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PROSPECTS OF INFORMATIONAL AND LEGAL REGULATION
OF THE INTERNET

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Abstract

The article analyzes one of the constituent elements of legal relations under civil law within the virtual space of the Internet – a legal subject under civil law. Although the concept of a legal subject under civil law has been sufficiently elaborated, an analysis of this institution with reference to the Internet will enable the features of its legal regulation to be set out. The main legal challenge associated with the concept of a legal subject under civil law on the Internet is fact that it cannot be personified within virtual space. Relations in the virtual space of the Internet are based on civil law contracts incorporating features of the virtual space created by the Internet. Within this context, the relationship between legal subjects under civil law within the virtual space of the Internet is not regulated specifically by legal norms, but by special agreements between these subjects. By virtue of this convention, the parties which establish legal relations on the Internet initially follow certain contractual settings based on the assumption that the counterparty entering into legal relations within virtual space is first and foremost a person with full legal capacity. Secondly, the subjects must act with the conscious intention to frame their actions in legal terms (inter alia by contractual agreement) even though no visible document is drawn up, as is required for relations between persons in the real world (not on the Internet).

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1. Introduction

Attempts to determine the legally significant constituent elements of the subject of law date back as far as Roman law. Under Roman law, a subject of law (*persona*) could be a person eligible to enjoy civil rights and be subject to obligations. In Rome, these could be either individuals or organizations, the former referred to as natural persons and the latter as legal entities (Andreev, 2014). Thus, the term ‘*persona*’ comprised the legally significant characteristic of the party to the legal relationship. The purpose of this article is to study the status of the legal subject within the virtual space of the Internet.

2. Problem Statement

The rights that individualize the legal law as a person traditionally include the right to one’s name. Article 19 of the Civil Code of the Russian Federation (Art. 20 of the RF Civil Code) provides that a citizen acquires and exercises rights and duties over his name, including the surname and first name. Both the name given to a citizen at birth as well as any changes in name must be registered, i.e. a person becomes a citizen from the time his or her name is registered. The citizen’s name characterizes a person as a legal subject under civil law, as a holder of civil rights and obligations, regardless of his physical and moral qualities (Castells, 2001). In this regard Ruzanova notes that: In order to implement and protect the rights of a person and to make civil relations sustainable, he or she must be individualized as a subject under civil law. The name and place of residence are essential means of individualizing an individual citizen (Castells, 2001).

Yu. S. Gambarov also mentioned the importance of a legal subject’s right to residence for his or her individualization: The concept of residence (*domicilium*) entails that every person is at all times recognized to be present at the place determined by a particular address or other legal characteristics that enable the place of residence to be identified. It acts above all as a basis for establishing jurisdiction in civil cases involving litigious proceedings or actions seeking judicial relief. It determines the location at which acts relating to civil status and many other public acts are to be executed (cited in Deibert & Rohozinski, 2008; Beloved, 2007; Boguslavskiy, 2005; Korshunova, & Ivanova, 2009; Novitskiy, 1954).

The next feature of a subject under civil law is age. D.I. Meyer referred to the criterion of age as a prerequisite for classification as a full-fledged subject of law: “The influence of age on the rights of an individual is very natural: whilst the individual is equally capable of holding rights all the times from birth until death, the exercise of the right involves the ability and will to act under civil law: the exercise of the legal right entails a legal action expressing the person’s intention to commit the acts; this ability can only be achieved if the person’s age is known. The ability to conclude acts under civil law commences upon reaching the age of majority”. G.F. Shershenevich also drew attention to the criterion of the age of legal subject under civil law: a person does not achieve physical and mental maturity soon after birth, and this must be taken into account by the law. Therefore, a method for determining the maturity and ability to conclude legal transactions is generally accepted – it is a certain age, with which the assumption of the ensuing maturity is associated (cited in Gambarov, 2003).

Scientists point to two main characteristics of a legal entity:

First, it is a person, a member of the public collectivity (individuals, organizations), which by its characteristics may actually be vested with individual legal rights and obligations. In order to do so, it must possess certain characteristics associated with freedom of will of every person which include: a) external isolation, b) personification; and c) the ability to develop, articulate and implement a personalized will.

Secondly such a person is actually able to act as a party to a legal relationship and has acquired the status of a legal subject by virtue of legal norms.

3. Research Questions

In the field of new media, citizens face a conflict between the democratic function performed by digital communications and the commercial constraints imposed by its services. Networked society is witnessing a shift in communicative power away from the traditional information chain (Civil law. Actual Problems of theory and Practice). The Internet is also perceived as a fundamental instrument for guaranteeing effective freedom of expression, whilst also enriching individual freedom of expression in a technological sense (Kalyatin, 2000). The Internet is the most widely utilized digital communication tool used to disseminate information (Kalyatin, 2007). The informational paradigm of the Internet defines the legal status of a legal relationship through the prism of its informational status. This conclusion inevitably follows from the thesis that the principal subject within the information sphere is the State in general, and public authorities and local governments more specifically, which are entitled to authorize or restrict access to information. Civil law relations on the Internet rely on other principles of law, and for this reason we consider citizens (individuals) and legal persons as the original paradigm for the concept of the subject of legal relations on the Internet. There is a growing trend among civil liberties groups, human-rights activists and legal scholars to argue that internet access has become so essential to participation in society that it should be seen as a right, a basic prerogative of all citizens (Kharitonov, 1999).

As mentioned above, a characteristic feature of the legal subject under civil law within the virtual space of the Internet, as well also as within physical space, starts with the definition of its legal personality - legal capacity, ability to act, name, age, place of residence – or in a nutshell its personification. Moreover, it is the basic legal difficulties associated with the legal subject under civil law on the Internet which are precisely at issue.

It is only the technical identification of computers and servers, but not the users themselves as specific individuals, which is usually done in the information and communication space. The lack of information concerning the location and identity of individuals allows them to remain anonymous, resulting in a situation in which none of the parties can be identified. In fact, according to Kalyatin (2007), the technical features of the organization and functioning of the Internet require a special kind of identification to be allocated to each computer connected to the Internet. This identification is achieved by allocating a certain unique protocol address (IP-address) comprised of a digital sequence to the Internet user's computer. At this level, the IP-address acts as something resembling a person's postal address, enabling relevant information to be forwarded to a particular person (Krasavchikov, 1958). V.K. Stepanov expresses even more clearly the thesis of V.O. Kalyatin regarding the identification of the Internet user's PC: The Internet as a whole, and in particular the World Wide Web, has a coherent

addressing system which provides accurate identification for each part of the network node by assigning to it the original address with a numerical value. An example of this code, called the IP-address, is 195.218.218.38, which enables all parameters to be identified starting from the country, through to the personal computer of each user (cited in Lucchi, 2014).

However, if, according to V.O. Kalyatin and V.K. Stepanov, it is still possible to identify any computer online using its IP-address, there is not yet any technique for identifying the person using the computer.

Due to the current vacuum within the legal regulation of the Internet and its unique nature, until now those concluding civil relations have unlimited freedom of choice and an ability to change their names. Commercial relations on the Internet can involve a person posing under a fictitious name or with no name at all, can freely enter into a relationship with others.

However, not all civil legal relations on the Internet can be classified with such provision. In most cases there are also significant legal gaps. In order to fill these gaps, the parties to civil relations on the Internet must have recourse to presumptions.

4. Purpose of the Study

It is known that legal personality as the ability of a legal person to be a party to civil law relations is defined as the unity of legal capacity - the ability to be vested with civil rights and responsibilities, and capacity to act, i.e. the ability of citizens to acquire civil rights and become subject to obligations through their actions. Under certain circumstances, civil law relations will be presumed to have been validly established by the relevant transactions. This primarily involves cases in which the law does not require a person's credentials to be verified (authorization). Oygenzikht (1976) formulates this point as a 'presumption of legal personality': 'Assuming that the age of majority have been attained, an obvious fact may be presumed, namely legal personality and the authorization by/competence of a person to be a subject of legal relations'.

The second problematic issue associated with the presumption is a presumption of intention. The nature of transactions tends towards speculation that the rights and obligations arising from this transaction will reflect the wishes of the parties (Oygenzikht, 1976). This is a general presumption of conformity with intention.

'Evaluation of behaviour holds a special place in this presumption, indicating the expression of will and, in particular, the conclusion of contractual bargains, from which assumptions concerning the intention of the entity/subject result. This is at any rate what V.A. Oygenzikht believes. Contractual bargains are deemed to include conclusive actions in which the will is expressed indirectly. But as O.A. Krasavchikov says, in this case it is not an intention that is expressed indirectly but our conclusion regarding this matter: our opinion is made up of such actions (cited in Savel'ev, 2014). Yet it is nothing but recognition of the presumption of contractual bargains, i.e. not an absolute conviction of compliance with intention but an assumption of that fact with a high degree of likelihood. A special instance of such conclusive action is implied consent. The presumption of an expression of intention and the agreed intention follow from silence (Shershenevich, 2005).

There is a question as to the theoretical value of the institution of presumptions within legal relations arising within the virtual space of the Internet (Stepanov, 2009). To start with, two main features of the architecture of the Internet will be presented. These include the lack of any geographical boundaries within the virtual space of the Internet and the complexity associated with the identification of users, which gives rise to the specific features associated with the legal regulation of the Internet. Here, without going into a long theoretical discourse about how the Internet is situated outside the legal domain, it may be noted, using only the conceptual apparatus of information law, that most relationships within the virtual space of the Internet are based on civil law contracts, albeit with the features of the virtual space created by the Internet. Within this context of the civil law component of the Internet, relationships between civil law subjects within the virtual space of the Internet are built on the external agreement, a convention enabling agreement to be reached concerning problems arising for which there is no legal framework. By virtue of this conventionality, parties to legal relations on the Internet initially comply with certain contractual settings, specifically that a contracting party or any other entity entering into any legal relations in the virtual space of the Internet is: first a full-fledged legal subject with full legal capacity; secondly, acting consciously; and thirdly, operating within the legal field stated, although no visible confirmation is available within traditional physical space. This is a presumption in its classical form. As can be seen, the scope of the institute within the virtual space of the Internet is much broader than in the physical space: many conclusive actions manifesting consent, which usually occur when any transactions in physical space are made and which are an inherent part of the transaction (for example, physical presence), are impossible in the Internet. The conventional nature of the relationship within the virtual space of the Internet also extends to processes pertaining to the contractual relationship between the entities. In this regard, it may be asserted that the rules governing these relationships are quasi normative in nature, since there are no legal rules on the Internet governing both how to identify the subject and how to establish jurisdiction.

For these reasons, one of the fundamental principles applicable to relations within the virtual space of the Internet can be referred to as the principle that the parties involved are presumed to have equal status and legal personality. This principle is formulated as follows: on the Internet, subjects with equal status and capacity may enter into relationships concerning the provision of goods and services to the extent provided by civil law and contractual agreements.

With regard to most contracts concluded in physical space, the visual perception of the other party is sufficient in order to establish that they have legal personality. However, things are different in the Internet: the architecture of the Internet cannot in most cases enable not only the age but also the personality of the counterparty to be established. Moreover, since the Internet removes the physical presence of the parties to the transaction, here for example, the seller under a contract of sale accepts an offer solely by virtue of the presumption that, despite the absolute lack of information concerning the other party's legal and physical status, the buyer is legally capable and competent, even though there is no document providing 'visual' evidence of this.

Another presumption on the Internet is a presumption of 'proper jurisdiction'. As mentioned above, one of the fundamental features of the Internet is its indifference to state boundaries. The virtual space of the Internet, as opposed to real space, is "separated" from its territorial and geographical

attributes and represents a single imaginary world of technological space with no specific national borders. Within cyberspace, the personal law of the subject and the law applicable to transactions are determined conventionally.

Thus, it can be stated as a general thesis that all relationships in the virtual space of the Internet, including legal relationships, are conventional in nature and are based on legal presumptions.

The conventional status of relationships on the Internet has developed over the course of long-term interaction between legal subjects as the best way of regulating relations in virtual space; it follows naturally from network practice. Any Internet user starting to work on the network accepts the presumption of the equality, integrity and personality of its counterpart without proof. Characteristically, existing relations allow legal relations to be established and for business to be done on the Internet without gross violations of rights and obligations. In doing so, the parties accept these assumptions that parties involved have legal personality and are equal in all respects without additional agreements. In adhering to this principle, the parties do not resort to any kind of sanction or other form of liability under civil law.

5. Research Methods

The legal persons that are parties to civil law relations within the virtual space of the Internet include Internet access providers and direct Internet companies offering a variety of services to users. Whilst the legal status of providers does not cause legal issues (they have to be registered as legal entities in the Republic of Tajikistan), there are legal challenges for Internet companies providing e-mail and informational services. It is increasingly common for businesses to enter into contracts, via the Internet, for the sale and purchase of goods or services to consumers who are domiciled in countries other than those in which the businesses are based. Such contracts are international in the sense that the legal relationships between consumer/purchaser and business/vendor are connected – actually and/or potentially – to the legal systems of more than one country (Tarasov, 2014). Thus, the vast majority of these companies are registered in other countries. For example, the Regulations posted on the website of the company ‘Facebook’, cite: “You will resolve any claim, cause of action or dispute with us arising from these Regulations or in connection with it or with Facebook, exclusively in the US District Court of Northern California or federal court located in San Mateo County” (Ushakov, 2013, p.23). Consequently, the company providing free services to citizens of Tajikistan (although also citizens of Russia and other countries around the world) is officially registered in the United States. Other Internet companies, representing information retrieval services – ‘Yandex’ – are registered in Hague in the Netherlands. In this case no one knows which regulations will apply to claims and lawsuits or to which type of transaction this form of contract may apply.

The law does not govern the territory but rather specific relationships, and problems usually start to arise when these relationships take on cross-border status. In such cases, the rules of private international law start to be applied to these relationships.

6. Findings

According to the private international law applicable to legal persons, the concept of the personal law or personal status of the legal entity (*lex societatis*) is applied. It is possible to establish with reference to this law whether or not any given formation is a legal entity, what its capacity and capability are, how responsibility for the obligations of the legal person is defined and so on. In order to do so, various criteria are applied including incorporation (the state of registration), location (the location of the centre of control), place of business (operational centre), the control theory, and others. These criteria help to determine the jurisdiction that regulates civil legal relations established on the Internet.

When determining jurisdiction, it would appear natural to apply the principle of the nationality of the owner of information (or site administrator). However, where this principle is directly applied it is open to abuse; when operating within one's own jurisdiction, a person acting in bad faith can violate the rights of others with impunity.

7. Conclusion

The most acceptable solution to the problem of jurisdiction on the Internet is considered to involve the conclusion of an international agreement on the definition of jurisdictional issues concerning the activities on the Internet. By taking a bird's eye perspective of arguments over whether the existence of a website is sufficient in order to assert jurisdiction over the entity behind the website, Uta Kohl argues that the most efficient regulatory options are not in fact the best or most realistic regulatory options if their implementation entails substantial legal disruption.

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