance. As AI systems take on more significant roles in areas traditionally reserved for human judgment, existing legal frameworks for corporate accountability and fiduciary duty may need to be reevaluated.

Armour and Eidenmueller [2] propose the concept of "self-driving corporations," where AI systems play an increasingly central role in corporate decision-making. This raises complex legal questions about accountability, fiduciary duty, and the role of human oversight in AI-driven corporate governance. Key issues include:

1. Board Oversight: Corporate boards may need to develop new competencies to effectively oversee AI systems and their risks. This may require changes in board composition and training to ensure adequate understanding of AI technologies and their

implications. The traditional role of the board as the ultimate decision-making authority in a corporation may need to be reconsidered in light of AI systems that can process vast amounts of data and make complex decisions at speeds far beyond human capability.

2. Fiduciary Duty: The use of AI in corporate decision-making may complicate traditional understandings of directors' and officers' fiduciary duties. Questions arise about the extent to which reliance on AI systems affects the duty of care and the business judgment rule. For instance, if an AI system makes a decision that leads to corporate losses, to what extent can directors claim protection under the business judgment rule if they relied on the AI's recommendation? The concept of "informed decision-making" may need to be redefined to account for the complexities of AI-driven decision processes.

3. Disclosure Requirements: Companies may face new obligations to disclose material information about their use of AI systems to shareholders and regulators. This could include information about the role of AI in strategic decision-making, AI-related risks and risk management processes, and potential impacts of AI on financial performance and business models. The challenge lies in determining what constitutes "material" information in the context of AI use, given the often opaque nature of AI decision-making processes.

4. Liability: The use of AI in corporate decision-making raises complex questions about liability allocation in cases where AI-driven decisions lead to harm. Traditional concepts of corporate liability may need to be reconsidered in light of autonomous AI systems. For example, if an AI system makes a decision that causes harm to stakeholders, how should liability be allocated between the corporation, its directors, the AI developers, and potentially the AI system itself? The concept of "AI personhood" and its implications for corporate law is an area of growing scholarly debate.

5. Shareholder Rights: The use of AI in corporate governance may impact shareholder rights and engagement. AI could potentially be used to enhance shareholder participation in corporate decision-making, for instance through AI-powered voting systems or AI-assisted shareholder proposals. However, this also raises concerns about the potential for AI to be used to manipulate shareholder sentiment or to create information asymmetries between different classes of shareholders.

6. Ethical Considerations: Corporations need to consider how to embed ethical considerations into their AI governance frameworks. This includes developing AI ethics committees or advisory boards, implementing ethical guidelines for AI development and deployment, ensuring diversity and inclusivity in AI teams and datasets, and considering the broader societal impacts of AI systems. The challenge lies in translating broad ethical principles into concrete operational guidelines and in ensuring that ethical considerations are not sidelined in pursuit of efficiency or profit.

These issues highlight the need for a fundamental reevaluation of corporate governance structures and practices in the age of AI. Companies will need to develop robust governance frameworks that address the unique challenges posed by AI while ensuring compliance with existing legal obligations. This may require new legal and regulatory approaches that can accommodate the dynamic and often unpredictable nature of AI systems.

7. Challenges in AI Governance

Despite the proliferation of AI governance initiatives, significant challenges remain in creating effective legal and regulatory frameworks. These challenges include:

1. Balancing Innovation and Regulation: Striking the right balance between fostering innovation and ensuring responsible development is a key challenge. Overly prescriptive regulations risk stifling technological progress, while inadequate oversight could lead to harmful outcomes [13]. The rapid pace of AI development makes it difficult for regulators to keep up, potentially leading to a regulatory lag that could have significant societal implications.

2. Explainability and Interpretability: The "black box" nature of many AI systems, particularly those based on deep learning, poses challenges for transparency and accountability. Developing clear standards for AI explainability and interpretability, particularly for complex machine learning models, remains a significant hurdle [5]. This challenge is particularly acute in high-stakes domains such as healthcare, criminal justice, and financial services, where the ability to understand and explain AI decisions is crucial for public trust and legal compliance.

3. Global Harmonization: The global nature of AI development and deployment necessitates greater international cooperation in governance. However, achieving harmonization across different legal and regulatory systems poses significant challenges [17]. Differences in cultural values, legal traditions, and economic priorities make it difficult to establish universally accepted AI governance norms. The potential for "regulatory arbitrage," where AI developers choose to operate in jurisdictions with less stringent regulations, is a significant concern.

4. Rapid Technological Advancement: The pace of AI development often outstrips regulatory efforts, creating potential gaps and inconsistencies in governance frameworks. Regulatory approaches need to be flexible enough to adapt to rapidly evolving technologies [18]. This may require new approaches to regulation, such as "regulatory sandboxes" or "adaptive regulation" models that can evolve in tandem with technological developments.

5. Long-term Societal Impacts: Assessing and mitigating the long-term societal impacts of widespread AI adoption remains a complex challenge. Current legal frameworks may not adequately address these potential impacts [6]. Issues such as AI's effect on employment, social cohesion, and democratic processes require careful consideration and may necessitate novel policy approaches.

6. Data Governance: The data-intensive nature of AI systems creates tensions with data protection principles and raises questions about data ownership, access, and control [8]. The global flow of data necessary for AI development and deployment challenges traditional notions of data sovereignty and jurisdictional authority.

7. Algorithmic Bias and Fairness: Ensuring fairness and preventing discrimination in AI systems remains a significant challenge, particularly given the potential for AI to perpetuate or exacerbate existing societal biases [10]. Developing robust methods for detecting and mitigating bias in AI systems, while also ensuring that these methods themselves do not introduce new forms of bias, is an ongoing area of research and policy development.

8. AI Safety and Security: Ensuring the safety and security of AI systems, particularly as they become more autonomous and influential in critical domains, is a growing concern [19]. This includes addressing issues such as AI system vulnerability to adversarial attacks, the potential for AI systems to be used maliciously, and the challenges of ensuring AI alignment with human values and goals.

9. AI and Employment: The potential impact of AI on employment and the nature of work raises complex policy challenges, including the need for workforce reskilling and potential changes to labor laws [12]. The potential for AI to automate a wide range of tasks raises questions about the future of work and the need for new social and economic models to address potential job displacement.

10. AI and Intellectual Property: The use of AI in creative processes and innovation raises new questions about intellectual property rights and the nature of authorship and inventorship [5]. Traditional intellectual property frameworks may be inadequate to address issues such as AI-generated inventions or creative works, potentially requiring fundamental reconsideration of intellectual property law.

Addressing these challenges will require ongoing collaboration between policymakers, industry leaders, researchers, and civil society to develop nuanced, context-specific approaches to AI ethics and risk management. The complexity and interconnectedness of these issues underscore the need for a holistic approach to AI governance that considers not only technical and legal aspects but also broader societal and ethical implications.

8. Future Directions in AI Governance

As the field of AI continues to evolve rapidly, several key trends and potential future directions in AI governance are emerging:

1. Adaptive Regulation: There is growing recognition of the need for more flexible and adaptive regulatory approaches that can keep pace with technological change. This may include the development of "regulatory sandboxes" where new AI applications can be tested under controlled conditions, or the use of "soft law" instruments that can be more easily updated than traditional legislation.

2. Algorithmic Auditing: The development of standardized methods for auditing AI systems for bias, fairness, and other ethical considerations is likely to be a key focus of future governance efforts. This may include the emergence of third-party auditing services and the development of technical standards for AI auditing.

3. AI Ethics by Design: There is increasing emphasis on incorporating ethical considerations into the AI development process from the outset, rather than treating ethics as an afterthought. This may lead to the development of new design methodologies and tools that embed ethical principles into AI systems at a fundamental level.

4. International Cooperation: Given the global nature of AI development and deployment, there is likely to be increased focus on international cooperation and the development of global governance frameworks for AI. This may include efforts to harmonize regulations across jurisdictions and the establishment of international bodies to oversee AI governance.

5. Sectoral Approaches: While there are efforts to develop overarching AI governance frameworks, there is also recognition of the need for sector-specific approaches that address the unique challenges and risks associated with AI use in particular domains such as healthcare, finance, and criminal justice.

6. AI and Human Rights: There is growing attention to the implications of AI for human rights, and future governance frameworks are likely to place increased emphasis on ensuring that AI development and deployment respects and promotes human rights principles.

7. Participatory Governance: There are calls for more inclusive and participatory approaches to AI governance, involving a wider range of stakeholders in the development of policies and regulations. This may include greater use of public consultations, citizen juries, and other mechanisms for incorporating diverse perspectives into AI governance.

8. AI Literacy: As AI becomes increasingly pervasive, there is likely to be greater focus on enhancing AI literacy among policymakers, business leaders, and the general public. This may include the development of educational programs and public awareness campaigns about AI and its implications.

9. Governance of Advanced AI: As AI systems become more sophisticated and potentially approach or exceed human-level intelligence in certain domains, new governance challenges are likely to emerge. This may include considerations of AI agency, rights, and responsibilities, as well as the development of governance frameworks for potential future artificial general intelligence (AGI) or artificial superintelligence (ASI).

10. Interdisciplinary Approaches: Given the complex and multifaceted nature of AI governance challenges, there is likely to be increased emphasis on interdisciplinary approaches that bring together insights from computer science, law, ethics, social sciences, and other relevant fields.

These future directions highlight the dynamic and evolving nature of AI governance. As AI technologies continue to advance and their societal impacts become more pronounced, the legal and regulatory landscape will need to evolve in tandem. This will require ongoing dialogue, research, and collaboration among diverse stakeholders to ensure that AI governance frameworks are effective, ethical, and adaptable to future technological developments.

III. Conclusion

The integration of artificial intelligence into corporate operations and decision-making processes presents unprecedented challenges to existing legal frameworks and corporate governance structures. This analysis reveals a complex landscape where regulatory approaches, industry initiatives, and established legal doctrines intersect, often struggling to keep pace with the relentless advancement of AI technologies.

The divergent regulatory strategies adopted by major jurisdictions, exemplified by the EU's comprehensive risk-based approach and the US's sectoral model, underscore the global struggle to balance innovation with responsible development. These contrasting approaches highlight the inherent tension between prescriptive regulation and adaptive governance in the face of rapidly evolving technologies.

Industry-led initiatives and self-regulatory efforts, while demonstrating a commitment to ethical AI development, raise critical questions about enforceability and potential conflicts of interest. The variability in the implementation and effectiveness of these voluntary measures underscores the need for more standardized approaches and potentially greater regulatory oversight.

The application of existing legal frameworks to AI-related issues reveals both the adaptability and limitations of current jurisprudence. Principles of data protection, antitrust law, and corporate governance are being stretched to their conceptual limits when applied to AI systems. This strain on established legal doctrines necessitates a

fundamental reevaluation of core legal concepts such as liability, personhood, and fiduciary duty in the context of AI-driven decision-making.

The concept of "self-driving corporations" challenges traditional notions of corporate governance and director responsibilities. As AI systems assume increasingly central roles in corporate decision-making, the legal framework must evolve to address novel questions of accountability, oversight, and the appropriate balance between human judgment and machine intelligence.

Significant challenges persist in the realm of AI governance, including ensuring explainability and interpretability of AI systems, achieving global harmonization of governance approaches, and addressing the long-term societal impacts of widespread AI adoption. The rapid pace of technological advancement creates a persistent tension between the need for regulatory certainty and the imperative to foster innovation.

Looking ahead, the future of AI governance is likely to be characterized by more adaptive regulatory approaches, increased focus on algorithmic auditing, and the emergence of sector-specific governance frameworks. The growing recognition of AI's implications for fundamental rights and the need for more participatory governance approaches point towards a more nuanced and context-sensitive legal framework for AI.

In conclusion, the governance of AI in corporate contexts demands a paradigm shift in legal thinking and regulatory approach. It requires a delicate balance between fostering innovation and ensuring responsible development, between leveraging the transformative potential of AI and safeguarding fundamental rights and societal values. The legal framework must evolve to provide clear guidelines and robust protections while remaining flexible enough to accommodate the dynamic nature of AI technologies.

The challenge for corporate law and governance in the coming decades will be to develop a coherent and effective legal regime that can navigate the complexities of AI-driven corporate decision-making. This will necessitate not only legal and regulatory innovation but also a fundamental reimagining of the relationship between corporations, technology, and society. The ultimate goal must be to harness the power of AI to enhance corporate efficiency and innovation while ensuring that its development and deployment align with ethical principles and contribute to the broader public good. Achieving this balance will be crucial in shaping the future landscape of corporate law and governance in the age of artificial intelligence.

References:

1. AI Act. Artificial Intelligence Act. Brussels: EU Publications Office, 2024.

2. Armour, John, and Horst Eidenmueller. "Self-Driving Corporations?" Harvard Business Law Review, Vol. 10, No. 1, 2020, pp. 87-116.

3. Bastit, Bruno, et al. "The AI Governance Challenge." S&P Global, 29 Nov. 2023. URL: https://www.spglobal.com/en/research-insights/special-reports/the-ai-governance-challenge, last access – 01.07.2024.

4. Cath, Corinne. "Changing Minds and Machines: A Case Study of Human Rights Advocacy in the Internet Engineering Task Force (IETF)." Doctoral dissertation, University of Oxford, 2021.

5. Chesterman, Simon. "Artificial Intelligence and the Limits of Legal Personality." International and Comparative Law Quarterly, Vol. 69, No. 4, 2020, pp. 819-844.

6. Cowls, Josh, et al. "A Definition, Benchmark and Database of AI for Social Good Initiatives." Nature Machine Intelligence, Vol. 3, No. 2, 2021, pp. 111-115.

7. DLA Piper. "AI Governance: Balancing Policy, Compliance, and Commercial Value." DLA Piper, 12 Sept. 2023. URL: https://www.dlapiper.com/en/insights/publications/2023/09/ai-governance-balancing-policy-compliance-and-commercial-value, last access – 02.07.2024.

8. European Commission. General Data Protection Regulation (GDPR). Brussels: EU Publications Office, 2016.

9. European Commission. Digital Services Act. Official Journal of the European Union, 2022.

10. Floridi, Luciano, et al. "How to Design AI for Social Good: Seven Essential Factors." Science and Engineering Ethics, Vol. 28, No. 3, 2022, pp. 1-26.

11. IAPP & FTI Consulting. "AI Governance in Practice Report 2024." IAPP, June 2024. URL: https://iapp.org/resources/article/ai-governance-in-practice-report, last access – 05.07.2024.

12. Kaplan, Andreas M., and Michael Haenlein. "Rulers of the World, Unite! The Challenges and Opportunities of Artificial Intelligence." Business Horizons, Vol. 63, 2020, pp. 37-50.

13. National Institute of Standards and Technology. "AI Risk Management Framework (AI RMF 1.0)." 26 Jan. 2023. URL: https://www.nist.gov/itl/ai-risk-management-framework, last access – 01.07.2024.

14. OECD. Principles of Corporate Governance. Paris: OECD Publishing, 2023.

15. Petrin, Martin. "Corporate Management in the Age of AI." Columbia Business Law Review, 2019. URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3346722, last access – 01.07.2024.

16. PwC. "2024 Global Digital Trust Insights." PwC, 2023. URL: https://www.pwc.com/gx/en/issues/cybersecurity/global-digital-trust-insights.html, last access – 08.07.2024.

17. Smuha, Nathalie A. "From a 'Race to AI' to a 'Race to AI Regulation': Regulatory Competition for Artificial Intelligence." Law, Innovation and Technology, Vol. 13, No. 1, 2021, pp. 57-84.

18. Stanford University Human-Centered AI Institute. "The AI Index 2024 Annual Report." Stanford Institute for Human-Centered Artificial Intelligence, 2024. URL: https://aiindex.stanford.edu/report/, last access – 25.07.2024.

19. White House. "Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence." The White House, 30 Oct. 2023. URL: https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/, last access – 12.07.2024.

20. World Privacy Forum. "Risky Analysis: Assessing and Improving AI Governance Tools." World Privacy Forum, 14 Dec. 2023. URL: https://www.worldprivacyforum.org/2023/12/new-report-risky-analysis-assessing-and-improving-ai-governance-tools/, last access – 20.07.2024

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