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BRICS LAW JOURNAL (BRICS LJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

The *BRICS Law Journal* is the first peer-reviewed academic legal journal on BRICS cooperation. It is a platform for relevant comparative research and legal development not only in and between the BRICS countries themselves but also between those countries and others. The journal is an open forum for legal scholars and practitioners to reflect on issues that are relevant to the BRICS and internationally significant. Prospective authors who are involved in relevant legal research, legal writing and legal development are, therefore, the main source of potential contributions.

The *BRICS Law Journal* is published in English and appears four times per year. All articles are subject to professional editing by native English speaking legal scholars. The BRICS LJ is indexed by Scopus.

Notes for Contributors

Manuscripts must be the result of original research, not published elsewhere. Articles should be prepared and submitted in English. The BRICS LJ doesn't accept translations of original articles prepared not in English. The BRICS LJ welcomes qualified scholars, but also accepts serious works of Ph.D. students and practicing lawyers.

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HARMONIZATION PROBLEMS OF THE EDUCATION SYSTEMS INDICATORS IN THE BRICS COUNTRIES

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The conditions for the development of modern states are impossible without cooperation and integration with other states in various socio-economic areas. The formation and protection of an alternative position in the world by a number of countries led to the creation of the BRICS association. Participation in this association is of great importance for Russia in a variety of fields. One of the promising areas of cooperation is the sphere of education in all its aspects, ranging from preschool education to the attainment of various degrees and titles. This article addresses the issue of coordination of the BRICS countries in the field of education.

The basis for determining the indicators of the education systems and the principles of their comparison was the similar data from the international organizations UNESCO, OECD and Eurostat. As a result of studying the principles of collecting statistical data and methodological materials for comparing the education sector indicators in these international organizations, a certain vision of the database of the BRICS countries has

been set. On the one hand, this base should not contradict international practice; on the other hand, the chosen indicators should be used by all countries of the BRICS association. Following this study, a proposal on the principles of information collection was made, as well as a proposal on the main indicators for education indicators comparison in the BRICS countries.

The basis for cooperation between the education systems is a harmonized system of concepts and definitions, which allows unambiguous interpretation of such fundamental terms as education, educational program, educational institution, student, entrant, acceptance for study programs, graduates, graduations, personnel of educational institutions, expenses for education, etc.

In parallel with the harmonization of the education system terminology, it is necessary to harmonize statistical indicators that can quantify the education system at all levels. As a rule, observation units of education statistics are institutions that provide educational services at all levels of education to both individuals and legal entities.

Keywords: BRICS countries; education; indicators of education; harmonization of information indicators of the education system; methods of comparing indicators.

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Introduction

In today's unstable political conditions, education plays an important role as the basis for the formation of interstate relations. In this connection, great importance is attached to the development of humanitarian ties between various countries and associations of countries. At the meeting of BRICS education ministers, held in New Delhi in September 2016, it was noted that

> the BRICS countries will strengthen international cooperation, promote fair and inclusive education.[1]

The hope was expressed for further strengthening of cooperation between all countries in such areas as vocational education, ensuring the quality of education, continuing education and promoting exchanges of teachers and students. It was also noted that the "Declaration" fully meets the requirements of the United Nations in the field of sustainable development until 2030. In accordance with the conclusions of the meeting of the Ministers of Education of the BRICS countries, the Ministry of Education of the Russian Federation set the task of assessing the education systems of the five BRICS countries and developing approaches to assessing and harmonizing these systems. In 2017, the Peoples' Friendship University of Russia conducted a study related to the search for ways in which to harmonize the indicators of the educational activities of the BRICS countries, some aspects of which are discussed in this article.

The main objective of this study is the development of guidelines for the renewable and long-term comparability of statistical data on the BRICS countries. The BRICS countries have quite different education systems. In these countries, the following areas can be identified in the development of education systems:

– Increase in compulsory schooling;
– Improvement in quality of education at all levels;
– Ensuring continuous learning;
– Improving the quality of education;
– Improvement of control over the quality of education;
– Increase in public spending on the education system.

However, not all directions are developed evenly. The tasks of active development of distance education are stated in Russia, India, China and South Africa. The task of developing the internationalization of universities is set by Russia, India and China.

A preliminary analysis of the education statistics of the BRICS countries allowed the determination of the general characteristics:

– Pre-school and higher education is not mandatory;

[1] New Delhi Declaration of the 4th Meeting of BRICS Ministers of Education, New Delhi, 30 September 2016 (Dec. 10, 2018), available at http://www.brics-info.org/new-delhi-declaration-of-the-4th-meeting-of-brics-ministers-of-education/.

– Primary and incomplete secondary education is compulsory;

– In all the BRICS countries, it is possible to get a secondary vocational education, which is not the first stage of university education;

– To continue training in a higher education institution one can obtain either a complete secondary education or a secondary vocational education;

– In all the BRICS countries, at the first stage of higher education there is an opportunity to study in undergraduate programs; however, there are also alternative national programs.

Nevertheless, there are differences that are most noticeable at the senior levels of secondary education and higher:

– Different duration of training at different levels of education and, accordingly, differences in the content of the training program;

– Differences in the duration of compulsory education;

– Differences in available educational levels.

In South Africa and India, there is an opportunity to get a professional bachelor's degree (from 4 to 5.5–6 years). In other countries there is one type of undergraduate program (4 to 6 years). In Brazil, the first stage of higher education also includes a licentiate degree program and higher technical education; in Russia – a specialty; in South Africa – the National Diploma and National Higher Certificate;

– The approach to the organization of final exams in schools and entrance exams for universities: in some countries, centralized state exams are held (e.g. Russia and China); in others, the university is allowed to organize its own entrance examinations (e.g. Brazil).

To ensure the comparability of the learning processes in the education statistics of the BRICS countries, the international classification of ISCED as amended in 2011 (ISCED 2011) was taken as the basis, which made it possible to carry out high-quality international comparisons and to outline further ways to improve the national education systems and their individual structural elements.

The main research methods chosen for this research were content analysis of official documents and documents in the open press as well as expert analysis with the involvement of specialists in the field of education of the studied countries. Surveys were conducted in the form of videoconferences as well as through the exchange of information via e-mail. Three basic research tasks were highlighted:

– Identify countries' interest in developing a methodology for harmonizing indicators of education systems;

– Determine the principles of the formation of the methodology in general and indicators in particular; and

– Define the statistical tools and approaches for obtaining statistical information.

Information was gathered through the study of official materials of the Ministries of Education of the BRICS countries. First of all, the goals and objectives as well as the structure of education of the countries were studied. The availability of statistical data,

which is published in the official press, was estimated. Another important source of information was the databases of international organizations: UNESCO, OECD and Eurostat. These international organizations conduct their research in various fields and have significant statistical data, which amounts to about 200 different indicators for evaluation of the education sector. The methodology for collecting information and the design of individual indicators was studied. The main sources of information were the following documents that are publicly available on the websites of the relevant organizations:

1) Documents of the UNESCO Institute for Statistics (UIS):[2]

– ISCED: International Standard Classification of Education 2011, 2013;

– Education indicators after 2015 (Post-2015 Education Indicators Consultation, Proposed indicators to track the post-2015 education framework);

2) Materials of the organizations of the European Union:

– OECD statistical base, Education, 2016[3] (Education at a Glance, 2016);

– The statistical base of Eurostat, the Education and Training section;

3) A joint document developed by three international organizations (UNESCO, OECD and Eurostat) on the methodology for collecting data on education (UNESCO, OECD, Eurostat – together referred to as "UOE") joint data collection – methodology).[4]

Materials of other international associations, such as ASEAN (Association of Southeast Asian Nations), UNASUR (*Unión de Naciones Suramericanas*) and NAFTA (North American Free Trade Agreement) were also studied. Content analysis showed that these organizations create practically no separate databases on education systems, but to some extent use indicators, principles of their collection and comparison proposed by UOE.

1. Analysis of Approaches to the Formation of a Methodology for Comparing Indicators of the Education Systems

The study of materials of international organizations, primarily UNESCO, OECD and Eurostat, made it possible to identify general principles for the formation of a statistical system for the formation of indicators for assessing socio-economic processes. When determining the list of methods used when comparing indicators of different education systems, it is advisable to follow a certain selection procedure.

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[2] UNESCO Institute of Statistics, Data for the Sustainable Development Goals (2017) (Dec. 10, 2018), available at http://www.uis.unesco.org/Education/Pages/international-standard-classification-of-education.aspx#sthash.xvN29DIF.dpuf.

[3] OECD, Education at a Glance 2016: OECD Indicators (2016) (Dec. 10, 2018), available at https://www.oecd-ilibrary.org/education/education-at-a-glance-2016_eag-2016-en.

[4] UNESCO OECD Eurostat (UOE) joint data collection – methodology (Dec. 10, 2018), available at http://ec.europa.eu/eurostat/statistics-explained/index.php/UNESCO_OECD_Eurostat_(UOE)_joint_data_collection_%E2%80%93_methodology.

There is a common methodology for comparing the statistical bases in the field of education and training, developed by the UOE organization, which, as practice shows, does not remove all problems of data comparability. The analysis of this methodology contributes to the development of common approaches and methods for comparing the statistical indicators of the BRICS countries.

The methodology for comparing results involves the following key steps:

1) A list of information sections of indicators;

2) Development of basic concepts and definitions agreed on by all participants;

3) Geographical division by regions with their subsequent coding;

4) The information collection period;

5) The principles and approaches for collecting information;

6) Development of forms for comparability of results.

The first stage is key and depends on the goals and objectives of the analysis of education systems. In this aspect, we turn to the bases of the three leading international organizations.

1.1. Characteristics of the Statistical Base of UNESCO

UNESCO is the legislator in the evaluation of education systems, and leading international organizations are guided by its recommendations. Due to the fact that national education systems are diverse in their structure and the content of their educational programs, it is rather difficult to compare the achievements of different countries and track their progress towards goals at the national and international levels. To understand and correctly interpret aspects and processes of education systems at the global level, it is especially important to ensure the comparability of data. This can be achieved through the use of the International Standard Classification of Education (ISCED), a concept paper intended to classify and provide internationally comparable statistics.

The UNESCO Institute for Statistics (UIS) is the statistical body of the United Nations Educational, Scientific and Cultural Organization; it stores information in the fields of education, science and technology, culture and communication from around the world and makes it available to the U.N. Here, the International Standard Classification of Education, ISCED 11 (the international abbreviation is ISCED 2011) was developed, which is taken as the basis for the maintenance of statistical databases by other organizations and countries. In this classification three levels of education are distinguished:

– Lower (education of young children; educational programs for the development of young children; programs of preschool education; primary education);

– Secondary (first stage of secondary education; second/highest stage of secondary education; post-secondary non-tertiary education);

– Upper (short cycle of tertiary education; bachelor's degree or its equivalent; magistracy or its equivalent; doctorate or its equivalent).

The classification of national educational programs in accordance with ISCED is the main tool for systematizing information on national education systems, educational programs and relevant qualifications used for comparing data on ISCED levels and helping them to be interpreted internationally.

The initial classification unit of ISCED is the national (and subnational) educational program and the corresponding recognized educational qualifications. In ISCED, an educational program is defined as a single complex or sequence of types of educational activity or communication, planned and organized to achieve preset learning goals or specific educational objectives for a certain period of time. A common characteristic of an educational program is that upon reaching the learning objectives or after completing the educational objectives a document is issued confirming its successful completion.

The basic principle of the UNESCO base and the selection of UNESCO indicators is the social orientation of education throughout the world, taking into account not only developed countries but also countries with a low level of education. The database consists of 129 indicators and indices, distributed across 15 sections, which are ideologically divided into 5 main groups. The base is built on a hierarchical principle: an integrated indicator, a complex indicator and a unit indicator/numerical parameter meter (or a section, sub-section and a measurable indicator). Table 1 shows an excerpt from the structure of the UNESCO database under Education as an example of the formation of indicators. For the example, the International Mobility section is taken.

Table 1: The Principle of Structuring Indicators of the UNESCO Base (Excerpt)
Section: International Mobility

Section	Subsection	Indicator
International mobility of students in higher education institutions	Arriving students	Arriving foreign students on the continent of origin
		Arrived foreign students by region of origin
		Arriving foreign students by country of origin
	Departed students	The departed foreign students in the region
	Mobility indicators	Net flow of foreign students
		The level of mobility of arrivals
		The level of mobility of the departed students by region
		The overall coverage rate for the departed by region

Source: International Standard Classification of Education, 2011, available at http://www.uis.unesco.org/DataCentre/Pages/BrowseEducation.aspx.

The collection of education statistics, carried out in accordance with ISCED, can be based on various sources:

– Administrative documents;

– Individual surveys;

– Household survey;

– A set of macroeconomic statistics.[5]

The classification of national educational programs in accordance with ISCED is the main tool for systematizing information on national education systems, educational programs and relevant qualifications used for comparing data on ISCED levels and helping them to be interpreted internationally.

1.2. Characteristics of the Statistical Base of the OECD

The priority for the recent Organisation for Economic Co-operation and Development (OECD) research in the field of education is the question of the development of higher (tertiary) education and its accessibility (cost). The problems relating to gender equality of pupils and graduates of various levels of higher education were also considered. Gender inequality in the OECD member countries in the teaching profession is noted, where high-paid positions are occupied, in the main, by men. In light of recent developments in the population movement from regions of Africa and the Middle East, issues involving immigrants in the educational process are being considered. The OECD database includes a large number of indicators that are universal measures of the level of educational activity in different countries shared by most professionals in the field. The indicators provide an idea:

– of human and financial resources invested in education;

– of the mechanisms of educational systems activity;

– of the return on investment in education.

The distinction of the OECD base lies in the greater economic focus on the education system and its results. OECD indicators provide data on the structure, financing and results of the education systems of OECD member countries and also some of the countries of the G20 and partner countries. Statistical indicators for the evaluation of education within the OECD are divided into the following groups:

– Accessibility of education and results;

– Effects of education on the economy and the labor market;

– Financial investments in education;

– Frames;

– Examination of the skills of adults.

Table 2 shows an excerpt from the base structure of the OECD for Education as an example of the formation of indicators. For the example, the "Access to Education, Degree of Involvement in Education and Performance" section is taken, which includes the indicator of International Mobility.

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[5] Joseph O. Fadare & Corinna Porteri, *Informed Consent in Human Subject Research: A Comparison of Current International and Nigerian Guidelines*, 5(1) Journal of Empirical Research on Human Research Ethics 67 (2010).

Table 2: The Principle of Structuring Indicators of the OECD Base (Excerpt)
Section: Access to Education, Degree of Involvement
in Education and Effectiveness

Section	Subsection	Indicator
C. Access to education, degree of involvement in education and performance	C1. Involved in the educational process	C1.1 Indicators of involvement in education and the expected number of years depending on the age group
		C1.2 Percentage of students aged 15 to 20
		C1.3a Percentage of students enrolled in senior grade programs by age
		C1.3b Involvement in continuing secondary education depending on specialization and age group
		C1.4 Percentage of part-time students by level of education and age group
		C1.5 Changes in student level by age group
	C2.Pre-school and primary education	C2.1 Percentage of students enrolled in early childhood and preschool programs, by age
		C2.2 Structure on programs for the development of young children and preschool education
		C2.3 Expenses for all programs for young children
		C2.4 Profile of purely educational and integrated preschool programs
		C2.6 The extent to which pre-school education programs are distributed within the framework of the OECD and partner countries
	C3. How many students are expected to enroll in higher education?	C3.1 Profile of students who are expected to enroll in universities
		C3.2 Profile of students who are expected to enter universities for the first time
		C3.3 Profile of students who are expected to enter universities for the first time, according to the tertiary level ISCED
		C3.4 Trends in terms of admission to universities, at the tertiary level ISCED
	C4. International mobility	C4.1 International student mobility and foreign students in higher education
		C4.2 Female students involved in the educational process, as a proportion of the total number of those involved. Depending on education and mobility status

C. Access to education, degree of involvement in education and performance	C4. International mobility	C4.3 Examples of foreign student mobility
		C4.4 Distribution of foreign students in master and postgraduate programs depending on the country of origin
		C4.5 Students enrolled in graduate or postgraduate programs abroad by country of residence

Source: OECD data collection program, OECD, available at http://www.oecd.org/statistics/data-collection/.

The basic principles that the OECD uses in its practice are as follows:

1) Individual indicators and principles of their collection were developed (reflected in the table above);

2) Cooperation has been established with international organizations such as the IMF, the World Bank, Eurostat, the United Nations Economic Commission for Europe, the United Nations Statistics Division and others. Russia is a participant in this cooperation;

3) Forms of presenting the results were developed – 100 diagrams and 200 tables with various indicators, which are combined into metadata (various complex indicators);

4) A special online resource has been developed that includes information on how countries are working to create education systems;

5) The unique OECD instrument in the field of education is an international program for the assessment of student achievement. Since 2000, every three years students from randomly selected schools around the world take tests on basic issues. To date, students from more than 70 countries (including Russia) have participated in the program;

6) A set of measures for testing higher education institutions has been developed. A large number of countries participate in testing, including Russian universities;

7) A center for assessing innovation in education has been created and quantitative indicators have been developed for assessing the necessary knowledge of the adult population;

8) OECD financing. The main part of the funding comes from the mandatory contributions of member countries. The size of the annual contribution is determined by the country's GDP share in total GDP – the total product of the OECD countries. The second part of the funding consists of voluntary contributions from member countries and partner countries for participation in projects and work programs of the relevant committees.

The most significant publication of the OECD in the field of education is "A Look at Education," which contains data on the structure, financing and performance

of education systems in more than 40 countries including Russia. With 100 charts, 200 tables and over 100,000 digits, the overview provides key information on:

– Results of educational institutions;
– The role of training in different countries;
– Financial and human resources;
– Progress in education;
– Conditions of training and organization of school activities.

The OECD emphasizes the strong link between education and employment.

A special online resource has been created at the OECD which includes information on how countries are working to create their education systems. Norway has established a National Quality Assessment System for the education sector providing access to information that helps public and private schools; education authorities evaluate their work and develop a development strategy.

The most popular statistical program of the OECD in the field of education is the international program for assessing the educational achievements of students. This is a unique tool of the OECD, as tests are developed that are not directly related to the school curriculum and are designed to assess how effectively students can apply their knowledge in real-life situations at the end of compulsory education.

As part of an international study of teaching and learning, the OECD conducted a survey of teachers on working conditions and the learning environment. The study includes questions relating to, for example:

– Initial teacher training and professional development;
– Feedback from students;
– School climate;
– Features of the training methodology;
– Teaching practice.

To address the challenges of improving the quality of higher education within the OECD, a program is being implemented on the institutional management of higher education, with the aim of creating the conditions for the international cooperation of leading educational institutions. In total, the program involves more than 250 institutions from 50 countries. Russia is represented here by a large number of educational institutions, among them – MESI, NRU-HSE, the National Training Foundation, St. Petersburg State University and the Southern Federal University.

1.3. Characteristics of the Statistical Base of the Statistical Office of the European Union (Eurostat)

Eurostat's mission is to provide high-quality statistics for Europe. Eurostat contributes to the following tasks within the EU: respect and trust, strengthening best practices, encouraging innovation, the development of the services sector and professional independence. Its database "Education and Training" contains information on participation in the educational programs of pupils and students

and teaching staff, as well as on the cost and type of resources allocated to education. The database is aimed at analyzing the general level of education in the particular country, expenditures on education, knowledge of the population in foreign languages, as well as the effectiveness of educational processes. The base consists of 264 indicators and indices, divided into 16 sections, which are ideologically divided into 6 main groups.

Eurostat has developed a data collection methodology that allows obtaining coordinated indicators from all member countries. First of all, a document was developed, i.e. the European Statistics Code of Practice. The Code is based on 15 principles covering the institutional environment, the production of statistical data and their outcome. A set of indicators has been developed. The Code has the following sections:

1) Institutional environment. The institutional and organizational factors such as professional independence, authority for data collection, adequacy of resources, quality assurance obligations, statistical confidentiality and impartiality have a significant impact on the efficiency of the statistical body that develops, produces and disseminates European statistics, and objectivity;

2) Statistical processes. In the processes of organizing, collecting, processing and disseminating European statistics, statistical agencies fully comply with European and other international standards, regulations and principles of best practice. Confidence in statistics is enhanced by a reputation for prudent management and efficiency. Important aspects are the soundness of the methodology, the validity of the statistical procedures, the moderation of the burden of the respondents and the economy;

3) Output statistics. The statistics provided to users should meet their needs. The statistics correspond to European quality standards and serve the needs of European institutions, governments, research institutions, production concerns and the general population. Therefore, it is important how the statistics are relevant, accurate and reliable, timely, consistent, interrelated, how comparable they are across regions and countries and whether they are easily accessible to users.

The activities of the EU statistical office for collecting, processing and analyzing data, as well as harmonizing the statistical information provided, are funded from the EU budget. The key study of Eurostat is the study of the working population and the impact of the education sector on it. The data obtained within the framework of the study are used for several indicators of "lifelong learning" and for statistics on the level of education and learning outcomes.

Table 3 shows an excerpt from the Eurostat base structure under "Education and Training" as an example of the formation of indicators; the excerpt is taken from the section "Educational Mobility."

Table 3: The Principle of Structuring Eurostat Base Indicators (Excerpt)
Section: Educational Mobility

Section	Subsection	Indicator
Educational mobility	2.1. Arrived foreign students	Arrived foreign students depending on the level of education, gender and education
		Arriving foreign students depending on their education, gender and country of origin
		The proportion of foreign students who arrived, depending on the level of education, gender and country of origin
		Distribution of foreign students who arrived, depending on the level of education, gender and education
	2.2. Certified foreign students	Certified foreign students, depending on the level of education, gender and education
		Certified foreign students based on education, gender and country of origin
		Percentage of graduated foreign students arriving depending on the level of education, gender and country of origin
		Distribution of graduated foreign students, depending on the level of education, gender and education

Source: Eurostat database, available at http://ec.europa.eu/eurostat/data/database.

With the development of the European Union, greater importance was attached to the task of harmonizing statistical methods used by EU Member States as well as candidate countries. Eurostat does not directly collect statistics – this work is done by the statistical services of the countries. The information collected by the national services is processed by Eurostat, reduced to uniform standards and published. Eurostat works closely with the national statistics services of the EU countries to develop uniform statistical standards. The activities of the EU statistical office for collecting, processing and analyzing data, as well as harmonizing the statistical information provided, are financed from the EU budget. Information-gathering activities in the European Union are regulated by the EU Statistical Law (Council Regulation 322/1997), which defines the general principles for the interaction of EU countries in the field of statistics, the role of Eurostat and the unified statistical program.[6]

[6] Council Regulation (EC) No. 322/97 of 17 February 1997 on Community Statistics (Dec. 10, 2018), available at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997R0322:EN:HTML.

Despite the fact that the legislator in charge of the statistical bases for education is the UNESCO organization, the most complete information is collected by the organizational structures of the EU, since it is the most deeply integrated. The statistical body of the European Union, Eurostat, does a great job of discussing issues related to the implementation of the updated International Standard Classification of Education (ISCED 2011). The Eurostat Working Group on Education and Training Statistics (Eurostat Working Group on Education and Training Statistics – WG ETS) was established to organize and coordinate the collection of data on relevant issues in the EU countries. Traditionally, the group meets once or twice a year.

By the beginning of 2014, most countries of the world had worked to harmonize their educational programs with the updated classification ISCED 2011. The so-called ISCED-mapping was carried out – a description of national education systems using updated approaches. In each country, this work is carried out by the staff of education administration authorities in conjunction with representatives of national statistical services.

The international education database is currently being developed jointly by UNESCO, OECD and Eurostat (i.e. UOE), and since 2014 it has been supplemented with information prepared in the ISCED 2011 format. UOE have developed a joint methodology for maintaining statistical data for evaluating education systems with different depths of analysis. An analysis of the statistical bases examined showed that the horizon of data collection cannot always be clearly established for all positions (indicators) and countries, since this depends on the policies of the individual countries in the area of statistics. The goals and tasks of statistical databases, confidentiality (secrecy) of information, data collection methods and information indicators themselves (indices) all vary. The instructions of any international organization for the collection of statistics are advisory in nature and are not mandatory for sovereign countries. As a result, there are gaps in the data, differing by country and information block.

Analysis of the databases of the three leading organizations shows differences in the approach to the formation of indicators. Table 4 presents a comparison of the basic sections of the three bases, from which the emphasis of each of them are clearly visible.

Table 4: The Composition of the Main Sections of the Statistical Databases of UNESCO, OECD, Eurostat

UNESCO	OECD	Eurostat
1) The process of education (children) 2) The level of education of the population as a whole	1) Demand for education and its impact on the labor market 2) Resources invested in education	1) Participation in the educational process 2) Educational mobility 3) Educational staff

3) Resources of the education system 4) Regional features of the educational process (selectively by regions of the world) 5) Overall indicators, including demographic and socio-economic	3) Access to education, the degree of involvement in education and results 4) Educational conditions and organizational process	4) Financing education 5) The effectiveness of education 6) Foreign languages
Total number of indicators: 129	Total number of indicators: 182	Total number of indicators: 264

Source: compiled by the authors based on the results of studies of the official sites of the organizations UOE.

1.4. Characteristics of the Formation of Statistical Indicators of Other International Organizations

To form the principles of harmonization of indicators of the BRICS countries, the experience of the harmonization of indicators of some international associations, which by certain characteristics are similar to the association of BRICS, was also studied. ASEAN (Association of Southeast Asian Nations), the North American Free Trade Agreement (NAFTA) and the Union of South American Nations UNASUR were taken as objects of research.

ASEAN is a political, economic and cultural regional intergovernmental organization of ten countries located in Southeast Asia. ASEAN was formed on 8 August 1967 in Bangkok along with the signing of the "ASEAN Declaration," better known as the "Bangkok Declaration." All the statistical indicators that ASEAN collects to analyze its activities can be divided into three categories: economic, socio-cultural and political. Education belongs to the socio-cultural and falls into the subcategory of the Millennium Development Goals (MDG). The annual compilation of MDG provides indicators assessing the results of ASEAN's work on the eight socio-cultural goals that it has set for itself. The indicators of the education sector that receive the most attention in the MDG are net primary education coverage and gender equality in education.

1) Procurement of a universal primary education:

– Net enrollment ratio in primary education in ASEAN member states;

– Literacy rate among 15–24-year-olds in ASEAN member states;

2) Promoting gender equality and empowering women in ASEAN member states:

– The ratio of girls to boys in primary education;

– The ratio of girls to boys in secondary education;

– The ratio of girls to boys in higher education.

ASEAN annually publishes statistical reports that show the indicators of education both for the region as a whole and for individual countries. In the annual statistical compilation ASEAN Statistical Yearbook, in the section Education and Health, the following indicators for evaluating education are presented:

– Adult literacy rate (for all countries, this indicator is considered from the age of 15+; for Brunei, from the age of 9+);

– Net enrollment in primary education, distributed by gender;

– Net coverage by secondary education, distributed by gender;

– The ratio of girls and boys in primary and secondary schools;

– The ratio of pupils and teachers in primary and secondary schools.

The main approaches to the coordination of statistical data within the framework of the ASEAN Association form a statistical body (ASEANstats – ACSS), which is one of the units within the ASEAN Economic Community Department responsible for providing statistical data. The activity of this unit is based on the principles of the work of the statistical bodies of the United Nations and adheres to its fundamental principles. The declaration of this organization (mission) states that ASEANstats seeks to serve the statistical information needs of institutions, enterprises and civil society of ASEAN, as well as provide statistical data to international organizations. ASEANstats strives to become an authoritative source of relevant, comparable and timely information to foster knowledge generation in the strong and respected ASEAN Community. ASEANstats works closely with the national statistical institutions of ASEAN member states and is interested in promoting the Commonwealth countries in the international arena. ASEAN Statistics Services work closely with EU statistical agencies and try to implement their standards.

The main functions of ASEANstats are:[7]

– Development of regional indicators and targets monitoring systems and initiatives;

– Consolidation, dissemination and transfer of statistical information about the region;

– Provision of statistical services to the governing bodies of ASEAN and all interested structures of the countries participating in the association;

– Harmonization of ASEAN statistics – standardization of concepts, definitions, classifications and approaches;

– Coordination and facilitation of regional statistical programs and activities, including the work of working groups and task forces within the framework of the ASEAN Statistical Cooperation, under the guidance of the ASEAN Statistics Committee;

– Implementation of policies and promotion of partnerships between the Committee on Statistics, the ASEAN bodies and the international/regional statistical communities.

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[7] ASEANstats (Dec. 10, 2018), available at https://www.aseanstats.org/about-aseanstats/.

As part of organizing the collection of statistical data, a code of norms of the ASEAN Statistical System was developed, which was approved at the 2nd session of the Committee in September 2012. The code of norms corresponds to the Basic Principles of Official Statistics, approved by the U.N. Statistical Commission in 1994, and reflects the principles established in the Codex Strategic Plan. The Code of Conduct includes eight basic principles:[8]

A. Institutional environment:

1. Authority to collect data;

2. Professionalism and integrity;

3. Confidentiality;

4. Reporting;

5. Cooperation and coordination of work in the field of statistics;

B. Statistical process:

6. Efficiency;

7. Reducing the burden of reporting;

C. Statistical products:

8. Obligation to ensure quality (relevance, reliability, timeliness, comparability, availability).

The committee reports to the ASEAN Ministers of Economics and coordinates its activities with other organizations operating within the framework of the association. However, since there is no single document that establishes the principles and norms of work that ensure the independence of statistical functions, reporting organizations can influence data collection. This may lead to a situation where official statistics, instead of providing independent information, will "provide" existing policies.

The North American Free Trade Agreement (NAFTA) is a comprehensive agreement on a free trade zone between Canada, the United States and Mexico. The U.S. strategy within NAFTA is to combine the distinctive advantages of the three participating countries: American high technology and investment, Canadian natural resources and Mexican cheap labor. The legal base of NAFTA consists of:

– The basic agreement on a free trade zone;

– A labor cooperation agreement;

– An agreement on cooperation in the field of ecology;

– Separate agreements (including bilateral) on automobiles, agriculture, textiles and clothing.

The main goal of NAFTA was the removal of barriers to trade in goods between the participating countries. Half of the barrier restrictions were lifted immediately, the rest were removed gradually over fourteen years. The agreement was an expanded

[8] Средство «Snapshot» для осуществления Кодекса норм ССCA: методы проведения самооценки [Snapshot Tool for Implementing the Code of Norms of the ASEAN Community Statistical System Committee: Self-Assessment Methods] (Dec. 10, 2018), available at http://www.unescap.org/sites/default/files/Snapshot_ACSS_CoP_Self-Assessment_Measures_ASEAN_Russian.pdf.

version of the 1989 trade agreement between Canada and the United States. One of the main features of the North American economic grouping is that each of its members is in different starting condition. For the last decade, Canada managed to approach the main macroeconomic indicators (GDP per capita, labor productivity) of the USA, while Mexico, which for many years was in the position of an economically backward state with a large external debt, still noticeably lags behind the U.S. and Canadian indicators. The difference in per capita GDP between Mexico and the United States reaches 6.6 times, and with Canada 4.1 times. Such significant gaps in the levels of economic development of the member countries make it difficult to create a single economic complex.

NAFTA has a clear organizational structure. The central institution of NAFTA is the Free Trade Commission, which includes representatives at the level of trade ministers from the three participating states. The Commission oversees the implementation and further development of the agreement and helps resolve disputes arising from the interpretation of the agreement text. The Commission provides assistance to the Coordinating Working Body – the NAFTA Secretariat.

The recognition of NAFTA as an economic policy for the member countries and its impact on higher education in Mexico encourage their universities, and Mexican companies, to adapt their education systems so as to be able to compete in the new economic environment. It should be noted that the United States, Canada and Mexico are also full members of the OECD. This organization also analyzes statistical data on the participating countries.

Since there is such a significant difference in the per capita GDP indications between these countries, it is worth assuming that the same difference will exist in efficiency and in the quality of education. The calculation of various indices helps to identify various aspects of the education sphere of the countries of NAFTA.

The education index and the human development index (Education and Human Resources) take the position of priority. The education index is part of the knowledge index and knowledge economy. This index is calculated by the World Bank based on the Knowledge Assessment Methodology and describes the level of education of the population and its stable skills to create, disseminate and use knowledge. The main indicator of the index is the adult literacy rate, the ratio of registered students (students and schoolchildren) to the number of persons of corresponding age, as well as a number of other indicators.

The human development index (HDI) in turn is a cumulative indicator of the level of human development in a given country, including in terms of education. Currently, the HDI is considered one of the most authoritative classifications characterizing social development, compiled annually by the United Nations Development Program (UNDP) and used in a special series of U.N. reports on human development. The HDI value serves as the basis for dividing countries into groups depending on the level of human development.

The education system in the NAFTA countries is evaluated through the following groups of indicators:

1) Attendance and Enrollment;
2) Education History;
3) Educational Transitions;
4) Employment;
5) Faculty and Staff;
6) Finances;
7) Parents and Family;
8) School and Institutional Characteristics;
9) School Districts;
10) Special Education;
11) Staffing;
12) Student Characteristics;
13) Teachers and Teaching.

One of the main groups that stand out in many documents is the concept of lifelong education (Long Live Learning).

Due to the nature of the organization's focus on free trade, education is not a significant part of the integration of countries. There is a full focus on U.S. standards. As a result, there is no separate body for monitoring the education system and data collection. Secondary data of state institutions (ministries and departments) and private companies are used to evaluate education systems. In the field of education, the USA is the leader among NAFTA countries and their education model dominates. In this regard, trends in interaction between educational institutions and exchange of experience are not rare.

Each of the countries participating in this international agreement focuses primarily on the situation inside its own national territory. Therefore, the first source of information is the relevant ministries and their data provided within the agreement. This collection of information is characterized by a fairly large amount of information processed.

Since the member states of NAFTA are members of other international associations (e.g. OECD, UNESCO), many indicators are taken from sources of international statistical databases. Specific statistical indicators for the selected country (or several countries) are chosen from the OECD list, where there are parameters in almost all areas of interest. Greatly influenced by these processes are the results of the work of the United Nations Statistics Division, whose members are all NAFTA member countries.

The frequency of gathering information depends primarily on the relevance of this indicator. Some statistics, such as those relating to the World Food Program, are updated constantly and annually; others, which include the education index – irregularly. Sometimes these updates may not even take place annually.

Education is not the main driver for the integration of NAFTA countries; therefore, no specific information collection methodologies or systematic approach has been found.[9] The main levels of education and groups of indicators are similar to those of the joint UIS database (UNESCO-EU).

The Union of South American Nations (UNASUR) is an international organization composed of twelve countries in South America: Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay and Venezuela. The organization was established on 23 May 2008 and began active operations on 11 March 2011.[10] The purpose of the organization is to ensure integration in the cultural, economic, social and political spheres, taking into account the provisions of each of the participating countries. The mission of UNASUR is to eliminate socioeconomic inequality, achieve social integration, expand citizens' rights, strengthen democracy and reduce the existing asymmetry of development, while taking into account the sovereignty and independence of each of the states. In the field of education, UNASUR has set itself the task of eliminating illiteracy, improving access to quality education and universal acceptance of various training systems and qualifications. The following goals are declared in the humanitarian sphere:

1) The elimination of illiteracy, equal access to quality education and regional recognition of courses and degrees;

2) Equal access to social security and medical services;

3) Strengthening the identity of the peoples of the region of the participating States by promoting the expression of knowledge and memory in order to promote cultural diversity.

Organizationally, UNASUR consists of various divisions, which include the South American Council of Education (CSE), the South American Council on Science, Technology and Innovation (COSUCTI), the South American Council of Culture (CSC) and the South American Council of Social Development (CSDS).

On the official website of UNASUR, as well as in the Charter of the Education Council, the composition and objectives in this area are presented.[11] Initially, the South American Council on Education, Culture, Science, Technology and Innovation dealt with the issue of education. Now, there are three independent councils, one for each area of knowledge: the South American Culture Council, the South American Council on Science, Technology and Innovation and the South American Council on Education.

The South American Board of Education consists of the following bodies:

1) Council of Ministers: ministers or officials having jurisdiction in matters of education in member states;

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[9] Sample Records for NAFTA Guidance Document (Dec. 10, 2018), available at https://www.science.gov/topicpages/n/nafta+guidance+document.html.

[10] UNASUR (Dec. 10, 2018), available at http://www.unasursg.org/en.

[11] Proyecto de Estatuto del Consejo Suramericano de Educación (CSE-UNASUR) [Draft of the South American Council of Education Statute (CSE-UNASUR)] (Dec. 10, 2018), available at http://www.unasursg.org/images/descargas/ESTATUTOS%20CONSEJOS%20MINISTERIALES%20SECTORIALES/ESTATUTO%20CONSEJO%20DE%20EDUCACION.pdf.

2) Executive body: representatives of ministries of education with jurisdiction;

3) Working groups for analysis, which can make suggestions and recommendations, as well as develop specific projects.

The main provisions of the Board of Education are:

– Regional integration, defined on the basis of the following elements: dialogue, cooperation and the exchange of knowledge and experience between the participating countries;

– Social equality – from building a democratic society and protecting the rights of trade unions to promoting affordable education, culture, science, technology and innovation in the territory of the allied countries, taking into account cultural, ethnic and ideological differences;

– Civil participation;

– Quality school education;

– Dialogue and solidarity as the basis of educational integration.

The working group of the Education Council planned the activities of the educational sector and developed a special plan for the creation of the "Hoja de Ruta" (Road Map). It contains general goals and specific goals for each area: basic education, secondary school and higher education. The report on the achievements in the field of education in the South American region ("*Los logros de la integración educativa en la región*") summarizes the goals that the countries of the region aspire to – increasing the literacy of the population, education coverage of the indigenous peoples of the continent, developing exchange programs (academic mobility) and comprehensive development of various training programs. The Roadmap also developed specific arrangements for collecting information on all training issues, and also identified responsible units and countries for implementation. The main tasks set in the framework of providing information are the following:

1) Encourage cooperation in educational, cultural, scientific, technological, and innovation activities in the region;

2) Reduce the asymmetry of regional and subregional organizations in the field of knowledge, in the fields of education, culture, science, technology and innovation;

3) Facilitate the exchange of information on the recognition and equivalence systems of various training and quality assurance systems at all levels in order to facilitate the integration, mobility and exchange of students and teachers;

4) Promote the coordination of initiatives and the exchange of experience for learning, research and innovation aimed at sustainable development, preserving the cultural diversity of countries and adapting to climate change;

5) Encourage actions aimed at improving the quality of education at all levels; promote inclusive education, development of skills and opportunities, appropriate training for better integration in the social and labor spheres;

6) Promote the development, access and use of social technologies in the interests of the needy layers in order to improve the teaching of science and popularize scientific knowledge.

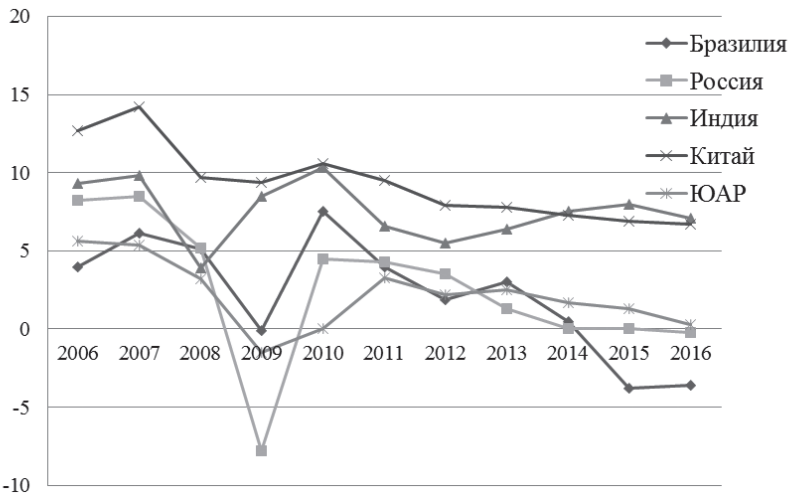
In open sources, there is no mention of a uniform methodology for calculating data on the UNASUR countries in the field of education. It can be concluded that each participating country independently approaches the collection of data in this area and submits the data to the South American Council on Education.

2. Assessment of the Socio-Economic Status of the BRICS Countries

To date, BRICS is a group of rapidly developing countries. Cumulatively, more than 3 billion people live in Brazil, Russia, India, China and South Africa, according to data from 2016, which corresponds to about 50% of the world population.[12] The cumulative GDP of the BRICS countries represents 22% of world GDP and is equal to US$16.8 trillion. The largest contribution to the overall figure is made by China and India, whose GDPs are US$11.2 and US$2.2 trillion, respectively.

A favorable position for these countries is ensured by the fact that they have both a powerful and developing economy as well as a large number of resources important for the world economy. However, in the global financial crisis, many BRICS countries have faced recession. In particular, the growth of China's economy over the past ten years has decreased almost two-fold. The financial crisis events of 2008 and 2014 also strongly affected Brazil and Russia, where GDP growth rates took negative values (*see* Diagram 1). According to data from 2017, the highest GDP growth rate was shown by India at +7.3%. For China, growth was 6.7% and for South Africa +0.7%. Russia and Brazil showed a drop in this key indicator of 0.4% and 2.9%, respectively.

Diagram 1: Dynamics of GDP of the BRICS Countries



Source: World Bank data, available at http://databank.worldbank.org/data/home.aspx.

[12] World Bank data (Dec. 10, 2018), available at http://databank.worldbank.org/data/home.aspx.

Despite the significant share of GDP in the world economy, GDP per capita in the BRICS countries is rather low. There is a large gap between the income levels of the population. This indicator can be determined with the aid of the Gini coefficient. The Gini coefficient is a macroeconomic indicator characterizing the differentiation of the monetary incomes of the population in the form of degree of deviation of the actual distribution of income from an absolutely equal distribution among the inhabitants. It is measured from 0% to 100%. The closer its value to 0, the more evenly distributed the public good:

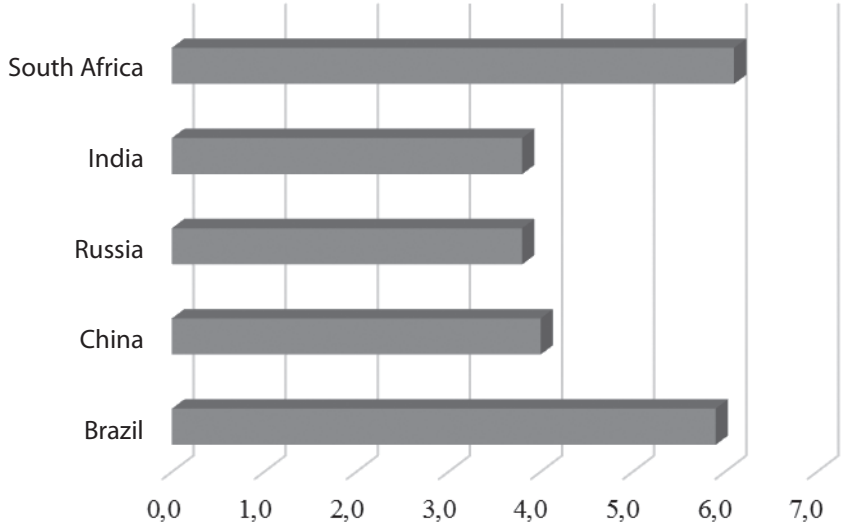
– South Africa 63.38% (2011);
– Brazil 51.5% (2014);
– China 42.16% (2012);
– Russia 41.59% (2012);
– India 35.15% (2011).

The greatest difference between the levels of life expectancy of the population is observed in South Africa. The population is most evenly distributed in India, but taking into account the low GDP per capita, it can be said that most of the population of India lives below the poverty line.

The development level of the education system is directly related to the level of economic development of the BRICS countries and the amount of public investment in education. The issues of education in these countries affect the following aspects: ensuring universal accessibility, improving the quality of education and the impact of education on the standard of living of the population. Providing poor families with access to education is one of the primary tasks in these countries. To this end, the state increases annual funding for education. The share of government spending on education in percent of GDP has worsened for eight years in all BRICS countries. The strongest state support is provided by the educational institutions of South Africa and Brazil.[13]

[13] Divya Budhia Gupta, *A Comparative Study of Basic Education Parameters for BRICS and their Relationship with Expenditure on Education*, 22(9) IOSR Journal of Humanities and Social Science (IOSR-JHSS) 1 (2017).

Diagram 2: Education Expenditure in the BRICS Countries, % of GDP (according to the World Bank)



Despite the crisis in university education,[14] Russia at the moment is leading in terms of the level of education among the rest of the BRICS countries. A comparative assessment can be made on the basis of the education level index, which was developed by the United Nations Development Program. This indicator is calculated as the normalized average value of the indicators of the average duration of training and the average expected duration of training. For Russia, the value of this indicator (reference is to 2015) is 0.816, for Brazil 0.681, for India 0.535, for China 0.631 and for South Africa 0.705.[15] A minimum of 0.8 is considered what developed countries should have. Thus, only the Russian Federation among the BRICS countries has an education index on a par with developed countries.[16]

The number of students at various levels of education in the BRICS countries is given in Table 5. By 2013, almost all the BRICS countries achieved 100% primary education. Despite this, the rates of enrollment in vocational education in the BRICS countries remain quite low (with the exception of Russia). The table also shows that the BRICS countries have a low level of access to higher education (with the

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[14] Dmitry Maleshin, *The Crisis of Russian Legal Education in Comparative Perspective*, 66(2) Journal of Legal Education 291 (2017).

[15] Human Development Data (1990–2017) (Dec. 10, 2018), available at http://hdr.undp.org/en/data.

[16] Oleg Vinnichenko & Elena Gladun, *Legal Education in the BRICS Countries in the Context of Globalization: A Comparative Analysis*, 5(3) BRICS Law Journal 4 (2018).

exception of Russia). Access to skills development programs is also limited, especially for illiterate adults, who are still quite numerous in India.[17]

The data on education expenditure, presented in Diagram 2, show a high level in South Africa and Brazil, whereas in India and Russia this indicator is only 3.8%, which is lower than the global level (6%).

Table 5: Number of Students at Various Levels of Education in the BRICS Countries

ISCED 1 (primary education)			
	The number of students	The number of students	The number of students
Brazil	16,761	48	21
China	95,107	46	16
Russia	6,343.4	49	21
South Africa	7,195.2	49	32
India	141,155	50	32
ISCED 2 and 3 (secondary education)			
	Number of students, thousand people; Share of women, %	Number of students, thousand people; Share of women, %	
Brazil	24,881	51	
China	88,692	47	
Russia	9,824.2	49	
South Africa	4,956.2	51	
India	119,401	48	
ISCED 5, 6, 7, 8 (higher education)			
	Number of students, thousand people; Share of women, %	Number of students, thousand people; Share of women, %	
Brazil	7,541.1	57	
China	41,924	51	
Russia	4,878.4	53	
South Africa	1,035.6	58	
India	28,175	46	

Source: Authors' summary of the following sources: World Bank, available at http://data.worldbank.org/indicator/; OECD, available at https://data.oecd.org/;

[17] UNESCO, BRICS: Building Education for the Future: Priorities for National Development and International Cooperation (2014) (Dec. 10, 2018), available at https://unesdoc.unesco.org/ark:/48223/pf0000229054.

European Union and the BRIC countries // European Union / 2012, available at http://ec.europa.eu/eurostat/.

An analysis of the data presented above suggests that the relative indicators of education in the BRICS countries have slight deviations from the average. Thus, the share of women at the primary level of education ranges from 46% to 50%; at the secondary level of education the share ranges from 47% to 51%. In contrast, at the higher education level the proportion of women is increasing in most countries, India being an exception. But the number of students per teacher is different: most students are in South Africa and India – 32 people, while in China – this figure is 16 people, and Brazil and Russia – 21 people.

All five BRICS countries have national medium-term plans for the development of education. The main dominants of their strategies follow:

- Brazil. Development priorities are aimed at increasing the coverage of education: provision of preschool education for all children aged 4–5 years; universal provision of 9-year training; increasing the coverage rate by secondary education to 85%. For higher education, the goals include increasing the enrollment ratio of youth aged 18–24 to 33%, and increasing the proportion of teachers and graduate students.[18]
- Russia. The program for the development of education for 2013–2020 focuses on the quality of education. The main objectives include the modernization of preschool and general education; improving infrastructure, management and finance to ensure equal access to education; creation of a modern system for assessing the quality of education; the development of higher education, courses and continuing education to meet the needs of youths and adults.[19]
- China. Fundamental principles of development: giving priority to education, students-focused orientation, experimenting with innovative reforms, giving all citizens equal access to education and improving its quality.[20] The most pressing issues are equal access to education and the conformity of the educational level to the country's economic development.[21]
- India. Goals for all levels of education: universal access to quality, free compulsory education for children aged 6–14; improvement of attendance, universal

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[18] Brazil National Plan for Education 2014–2024 (Dec. 10, 2018), available at https://internationaleducation.gov.au/International-network/Latin%20America/policyupdate/Pages/Article-Brazil-National-Plan-for-Education-2014-2024.aspx.

[19] *Аксенова О.А.* Экономическое развитие России и векторы реформирования высшего образования: барьеры и возможности // Научный альманах. 2016. № 2-1(16). С. 27–36 [Olga A. Aksenova, *Development of Russian Economy and Directions of Reforming the System of University Education: Barriers and Opportunities*, 2-1(16) Science Almanac 27 (2016)].

[20] Zhizhou Wang et al., *Internationalizing Chinese Legal Education in the Early Twenty-First Century*, 66(2) Journal of Legal Education 237 (2017).

[21] M.A. Jiani, *Why and How International Students Choose Mainland China as a Higher Education Study Abroad Destination*, 74(4) Higher Education 563 (2016).

enrollment in education of 90% in secondary schools and 65% in senior schools; increase literacy among youths and adults to 80%; universal provision of at least one year of preschool education; improving the results of training, with emphasis on basic reading.[22]

• South Africa. The main tasks are the eradication of poverty and the reduction of inequality. The government defines the goals of education until 2030, which include: universal assistance in preschool education; high standards of literacy of school education; expansion of higher education and courses; the creation of an innovative system that will link universities, scientific councils and other research institutions.[23]

According to the results of the assessment of the socio-economic situation of the BRICS countries, it can be concluded that for a comparative analysis it is necessary to use the indicators of coverage with educational programs. Also, an important aspect is the possibility of financing education and state support for education, since for the most part the population of the BRICS countries does not have high solvency.

3. Principles for the Formation of a Base of Information Comparison

According to the results of the socio-economic assessment of the BRICS countries, two main aspects can be identified for comparing education systems: the coverage of educational programs by the population of countries and the financing of the education system. The coverage indicators will provide an opportunity to determine the depth of penetration of education in different age groups and the entire population as a whole. An important aspect is the possibility of financing education and state support for education, since in the bulk of its population the BRICS countries do not have high solvency. To form a data system, the following items must be provided:

1) Determination of the main purpose of maintaining the general statistical bases of education;

2) Development of a list of information sections of indicators;

3) Basic concepts and definitions agreed upon by all participating countries;

4) Setting the period of collection of information;

5) Identification of sources of information collection;

6) Development of forms for comparability of results.

• *General objectives of information collection.* The overall goal of coordinating the BRICS education systems can be seen as increasing the competitiveness of specialists and educational mobility. Since the BRICS countries are heterogeneous in terms of

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[22] Lovely Dasgupta, *Reforming Indian Legal Education: Linking Research and Teaching*, 59(3) Journal of Legal Education 432 (2010).

[23] BRICS: Building Education for the Future, *supra* note 17.

the educational level of the population, the main objectives may be generalized positions of education:

– Coverage and accessibility by levels of education, i.e. general involvement (non-involvement) of the population in the educational process (starting from preschool education and up to higher education);

– Assessment of educational levels (by ISCED 11 categories[24]), i.e. types of education, quality indicators and the state of infrastructure;

– Level of costs for education;

– Academic mobility of students;

– Professional status of graduates and working population.

• *The principle of determining the composition of information*. There are several approaches to the formation of an indicator system. The following options for forming the base of indicators were identified.

A combined principle of forming the system of indicators is based on the comparison of the indicators of the education systems of the BRICS countries with the identification of common and most relevant indicators for each country. General indicators are collected by all five of the countries, which simplifies and accelerates the process of collecting and comparing data.

On the basis of OECD, with which the BRICS countries work in the field of education statistics. The OECD's statistical base is linked to the economic activities of states, and the conditions for the provision of statistical data are related to this circumstance.

On the basis of UNESCO, which already collects certain statistics for many countries, including the BRICS countries, based on indicators collected by the UNESCO organization. The database of this organization has a socio-humanitarian focus. If we consider the declared priority areas of cooperation of the BRICS countries,[25] the most appropriate evaluation system is that of UNESCO.[26]

The basic principle of indicators choice:

a) On the basis of the studies carried out, the main areas of educational activity were identified: the coverage of education of various groups and its structure, the termination of educational levels, financial resources and the burden on pedagogical staff;

b) Use of comparison principles on the generally accepted ISCED basis and ten basic principles of official statistics for cross-country comparisons (adopted by the United Nations Statistical Commission);

c) Use of indicators by all BRICS countries;

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[24] ISCED 11 – International Standard Classification of Education, developed by UNESCO in 2011.

[25] New Delhi Declaration, 2016, *supra* note 1.

[26] A.5.2. The list of 25 quantitative statistical data is a list of statistical computational indicators that allow quantifying the characteristics of the BRICS education systems.

d) A limited number of indicators for the initial coordination of statistical information of all countries.

All indicator databases are formed on the basis of ISCED standards and fully correlate with world statistics.

• *Definition of basic education systems concepts.* When we discuss basic concepts and definitions, we should focus on general concepts and definitions:

– Formal education (subject to statistical evaluation): planned educational programs implemented by state and public organizations and recognized private organizations in the field of education;

– Pre-school education: programs at the ISCED-0 level or the education of young children;

– First education and adult education: training of persons before their first entry into the labor market;

– Formal educational programs for adults included in the database can be classified as educational programs of the second higher education;

– Completion of the training process/release is confirmed by the assignment of an educational qualification;

– Educational institutions. The statistical records include those educational institutions that have the provision of educational programs for students as their main goal (for example, schools, colleges, universities);

– Applicants and graduates are those who have completed their school education, received a certificate of completion and hold a graduation document;

– Training staff consists of all employees in educational institutions;

– Students are classified as students on a full-time or part-time basis within the academic year (the established period);

– The total amount of *state expenditure* on education includes:

a) Direct state financing of educational institutions;

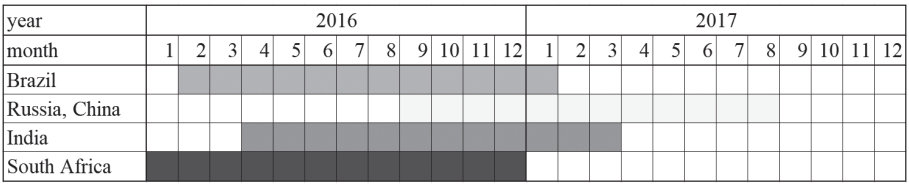
b) Interbudgetary transfers for education;

c) State subsidies (scholarships, loans, etc.) to families and enterprises (including non-profit organizations).

• *Setting the collection period.*

1. The accounting period for non-monetary indicators – such as the number of students, applicants and staff – is one academic year. One of the key factors affecting the comparability of data is the establishment of a data collection and reporting period for all countries. The main problem here is that the school year in the BRICS countries starts at different times. The beginning of the school year in Brazil is in February, in Russia and China in September, in India in April, in South Africa in January. The training calendar is shown in Diagram 3.

Diagram 3: BRICS Study Calendar



Source: compiled by the authors.

According to the diagram, the last month in the 2016–2017 school year is August. Consequently, a request for data to countries can be sent in September, with the proviso that on 1 December 2018 countries will have to provide relevant statistics for the completed 2016 academic year.

2. Data on the number of students is presented on a certain date at the beginning of the academic year, for example, at the end of the first month of training.

3. Data on education workers generally refers to a specific date at the beginning of the school year.

4. To obtain data on expenses for the base, the financial year is taken (in most cases it is a calendar year).

5. If financial and non-financial indicators are taken into account, for example when calculating the costs per student, the data without material costs is adjusted in the reporting period of the fiscal year.

6. Determining the time of data storage: in the databases of international organizations one can find data from as far back as the 1890s. The data storage horizon can be agreed on by the countries participating in the project.

The main sources of information are the national statistical agencies of the BRICS countries. State statistical observation of the education sector covers all levels of education from preschool to higher professional and postgraduate education in all BRICS countries. The main respondents in this field are educational institutions that implement programs in the field of general and additional education for children, as well as programs for secondary vocational education (SVE) and higher professional education (HPE).[27]

The sources and methods of collecting statistics in the field of education include, in addition to information on forms of state statistical observation coming from educational institutions, and other instruments, in particular the Population Census, as well as sample surveys (e.g. on employment issues, etc.).

In addition, information sources may be data from population surveys that are conducted by specialized marketing agencies commissioned by statistical

[27] Statistical tools in the Russian Federation are various forms of the Federal Statistical Observatory (forms of the FSN) in 2016 – SPO-1, SPO-2, VPO-1, VPO-2, etc., which are approved by the government.

agencies or other interested organizations (e.g. the executive bodies of the BRICS countries).[28]

Development of reporting forms: to collect statistical data it is proposed to develop tabular forms for each indicator. Table 6 is an example of such a form.

It is assumed that countries will provide the data needed to calculate the indicators in absolute terms that will automatically be converted into relative figures by the BRICS executive bodies using the Standard Data Delivery Form below. Filling out the form graph in absolute terms will be a prerequisite for providing data.

Table 6: Statistical Indicators Presentation Form

<table>
<tr><td colspan="6">Section: Section name, indicator number</td></tr>
<tr><td colspan="6">The organization that provided the data (e.g. Rosstat)_____
Description of the index, indicator _____</td></tr>
<tr><td colspan="2">Period of data provision</td><td colspan="3">Data and methods of collection</td><td rowspan="2">Contacts</td></tr>
<tr><td>Date of Request</td><td>Date of Provision</td><td>Registration</td><td>Method of data collection</td><td>Frequency of information collection</td></tr>
<tr><td>The 1st of September</td><td>The 1st of December</td><td>Registration form developed by the BRICS countries</td><td>Instruction (for example, one of the Institute of Statistics)</td><td>Annually</td><td>e-mail of the person in charge</td></tr>
</table>

Source: developed by the scientific team on the basis of OECD data, 2017. Statistical Database: Education, available at http://www.oecd.org/statistics/data-collection/educationandtraining.htm.

4. The Results of the Study on the Harmonization of Indicators of the Education Systems of the BRICS Countries

As a result of the above analysis, a system of eight key statistical indicators was proposed, monitoring of which ensures the comparability of statistical data of the BRICS countries and allows making operational decisions on the development of educational policy in the Russian Federation. The scorecard is represented by the following list of indicators.

The system displays a comparison of indicators of the number of students and teachers, indicators of the duration of training, as well as in the general form of educa-

[28] Delia North et al., *Building Capacity for Developing Statistical Literacy in a Developing Country: Lessons Learned from an Intervention*, 13(2) Statistics Education Research Journal 15 (2014).

tional programs by level of education. Indicators 7 and 8 are aimed at overall tracking of funding in different education systems of the BRICS countries. The characteristics of these indicators are given below:

1) Cumulative gross graduation rate (CGGR). Purpose: to determine graduation structure by levels;

2) Cumulative entry rate (GER). Purpose: to determine entry structure by levels;

3) Cumulative gross enrolment rate (CGER). Purpose: to reflect the overall enrollment level of the population at each ISCED level;

4) Cumulative net enrolment rate (CNER). Purpose: to reflect the education coverage level of certain age population for each ISCED level;

5) Government expenditure on education as % of GDP (GEE). Purpose: to determine the education expenditure share;

6) Government expenditure per student as % of GDP per capita (GEPS). Purpose: to determine the education expenditure per citizen;

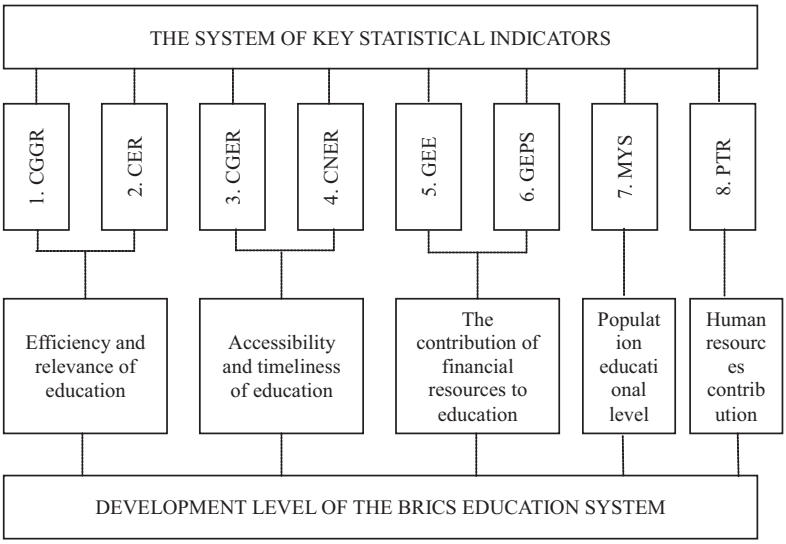
7) Mean years of schooling (MYS). Purpose: to determine the educational level of the population;

8) Pupil-teacher ratio (PTR). Purpose: to measure the level of human resources input in terms of the number of teachers in relation to the size of the pupil population.

The system displays a comparison of the indicators of the number of students and teachers, the indicators of the duration of training, as well as in the general form of educational programs by level of education. Indicators 7 and 8 are aimed at overall tracking of funding in the different education systems of the BRICS countries.

Diagram 4 shows the final scheme of indicators and their informational purpose. The coefficients of the system of indicators are combined according to the principle of determining the basic positions of the education systems of the BRICS countries. The insignificant number of indicators (in comparison with the statistical bases of the leading international organizations UOE) is explained by the fact that it is necessary to take the first step to harmonize the indicators of the education systems. As mentioned above, the education systems of the BRICS countries are noticeably spread. The selected indicators are collected by all BRICS countries and are quite convenient for the initial phase of comparison. At the same time, these indicators characterize important directions of the education systems of the BRICS countries.

Diagram 4: The System of Harmonization of Indicators of the Education Systems in the BRICS Countries



I. Cumulative gross graduation rate (CGGR). Total number of graduates at the specified level of education divided by the population at the typical graduation age from the specified ISCED level. The data allow the assessment of the level of population education in general.

II. Cumulative entry rate (GER). Number of students in the theoretical age group for a given level of education enrolled in that level.

III. Cumulative gross enrollment rate (CGER). Total enrollment for a given level of education. Total number of students enrolled in a given level of education, regardless of age, divided by the age from the specified ISCED level.

IV. Cumulative net enrollment rate (CNER). Complementary indicator that shows total number of new entrants to a given level of education, regardless of age, expressed as a percentage of the population of theoretical entrance age to this level. The value will be calculated separately for each level of education.

V. Government expenditure on education as % of GDP (GEE). The indicator provides information on the total financing of the education system.

VI. Government expenditure per student as % of GDP per capita (GEPS). The indicator shows the relative value of education expenditure in the BRICS countries.

VII. Mean years of schooling (MYS). Average number of completed years of education of a country's population aged 25 years and older. High MYS indicates high education level of the population, the level of society and economy development, and shows the importance of qualified personnel.

VIII. Pupil-teacher ratio (PTR). Purpose: to measure the level of human resources input in terms of the number of teachers in relation to the size of the pupil population. Average number of pupils per teacher at a given level of education. Low PTR indicates high relative access of the student to the teacher. Comparison:

a. with established national norms on the number of pupils per teacher

b. to develop a standard for the BRICS countries.

This method involves filling out standard forms with statistical committees (bureaus, institutes) of each country in absolute terms for national education levels and the corresponding intervals for the BRICS Central Committee of Statistics. Then the central committee will provide the data.

In addition, to ensure the quality of the data the obtained indicators can be compared (or, in the absence of data, borrowed) with the indicators calculated by the UNESCO Institute of Statistics. Equivalents of indicators:

1) Total graduation ratio (equivalent in the UNESCO base – Gross graduation ratio);

2) Total net enrollment ratio (equivalent in UNESCO base – Net enrollment rate by level of education);

3) Total gross enrollment ratio (equivalent in UNESCO base – Gross enrollment ratio by level of education);

4) Total gross entry ratio (equivalent in UNESCO base – Gross entry ratio by level of education);

5) The coefficient "student/teacher" (equivalent in the UNESCO database – Pupil-teacher ratio by level of education);

6) Average duration of studies (equivalent in the UNESCO database – Mean years of schooling);

7) The ratio of expenditure on education to GDP (equivalent in UNESCO base – government expenditure on education as a percentage of GDP);

8) Unit expenditure on education (equivalent in the UNESCO database – government expenditure on education per student as a percentage of GDP per capita).

Harmonization of education indicators of the BRICS countries will make a significant contribution to even greater integration within this association. In the future, it will be possible to create a single educational space in which to combine the competencies and strengths of all of the countries. Undoubtedly, such efforts will lead to the development of each country of the association, and will strengthen its position at the international level.

Conclusion

The harmonization of the activities of any international associations always causes certain difficulties. This applies to both the collection and the provision of statistical information. The main problems of the harmonization process, first of all, include the goals and motivation of the participants in associations. The simple question about

the necessity of such a process is not an easy question to find an answer to. It can be assumed that competition in the global economic and political space is a powerful engine. Alone, it is difficult to confront modern challenges.

In addition to the problem of goal-setting, the question arises of the coordination and technical execution of procedures for collecting and providing information. According to the research data, Eurostat has the most complete base of indicators, as it operates within the framework of the EU association, where there is a strict discipline. What can be said about other international associations? Even the UNESCO bases have significant information gaps. The process of collecting information in modern conditions does not represent technical difficulties.

To meet the challenges of developing methodological principles for the harmonization of the indicators of the BRICS countries, it is necessary to have a simple system of comparing data from the education systems of the BRICS countries and the possibility of developing a common standard for evaluating the education systems. Moreover, it is advisable to take as a basis the experience of creating such a system of the developed countries (the UOE system). Although, it should be noted that the three leading international organizations do not give up their own bases for the evaluation of education and training, since the data collection points are different from them: social, economic and political-economic.

In the presented work, a methodology for harmonizing the indicators of the education systems of the BRICS countries is proposed, which can be considered to be the first step towards combining efforts to improve the competitiveness of the populations of these countries.

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TAXATION REGULATION OF THE BRICS' INNOVATIVE COMPANIES

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The question as to whether tax rate influences capital structure remains unresolved, though the amount of research conducted on the issue grows every year. This question is particularly important for innovative companies for two reasons. First, R&D spending and the level of innovativeness among firms are crucial indicators of a country's overall economic performance. The second reason is that tax incentive programs today are applied by governments with increasing frequency. There is a strong lack of tax rate influence on the capital structure of innovative companies and tax incentive programs impact on the debt-to-equity ratio particularly. This research is intended to help fill this gap. The question as to the influence of tax rate as well as influence of R&D taxation programs on capital structure will be studied via the econometrics approach – that is, through panel regressions. The time frame to be considered is from 2012 until 2015. Four hypotheses connected with taxation influence on capital structure in BRIC countries were investigated. These hypotheses differ according to which indicator of the structure of capital is taken as the basis of the analysis. This investigation may be useful for governments or other analysts to estimate ETR influence on capital structure choice and assist in making a decision between increasing the tax rate (and thereby collect more taxes) versus stimulating companies to take on less debt and less risks. The results highlighted in this paper show an absence of significant impact vis-à-vis the tax rate on the capital structure and also indicate an absence of a significant impact of tax incentive programs on capital structure.

Keywords: R&D; innovative companies; R&D taxation programs; effective tax rate; taxation policy.

Recommended citation: Elena Makeeva & Irina Mikhaleva, *Taxation Regulation of the BRICS' Innovative Companies*, 6(1) BRICS Law Journal 41–62 (2019).

Table of Contents

Introduction

Information and intangible assets such as knowledge seem to play a central role in economic success in the 21st century, both on micro and macro levels of investigation. Innovative knowledge is what matters today, and what distinguishes winners from losers. From a macroeconomic perspective, it can mean that a country which successfully implements innovative knowledge in different economic and social spheres has a good chance to outpace competitors in terms of economic progress in a relatively short period of time. On the microeconomic level, it means that a firm which has high R&D spending is incentivized to lead innovative progress and develop existing production either qualitatively or quantitatively, and in a few years may well have a competitive advantage over its rivals.

Recent studies on capital structure contradict each other when it comes to naming the factors influencing firms' choice of financing operations. One of the main issues here is whether corporate tax rate affects capital structure choice and, if and where it does so, to what specific extent it has such an effect. This issue is particularly important in studies of innovative companies for the following reasons: since R&D

spending and the level of innovativeness among its firms are crucial for a country's overall economic performance, fiscal policy often provides innovative companies with beneficial tax programs, usually referred to as "tax stimulating innovation policies." There are several types of such programs, among which the most popular are "R&D tax credit," "R&D super deduction," and "innovation" or "patent box regimes." These policies are common not only in developed countries but also in transitional economies or developing countries where they have been recently adopted.

The majority of capital structure research is focused on understanding forces that influence corporate financing choice in developed countries, mainly in the United States. However, over the last few years, scientific interest in similar trends pertaining towards developing countries has increased. Though there are more papers referring to such countries as China and Brazil today, there is still lack of research in developing countries looking into the applicable variables influencing corporate financing behavior and corporate tax rates specifically. This paper focuses on this area specifically, referring to the data on innovative companies in BRIC countries' to analyze the effect of tax rates on corporate structure choice.

Problem Statement. The purpose of this paper is to measure the impact of effective tax rate influence and tax stimulating programs on corporate structure choice for a sample group of firms based in Brazil, Russia, India and China. It is important to note that, originally, the authors planned to analyze R&D tax credit, R&D super deductions, and innovation and patent box regime influence on corporate structure choice separately. If that was to be done, this study would become the first one we know of thus far which considers the issue of tax stimulating programs' influence on capital structure. However, due to a lack of available data we were unable to do such an analysis for BRIC countries. Since we are still specifically interested in such impact, we analyzed the impact of tax stimulating programs on the capital structures of innovative companies for more developed countries instead, for which more data is available. We hope that one day our study will serve as a template for a similar analysis of BRIC countries when more data on these countries becomes widely available for economics research.

1. Literature Review

1.1. The Influence of Tax Incentive Programs on Innovation

1.1.1. Causality Between Tax Incentive Programs and Performance

For the purposes of this paper, the existing literature on tax incentive programs influence on company's performance (on R&D quantity and quality to be precise) must be analyzed. There is no doubt that the causality between performance and capital structure exists – the issue today is whether high-performance innovative companies use debt financing more often than less successful parties. It was already mentioned that debt financing is easier for companies with high-quality R&D and that patents can even be used as a guarantee on bank debt.

Bloom, Griffith, and Van Reenen's (1999)[1] early paper separately analyzes the influence of tax credits on R&D. Using panel data on tax changes from eight OECD countries, research concludes that tax credits increase R&D intensity, or quantity, in these countries. However, most of the countries analyzed in that paper are developed countries such as the United States, the United Kingdom, and Canada. The research also uses data from Spain, and we would apply these results, though our paper mainly focuses on BRIC countries, none of which are analyzed in Bloom, Griffith, and Van Reenen (1999).

The Hall and Van Reenen (2000)[2] survey summarizes evidence of fiscal incentives for R&D and concludes that each dollar in tax credit for R&D stimulates one dollar of R&D additional spending, expanding R&D. However, this study emphasizes that the information gained on the topic and the amount of literature was yet insufficient.

The Karkinsky and Riedel (2012)[3] article analyzes corporate patents in multinational firms as a source of profit-shifting opportunities and a correlation between corporate tax rate and the number of patents holds in the country. The paper shows that there is a strong negative effect between tax rate for corporations and the number of patent applications filed. Though our study does not focus on MNE, the result of the Karkinsky and Riedel study is important for our analysis since it shows that the lower the corporate tax rate, the higher the performance showed by the innovative firm in terms of quality – that is, in terms of patents registered.

The Ernst, Richter, and Riedel (2013)[4] study focuses not only on the issue of tax incentive programs' influence on R&D spending, but also whether these programs expand R&D quality, directly heightening companies' performance. The conclusions of this paper are highly useful. It discusses a recently introduced tax incentive program – reduced income tax rates on R&D output – which is the only one so far influencing R&D quality instead of quantity. The rest of the programs, (i.e. special tax allowances and tax credits) do influence the quantity of R&D spending, but not the quality of results. The implication of these results is the following: while special tax allowances and tax credits benefit from R&D input, reduced income tax rates on R&D benefit through output.

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1 Nick Bloom et al., *Do R&D Tax Credits Work? Evidence from an International Panel of Countries 1979–1994*, Institute for Fiscal Studies, Working Paper No. W99/8 (1999).

2 Bronwyn Hall & John van Reenen, *How Effective Are Fiscal Incentives for R&D? A Review of the Evidence*, 29(4–5) Research Policy 449 (2000).

3 Tom Karkinsky & Nadine Riedel, *Corporate Taxation and the Choice of Patent Location Within Multinational Firms*, 88(1) Journal of International Economics 176 (2012).

4 Christof Ernst et al., *Corporate Taxation and the Quality of Research and Development*, 21(4) International Tax and Public Finance 694 (2014).

1.1.2. On R&D Tax Incentive Programs

Different R&D tax incentive programs aim to make economies more competitive. First, we will examine existing types of R&D tax incentives. There are three main categories of incentive: "R&D tax credits," "R&D tax super deductions" and "patent box regimes." R&D tax credit is an amount subtracted directly from the tax liability. Programs may vary by whether the tax credit is refundable, taxable, or based on the volume of R&D. Regardless of the specific type, tax credit works through decreasing taxable income. The second type of R&D incentive – R&D tax super deductions – also decreases the taxable income, but instead of decreasing it on the different percentage which varies depending on other factors, super deduction does so based on the fixed value of the R&D assets or capital. The program looks almost the same as the tax credit, but companies using it can reduce their taxable income even more. By way of example, super deduction base reaches 300% in Latvia and Lithuania. Finally, patent box regimes use another principle – they decreases corporate tax rate for patents income, making holding patents even more beneficial.

Table 1 is examines how these programs are used in various countries according to the nature of the benefit available. One of the most popular incentives is certainly tax credit, available in most countries observed:

Table 1: Tax Credit Practice by Country

Country	**Details on tax credit**
BRICS	
Russia	Tax credit may be provided for one to five years and shall not exceed 50% of a taxpayer's total payment for the period. In addition, the investment tax credit shall not exceed 100% of the acquisition value of fixed assets that are to be used in R&D activity or can be negotiated with the authorities
Other countries	
Australia	A refundable 45% tax credit for SMEs and nonrefundable tax credit of 40% of large firms
Austria	10% volume-based refundable credit
Canada	15% tax credit for all qualifying R&D costs and refundable investment tax credits at a rate of 35% for small Canadian-controlled private corporations
France	30% tax credit for the first EUR 100M of qualified R&D expenditure incurred during the tax year. For qualified research expenditure above this EUR 100M threshold, the rate is reduced to 5%
Ireland	25% volume-based tax credit
Italy	Incremental R&D tax credit equal to either 25% or 50% depending on the size of the company and 25% credit for digital economy

Japan	Differentiated volume-based credits: for SMEs the rate is 12% of total R&D expenditure and for all other companies the rate is 8% to 10% of total R&D expenditure
Portugal	Atax credit of 32.5% of the R&D expenditure and 50% of the incremental expenditure of the period is available
South Korea	Volume-based and incremental tax credits for SMEs and large companies
Spain	Volume-based tax credits for 25% of qualified expenditure and Incremental credit equal to 42% of the amount of current year expenditure
UK	10% refundable credit for large companies and 33.35% refundable credit for SMEs
USA	Incremental research tax credits

Source: Deloitte working papers.

Super deductions are widespread as well, performed in the following countries (represents in the Table 2) under diverse conditions.

Table 2: Super Deduction Practice by Country

Country	**Details on super deduction**
BRIC	
Brazil	160%–200% super deduction
Russia	150% super deduction
India	200% super deduction for in-house R&D expenditure and 125%–200% super deduction for payment to research institutions
China	150% super deduction
Other countries	
Belgium	A one-time deduction of 13.5% of all R&D investments or a current deduction of 20.5% of depreciation related to R&D assets
Croatia	Depending on the project category: fundamental research project – 250%, applied research project – 225%, developmental research project – 200%, technical feasibility studies – 175%
Czech Republic	200% super deduction
Hungary	200% super deduction
Latvia	300% super deduction
Lithuania	300% super deduction
Malaysia	200% super deduction
Netherlands	160% super deduction

Poland	100% super deduction
Romania	150% super deduction
Singapore	Additional 50% deduction for certain R&D expenses incurred in Singapore and additional 250% or 300% deduction on the first SGD 400K
South Africa	150% volume-based super deduction
Turkey	Incremental 100% deduction
UK	130% volume-based super deduction for large companies, 230% volume-based super deduction for SMEs

Source: Deloitte working papers.

Patent box regimes are a less popular measure though it is also used in several countries. Data are shown in the Table 3.

Table 3: Patent Box Regime Practice by Countries

Country	**Details on patent box regime**
BRIC	
India	Income by way of royalty in respect of a patent developed and registered in India earned by an eligible taxpayer shall be subject to tax at the rate of 10% (plus surcharge and cess) on a gross basis
China	China extends its patent box to allow income from certain types of commercial "know-how". Exemption for revenue below RMB 5M ($783K) and 50% above RMB 5M. Tax Rate – 12,5%
Other countries	
Belgium	Patent income deduction of 80% of qualifying patent income
Hungary	A patent box deduction from income tax 50% of the gross amount of the royalty received
Italy	50% tax exemption that will be phased-in over a 3-year period
UK	10% patent box deduction

Source: Deloitte working papers.

It is important to once again highlight that there are several other tax incentive programs that are not covered here – measures which are specific to certain countries. Some countries listed above use several programs: for instance, the United Kingdom uses all three types of programs mentioned above, while Turkey has only a 100% incremental super deduction. Today there are many studies held on the subject of whether tax incentive programs achieve their goal of enhancing R&D spending. However, economic science is still undecided on the issue, so it is hard to be sure at this point whether using more or less tax incentive programs is beneficial or not.

2. Methods

2.1. Introduction to the Research Method

This research consists of two separate but closely related parts. In the first part, effective tax rate (ETR) influence on the capital structure of innovative firms from BRIC countries will be analyzed. For this purpose, we use a panel data set [2012–2016 years] of companies from Brazil, Russia, India, and China. We had planned to include South Africa in our data set as well, but our research revealed a significant lack of data on this country and virtually no companies that would meet our definition of innovative companies.

In the second part, we observe not only effective tax rate impact on the capital structure, but tax influence is decomposed into three components by tax incentive programs – R&D tax credit, R&D super deduction, and patent box regime. For that purpose, another data set is used – though, as we have noted, despite tax incentive programs becoming more popular and widespread in developing countries (including BRIC countries), corporate culture in these countries still lacks transparency, which leads to a lack of reliable data from sources such as the financial statements of companies. Moreover, the relative novelty of tax incentive programs throughout the world leads to another data related issue – that is, the fact that it is hard to compose even a relatively balanced panel data set (which would contain tax variables decomposed according to taxation programs) even if one were analyzing developed rather than developing countries. That is why one-year data from 21 developed countries' innovative companies is used in this study to bring an approximate estimation of tax stimulating programs effect on capital structure choice.

3. Data

3.1. Data Sources for BRIC Countries

Our main data source for both parts of our research is Bloomberg Terminal, and the data was analyzed using data analysis program Stata 13. Bloomberg Terminal is a widely-used computer software system provided by financial data vendor Bloomberg. This system contains real-time updated verified data on a wide range of financial variables.

We based our research on BRIC countries on the 2012, 2013, 2014, 2015 fiscal years' data from Bloomberg, which contains financial data for innovative firms which are headquartered in and trade in BRIC countries. We have preferred to use panel data in this part of our research over cross-sectional data which we use in second part of our research due to some valuable panel data advantages:

– as we have already mentioned, there is significantly less verified data available on BRIC countries' companies in comparison to firms based in developed countries. Lack of recorded observations may lead to serious problems in regression construction in instances of insolvency. One way to deal with the issue is to use panel data which

enlarge the number of observations and improve the effectiveness of evaluations, for example:

– using panel data makes it possible to analyze the influence of independent variables on the dependent ones over a certain time interval, which is particularly important for our research since an overview of company investments in R&D over a certain time interval is more objective.

The data was primarily selected according to the following criteria:

– Where the countries of domicile are Brazil, Russia, India, China;

– Where R&D spending for each year observed [2012–2016] has data;

– Where R&D spending value for each year observed [2012–2016] is greater than zero;

– Where total assets for each year observed [2012–2016] has data or value is greater than zero.

Therefore, we include in the data set those firms that have total assets and R&D spending data for 5 years and whose securities are currently traded. As a result of this selection, observations from 2,690 companies were primarily received, which, in total, composed 13,450 observations. Each company was given a unique id number, which, further on, was set as panel variable. Data duplicates were detected and erased using the duplicate function in Stata 13. Data outbursts were detected by a graphical analysis of data for each variable grouped by year, implemented in Microsoft Office 365 Excel. Uploading data from Bloomberg Terminal was transformed into panel structure with the help of an add-in Power Query.

The next step in the data analyses was performed in Stata 13 with a normal distribution of errors verification. Verification was made using the -qnorm- function, which displays an error distribution graph. For each of the variables, distribution graphs showed reverse normality with the exception of some omissions, which were erased. Further, the data were checked for multicollinearity by compiling an independent variables correlation matrix.

After performing this data selection process, we ended up with the sample of 1,508 companies, which corresponds to 7,540 observations. Company distribution by country is presented in the Table 4 below.

Table 4: Company Distribution by Country

Country	Number of companies	Number of observations	Percentage in the total sample
Russia	6	30	0.398%
Brazil	23	115	1.525%
China	1054	5270	69.894%
India	90	450	5.968%

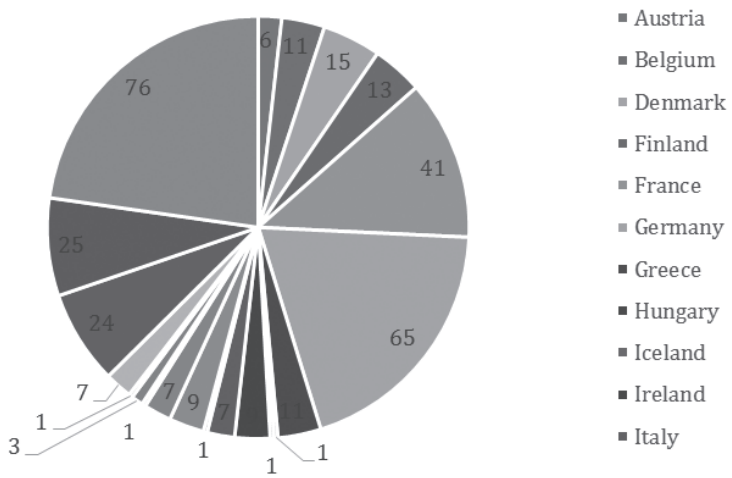
Source: Author's own calculations.

3.2. Data Sources for Data Set on Tax Stimulating Programs

For initial data set from 21 developed countries on tax stimulating programs we used Bloomberg terminal as well with the same primary constraints. However, there is no data available in any financial aggregator as we know so far which would provide separate data on tax incentive programs.

Therefore, data collection for this sample was a two-stage process. For the first stage, data from Bloomberg Terminal on basic control variables was collected (the same set of control variables as in the earlier BRIC countries sample was utilized) as well as data on effective tax rates, while the second stage process consisted of a manual data search and sample collection. Instead of using panel data, in this case we used cross-sectional data from the same year [2016] from 21 developed European countries: Australia, Belgium, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxemburg, Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden, Switzerland, and the UK. The final distribution of companies for these countries is shown in Figure 1.

Fig. 1: Company Distribution by Country



Source: Author's own calculations.

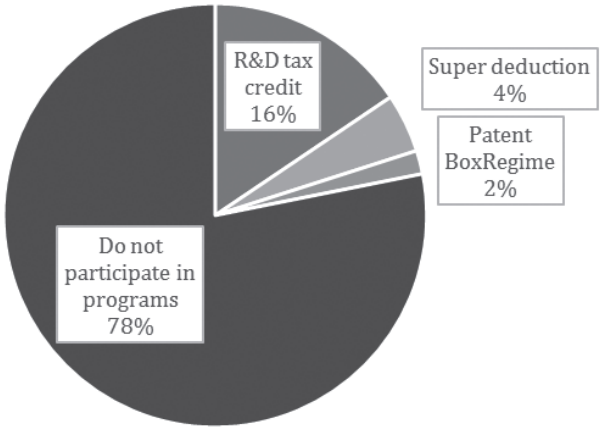
As previously described, the three different types of tax incentive programs – R&D tax credit, R&D super deduction and patent box regime – impact on capital structure is analyzed here. Tax incentive programs are implemented in the model as three different dummy variables, which equal 1 if the company participated in program and 0 if no participation took place. For the data which could not be found these variables accommodate the missing value. The main source for these "dummy

variables" data is the annual financial reports of the individual companies (notes section). In the official governmental accounts of the countries surveyed, as opposed to each company's individual reporting, the relevant information was presented in sufficient detail to enable it to be possible to find data for the sample according to the category of incentive programs. This may be one of the reasons why these dummy variables coefficients are insignificant.

In this sample mainly developed countries were included. Some countries such as Slovenia, Hungary and Poland are relatively less developed than others in the category, but they are still considered to be developed; the only country which is under debate is Greece, but since this country is a member state of the European Union, we may also consider it to be developed. Regardless, in this research model we did not distinguish between developed and developing countries for two reasons. First, the goal of this part of our research is to make a rough estimate of tax incentive programs' influence on capital structure without distinguishing results by economic development of the individual countries. Second, not enough data is available to make such a distinction.

The last peculiar characteristic of the data to take notice of here, is that during the process of collecting information vis-à-vis companies' participation in tax incentive programs it became apparent that there is a relatively low participation rate in these programs, which lowers again in relative terms as we move down the order of development for these countries (from more developed to less developed). This is a rough estimate and needs to be proven via a more thorough econometric analysis. In this case, analysis is based on simple observation. The share of companies' participation in various programs – R&D tax credit, R&D super deduction and Patent Box Regime – according to our data can be observed on Figure 2.

Fig. 2: Companies' Participation in Tax Incentive Programs



Source: Author's own calculations.

Thus, this data set includes financial indicators from 21 countries and 334 companies. Among these companies 261 company do not participate in tax incentive programs, though such programs exist in these countries. Any notable lack of participation can occur due to various reasons (such as companies' ignorance towards such programs).

4. Hypotheses and Model Specification

4.1. On the BRIC Countries Data Set

The study on the BRIC countries data set tests four main hypotheses, which demonstrate the impact of taxation on the capital structure of innovative companies. These hypotheses differ according to which indicator of the structure of capital is taken as the basis of the analysis.

With regard to incentive programs, as we have already noted, separate analyses of their influence on capital structure is impossible for now due to the lack of required data. However, we would like to note that the use of a variety of incentive programs is increasingly prevalent in BRIC countries. Nowadays virtually all the types of stimulation programs which prevail in developed countries are used in BRIC countries as well.

Table 5: The Policy of Stimulating Innovation in Developed Countries

Countries	R&D tax credit	R&D super deduction	Innovation or patent box regime
Australia	+		
Belgium	+	+	+
Denmark	+		
France	+		+
Ireland	+		+
Japan	+		
Netherlands	+	+	+
South Korea	+		+
Switzerland			+
United Kingdom	+	+	+
USA	+		

Source: Author's own calculations.

Table 6 shows the existing tax programs and indicates whether they are present in a particular developed country.

Table 6: The Policy of Stimulating Innovation in BRIC Countries

Countries	R&D tax credit	R&D super deduction	Innovation or patent box regime
Brazil		+	
China		+	+
India		+	+
Russia	+	+	

Source: Author's own calculations.

The table above (Table 6) shows the existing tax programs and indicates whether they are present in a specific developing country (in this case, the BRIC countries).

In our study, we derived the following hypotheses based on the existing literature and different indicators of a company's capital structure. We use four different indicators – that is, four different dependent variables: Total Debt/Total Equity, Net Debt/Total Equity, Short term Debt/Total Equity, and Long term Debt/Total Equity.

The hypotheses therefore are:

H10: The impact of effective tax rate [ETR] in BRIC countries on Total Debt/Total Equity is statistically significant.

H11: The impact of effective tax rate [ETR] in BRIC countries on Total Debt/Total Equity is statistically insignificant.

H20: The impact of effective tax rate [ETR] in BRIC countries on Net Debt/Total Equity is statistically significant.

H21: The impact of effective tax rate [ETR] in BRIC countries on Net Debt/Total Equity is statistically insignificant.

H30: The impact of effective tax rate [ETR] in BRIC countries on Short term Debt / Total Equity is statistically significant.

H31: The impact of effective tax rate [ETR] in BRIC countries on Short term Debt / Total Equity is statistically insignificant.

H40: The impact of effective tax rate [ETR] in BRIC countries on Long term Debt / Total Equity is statistically significant.

H41: The impact of effective tax rate [ETR] in BRIC countries on Long term Debt / Total Equity is statistically insignificant.

To reveal the effect of taxation on capital structure choice, the effective tax rate (ETR) is utilized as an indicator. ETR is the ratio of income tax expense to pre-tax financial income and has been widely used in research (Klapper and Tzioumis, 2008).

ETR is firm-specific, but since we apply an innovative large firms' data set, this fact should not lead to statistical bias.

This study applies the following panel-data specification:

$$Yit = \alpha i + \beta iXit + \gamma iETRit + \varepsilon it \quad (1)$$

Where Y represents the debt-to-equity ratio [depending on specification], X is a vector of control variables, ETR stands for effective tax rate, α denotes firm-specific factors, β and γ represent coefficients of X vector and ETR accordingly and ε denotes the residuals.

With regard to control variables, we use a series of variables which theoretically influence firms' financing decisions and were utilized in previous studies. The set of variables is shown in the Table 7.

Table 7: Variables Summary

Type	**Variables**
Dependent variable	Total Debt-to-Total Equity ratio
	Net Debt-to-Total Equity ratio
	ST Debt-to-Total Equity ratio
	LT Debt-to-Total Equity ratio
Control variables	Revenue [logarithmic]
	Tangibility
	Return on assets [ROA]
	Current ratio [CR]
	R&D-to-Net Sales ratio
	R&D Expense [logarithmic]
Main independent variable	ETR (effective tax rate)

Source: Author's own calculations.

Certain of the variables in the above model warrant some brief explication:

1. *Revenue* (used in models as rev). The main purpose of using this variable is as an indirect indicator of a company's size. This variable (or its analogue – Sales) is used in almost every existing study on capital structure and the factors influencing it. In the regression, in order to receive weighted data, we used a logarithmic version of this variable, generated by gen rev=ln(Revenue) command in Stata 13.

2. *Tangibility* (used in models as tang). Is calculated in Excel as Property, Plant and Equipment/Total Assets.

3. *R&D Expense* (used in models as rd_exp). According to the data selection criteria, it is a non-zero variable. In the regression, in order to receive weighted data we used a logarithmic version of this variable, generated by gen rd_exp=ln(RD_Exp) command in Stata 13.

Table 8 shows a summary of statistics on all the independent variables. Normality of errors of variables is observed as well as lack of multicollinearity. The criterion for the absence of multicollinearity was the absence of a correlation exceeding 0.7 in the correlation matrix of independent variables [Table 9].

Table 8: Summary of Statistics

Variable	Obs	Mean	Std.Dev	Min	Max
etr	6693	2.88349	1.66978	-6.9148	27.5537
roa	6798	1.69440	2.01185	-5.6775	27.6207
tang	6936	-1.1150	1.08573	-10.137	7.11305
cr	7539	.803043	2.05032	-2.4602	27.4405
rd2ns	7539	.941389	2.28360	-9.7046	27.6294
rev	7539	21.2349	1.84163	12.0097	29.4411
rd_exp	7540	17.4688	1.70337	7.60090	24.3427

Source: Author's own calculations.

Table 9: Correlation Matrix of Independent Variables

	Rd_exp	rev	Rd2ns	etr	tang	roa	Cr
rd_exp	1.0000						
rev	0.6122	1.0000					
rd2ns	0.2263	-0.2685	1.0000				
etr	-0.0058	0.0739	-0.0694	1.0000			
tang	-0.0111	0.1291	-0.1202	0.0220	1.0000		
roa	-0.0565	-0.1164	0.0756	-0.0339	-0.0606	1.0000	
cr	-0.0580	-0.1458	0.0707	-0.0281	-0.0818	0.0474	1.0000

Source: Author's own calculations.

4.2. On the BRIC Countries Model Specification

There are several ways to approach panel data analyses. For example, a basic linear regression may be constructed without utilizing the panel data structure. Such an analysis does not allow one to consider the dynamics of variables, however, it still may use one of the main panel data advantages, that is, more observations, which reduces statistical bias. Before using panel data, we tried to use cross-sectional data instead and a basic linear model, but the results of such a regression turned out to be

unreliable. This was mainly due to an insufficient number of observations, especially after the removal of duplicates and omissions [only 174 observations could be used in that sample]. Thus, first we used a basic linear regression built on panel data.

The next model used to obtain results was a fixed effects model. With this approach, regression "within" was estimated. "Within" regression is an original regression model [1], rewritten in terms of variable values deviations from time-averaged values:

$$Yit - Yiav. = \alpha i + \beta i\,(Xit - Xiav.) + \gamma i\,(ETRit - ETRiav.) + \varepsilon it - \varepsilon iav. \quad (2)$$

Where Y represents the debt-to-equity ratio [depending on specification], Yav. represents a time-averaged dependent variable value, X is a vector of control variables and Xav. is a vector of these variables time-averaged values, ETR stands for effective tax rate and ETR av. stands for effective tax rate time-average, α denotes firm-specific factors, β and γ represent coefficients of X vector and ETR accordingly and ε denotes the residuals.

This model allows one to eliminate unobserved observations from their regression; the coefficient values in the model are estimated using ordinary OLS. "Within" regression estimates regression with fixed effects (FE), meaning that βw est. = βFE est. Fixed effects model was estimated for the following independent variables etr, rd_exp, rd2ns, rev, tang, roa, cr using four regressions, each constructed on different dependent variables d2e, net_debt2e, st_debt2e, lt_debt2e.

For the next step, the random effects model was estimated using four regressions constructed on the same dependent and independent variables. The random effects model is a compromise between cross-section regression (which imposes a strong restriction on coefficients' homogeneity) and fixed effects regression, which allows one to assign a unique constant for each sample object.

An advantage of the random effects model compared to the fixed effects model is that time invariant variables can be included. It should be used in the case when differences across entities [innovations companies] have some influence on dependent variables. In the case of the BRIC countries data set this might be the case, since though all the countries in the data set are developing countries, their institutional settings are diverse. To eliminate this effect, the spatial category n_country is used, which contains a unique number from 1 to 4 assigned to each country, by applying the n_country function in Stata 13, the risk of an intercountry difference impacting on dependent variables is to some extent prevented. The regression model for random effects is written as follows:

$$Yit = \alpha i + \beta iXit + \gamma iETRit + uit + \varepsilon it \quad (3)$$

Where Y represents a debt-to-equity ratio [depending on specification], X is a vector of control variables, ETR stands for effective tax rate, α denotes firm-specific factors, β and γ represent coefficients of X vector and ETR accordingly, ε denotes within-entry error and u denotes between-entry error. Random effects model was

estimated for the same variable as fixed effects model. For this estimation the GLS method is applied.

To compare last two models in terms of efficiency, a Hausmann test was conducted. At any reasonable level of significance, the null hypothesis [Ho: the difference in coefficients is not systematic] of the test is rejected for all four regressions performed, indicating that the fixed effects model is preferable for conducting these regressions estimations. The results of Hausmann test for regression with the dependent variable d2e are presented in the Table 10. The results of the Hausmann tests for the dependent variables st_debt2e, lt_debt2e, net_debt2e are presented in the Appendix.

Table 10: Hausmann Test for Regression on d2e

	(b) .	(B) Random_eff~s	(b-B) Difference	Sqrt(diag(V_b-V_B)) S.E.
rd_exp	.0049348	-.0182716	.0232064	.0217638
Rev	.0767146	.2365809	-.1598663	.0260494
rd2ns	-.012981	-.0357218	.0227408	.0051066
Etr	-.0006176	.0115498	-.0121674	.0051959
Tang	.0144518	.0795615	-.0651097	.016687
Roa	-.0179262	-.0631035	.0451773	.0048909
Cr	-.0477167	-.0872203	.0395036	.0044474
Test: Ho: difference in coefficients not systematic chi2(7) = (b-B)'[(V_b-V_B)^(-1)](b-B) = 175.91 Prob>chi2 = 0.0000				

Source: Author's own calculations.

Thus, the fixed effects model was chosen as the most reliable [2]. However, in the results section, the results obtained from all three models (cross-sectional linear regression model, random effects model and "within" fixed effects model) are presented and analyzed. More detailed calculations can be found in the Appendix.

5. Results

5.1. Results Anticipated

The expected influence of ETR is statistically significant and positive for both samples and with regard to all dependent variables. The stimulation of impact of factors on debt-to-equity ratio is based on basic linear regression in the case of the European countries sample and on three different models in the case of the BRIC countries sample.

For the BRIC countries sample, in the case of null hypotheses fulfillment, the expected direction of independent variables vis-à-vis the dependent variable impact is the same as that for the European countries sample and is arranged as follows in the Table 11 [the expectations are based on the existing literature analyses].

Table 11: Expected Direction of Independent Variables Impact on Capital Structure

Variable	Direction
rd_exp	-
Rev	+
rd2ns	-
ETR	+
Tang	-
ROA	-

Source: Author's own calculations.

For both data samples we expect the ETR coefficient to be significant around the 5% level, and for the European countries sample we expect the coefficient before different types of programs to be insignificant due to a low participation level of firms in these programs. We expect coefficients pertaining to the size of the company, which is expressed by revenue, to be significant for both data samples as well as those related to ROA and tangibility. The degree of innovativeness indicated by the independent variables R&D expenditure and R&D to Net Sales is expected to be significant.

5.2. Results Obtained from the BRIC Countries Data Sample

Three econometrics models were applied to estimate ETR impact on debt-to equity ratio. All three models were estimated for four dependent variables, presenting four different debt-to-equity ratios. First, basic linear regression was conducted. The results in the Table 12 were obtained for different debt-to-equity ratios.

Table 12: Condensed Linear Regression Results

	Coef. [d2e reg.]	Coef. [net_debt2e reg.]	Coef. [st_debt2e reg.]	Coef. [lt_debt2e reg.]
rd_exp	-.0555386**	-.091976***	-.0651069***	-.111694***
rev	.2790713***	.2318904***	.181609***	.2656083***
rd2ns	-.0416375***	-.03658**	-.0272268**	-.0218436

ETR	.0287206*	-.0202398	.0021585	.0261884
tang	.1033259***	.049982**	.0775271***	.1075877***
ROA	-.1206119***	-.0910048***	-.1229988***	-.10105***
CR	-.1541001***	-.056695***	-.1370199***	-.111694***
_cons	-1.454451***	-4.437883***	-4.149844***	.2656083***
*** Significant on 1% significance level ** Significant on 5% significance level * Significant on 10% significance level				

Source: Author's own calculations.

For the most part, independent variables have significant influence on debt-to-equity ratios (on a level of at least 10% significance); R&D expenditures, R&D to net sales, ROA and current ratio mostly negatively influence total debt-to-total equity ratio, while revenue, ETR and tangibility positively influence this ratio. These results partly contradict those anticipated [for tangibility, which were expected to have negative coefficient]. Concerning the effect of ETR on debt-to-equity, the coefficient pertaining to ETR is statistically insignificant in all cases except with regard to total-debt-to-total-equity regression case, where it is statistically significant only at a level of 10%.

Secondly, a random effects model regression was conducted. The results were obtained for different debt-to-equity ratios are shown in the Table 13.

Table 13: Condensed Random Effects Model Regression Results

	Coef. [d2e reg.]	Coef. [net_debt2e reg.]	Coef. [st_debt2e reg.]	Coef. [lt_debt2e reg.]
rd_exp	-.0182716	-.0596394***	-.0357439*	-.0622519**
rev	.2365809***	.1708834***	.1501235***	.1893761***
rd2ns	-.0357218***	-.0219142*	-.0250986***	-.0195287
etr	.0115498	-.0221845*	-.0032216	-.0001264
tang	.0795615***	.0419873*	.0597574***	.0355873
roa	-.0631035***	-.0678415***	-.0478053***	-.0530971***
cr	-.0872203***	-.0300755***	-.0713136***	-.0080609
_cons	-1.362515***	-3.851275***	-4.216747***	-5.409316***
*** Significant on 1% significance level ** Significant on 5% significance level * Significant on 10% significance level				

Source: Author's own calculations.

Independent variables significantly influence debt-to-equity ratios at a level of at least 10% significance, except for ETR, which doesn't have a significant impact on debt-to-equity ratios but significantly influences the net_debt-to-equity ratio at only a 10% level; R&D expenditures, R&D to Net Sales, ROA and current ratio mostly negatively influence the total-debt-to-total-equity ratio, while revenue, ETR and tangibility positively influence this ratio. These results partly contradict those anticipated [ETR was expected to have positive influence on dependent variable while tangibility was expected to have a negative influence].

Thirdly, the most reliable results according to the Hausmann test were obtained from fixed effects model regressions. The results were received for different debt-to-equity ratios and shown in the Table 14.

Table 14: Condensed Fixed Effects Model Regression Results

	Coef. [d2e reg.]	Coef. [net_debt2e reg.]	Coef. [st_debt2e reg.]	Coef. [lt_debt2e reg.]
rd_exp	.0049348	-.0596413**	-.0248716	.0393842
rev	.0767146**	-.0340122	.0759691***	.0010999
rd2ns	-.012981	.0054019	-.0142254	-.0136416
etr	-.0006176	-.0202769	-.0051857	-.0241419
tang	.0144518	.0191269	.0270042	-.0283033*
roa	-.0179262	-.0475519***	-.0162388*	.0164138
cr	-.0477167***	-.0117541	-.0480903***	-2.185445**
_cons	1.5479*	.6914052	-2.868104***	.0393842
*** Significant on 1% significance level ** Significant on 5% significance level * Significant on 10% significance level				

Source: Author's own calculations.

This model presents significant contradictions to the results of previous models; when it comes to direction of influence, it contradicts the cross-sectional regression model in ETR and presents contradictions in the case of total-debt-to-total-equity ratios in R&D to net sales coefficients. In some cases, only revenue, R&D expenses, ROA and current ratios significantly influence debt-to-equity ratios to at least a 5% level of significance. ETR does not have a significant impact on debt-to-equity ratios and has a negative coefficient. These results do not contradict the anticipated results for significant coefficients.

Conclusion

This study is devoted to revealing the influence of taxation on the capital structure of innovative companies in BRIC countries. To our knowledge, there is no other research which would investigate all three factors simultaneously, namely influencing capital structure, specificity of capital structure of innovative companies and taxation influence on capital structure in BRIC simultaneously. We supplement this analysis by investigating how different types of tax incentive programs influence capital structure through influence on debt-to-equity ratios, but since this analysis is yet impossible to apply to BRIC countries because of a lack of sufficient data, we have applied it to the set of European countries.

We investigate four hypotheses connected with taxation influence on capital structure in BRIC countries. This investigation can be useful for governments to estimate ETR influence on capital structure choice and how to make a trade-off decision between increasing tax rate and collecting more taxes, or stimulating companies to take on less debt and less risks. Moreover, an additional part of the research (dedicated to the influence of different tax incentive programs on debt-to-equity ratios) can help governing parties to make a decision on choice between tax incentive programs and draw conclusions about the extent of their influence on the choice of capital structure. Conscious interaction between business and government through tax policy leads to an increase in efficiency for the whole economy. Therefore, it is important for managers to understand how much debt financing is needed, while government decision makers should understand how to use tax policy to improve the economic environment throughout the country.

The results of the presented data analysis disproved the proposed null hypotheses both for data on BRIC countries and for data from European countries. The results show the absence of significant impact of the tax rate on the capital structure and also indicate the absence of a significant impact of tax incentive programs on capital structure.

The possibility of further development of this research is important, which would entail conducting a deeper analysis and consider the impact of incentivized tax programs on the capital structure of developed countries using panel data, since rejection of null hypotheses in this part of the study in our case may be due to an insufficient number of observations. Moreover, the same can be done with BRIC countries when the required sufficient data is available. Also, an interesting development of the research would be the inclusion in the analysis of new additional variables, such as investment loans and depreciation.

Today, there is still a lack of concise financial literature on developing countries and on the influence of taxation in particular. This study is devoted to partly closing this analytical gap.

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CRYPTOCURRENCY REGULATION IN THE BRICS COUNTRIES AND THE EURASIAN ECONOMIC UNION

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This article presents the results of a comparative analysis of the legislative approaches to the regulation of cryptocurrencies in the BRICS countries and the Eurasian Economic Union. During the analysis, regulatory legal acts and draft laws, including material on judicial practice, of the Russian Federation, China, India, Brazil, the Republic of South Africa, the Republic of Belarus, Kazakhstan, Kyrgyzstan and Armenia were studied. The use of a comparative-legal method makes it possible to develop recommendations about the development of legislation on the circulation of cryptocurrencies within the BRICS countries. The assessment of the experience of EEU countries, and especially that of the Republic of Belarus, has great importance since the Russian Federation is a member country of both the EEU and BRICS. Comparative analysis was achieved by taking into account such key points as the existence of a regulatory framework, regulation of transaction taxation and counteracting the legalization of profits from crime. The results of the analysis are presented for each country separately and then systematized in the form of an analytical table. Based on the analysis, three approaches to the regulation of cryptocurrencies are identified: conservative, liberal and neutral.

The study of the experiences of the BRICS and EEU countries allowed the authors to conclude that these countries need to formulate similar requirements for the regulation of cryptocurrencies so as to avoid the migration of investment and capital to other countries which have a more liberal approach.

Keywords: cryptocurrency; bitcoins; EEU; BRICS.

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Table of Contents

Introduction

The current stage in the development of the economy and law poses more and more difficult challenges for legislators. The emergence of new financial and economic instruments requires the development of adequate measures of administrative and legal impact on economic relations. Legal and economic issues related to the circulation of cryptocurrencies are in the zone of close attention of domestic and foreign researchers. The scientific interest in digital currencies is comparable to the high demands that investors demonstrate in the markets. The relevance of this study can be evidenced by the fact that at the IV BRICS Legal Forum in Moscow, in December 2017, a decision was made to set up a working group to work out common approaches to the legal regulation of cryptocurrencies and their turnover in the BRICS countries.[1] There is also a similar task for the Eurasian Economic Union. The greatest complexity of the study is associated with the rapidly changing approaches to regulation, from full liberalization to prohibition.

The purpose of the study is to carry out a comparative analysis of the legal approaches to the regulation of cryptocurrencies within BRICS and the Eurasian Economic Union (EEU). The subject of the study is the cryptocurrency as an economic and legal phenomenon. It should be noted that many studies have focused on Bitcoin, which is the most popular digital currency. This narrow focus on one form of cryptocurrency seems insufficiently justified, since at the legislative level other digital assets are also understood as cryptocurrency. In view of the rapidly changing situation, it is necessary to take into account that all data are given as of December 2018.

[1] *Гусарова С.А.* Технология блокчейн и криптовалюта в странах БРИКС // Экономика и предпринимательство. 2017. № 10-2(87). С. 80–84 [Svetlana A. Gusarova, *Blockchain Technology and Cryptocurrency in BRICS Countries*, 10-2(87) Economics and Entrepreneurship 80 (2017)].

1. Cryptocurrency: Definition, Advantages and Problems

The term "cryptocurrency" originally was used by the Bitcoin system introduced in 2009. Cryptocurrency is a type of digital currency whose operations are based on methods of cryptography. The word "crypto" comes from Greek, meaning "hidden" or "private." Cryptocurrency, then, means money that is made hidden and private – and therefore secure – by means of encryption, or coding.

The general arguments for cryptocurrencies are based on the following advantages:

1. Decentralization, freedom and trust. The system does not require a central authority; its state is maintained through distributed consensus.[2]

2. Global usage and opportunities for integration. Cryptocurrencies can be used throughout the world, as they do not refer to national currencies. This is very important in the context of economic, political and legal integration.

3. Income opportunities. Investors' interest in cryptocurrencies is explained by the opportunity of high income (returns) without taxes and control.

4. From a state-legal position, cryptocurrencies also have great potential. In Russia 70 percent of the country's gross domestic product comes from the sale of mineral resources such as oil, gas and coal. Developing digital technologies can help to reduce the country's dependence on natural recourses.

5. Cost reduction. Unlike traditional money, cryptocurrency is not issued in the form of coins or banknotes. Because of this, the costs of production and protection against forgery are reduced. The use of digital technology can significantly reduce the cost of organizing monetary circulation.

Despite the presence of significant advantages, cryptocurrencies carry a number of risks and threats:

1. Lack of clear legislative approaches. The legislation of most countries does not allow the circulation and emission of currencies other than those of the national state on the territory of the state. The financial legislation regulating monetary turnover was formed in the 20th century, which makes it difficult to apply them in the digital economy of the 21st century. The very word "currency" introduces a significant difficulty, since from the position of the classic approach "cryptocurrencies" cannot be considered to be money. Cryptocurrency is understood through such concepts as "money surrogate," "financial instrument," "commodity," "security" and "property."[3] In some countries, the authorities and scholars use the words "virtual currencies," "altcoins" and "digital currencies." In this paper, we will use the term "cryptocurrency."

2. Lack of state guarantees. Since the state does not issue and even in most cases does not regulate cryptocurrency, there are no state guarantees for investors and

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[2] Jan Lansky, *Possible State Approaches to Cryptocurrencies*, 9(1) Journal of Systems Integration 19 (2018).

[3] Irina Cvetkova, *Cryptocurrencies Legal Regulation*, 5(2) BRICS Law Journal 128 (2018).

users. The lack of state guarantees significantly hinders the use of cryptocurrency and raises a lot of questions. Can we use cryptocurrency to pay wages and taxes? Can we inherit it? Can we lend it?

3. Volatility and high risks for the investor. Most cryptocurrencies are subject to significant fluctuations in their value. Periods of rising value may be followed by a collapse in value. Volatility increases the risk of investment by private investors, banks, corporations, etc.

4. Uncertainties in accounting and taxation. Investors' interest in cryptocurrencies is primarily connected with the possibility of earning income quickly. The tax legislation of many countries, including Russia, does not yet contain clear rules on the taxation of such earnings.

5. Criminal use. In 2017 in the United States, the first ever case of fraud in an initial coin offer (ICO) was instituted. At the moment, the U.S. Federal Bureau of Investigation is conducting more than 100 different investigations of connected crimes, including human trafficking and money laundering. The experience of the Russian Federation shows that cryptocurrencies are already being actively used in the criminal environment, for example as a payment for drugs. On the one hand, the use of the blockchain system can positively influence the investigation of crimes, but, on the other hand, the anonymity of cryptocurrencies facilitates the commission of crimes.[4]

6. High technological risks. Cryptocurrency is used on the internet, so a very important consideration of this technology is security. What will we do in the event that there is a hacker attack or blackout? Is it really safe to trust technology, computers and software?

Large-scale problems increase the value of conducting a comparative legal analysis and evaluation of the experiences of countries belonging to integration unions. Below are the results of the analysis of the legislative framework in the BRICS countries and the Eurasian Economic Union.

2. Legal Regulation of Cryptocurrencies in BRICS

Brazil. The market for cryptocurrency was almost absent in Brazil during 2014. However, in 2017 it was estimated at US$2.5 billion. The number of Bitcoin traders in Brazil was twice as high as the number of investors registered on the Sao Paulo Stock Exchange – Brasil Bolsa Balcao. As of December 2017, there were 619,000 registered users on the exchange. The three largest Bitcoin-exchanges of the country, which account for 95% of all cryptocurrency transactions in Brazil, had 1.4 million registered

[4] *Сорокина Я.С., Торжевский К.А.* Биткоин: инновационная валюта или инструмент финансовых преступлений? // Политематический сетевой электронный научный журнал Кубанского государственного аграрного университета. 2017. № 131. С. 1301–1310 [Yana S. Sorokina & Kirill A. Torzhevsky, *Bitcoin: Innovative Currency or Financial Crimes Instrument?*, 131 Polythematic Network Electronic Scientific Journal of the Kuban State Agrarian University 1301 (2017)].

customers. In addition, there were Bitcoin traders that use foreign exchanges or trade offline.

In particular, the number of the Brazilian crypto-exchange Mercado Bitcoin clients during 2017 increased by 275% and reached 750,000. The daily number of new users increased from 500 to 5,000. The largest Brazilian investment company, XP Investimentos, plans to enter the cryptocurrency market and launch a brokerage Bitcoin-exchange. XP Investimentos, which manages more than $35 billion for about 500 thousand customers, has already registered the company XDEX Intermediacao LTDA with confirmed capital of $7.3 million.

Despite the optimism of investors, Brazil's government institutions are wary of cryptocurrencies. Brazilian legislation in the field of regulation of the use of virtual currencies has been steadily tightening controls since 2015.

The Brazilian government established a commission in May 2017 to examine the regulation of the country's cryptocurrencies. Seven public hearings were held during which experts consulted with politicians on this topic. The decision was made to

> designate our position as prohibitive, prevent commercialization of the cryptocurrency and… not allow its usage for mediation purposes and as a method of payment in the country.[5]

The lower chamber of the National Congress began discussing a bill that proposed to prohibit cryptocurrencies and equate their use to financial crimes as of December 2017.

The President of the Central Bank of Brazil, Ilan Goldfine, has said:

> Bitcoin is an unsupported financial asset that people buy because they think that it will be valued. This is a typical bubble or pyramid... The central bank is not interested in bubbles or illegal payments.[6]

According to Goldfine, the motivation of those who buy cryptocurrencies is similar to the desire to make money on fraudulent schemes. The head of the Brazilian Central Bank believes that the price of the first cryptocurrency, similar to what occurs in Ponzi schemes, is based on the flow of new investors, who, in turn, also attract other buyers of bitcoins. Thus, we can state the change of approach in the regulation of Bitcoin from liberal to conservative.

The Russian Federation. Growing interest in digital currencies began in 2016. Cryptocurrency mining in Russia has expanded rapidly over the last few years; in

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[5] Central Bank of Brazil, Distributed Ledger Technical Research in Central Bank of Brazil: Positioning Report, 31 August 2017 (Jan. 8, 2019), available at https://www.bcb.gov.br/htms/public/microcredito/Distributed_ledger_technical_research_in_Central_Bank_of_Brazil.pdf.

[6] *Id.*

many respects, it has already become an industrialized business. Home mining has also become a source of income for a number of crypto-enthusiasts. Amateur mining is very popular in Russia, because electricity rates for individual consumers are quite low: in some Russian regions, prices are currently below $0.03 per kWh.

The law regulating the circulation of cryptocurrencies has not yet been adopted in the Russian Federation. Legislators find it difficult to develop conceptual approaches because of the novelty of the phenomenon under consideration. The need to expand knowledge about the features of digital currency circulation is indicated by the placement of a notice by the State Duma on holding an open tender for rendering expert analysis services on the topic "Legislative Regulation of the Introduction and Practical Implementation of Modern Financial Technologies. Analysis of International Experience and the Modality of Adaptation in Russian Practice." The maximum contract amount was set at 2.5 million rubles (approximately $40 thousand).[7]

Several draft laws have been submitted to the State Duma. An analysis of their texts shows that it is still difficult for the Russian legislators to determine the legal nature of this phenomenon. The authors of the draft laws adhere to fundamentally different approaches, from a complete ban on transactions with the digital currency to full liberalization. The attitude towards crypto-mining is much more positive than the use of cryptocurrency in general, as mining does not contradict Russian law. Proposals have been made to introduce a preferential tax regime and even tax breaks for miners in the energy-rich country.

The concept of "cryptocurrency" also remains unclear. Article 75 of the Constitution of the Russian Federation determines that the ruble is the monetary unit, and the issue of other money is not allowed. Proceeding from this, the authors of the bill use the term "digital financial asset," referring to it as property. In turn, cryptocurrencies and tokens are classified as types of digital financial assets. On 1 June 2018, the draft law on the regulation of cryptocurrency was adopted in the first reading with the following rules:

– The draft law defined "cryptocurrency" and "token" as digital financial assets, i.e. as property created in electronic form using cryptographic devices.[8] Information on such property is stored in digital wallets, those being hardware and software devices;

– The activity of digital financial assets' exchange operators is subject to licensing (license of professional participants in securities markets or license of trade organizer is required);

– The activity of foreign legal entities acting as operators may be conducted subject to establishment of a Russian legal entity in the territory of the Russian Federation and the obtaining of a license;

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[7] Information on holding an open tender for procurement No. 0173100009617000107 (Jan. 8, 2019), available at http://zakupki.gov.ru/epz/order/notice/printForm/view.html?printFormId=49515635.

[8] Draft federal law "On Digital Financial Assets" (Jan. 8, 2019), available at https://www.minfin.ru/en/document/.

– Tokens should be issued on the basis of a public offer containing the information specified in the draft law;

– Issuers of tokens will be obliged to disclose information both in the public offer and in the investment memorandum, which must also conform to the requirements of the draft law.

Although the draft law, adopted in the first reading, does not regulate all issues associated with mining, it defines mining as an activity aimed at the creation of cryptocurrency and/or validation in order to receive remuneration in the form of cryptocurrency. Based on the draft law, mining may be considered entrepreneurial activity subject to specific conditions (if during a three-month period the person exceeds the energy consumption limits established by the Government of the Russian Federation).

The changes should be implemented by amendments to the Civil Code of the Russian Federation in parallel with the enactment of new laws. The draft law "On Introduction of Amendments to Parts One, Two and Four of the Civil Code of the Russian Federation" was introduced on 26 March 2018. Among other things, the draft law proposes to introduce in the Civil Code basic terms and general rules that may serve as the basis for more specific and detailed regulation of the existing objects of economic relations. Mainly, the provisions of this draft law relate to the introduction of definitions of "digital law" and "digital money."

In the second reading, the bill "On Digital Financial Assets" was changed radically. First, it will not regulate taxation. The Federal Tax Service will have to decide on its own whether it will tax such operations. References about mining and cryptocurrencies were also removed from the bill. After long discussions, the bill was returned to the first reading in November 2018. We can conclude that Russian legislators still do not have a clear idea about the economic and legal nature of cryptocurrency.

Despite the absence of legislative regulation of the circulation of cryptocurrencies, judicial practice is gradually beginning to be formed in the Russian Federation. For example, in March 2018 the Moscow Arbitration Court considered the question of whether funds in the form of a cryptocurrency can be included in the insolvency estate when the debtor is declared bankrupt. In the opinion of the financial manager, the cryptocurrency can be attributed to the property and must be included in the insolvency estate. Representatives of the debtor objected to the claimed petition, explained that,

> The current legislation of the Russian Federation does not regulate relations of the cryptocurrencies, the cryptocurrency is not an object of civil rights, the protection of the right on the cryptocurrency is not provided by the power of the state, and the cryptocurrency cannot be attributed to the debtor's property.

The court of the first instance took the side of the defendant, and did not support the arguments of the financial manager, which is why the cryptocurrency was not included in the insolvency estate.[9] However, the Ninth Appellate Court of Moscow canceled the previous decision of the court of first instance and included bitcoins in the insolvency estate. The analysis of this case is very revealing, since it becomes obvious that the inclusion of cryptocurrencies in civil circulation raises questions about inheritance and inclusion in the insolvency estate during bankruptcy procedure. The absence of legislative Acts leads to the formation of controversial judicial practice.

India. The Indian government has not yet decided its position on Bitcoin and other cryptocurrencies. The Reserve Bank of India (RBI) issued a warning to investors about the risks of operations with cryptocurrencies, comparing them to financial pyramid schemes. A number of major world banks, including Citibank India in early 2018, banned the possibility of using credit cards when purchasing cryptocurrency. The position of the RBI is the following:

> Rapid changes in the landscape of the payments industry along with factors such as emergence of private digital tokens and the rising costs of managing fiat paper/metallic money have led central banks around the world to explore the option of introducing fiat digital currencies. While many central banks are still engaged in the debate, an inter-departmental group has been constituted by the Reserve Bank to study and provide guidance on the desirability and feasibility to introduce a central bank digital currency. The Report will be submitted by end-June 2018. Technological innovations, including those underlying virtual currencies, have the potential to improve the efficiency and inclusiveness of the financial system. However, Virtual Currencies (VCs), also variously referred to as crypto currencies and crypto assets, raise concerns of consumer protection, market integrity and money laundering, among others. Reserve Bank has repeatedly cautioned users, holders and traders of virtual currencies, including Bitcoins, regarding various risks associated in dealing with such virtual currencies. In view of the associated risks, it has been decided that, with immediate effect, entities regulated by RBI shall not deal with or provide services to any individual or business entities dealing with or settling VCs. Regulated entities which already provide such services shall exit the relationship within a specified time.[10]

Indian Banks complied, and closed the accounts of crypto-exchanges by July 2018. The ban on the use of cryptocurrency in banks caused a wide public response

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[9] Decision of the Moscow Arbitration Court of 5 March 2018 in the case No. A40-124668/17-71-160F.

[10] Reserve Bank of India, First Bi-monthly Monetary Policy Statement, 2018–19 (Jan. 8, 2019), available at https://rbi.org.in/scripts/BS_ViewBulletin.aspx?Id=17479.

and reaction from the business community. For example, Zebpay was one of India's largest cryptocurrency exchanges. Nevertheless, its exchange activities in India were shut down at the end of September 2018 due to the cryptocurrency banking ban. The country's supreme court is willing to hear a case instituted by Zebpay, but the case keeps being postponed. Representatives from the Ministry of Finance submitted that the RBI circular as well as warnings issued by the Ministry of Finance on 29 December 2017, and by Finance Minister Arun Jaitley in his budget speech on 1 February 2018, are in line with the first inter-ministerial (interdisciplinary) committee's recommendations on cryptocurrencies. The country has begun work on the creation of a law for cryptocurrency regulation.

China, with its high rate of economic growth, plays an important role in the world economy, including in the circulation of cryptocurrencies. A Goldman Sachs report has shown that almost 80% of Bitcoin trading volume is held in RMB, only 19% of the exchange is in U.S. dollars and even less (1%) is in euros.[11] China is considered to be the world center of mining. Because of cheap electricity and developed infrastructure, as well as manufacturers of inexpensive hardware based in China, the country takes a leading position in both trade and mining. Operations with cryptocurrencies were carried out without a commission on Chinese exchanges until 2018, which facilitated the attraction of investors.

The high interest in cryptocurrencies in China has caused a large outflow of capital. According to Chainanalysis, in 2016 $2 billion were withdrawn from China. The government of the People's Republic of China then began to pay more attention to monitoring the trade operations of bitcoin-yuan. The People's Bank of China subsequently banned Bitcoin transactions in banks, retailers and payment operators, including Alipay and Tencent.[12]

Chinese banks are required to notify the national regulator of all money transfer transactions of more than 50,000 yuan (about $7,000). In 2018, the largest Chinese cryptocurrency exchangers such as BTCC, Huobi and OKCoin announced the introduction of a commission for transactions with Bitcoin and Litecoin in the amount of 0.2% for each transaction. Measures have been introduced to "cut speculation" and "prevent volatility" in the digital currency market. In early January 2018, the Chinese authorities decided to

> stop the country's mining of bitcoins because of the consumption of a huge amount of electricity and rising speculation with virtual currencies.

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[11] Robert D. Boroujerdi & Christopher Wolf, *What If I Told You… Themes, Dreams and Flying Machines*, Emerging Theme Radar, Goldman Sachs Equity Research, 2 December 2015 (Jan. 8, 2019), available at http://www.goldmansachs.com/our-thinking/pages/macroeconomic-insights-folder/what-if-i-told-you/report.pdf.

[12] Reshef Mashraky, *People's Bank of China Proclaims Bitcoin is Not a Legitimate Payment Method*, Finance Magnates, 9 March 2018 (Jan. 8, 2019), available at https://www.financemagnates.com/cryptocurrency/news/cryptocurrencynewspeoples-bank-china-proclaims-bitcoin-not-legitimate-payment-method/.

The introduced measures are aimed at the complete elimination of all areas of exchange and trade services for cryptocurrencies both in mainland China and in Hong Kong. The head of the Central Bank of the Russian Federation, E. Nabiullina, noted that, "China is following the path of prohibitions."[13] The introduction of bans on operations with cryptocurrencies in China was one of the reasons for the sharp decline in the rate of Bitcoin in early 2018. In spite of introducing restrictions and bans on virtual currencies, the Chinese government as a whole positively assesses the technology of the blockchain. In mid-March 2018, the issue of creating national standards to stimulate the development of blocking and distributed ledger technology (DLT) in the country began to be developed.

The Republic of South Africa (RSA). The positions reflecting the approaches to the regulation of cryptocurrencies in South Africa are reflected in the "Position Paper on Virtual Currencies."[14] Their essence boils down to the following:

– There is no separate regulatory Act or law about regulation of cryptocurrencies in the RSA;

– Virtual currencies are not recognized as a method of payment, since the requirements for money are not observed, such as: a stable means of exchange, units of measurement and a stable unit of value. Instead of using the term "cryptocurrency" the term "cyber-token" has been proposed;

– Due to the lack of the necessary legislative base, the protection of investors' rights is not guaranteed, thus operations should be carried out by the investor with an understanding of the high level of risk;

– The current legislation in the field of currency control of South Africa limits the opportunities for citizens there to transfer funds abroad for investment in virtual currencies.

The foregoing allows us to assess the approach to the regulation of crypto-currencies in South Africa as conservative.

3. Legal Regulation of Cryptocurrencies in the Eurasian Economic Union

As mentioned earlier, the experience of regulating the currency by the nearest neighbor countries and partners in the EEU is of great importance for the Russian Federation.

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[13] *Литова Е., Маляренко Е.* Набиуллина заявила об «опасности криптомании» // РБК. 14 сентября 2017 г. [Ekaterina Litova & Evgeniya Malyarenko, *Nabiullina Stated the Danger of Cryptomania*, RBC, 14 September 2017] (Jan. 8, 2019), available at https://www.rbc.ru/finances/14/09/2017/59ba53ae9a794762264bf471.

[14] National Payment System Department, South African Reserve Bank, Position Paper on Virtual Currencies (2014) (Jan. 8, 2019), available at https://www.resbank.co.za/RegulationAndSupervision/NationalPaymentSystem(NPS)/Legal/Documents/Position%20Paper/Virtual%20Currencies%20Position%20Paper%20%20Final_02of2014.pdf.

The Republic of Belarus. The most consistent regulation of cryptocurrencies circulation is carried out in the Republic of Belarus. In order to develop the innovation sphere and build a modern digital economy in the state, the President of the Republic of Belarus on 21 December 2017 signed Decree No. 8 "On the Development of the Digital Economy." First of all, it should be noted that during the development of the document the opinions of experts not only those of the Belarusian High-Technology Park but also those of the largest IT companies in Belarus were collected and analyzed. In addition, consulting companies and legal firms contributed their input on the decree. The decree supports

> all the ideas and initiatives of the IT community and, as the Belarusian mass media has stated, can rightfully be called revolutionary.[15]

This normative Act is designed to create the conditions for the introduction into the economy of the Republic of Belarus of blockchain technology for transactions registration and other technologies based on the principles of distribution, decentralization and security of operations performed with their use. It should be pointed out that before the adoption of the decree, the circulation of digital assets (tokens) was not regulated by legislation of the Republic of Belarus, and they were not the object of legal relations.[16] Today, the key statements of the decree establish that legal entities (primarily residents of the Belarusian High Technology Park) and individuals have the right to own tokens and perform the following operations: mining, storing tokens in virtual wallets, exchanging tokens for other tokens, their acquisition, alienation for Belarusian rubles, foreign currency, electronic money, as well as donation and bequeathing of tokens.

The activities of mining, acquiring and alienation of tokens, carried out by individuals independently without involving other individuals under labor and (or) civil law contracts, are not considered to be business activities in the Republic of Belarus. Also, tokens are not subject to declaration.

In addition, in accordance with the decree statements, participants involved in the use of modern technologies are granted significant benefits and preferences. Thus, until 1 January 2023 the following are not recognized as objects of taxation:

– Turnover, profit (income) of legal entities from mining activities and the creation, acquisition, alienation of tokens;

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[15] *Воробей А.В.* ICO как новая форма привлечения капитала // Промышленно-торговое право. 2017. № 10. С. 22–26 [Alexey V. Vorobey, *ICO as a New Form of Raising Capital*, 10 Industrial and Commercial Law 22 (2017)].

[16] *Карпекина У.И., Ярош А.С.* Виртуальные деньги – миф или реальность? // Промышленно-торговое право. 2017. № 10. С. 27–30 [Ulyana I. Karpekina & Anton S. Yarosh, *Virtual Money – A Myth or a Reality?*, 10 Industrial and Commercial Law 27 (2017)].

– Income of individuals from mining activities, acquisitions (including gifts), alienation of tokens for Belarusian rubles, foreign currency, electronic money and (or) exchange for other tokens.

The decree also establishes that it is not required to obtain special permission (a license) for the activities of legal entities which are related to the development and (or) application of the technology of transaction blocks registration (blockchain); the activities of individuals in the implementation of mining, storing, acquisition, alienation of tokens; the activities of legal entities during storage, acquisition, alienation of tokens, and other transactions with them. Tokens do not relate to funds in the meaning defined by the legislation on preventing the legalization of proceeds from crime, financing terrorist activities and financing the proliferation of weapons of mass destruction.

In addition, the decree provides a field for a legal experiment within the Belarusian High Technology Park to approve new legal institutions for the possibility of their implementation in the civil legislation of the Republic of Belarus. For this purpose, the residents of the High Technology Park were given the right to conclude a contract for a convertible loan, as well as to execute transactions through a smart contract. The Ministry of Finance in Minsk has developed a new standard that specifies the procedures for keeping accounting records of crypto transactions. The document does not explicitly mention cryptocurrencies, which are not regarded as legal tender in Belarus. Nevertheless, it effectively regulates the reporting of cryptocurrency flows.

The obligations of organizations conducting token sales and the exact approaches to assessing the cost of "digital tokens" are also defined in the Ministry's decree. The rules apply to private entities and not to the state-owned banks or government institutions. The new standard classifies "cryptos" according to their acquisition and intended use. Tokens acquired through initial coin offerings (ICOs) are referred to as "investments." They should be debited as either "long-term financial investments," if their circulation period exceeds twelve months, or as "short-term financial investments." Their amounts must be credited in the accounting balance sheet under "Settlements with different debtors and creditors" and "Other income and expenses."

If tokens are purchased for subsequent sale, by a trader or an exchange, they have to be reported in the "Goods" debit account and under the following credit accounts: "Settlements with suppliers and contractors" and "Income and expenses for current activities." Digital tokens acquired as the result of mining operations or as remuneration for verification of crypto transactions are to be recorded under the "Finished goods" debit account and also as "Main activities" in the credit section of the balance sheet.

The new regulations include measures to simplify procedures regarding foreign trade and the hiring of foreign nationals by the residents of the High Technology Park. Employees and investors in the High Technology Park will not be required to apply for work permits. They will also benefit from a special visa-waiver regime and

will be granted temporary residence status in Belarus. In 2018, a special Council for the Development of the Digital Economy was created. President Lukashenko also introduced the creation of a Ministry of the Digital Economy. The new department may be set up very soon. This demonstrates that Belarus wants to become a new financial hub in the EEU, and even in Europe. The number of new registrations with the High Technology Park increased by about a quarter in 2018. Residents of the High Technology Park now work in 67 markets around the world. Belarus is becoming more popular among Russian IT and financial experts. While the new regulations create favorable conditions for foreign investment and technological development, there are several critical points to consider. The first and main one is that Belarus may become merely a crypto-offshore zone. The decree also does not solve the problem of paying salaries and bills with cryptocurrency.

The Republic of Kazakhstan. In the Law of the Republic of Kazakhstan "On Currency Regulation and Currency Control" there is a definition of currency, and it is as follows:

> Currency is the monetary units accepted by states as legal means of payment, or official standards of value in cash and non-cash forms, in the form of banknotes, treasury bills and coins, including those from precious metals (including those withdrawn or withdrawn from circulation, but subject to exchange for banknotes in circulation), as well as funds in accounts, including international money governmental or units of account.

Thus, the legislation of Kazakhstan defines an exhaustive list of funds that may be attributed to the currency. This rule, which defines the concept of currency in Kazakhstan, is fundamental, and the prevention of digital technologies in it as a means of payment (currency) gives the right to classify cryptocurrency as property.

The National Bank of the Republic of Kazakhstan in its information message of 16 January 2017 noted the following:

> In Kazakhstan, organizations currently providing investment services for the population using cryptocurrencies are functioning. Participants who have given money in favor of these organizations do not have legal guarantees for the return of the invested money, because in accordance with the civil legislation of the Republic of Kazakhstan, entry into this organization and the transfer of money by individuals occur on a voluntary basis and without any reinforcement by documentary procedures.[17]

The position of the National Bank of Kazakhstan is largely determined by the adopted course on countering financial pyramid schemes.

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[17] Information message of the National Bank of Kazakhstan (Jan. 8, 2019), available at http://www.nationalbank.kz.

In May 2018, the President of Kazakhstan called for a joint study with other countries on the possibility of adapting digital money to the financial system and developing common rules for regulating cryptocurrency. It can be assumed that at this stage of development of the economy of Kazakhstan the regulation of cryptocurrency at the legislative level will have a positive impact not only in the sphere of entrepreneurship but also in other areas of the state and society.

The Kyrgyz Republic. The National Bank of the Kyrgyz Republic has recommended that the citizens of the country refrain from using cryptocurrency and not take cryptocurrencies as payment for goods, services and work. Citizens investing their funds in cryptocurrencies must fully and clearly understand and assess the risks and possible financial losses, and losses incurred, in the funds invested in cryptocurrency.[18]

Despite the tough official position of the National Bank, in 2018 Kyrgyzstan prepared to issue a national cryptocurrency. Kyrgyz authorities had decided to engage in the development of gold mines, and for this the state needed private investment. The project name is GoldenRock. To raise money quickly, it was decided to use cryptocurrency. This is the first such state project in the countries of the Eurasian Economic Union to do so. Each token of GoldenRock will be provided with a gold equivalent. After the development of the field, the owner of the token will be able to exchange it for gold metal. At the time of the writing of this paper, the decision on the exact price of the token had not yet been made.

By order of the Prime Minister of Kyrgyzstan, the local state company Trading House Kyrgyzstan (TDK) was appointed responsible for the implementation of the project. It will generate cryptocurrency tokens at its facilities. The main trader of GoldenRock will be the Russian company Crypt NN. ICO is an analogue of IPO (Initial Public Offering) – the initial public offering of shares of a company on the stock exchange in the traditional economy. This is the process of issuing tokens (digital certificates – the equivalent of stocks on the traditional financial market) and placing them on a cryptocurrency exchange. Placement on the stock exchange will be handled by the main trader Crypt NN.

Since the TDK shareholder is the state, specific ICO parameters are at the stage of coordination with the government. The government of Kyrgyzstan hopes to receive between $5 million and $40 million by ICO. The TDC invests this money in the development of a gold field with reserves of 40 tons. If the project is successful, the next stage will be investments in agricultural projects.

According to the head of the working group of the Central Bank of Russia on cryptocurrency issues, Elina Sidorenko, Kyrgyzstan has developed a good idea to attract investment. This approach is similar to the idea behind bonds and shows that modern digital technologies can make a smooth transition from the model of joint stock company to an ICO.

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[18] Предостережение Национального банка Кыргызской Республики относительно распространения и использования «виртуальных валют», в частности биткойнов (bitcoin) [Warning of the National Bank of the Kyrgyz Republic Regarding the Distribution and Use of "Virtual Currencies," in Particular Bitcoins] (Jan. 8, 2019), available at http://www.nbkr.kg/newsout.jsp?item=31&lang=RUS&material=50681.

The Republic of Armenia. At the time of the writing of this paper, the legislative basis for circulation of cryptocurrencies in Armenia had not yet been created. In 2015, the Central Bank of Armenia, following the experiences of the EEU countries, warned citizens about the risks of investing funds in bitcoins. Since 2015 the situation and opinions about cryptocurrencies have been changing. Analysis of the experience of the Republic of Belarus had a significant impact on Armenian legislators, with the result that a bill has been submitted to the National Assembly of Armenia and is aimed at liberalizing the circulation of cryptocurrency and excluding transactions from taxation.

The newly proposed draft bill "On Digital Technologies" provides the basis for cryptocurrency and mining in the country. This draft offers tax exemptions and allows mining without any licensing. Mining companies may get other benefits such as preferential customs tariffs. If the bill is adopted, Armenia may follow Belarus with a liberal approach to cryptocurrency regulation. (It is important to mention that Georgia (Armenia's neighbor in the South Caucasus) is a real pioneer in crypto legalization. The implementation of blockchain technologies there has been expanding for several years, in both the private and the public sectors. In fact, the first Bitcoin mining farm in the South Caucasus was set up in Georgia, and since 2016 the Georgian land register has been maintained with blockchain technology.) Armenian authorities also announced plans to create a free economic zone for startups developing distributed ledger applications.

4. Approaches to Regulation and the Future of Cryptocurrencies

Table 1 shows the results of the study. It presents a comparison of the characteristics of the approaches to the regulation of cryptocurrencies in the BRICS and EEU countries.

Table 1: Comparative Characteristics of Approaches to the Regulation of Cryptocurrencies

Country	Availability of a separate law on cryptocurrencies circulation	Approach to regulation
Brazil	No	Conservative
Russia	The draft law has been developed and adopted in the first reading	Neutral
India	No	Changing from liberal to conservative
China	No	Conservative
South Africa	No	Conservative

Belarus	Decree No. 8 of 21 December 2017 "On the Development of the Digital Economy"	Liberal operations with cryptocurrency are allowed; Incomes are not taxed
Kazakhstan	No	Conservative
Kirghiz Republic	No	Neutral
Armenia	No	Liberal (potentially)

The normative framework for regulating the circulation of cryptocurrencies was created only in the Republic of Belarus. In the Russian Federation, the law was passed in the first reading. There are no thematic laws in other BRICS and EEU countries; the position on regulation is voiced mainly by representatives of the central banks.

On this issue the range of opinions is broad. A number of scientists and representatives of the banking environment assess virtual currencies extremely negatively, equating them with "financial pyramids" and "bubbles."[19] Taking into account the high volatility of digital currency rates, a proposal has been made to limit access to such currencies in order to prevent speculation.[20]

Supporters of virtual currencies speak of a digital revolution, freedom and a decrease in dependence on intermediaries. One of the most important arguments in their favor is that "the digital economy needs a digital currency."[21] Here is the opinion of Yu. Kozenko:

> The application of exclusively prohibitive measures to the sphere of creation and use of digital financial assets, in conditions of extremely dynamic development of appropriate approaches and technologies in developed countries, may turn into another century of backwardness for our country.[22]

There is a largely negative and cautious attitude to this phenomenon inside the Russian legal environment.

The Central Bank of Russia proposed creating the first joint multinational cryptocurrency for the BRICS and EEC countries. By jointly adopting a new

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[19] Philip Godsiff, *Bitcoin: Bubble or Blockchain* in *Agent and Multi-Agent Systems: Technologies and Applications: 9th KES International Conference, KES-AMSTA 2015 Sorrento, Italy, June 2015, Proceedings* 191 (G. Jezic et al. (eds.), Cham: Springer, 2015).

[20] Chung Baek & Matt Elbeck, *Bitcoins as an Investment or Speculative Vehicle? A First Look*, 22(1) Applied Economics Letters 30 (2014).

[21] *Прокопович Г.А., Юсупов А.Р.* Биткоины в платежной системе онлайн бизнеса: возможности правового обеспечения и проблемы использования // Вестник экономической безопасности. 2017. № 1. С. 196–200 [Galina A. Prokopovich & Alisher R. Yusupov, *Bitcoins in the Online Business Payment System: The Possibilities of Legal Provision and the Problems of Use*, 1 Economic Security Bulletin 196 (2017)].

[22] *Козенко Ю.А.* Аксиомы использования цифровых финансовых активов // Дальневосточный аграрный вестник. 2017. № 4(44). С. 203–210 [Yuriy A. Kozenko, *Axioms of Using Digital Financial Assets*, 4(44) Far Eastern Agrarian Bulletin 203 (2017)].

cryptocurrency all these states will be able to increase their investments in blockchain and smart contract technology, which will serve as the basis for creating a cashless society and improve the management of trade liquidity with substantial support from the New Development Bank (NBR).

If the initiative is adopted and implemented, the first multinational cryptocurrency could be used by more than 41 percent of the world's population. This could potentially increase the efficiency of trade between the states by replacing the local currencies that are currently being used for trade. And this could create a technological trading block that could change global trade through blockchain and the technology of smart contracts. Thus, several factors play a role here: speed of transactions, trust and reducing costs. Therefore, when we talk about the use of cryptocurrencies in the trade exchange between the countries that are members of BRICS and the EEU association, we realize that this can give a tangible, practical result. For the Russian Federation such an initiative is very important, because it allows the development of trade even in the context of international sanctions: the use of cryptocurrency will limit the impact of the SWIFT system.

Creating a single supranational currency will mitigate volatility problems. Modern digital currencies, such as Bitcoin, are not secured. Changes in supply and demand and the impact of positive and negative news lead to serious price fluctuations. In the case of the emergence of a single cryptocurrency within the framework of BRICS, a fundamentally new situation will arise. The rate of supranational cryptocurrency can be based on the exchange rate of the ruble, yuan, rupee and the Brazilian real, as well as, possibly, other national currencies. In this case, volatility will decrease. Based on blockchain technology, this cryptocurrency will be tied to the central banks of member countries, as well as to the financial policies that they enforce. Accordingly, the cost of such a cryptocurrency will be determined by the value of the national currencies of the BRICS countries, and this will lead to stability.

However, in order for this initiative to succeed, among other things, the transnational legislation of states in respect of cryptocurrencies must be updated simultaneously. Currently, there are significant differences between the laws of states that can potentially use a single cryptocurrency. The study allows us to identify the most important points that should be reflected in the legal framework:

1. The circulation of cryptocurrency should be anchored on a legislative basis. The absence of laws or their imperfection leads to chaos.

2. Prohibitions will not stop the development of cryptocurrencies. The digital economy needs digital money. The Indian experience shows that the introduction of restrictive measures can result in acrimonious public debate and protests.

3. When drafting laws, it is necessary to take into account the experience of neighboring countries. The provision of a liberal regime by Belarus will facilitate the outflow of capital from the countries of the Eurasian Economic Union.

4. The task of each state is to improve financial literacy and explain the risks of investing in digital assets. The possibility of limiting investments in digital assets to

a certain amount can be justified, at least at the initial stage. Private investors need to understand that the value of digital currency is subject to fluctuations. The state cannot be responsible for the risks of investors. Being aware of the high volatility, it seems reasonable to determine the maximum amount of investment in digital assets for banks, pension funds and other institutional investors.

5. Transactions with digital assets are subject to accounting and taxation. At the first stage, the BRICS and Eurasian European Union countries may provide tax benefits. These actions should be coordinated. It seems that over time it will be necessary to introduce norms that will allow the taxation of income from transactions in the same way as transactions with securities is now organized. The tax base for cryptocurrency purchase and sale transactions may be determined as the excess of the total income received by the taxpayer in the tax period from the sale of the corresponding cryptocurrency over the total amount of documented expenses for its acquisition.

6. All countries that are part of BRICS and the EEU should work together to develop common approaches that prevent the use of cryptocurrency for criminal purposes.

Conclusion

On the basis of the comparative analysis, several approaches to the regulation of cryptocurrencies can be formulated. Within the conservative approach, either restricting or prohibiting cryptocurrencies is envisioned. China, South Africa, Brazil and Kazakhstan are leaning towards conservative regulation. It should be noted that the implementation of a complete ban on this activity in the conditions of a global regulatory trend for the formal permission of such activities under special licenses may lead to the reduction of innovative projects in this area and transfer them to more transparent regulatory jurisdictions within the framework of BRICS or the Eurasian Economic Union. This problem has already been faced by China.

Within the liberal approach, operations with cryptocurrencies are allowed, tax exemptions are made, and licensing and financial control requirements are lowered by the government. This approach was implemented in the Republic of Belarus at the time of the writing of this paper, and the possibility of its application in Armenia is also being considered.

The third approach, which can be called neutral, is common to the position of Russia. Within this approach, it is necessary to find the best compromise in the legislative regulation of the cryptocurrency, determine its legal nature and the approach to licensing the activities of the market participants, and decide upon the taxation of transactions and revenues. Also, special attention should be paid to countering the legalization of proceeds from criminal activities.

The Russian state should not refrain from the legal regulation of new economic instruments. Within BRICS and the Eurasian Economic Union, it is feasible to formulate similar requirements for the regulation of cryptocurrency, in order to avoid the migration of investments and capital to countries with a more liberal approach.

On the analysis of the legislative base, and the evaluation of the advantages and disadvantages of cryptocurrencies, the authors conclude that it is possible and feasible to create a single currency within the framework of integration associations. The use of a supranational cryptocurrency will reduce the dependence on the dollar and may have a positive impact on the economic development of the countries in BRICS and the EEU. At the same time, it is important to remember that, while adopting new laws and putting to use new technologies holds promise, cryptocurrencies cannot now replace traditional money and national currencies.

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TRENDS AND PROSPECTS FOR LEGISLATIVE REGULATION OF LEGAL RESPONSIBILITY FOR ENVIRONMENTAL OFFENSES IN BRICS COUNTRIES: COMPARATIVE LAW

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This article provides a comparative analysis of the features of the national legislation of the BRICS countries that regulates the issues of legal responsibility for environmental offenses. The authors consider aspects of the normative consolidation of the rights and obligations of citizens in the field of environmental protection, the types of legal liability and the applicable sanctions for violations of environmental standards provided for by the national legislation of all BRICS countries. The study of the environmental legislation of the BRICS countries (Brazil, Russia, India, China and South Africa) reveals a number of general and specific directions in environmental policy with the aim of enriching the said countries with positive experience, overcoming difficulties in the organization of environmental management and environmental protection, the prevention of possible errors in the context of global economic and environmental crises, and making recommendations for environmental improvement.

Improving the legislation of the BRICS countries in the field of legal liability for environmental offenses by taking into account the positive experience of these countries will help increase the effectiveness of prevention and rectification of negative consequences for the environment in both the Russian Federation and the BRICS association as a whole. Consequently, a comparative legal analysis of national environmental legislation of BRICS countries suggests that the general principles of

responsibility for environmental offenses are inherent in all these countries, despite their fundamental differences in history, culture and geographical location.

Keywords: BRICS; environmental rights; environmental responsibilities; environmental legislation; responsibility; environmental protection.

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Introduction

BRICS is an association of five countries, the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa. Each of the member countries of the association has its own unique legal features and environmental legislation due to the mentality of the population and the level and nature of social, economic and legal development.[1] These factors affect the goals and the methods of the arrangement of land, mineral resources,

[1] *Ушаков И.В.* Укрепление международно-политических позиций России в контексте экологической дипломатии в рамках БРИКС и китайский фактор // Стратегия России в БРИКС: цели и инструменты: Сборник статей [Igor V. Ushakov, *Strengthening the International Political Positions of Russia in the Context of Environmental Diplomacy of the BRICS Countries and the China Factor* in *Russia's Strategy Within BRICS: Aims and Instruments: Collection of Articles*] 402 (V.A. Nikonov & G.D. Toloraya (eds.), Moscow: RUDN, 2013).

forest plantations and other natural resources, as well as the attitude of society to them. This is most clearly manifested in relation to legal responsibility. Currently, the punishments imposed for committing environmental offenses in BRICS countries differ significantly. In some, emphasis may be placed on criminal law sanctions, in others, on a combination of administrative and civil responsibility. In academic literature, BRICS is described as international quasi-organization[2] or an "informal club."[3]

According to O. Meshcheryakova, this is due to the fact that BRICS cannot be called an integrated community in the full sense of the word: the countries of the association are located in different parts of the planet, their national interests vary significantly, and they have different currencies.[4] V. Lukov qualified BRICS as an "alliance of reformers," bearing in mind the general focus on reorganizing the system of key international institutions (primarily financial and economic).[5] The important elements of the organizational unity of the BRICS association are the tools that ensure an equivalent exchange of resources between interested states.[6]

The creation of alternative centers of the world system is a key aim of the transformation of the modern world order. The transcontinental BRICS union combines, along with other factors, their ecological uniqueness at the global inter-mainland level: together, Russia and Brazil account for 40% of the world's forest land, and have a decisive impact on the production of oxygen and the climate of the planet.[7]

As P. Catalano pointed out, the BRICS countries are together responding to modern challenges (e.g. territorial expansion, demographics and economic stability); this is facilitated by the legal history of large spaces with a continuity of at least two real empires, i.e. the Middle Empire (China) and the Roman Empire, as well

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[2] *Абашидзе А.Х., Солнцев А.М.* БРИКС – международная квазиорганизация? // Актуализация процесса взаимодействия стран БРИКС в экономике, политике, праве: Материалы научного семинара [Aslan K. Abashidze & Alexander M. Solntsev, *BRICS – International Quasi-Organization?* in *Updating the Process of Interaction of the BRICS Countries in Economy, Politics, and Law: Materials of a Scientific Seminar*] 14 (K.M. Belikova (ed.), Moscow: Senat Press, 2012).

[3] *Кузнецов А.В.* Транснациональные корпорации стран БРИКС // Мировая экономика и международные отношения. 2012. № 3. С. 3–4 [Alexey V. Kuznetsov, *Transnational Corporations of the BRICS Countries*, 3 World Economy and International Relations 3, 3–4 (2012)].

[4] *Мещерякова О.М.* Фрагментация как основной фактор, определяющий развитие интеграционных процессов // Актуализация процесса взаимодействия стран БРИКС в экономике, политике, праве: Материалы научного семинара. С. 91–94 [Olga M. Meshcheryakova, *Fragmentation as a Main Factor Determining Integrative Processes* in *Updating the Process of Interaction of the BRICS Countries in Economy, Politics, and Law*, *supra* note 2, at 91].

[5] *Луков В.В.* БРИКС – фактор глобального значения // Международная жизнь. 2011. № 6. С. 32–33 [Vadim V. Lukov, *BRICS – a Factor of Global Importance*, 6 International Life 30, 32–33 (2011)].

[6] Аналитический доклад «Россия в БРИКС. Стратегические цели и средства их достижения» [Analytical report "Russia in BRICS. Strategic Goals and Means of Achieving Them"] 24 (Moscow, 2013).

[7] *Акопян О.А. и др.* БРИКС: контуры многополярного мира: Монография [Olga A. Akopyan et al., *BRICS: The Contours of the Multipolar World: Monograph*] (T.Ya. Khabrieva (ed.), Moscow: Institute of Legislation and Comparative Law under the Government of the Russian Federation; Yurisprudentsiya, 2015).

as the "Third Rome" in the East (Russia) and the a fifth empire in the West (Brazil).[8] The position of N. Bevelikova is worth supporting; she believed that the need for a dialogue to establish legal interaction between countries that are major centers of influence in their regions (Russia in the Eurasian Union and the SCO, China in ASEAN, and Brazil in MERCOSUR and CELAC) is dictated by the intensity of ongoing integration processes in the globalizing world, and the evident activity of BRICS is a distinctive feature of its dynamic formation. Under these conditions, the BRICS association is a new algorithm of international relations that is being built without stereotypes – as a global platform with its own development vector.[9]

Therefore, the BRICS association is presently an integration structure of a completely new type, differing both from regional alliances (ASEAN, APEC, the EU, NAFTA, and SCO) and from the interregional organization ASEM (Asia-Europe Meeting), which includes countries from Eastern Asia and Western Europe. The creation of numerous interstate associations (EEU, SCO, BRICS, etc.), along with economic, political, and military endeavors, as well as environmental ones, designed to balance world, intercontinental, national ecological contradictions and conflicts arising from of the opposition between economics and ecology, which have one phonetic root, but are in a constant state of discord.[10]

The availability of oil, gas, coal and other natural resources, as well as emissions of harmful substances into the atmosphere, draw the attention of the world community to the state of their sovereign consumption, as well as their impact on neighboring countries and the planet as a whole.

In 2009, the BRICS members formed the Basic system to carry out coordinated activities to develop joint decisions on climate change issues. The proposal to harmonize the environmental legislation of the five countries, to clarify its goals, scope, depth and methods, to expand the competence of legal bodies and the Basic system site to include environmental issues is worth supporting.[11] Actually, it is the

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[8] *Каталано П.* Главные цели и основания БРИКС: природа и история // Правовые аспекты БРИКС: Сборник докладов и выступлений на научном семинаре 8–9 сентября 2011 г. [Pierangelo Catalano, *The Main Objectives and Bases of the BRICS: Nature and History* in *Legal Aspects of BRICS: Collection of Reports and Presentations at the Scientific Seminar, 8–9 September 2011*] 13, 15 (T.A. Alekseeva & P. Catalano (eds.), St. Petersburg: Publishing House of the Polytechnic University, 2011).

[9] *Бевеликова Н.М.* БРИКС: правовые особенности развития // Журнал российского права. 2015. № 8. С. 110–123 [Nelly M. Bevelikova, *BRICS: Legal Features of Development*, 8 Journal of Russian Law 110 (2015)].

[10] *Боголюбов С.А.* Суверенитет России на ее природные ресурсы // Lex Russica. 2016. № 6. С. 11–12 [Sergey A. Bogolyubov, *Sovereignty of Russia over its Natural Resources*, 6 Lex Russica 10, 11–12 (2016)].

[11] *Шорников Д.В.* Пределы и особенности гармонизации экологического законодательства России и иных стран БРИКС // Правовые аспекты БРИКС: Сборник докладов и выступлений на научном семинаре 8–9 сентября 2011 г. С. 120 [Dmitry V. Shornikov, *Limits and Features of Harmonization of Environmental Legislation of Russia and Other BRICS Countries* in *Legal Aspects of BRICS*, *supra* note 8, at 116, 120].

aim every modern environmentally-oriented state to create effective instruments for the legal protection of the environment and to ensure the right of every person to a favorable environment. Continuous international cooperation and improvement of national environmental legislation and the creation of international universal legal means of environmental protection are necessary to solve this problem.[12]

Comparative legal research of the environmental legislation of the BRICS countries has not received appropriate attention in Russian legal literature. Therefore, it is reasonable to research this topic to expand doctrinal ideas about foreign experience in the field of responsibility for environmental offenses and to use this experience to develop Russian environmental legislation.

Most contemporary research is devoted to the discussion of the legislation and judicial practice of the BRICS countries on environmental protection in general (works by S. Bogolyubov,[13] A. Rozentsvayg,[14] N. Khludeneva[15] and others), without comparative analysis of the separate environmental-legal doctrines. At the same time, many researchers agree that the law, the state, and society, having proclaimed the environmental rights of citizens, should name bodies and officials responsible for upholding and protecting such rights. This tends to be the case, but a number of state responsibilities are indicated vaguely or declaratively – the conduct of the country's environmental policy directly depends on the performance of the appropriate duties of legal entities and individuals, since there can be no subjective law without a proper and adequate adherence to it, aimed at its fulfilment.[16]

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[12] *Рыженков А.Я.* Правовой опыт охраны окружающей среды в зарубежных странах: вопросы взаимовлияния // Бизнес. Образование. Право. Вестник Волгоградского института бизнеса. 2012. № 4(21). С. 237–241 [Anatoly Ya. Ryzhenkov, *Legal Experience of Environmental Protection in Foreign Countries: Issues of Mutual Influence*, 4(21) Business. Education. Law. Bulletin of the Volgograd Institute of Business 237 (2012)].

[13] *Боголюбов С.А.* Соотношение экологических политик России и других государств // Экологическое право. 2016. № 4. С. 23–32 [Sergey A. Bogolyubov, *The Correlation Between the Environmental Policies of Russia and Other States*, 4 Environmental Law 23 (2016)].

[14] *Розенцвайг А.И.* Развитие экологической политики в Российской Федерации на современном этапе // Право и экология: Материалы VIII Международной школы-практикума молодых ученых-юристов (Москва, 23–24 мая 2013 г.) [Anna I. Rozentsvayg, *The Current Stage of Development of Environmental Policy in the Russian Federation* in *Law and Ecology: Materials of the 8th International School of Practice of Young Scientists and Lawyers (Moscow, 23–24 May 2013)*] 99 (Yu.A. Tikhomirov & S.A. Bogolyubov (eds.), Moscow: IZiSP; Infra-M, 2014).

[15] *Хлуденева Н.И.* Приоритеты государственной экологической политики и право // Право и экология: Материалы VIII Международной школы-практикума молодых ученых-юристов (Москва, 23–24 мая 2013 г.). С. 103–110 [Natalya I. Khludeneva, *Priorities of the State Environmental Policy and Law* in *Law and Ecology*, *supra* note 14, at 103].

[16] *Жаксыбекова Ф.С.* Уголовная политика в борьбе с экологической преступностью в Республике Казахстан // Право и экология: Материалы VIII Международной школы-практикума молодых ученых-юристов (Москва, 23–24 мая 2013 г.). С. 142–145 [Farida S. Zhaksybekova, *Criminal Policy in the Fight Against Environmental Crime in the Republic of Kazakhstan* in *Law and Ecology*, *supra* note 14, at 142].

The purpose of this paper is to summarize the experience of the BRICS countries in the field of regulating responsibility for environmental offenses to make recommendations for improving the environmental legislation of the Russian Federation, as well as proposing successful regulatory solutions on the basis of Russian law for other BRICS countries taking into account their national peculiarities.

1. Peculiarities of the Legislation of the BRICS Countries on Legal Liability for Environmental Offenses

1.1. Federative Republic of Brazil

Brazilian environmental legislation is considered to be one of the most modern in the world. Article 225 of the Brazilian Constitution states that everyone has the right to a balanced environment (a balanced environment is required for a good quality lifestyle), which should equally be provided by the state and civil society.[17]

According to other constitutional provisions, the State promotes research and exploitation of mineral resources on a sustainable basis, i.e. taking into account environmental protection and improving the socio-economic conditions of researchers. Everyone has the right to utilize an environmentally balanced environment suitable for general use by people and necessary for a good quality lifestyle (Arts. 174, 225 of the Constitution of Brazil).

Brazil's key law in the field of environmental protection is the Environmental Policy Act No. 6.938, adopted on 31 August 1981.[18] The Act establishes the mechanism for the formation, fulfillment and protection of rights to use natural resources, and sets up a "National Council" governmental institution, subordinated to the Ministry of the Environment, the main task of which is to integrate the activities of three levels (federative, state and municipal) of power in the field of environmental protection.

This Act is aimed at coordinating the responsibilities of state bodies in the field of environmental management and does not affect the rights and obligations of citizens in the field of environmental protection, although the Constitution imposes the same obligation to protect the environment on the state as on its citizens. Brazil's environmental legislation provides for three types of legal liability: civil law, criminal law and administrative law. Civil liability in the field of environmental protection is governed by Law No. 7.347 regulating industrial activities in order to avoid environmental disasters, adopted in 1985. This responsibility occurs when the action or inaction of the offender caused any type of environmental damage. The result of such liability is the elimination of damage caused to the environment and injured third parties.[19]

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[17] Экологические положения конституций [*The Environmental Provisions of Constitutions*] 48–59 (E.A. Vystorobets (eds.), Moscow; Ufa: MiRmpOS, 2012).

[18] Environmental Policy Act No. 6.938 of 31 August 1981 (Jan. 2, 2019), available at https://www.ecolex.org/details/legislation/environmental-policy-act-no-6938-lex-faoc012932/.

[19] Law No. 7.347 of 24 July 1985 regulating industrial activities in order to avoid environmental disasters (Jan. 2, 2019), available at https://www.ecolex.org/details/legislation/law-no-7347-regulating-industrial-activities-in-order-to-avoid-environmental-disasters-lex-faoc025060/?q=No.+7.347+%281985%29.

Paragraph 1 of Article 14 of the Brazilian Environmental Policy Act No. 6.938 states that

> the polluter is obliged, regardless of whether it is guilty, to compensate for damage caused to the environment and to third parties injured by its activities.

Under paragraph 4 of Article 3 of the Environmental Policy Act, the term "polluter" should be understood to mean any individual or legal entity directly or indirectly responsible for the activity that led to environmental deterioration.

The principle of objective civil liability is also enshrined in Chapter 1 of Section 9 of the Brazilian Civil Code, which contains provisions on liability for damages. Article 927 of the Brazilian Civil Code provides that the obligation to pay for damage will exist regardless of fault in cases provided for by law, or when the activity performed by the person causing the harm entails a risk to the exercise of rights of others.

In other words, the legislator determined that civil liability aimed at compensating environmental damage does not require guilt (responsibility does not depend on guilt), and evidence of the existence of an action (omission) violating environmental law, and the cause and effect relationship between the damage and the action/omission of the offender are sufficient grounds for the application of civil liability measures aimed at compensation for environmental damage. Brazilian environmental legislation also establishes the principle of joint and several liability. In accordance with Article 942 of the Civil Code, provided that the offense that caused the damage was committed by several persons, these persons should be liable jointly and severally for the compensation of environmental damage.

Administrative and legal responsibility for violations of environmental legislation is regulated by Decree No. 6.514, adopted on 22 July 2008. Environmental administrative and legal liability is based on the results of the actions or omissions of the offender that violated environmental legislation, regardless of the occurrence of actual environmental damage.

The following administrative penalties apply to offenders: a warning; a fine (up to 50 million reals); confiscation of illegal gains, as well as products and funds used to commit a crime; suspension of activity; closing of premises; demolition work; and restriction of rights.[20]

Law No. 9.605 on Environmental Crimes, adopted on 12 February 1998, establishes that criminal responsibility is personalized and applies not only to individuals but also to legal entities. Types of criminal punishment in the field of environmental management include: fines; temporary restrictions of rights; partial or full suspensions of activity; house arrest; and seizure of the instrument of the crime.

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[20] Decree No. 6.514 of 22 July 2008 establishing penalties and administrative offences for illegal activities against the environment (Jan. 2, 2019), available at https://www.ecolex.org/details/legislation/decree-no-6514-establishing-penalties-and-administrative-offences-for-illegal-activities-against-the-environment-lex-faoc109832/?q=6.514+&xdate_min=&xdate_max=.

The question of specialized environmental courts has also been positively resolved in Brazil. The High Court of Brazil, which has already pronounced judgements on several thousand environmental cases, is the country's *de facto* environmental court. This led to its being referred to in academic literature as the Brazilian "Green Court," since it was praised by officials of the United Nations Environment Program (UNEP) and the International Union for the Conservation of Nature and Natural Resources (IUCN) for its transparency and innovation in the field of environmental law.

Over the past few years, the court has achieved great success in ensuring compliance with environmental legislation, demonstrating its deep understanding and awareness of environmental problems in the country.[21]

1.2. Republic of India

Article 48A of the Constitution of India states that

> The state aims to protect and improve environmental conditions, to protect forests and wildlife of the country.

The Constitution also provides that one of the main responsibilities of every Indian citizen is to protect and improve forests, lakes, rivers, and wildlife (Art. 51A(d)).[22]

The right to a satisfactory and healthy environment is not directly enshrined in the Constitution of India but there are many provisions in the Constitution of India guaranteeing its fulfillment. In our opinion, this approach cannot be considered convincing from the point of view of the legal drafting standards and the priority of environmental protection tasks defined in the sectoral legislation of India. Therefore, it seems that it would be advisable to enshrine such a significant subjective right as the right to satisfactory and healthy environment in the Constitution of India as a separate provision and, in this respect, the experience of the constitutional entrenchment of environmental rights in Russia may be of interest to the Indian legislator.

The key documents in the field of environmental protection in India are two normative acts: the Environmental Protection Rules, adopted on 19 November 1986 (with subsequent amendments and additions),[23] and the National Environmental Tribunal Act, adopted on 17 June 1995.[24] In general, in India, the emphasis is on criminal liability, and the main sanctions are measures such as fines and imprisonment.

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[21] Nicholas S. Bryner, *Brazil's Green Court: Environmental Law in the Superior Tribunal de Justiça (High Court of Brazil)*, 29(2) Pace Environmental Law Review 470, 475–476 (2012).

[22] Конституции государств Азии. В 3 т. Т. 2: Средняя Азия и Индостан [*The Constitutions of States in Asia. In 3 vol. Vol. 2: Central Asia and the Indian Subcontinent*] 177–448 (Moscow: Institute of Legislation and Comparative Law under the Government of the Russian Federation; Norma, 2010).

[23] The Ministry of Environment & Forests, The Environment (Protection) Rules, 1986 (Jan. 2, 2019), available at http://www.envfor.nic.in/legis/env/env4.html.

[24] The Ministry of Environment & Forests, The National Environment Tribunal Act, 1995 (Jan. 2, 2019), available at http://www.envfor.nic.in/legis/others/tribunal.html.

Thirty years ago, the Government of India developed and adopted an Action Plan on the Ganges – the "river of life" – establishing a central authority to purify its waters and reduce industrial, domestic and other anthropogenic pollution. The Supreme Court of India is responsible for supervision of the execution of environmental legislation. The Court has a Supervisory Committee and the Plenipotentiary Committee on Waste, coordinating and approving the activity of environmental and law enforcement agencies.[25]

In order to ensure environmental safety during the use of atomic energy in India, a commission on regulation of activities in the field of atomic energy has been established to ensure ionizing radiation and atomic energy does not damage the health of the population, the state or the people working in the nuclear industry.

Depending on the degree of the possible impact on health, registration and approval of technical passports for objects may be required, together with research of project documentation, including calculation of possible threats and consequent supervisory measures and inspections in accordance with the Safety Guidelines and the Code for the Safe Operation of atomic power stations,[26] as well as a procedure and rules for decommissioning, liability for radiation pollution, and compensation of harm.

Issues of compensation for environmental damage are regulated in the National Green Tribunal Act of 2 June 2010,[27] which is aimed at resolving disputes arising in connection with environmental protection and conservation of forests and other natural resources, and also to regulate the issues of ensuring and observing any legal rights related to the environment, and simplifying procedures for obtaining compensation for damage caused to persons and their property by environmental crime.

Article 17 of Chapter 3 of the Law on the National Green Tribunal stipulates that for causing death, damage to any person or his property, or damage to the environment, the owner (holder) is directly responsible for compensation based on the "polluter pays" principle.

At the same time, in cases of fatalities, injuries or damage caused by an accident, operations or processes where the adverse environmental impact of the enterprise's activities cannot be referred to any single activity, operation or process, but a combination of several such activities, the responsibility can be proportionally distributed among those who are responsible for the activity, operations and processes which led to the environmental offense.

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[25] *Шейнин Л.Б.* Органы охраны окружающей среды: необычный опыт Индии // Государственная служба. 2008. № 3. С. 72–76 [Leonid B. Sheynin, *Environmental Protection Authorities: The Unusual Experience of India*, 3 Public Service 72 (2008)].

[26] *Крысенкова Н.Б.* Обеспечение экологической безопасности объектов атомной отрасли в Индии // Право и экология: Материалы VIII Международной школы-практикума молодых ученых-юристов (Москва, 23–24 мая 2013 г.). С. 344–349 [Natalya B. Krysenkova, *Ensuring Environmental Safety of Nuclear Facilities in India* in *Law and Ecology*, *supra* note 14, at 344].

[27] The Ministry of Environment & Forests, The National Green Tribunal Act of India, 2010 (Jan. 2, 2019), available at http://www.moef.nic.in/downloads/public-information/NGT-fin.pdf.

In addition, the law also provides for the establishment of a special court called the National Green Tribunal, whose activities are aimed at resolving environmental disputes, as well as reducing the burden of litigation.

1.3. People's Republic of China

The regulatory framework in the field of China's environmental protection is formed by the PRC Law on Environmental Protection, and special laws on Water, on the Protection of Wild Fauna and on Land Management. The key legislation in the field of environmental protection is the Law of the People's Republic of China on Environmental Protection adopted on 26 December 1989 (with amendments and additions dated 24 April 2014, which came into effect on 1 January 2015).

Chapter 1 of the PRC Constitution (Art. 26) establishes state protection of the environment in which people live, and the duty of the state to prevent and control environmental pollution and violations in the field of environmental management.[28] There is no article containing the right of citizens to a favorable environment in the second chapter on regulation of the basic rights and duties of citizens. In our opinion, the existence of such a right in the Constitution of any country should be binding. The main responsibilities in the field of environmental protection are contained in Article 6 of the Law on Environmental Protection.

These include: the raising of environmental awareness; maintaining an energy-saving lifestyle; and conscientious fulfillment of environmental protection duties. Legal responsibility issues are given in Chapter 6 of the Law. Measures of administrative responsibility of the legislative bodies of the People's Republic of China include sanctions such as fines (Arts. 59, 61, 62); suspension of activities (Arts. 60, 61); detention (Art. 63); reprimands, severe reprimands, demotion, and removal from office (Art. 68).

Those who damage through pollution and environmental degradation bear tort liability in accordance with the provisions of the Tort Law of the People's Republic of China, adopted on 26 December 2009 and came into effect on 1 July 2010.[29] The mechanism of compensation for environmental damage in China is enshrined in Article 64 of Chapter 6 of the Environmental Protection Law of People's Republic of China and in Chapter 8 of the Tort Law of the People's Republic of China.

Therefore, in accordance with the Law on Tort Liability, a person who damages the environment or, as a result of committing an environmental offense, damages the life, health or property of people, must bear the tort liability. In the event of any dispute concerning environmental pollution, the polluter directly assumes the burden of proof in matters of his involvement in the subject of the dispute (that is,

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[28] Constitution of the People's Republic of China, 4 December 1982 (Jan. 2, 2019), available at https://china.usc.edu/constitution-peoples-republic-china-1982#preamble.

[29] Tort Law of the People's Republic of China, 26 December 2009 (Jan. 2, 2019), available at http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn136en.pdf.

it is legitimate to talk about the presumption of the polluter's fault), the existence of a cause and effect relationship between his behavior and the caused harm, as well as in matters of responsibility for environmental offenses or reduction of liability in certain circumstances (in case of the mitigating circumstances specified in Chapter 3 to which the legislator refers: conditions under which the injured party is also guilty of causing damage; intentional damage by the victim; damage caused by force majeure; and damage caused by the need for such behavior or self-defense).

As for criminal liability, Article 69 of the Law of the People's Republic of China on Environmental Protection provides that violation of this Law is a criminal offense and can be investigated in accordance with the law on criminal liability.[30] The Law provides for distribution of liability for committing environmental offenses if there are two or more offenders.

Such distribution depends on various factors, including the type and amount of pollutants emitted by a particular polluter. In addition, the Law establishes that, for damage to health or property caused as a result of environmental pollution, the polluter is jointly and severally liable with the third party, even if this damage was caused by the fault of the third party. This rule gives victims the right to choose from whom exactly to seek compensation for environmental damage because, in situations where the damage is caused by a third party, the affected party may claim compensation from either the polluter or the third party.

The Law also allows the polluter and a third party to decide independently among themselves on matters relating to compensation for environmental harm. If the affected party prefers to seek compensation for environmental damage from the polluter, then the polluter may subsequently demand compensation from a third party for this. In the PRC, there is no special judicial body that deals with cases of bringing offenders to justice for environmental offenses. These offenses are considered by the courts of general jurisdiction, as is the case in Russia.

1.4. Republic of South Africa

As in all previous countries considered in this article, the South African Constitution (in Article 24) provides for the right of everyone to an environment that is not harmful to their health, as well as for the protection of the environment for the benefit of present and future generations, and for the adoption of reasonable legislative and other measures to prevent pollution of nature and environmental degradation.[31] The key South African law in the field of environmental protection is Law No. 107 on Environmental Protection, adopted on 27 November 1998. The Preamble of the Law

[30] Environmental Protection Law of the People's Republic of China, 1 January 2015 (Jan. 2, 2019), available at https://www.chinadialogue.net/Environmental-Protection-Law-2014-eversion.pdf.

[31] Constitution of the Republic of South Africa, as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly (Jan. 2, 2019), available at http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf.

sets out the basic rights of citizens in the field of environmental protection. The Law establishes that everyone has the right to live in a protected environment for the benefit of present and future generations, the right to prevent pollution and environmental degradation, and the right to promote conservation. The Law also requires safe, environmentally sustainable development and use of natural resources.

The main responsibilities for the compensation of environmental damage are spelled out in Article 28 (Chapter 7) of the National Environmental Management Act of 1998. These include the adoption of reasonable measures to prevent pollution and continuing or repeated environmental degradation.[32]

Under the term "reasonable measures," South African lawmakers understand research, analysis and assessment of the impact on the environment, the timely awareness of employees (the Department of Environment and Tourism) of environmental risks, measures aimed at terminating, altering or controlling any actions of an activity or process causing pollution or environmental degradation, measures to prevent the movement of pollutants, measures to eliminate the source of pollution or degradation and, measures designed to eliminate the effects of pollution and environmental degradation. Legal liability for offenses in the field of environmental protection in South Africa does not have the usual division of administrative, criminal, property and disciplinary responsibility as in Russian legislation. However, in the Republic of South Africa there is Corporate Social Responsibility (hereinafter CSR), which is commonly understood as the duty to conduct business ethically and to contribute to economic development, improving the quality of life of workers and their families, as well as society as a whole. One of the main goals of CSR is to maintain natural resources and environmental programs to protect and preserve natural habitats and to create information openness for people about the world around them.

Types and penalties for violations of environmental legislation are contained in various regulatory acts of South Africa and include fines and imprisonment. For example, fines are referred to in Articles 67 and 68 of the National Environmental Management Waste Act of 2008, in the Atmospheric Pollution Prevention Act of 1965 and in Article 24 of the National Environmental Management Act. In the system of government bodies in South Africa, as well as in China and Russia, there is no specialized court authorized to bring those who are guilty of environmental offenses to legal responsibility.

1.5. Legal Regulation of Legal Responsibility for Environmental Law Violations in the Russian Federation

Article 42 of the Constitution of the Russian Federation enshrines the right of everyone to a favorable environment, reliable information about the state of the

[32] National Environmental Management Act, 1998 (Jan. 2, 2019), available at https://www.environment.gov.za/sites/default/files/legislations/nema_amendment_act107.pdf.

environment and to compensation for harm caused to the health and/or property of a citizen by an environmental offense. The main law in the field of environmental protection in the Russian Federation is Federal law of 10 January 2002 No. 7-FZ "On Environmental Protection." Article 11 of this Law enshrines the basic rights and obligations of citizens in the field of nature preservation.

The environmental legislation of the Russian Federation provides for the following types of liability for offenses in the field of environmental protection: civil law (property); disciplinary; administrative; and criminal.[33] Understanding the subject-matter and legal nature of civil liability is very important for the formation of effective legal measures for compensation for, and protection from, harm.

Current Russian law does not refer to the term "environmental damage," however, in paragraph 1 of Article 79 of the Federal law "On Environmental Protection" the right to compensation for harm caused to the health of citizens by the negative impact of the environment as a result of economic or other activities of legal entities or individuals. Therefore, any environmental harm to health is subject to compensation, and not just harm caused by environmental offenses.

The category of "environmental harm" has received an ambiguous assessment in legal science; academics usually refer to damage caused to the environment. Environmental harm is considered any deterioration of the state of the environment due to a violation of legal environmental requirements. Harm primarily manifests itself in the form of environmental pollution, spoilage, destruction, damage, depletion of natural resources, and destruction of ecological systems.[34]

V. Petrov subdivided environmental harm into economic (that is, directly encroaching on the property interests of nature users, including owners), ecological (affecting the ecological interests of society in a clean, healthy, productive, genetically diverse natural habitat) and anthropological (encroaching on human health and the state of future generations).[35]

The Constitutional Court of the Russian Federation included environmental damage, damage to human health (social damage), and damage to private and public property (economic damage) under damage caused by an environmental offense.[36]

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[33] Федеральный закон от 10 января 2002 г. № 7-ФЗ «Об охране окружающей среды» // Собрание законодательства РФ. 2002. № 2. Ст. 133 [Federal Law No. 7-FZ of 10 January 2002. On Environmental Protection, Legislation Bulletin of the Russian Federation, 2002, No. 2, Art. 133].

[34] *Бринчук М.М.* Экологическое право: Учебник [Mikhail M. Brinchuk, *Environmental Law: Textbook*] (Legal reference system "ConsultantPlus," 2008).

[35] *Петров В.В.* Правовая охрана природы в СССР: Учебник [Vladislav V. Petrov, *Legal Protection of Nature in the USSR: Textbook*] 151–154 (Moscow: Yuridicheskaya literatura, 1984).

[36] Постановление Конституционного Суда РФ от 2 июня 2015 г. № 12-П «По делу о проверке конституционности части 2 статьи 99, части 2 статьи 100 Лесного кодекса Российской Федерации и положений Постановления Правительства Российской Федерации «Об исчислении размера вреда, причиненного лесам вследствие нарушения лесного законодательства» в связи с жалобой общества с ограниченной ответственностью «Заполярнефть»» [Resolution of the Constitutional

On this basis, environmental harm is any environmental degradation due to environmental violations, including pollution, depletion, damage, destruction, irrational use of natural objects, and degradation and destruction of ecological systems, natural sites and landscapes. The result of this can be the derogation of the material and non-material benefits protected by law, including the life and health of people, and the property of individuals and legal entities.

From the point of view of Russian scientific doctrine and legislation, according to the criterion of an object, environmental harm is of two kinds: harm caused to the environment and harm caused to the life, health and property of citizens. General rules for the compensation of environmental harm are regulated by Section 59 of the Civil Code of the Russian Federation "Obligations Arising due to the Causing of Harm," and special rules are prescribed by Articles 77–79 of the Federal law "On Environmental Protection," Article 69 of the Water Code of the Russian Federation, Article 100 of the Forest Code of the Russian Federation, Article 51 of the Law of the Russian Federation "On Minerals" and others.

Environmental damage can be caused by both legal and illegal actions. Article 77 of the Federal law "On Environmental Protection" imposes an obligation on business entities to compensate for environmental harm caused by an activity that is deemed responsible by a state expert examination.

Disciplinary responsibility is applied to persons whose duties include direct compliance with environmental legislation, as well as for non-compliance or improper performance by an employee of his official duties. The Labor Code provides for a number of disciplinary measures, i.e. warning, reprimand and dismissal.

Meanwhile, as A. Ryzhenkov noted, employees are brought to disciplinary responsibility for disciplinary misconduct, that is, non-performance or improper performance by the employee of assigned duties through his fault. This means that employees are brought to disciplinary responsibility not for a violation of environmental law but for a violation of labor law. There are no "environmental" disciplinary offenses. Therefore, this type of legal responsibility for environmental offenses should be excluded from Article 75 of the Federal law "On Environmental Protection."[37] In our opinion, this conclusion is correct.

Administrative responsibility occurs for violations of the provisions of environmental law (by an individual or legal entity) and is regulated by Chapter 8 of the Code of Administrative Violations of the Russian Federation. The main types of

Court of the Russian Federation No. 12-P of 2 June 2015. On the Review of the Constitutionality of Part 2 of Article 99, Part 2 of Article 100 of the Forest Code of the Russian Federation and Provisions of the Order of the Government of the Russian Federation "On Calculation of the Size of the Harm Done to Forests Owing to Violation of the Forest Legislation" in Connection with the Complaint of Limited Liability Company "Zapolyarneft"] (Jan. 2, 2019), available at http://www.consultant.ru/document/cons_doc_LAW_180575/.

[37] *Рыженков А.Я.* Принципы экологического права [Anatoly Ya. Ryzhenkov, *The Principles of Environmental Law*] 108 (Moscow: Yurlitinform, 2018).

administrative penalties in the field of environmental protection include: warnings; fines; administrative suspension of activity; confiscation of the instrument used to commit an offense; confiscation of products of an illegal nature; and deprivation of special rights.

Criminal liability arises as a result of an environmental crime, which should be understood as a socially dangerous act, committed in the form of an action or omission that has a negative impact upon the state of the environment, ecological systems and the components thereof. Punishments for criminal liability include: fines, compulsory work, forced labor, deprivation of the right to occupy certain positions and engage in certain activities, and the deprivation of liberty.[38] Therefore, in Russia, as in other BRICS countries, we see a system of various types of legal responsibility for environmental offenses, and the absence of a special court that could consider such cases.

2. Suggestions for Improving Legal Responsibility for Environmental Offenses in the Context of the BRICS Experience

Russia is a fully-fledged part of the world community and contributes to environmental protection at the international and national levels. At the same time, the lack of effective organizational mechanisms in the field of environmental preservation in some cases does not allow implementation of the principle of inevitability of responsibility and thereby actually neutralizes the effect of establishing a broad range of legal sanctions.

It seems that an important role in solving this problem could be played by the exchange of experience in the formation of environmental legal awareness among representatives of the environmental and legal science of the BRICS countries, which would not only develop an understanding of legislative technologies and law enforcement experience, but also help identify the influence of the population's mentality on the perception of environmental legal information.

It seems necessary that, following the example of Brazil, Russia create a government agency (for example, in the form of the National Ecological Council (NEC)), subordinated to the Ministry of Natural Resources and Ecology of the Russian Federation, whose main task would be to coordinate the activities of two levels (federal and local) in the field of environmental protection, the synthesis of practical experience, and the development of proposals for improving the mechanism of compensation of environmental harm caused to the health and property of a citizen.

The status of this body should be regulated by the regulations of the Ministry of Natural Resources and Environment of the Russian Federation. It is also necessary

[38] Уголовный кодекс Российской Федерации 13 июня 1996 г. № 63-ФЗ // Собрание законодательства РФ. 1996. № 25. Ст. 2954 [Criminal Code of the Russian Federation No. 63-FZ of 13 June 1996, Legislation Bulletin of the Russian Federation, 1996, No. 25, Art. 2954].

to oblige each constituent entity the Russian Federation and each federal district of Russia to submit annual reports to the NEC on the dynamics of the state of the environment, statistics on environmental offenses, data on compensation for environmental harm and other information. It is equally reasonable to use the positive experience of India in the field of setting up a specialized environmental court. In Russia, it would be advisable to organize a judicial panel (on environmental and natural resources disputes) as part of the Supreme Court of the Russian Federation, whose main task would be to resolve environmental and natural resources issues at the regional and federal levels. Today, in view of the high workload, the courts of general jurisdiction and the magistrate courts are increasing the time limits for the consideration of cases, which entails a number of negative consequences.

Specialized courts are narrowly specialized judicial bodies that have a special subject of litigation. These courts consider categories of cases that need a specialized approach. Consideration of cases in specialized courts presupposes a higher qualification of judges in certain branches of law, a uniform application of legislation, and a reduction of the number of judicial errors. As M. Kuchina notes, the need to create specialized courts is due to the desire to solve an extremely important state task, i.e. to increase the efficiency of judicial power.[39]

The system of specialized courts contributes to the formation of less costly, faster and more efficient legal proceedings, and one of the reasons for the undoubted merits of setting up specialized courts is the increase in accuracy in the adjudication of specialized cases.[40] Federal Constitutional Law of 31 December 1996 No. 1-FKZ "On the Court System of the Russian Federation"[41] secured specialized courts in the system of federal courts of general jurisdiction and specialized arbitration courts that make up the system of federal arbitral courts.

According to Article 26 of this Law, specialized federal courts for considering civil and administrative cases, jurisdictional courts of general jurisdiction, as well as arbitration courts that consider business-related disputes and other cases, are established by amending and supplementing this Federal Constitutional Law.

Recently, a new specialized judicial body emerged among arbitration courts, i.e. a court specializing in resolving disputes related to the violation of intellectual property and related rights. The idea of creating such a court was discussed back in the

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[39] *Кучина М.С.* Специализированные суды: зарубежный опыт и перспективы развития в России // Российский следователь. 2017. № 13. С. 53–56 [Maria S. Kuchina, *Specialized Courts: Foreign Experience and Prospects of Development in Russia*, 13 Russian Investigator 53 (2017)].

[40] *Приженникова А.Н.* Перспективы развития специализированных судов в России // Юридические исследования. 2014. № 6. С. 117 [Alyona N. Prizhennikova, *Prospects of Development of the Specialized Courts in Russia*, 6 Legal Research 116, 117 (2014)].

[41] Федеральный конституционный закон от 31 декабря 1996 г. № 1-ФКЗ «О судебной системе Российской Федерации» // Собрание законодательства РФ. 1997. № 1. Ст. 1 [Federal Constitutional Law No. 1-FKZ of 31 December 1996. On the Court System of the Russian Federation, Legislation Bulletin of the Russian Federation, 1997, No. 1, Art. 1].

late 80s and early 90s of the last century. On 6 December 2011, Federal Constitutional Law No. 4-FKZ "On Amendments to the Federal Constitutional Law 'On the Court System of the Russian Federation' and the Federal Constitutional Law 'On Arbitration Courts in the Russian Federation' in Connection with the Creation in the System of Arbitration Courts of the Court of Intellectual Rights" was published and came into force.[42] The Court of Intellectual Rights began to consider cases on 3 July 2013, as determined by the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation.[43] The need to create this court was due to the complexity, and increase in the number, of cases in the field of intellectual rights. In this court, cases are considered in the first and cassation instances.

According to experts, the work of the court on intellectual property rights was recognized as effective and expedient.[44]

As indicated by D. Danielyan, the formation of the first specialized court in the system of arbitration courts required the specialization of judges to be taken into account and entailed the establishment of special procedures, and a change in the organizational aspects of the activity and interaction of the new court within the existing courts, i.e. a systematic approach to the development of the entire judicial system and the system of arbitration courts in particular.[45]

Similar judicial bodies operate in Austria (Patent Court), Germany (Federal Patent Court), Thailand (Intellectual Property Court) and other countries. There are legal prerequisites for setting up specialized courts to deal with environmental and natural resources disputes in Russia. Their introduction will make the process of considering environmental and natural resources cases more qualified and efficient. We believe that judges in environmental and natural resource courts (courts of general jurisdiction) will narrowly specialize in resolving disputes arising in the field

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[42] Федеральный конституционный закон от 6 декабря 2011 г. № 4-ФКЗ «О внесении изменений в Федеральный конституционный закон «О судебной системе Российской Федерации» и Федеральный конституционный закон «Об арбитражных судах в Российской Федерации» в связи с созданием в системе арбитражных судов Суда по интеллектуальным правам» // Российская газета. 2011. № 278 [Federal Constitutional Law No. 4-FKZ of 6 December 2011. On Amendments to the Federal Constitutional Law "On the Court System of the Russian Federation" and the Federal Constitutional Law "On Arbitration Courts in the Russian Federation" in Connection with the Creation in the System of Arbitration Courts of the Court of Intellectual Rights, Rossiyskaya Gazeta, 2011, No. 278].

[43] Постановление Пленума ВАС РФ от 2 июля 2013 г. № 51 «О начале деятельности Суда по интеллектуальным правам» [Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 51 of 2 July 2013. On the Beginning of the Activities of the Court on Intellectual Property Rights] (Jan. 2, 2019), available at http://www.consultant.ru/document/cons_doc_LAW_149167/.

[44] *Кистринова О.В.* Специализированные суды: опыт России и зарубежных стран // Российский судья. 2015. № 2. С. 11 [Olga V. Kistrinova, *Specialized Courts: The Experience of Russia and Foreign Countries*, 2 Russian Judge 9, 11 (2015)].

[45] *Даниелян Д.Р.* К вопросу о специализации судов в организации аппарата судебной власти России // Мировой судья. 2013. № 7. С. 20–21 [Daniel R. Danielyan, *On Specialization in the Organization of the Apparatus of the Judiciary of Russia*, 7 Justice of the Peace 19, 20–21 (2013)].

of environmental and natural resource law, and the presence of special knowledge in this area will be a mandatory criterion for their appointment to the post.[46]

With such a dispute resolution system, there will be a significant reduction in costs. This will also ensure the uniformity of judicial practice in environmental and natural resources disputes, which will enable the parties to predict the likely outcome of a case based on a previous decision and established judicial practice. The presence of a special court will also provide an opportunity to expand the subject matter of the trial, especially for lawsuits arising from public interest, for participation in the process by interested third parties, for commencement of a class action, etc.[47] The issue of the timing of the consideration of environmental and natural resources disputes will also be resolved.

In turn, the experience of Russian regulation of environmental relations (including in the field of legal liability for environmental offenses) could also be of interest to other BRICS countries.

For example, in Russia, as well as in Brazil and South Africa, the constitutional right of everyone to a favorable environment is enshrined in law and directly guaranteed by the state.

However, in India there is no rule directly regulating the right of everyone to a favorable environment, which is an omission that needs to be rectified. China's Constitution also lacks any provision guaranteeing the right of citizens to a favorable environment but it does establish the obligation of the state to protect the environment. Furthermore, the provisions of Russian environmental legislation that regulate civil (property) liability for environmental offenses may be of interest to the other BRICS countries in terms of procedures for compensation for lawful harm, as well as the three-tiered system of the structure of environmental harm (economic, environmental and social) that was formulated by scientific doctrine (and adopted by the legislator) and its practical importance for calculating the amount of compensation. Structures of individual parts of the Criminal Code of the Russian Federation (Article 358 "Ecocide") or administrative sanctions (administrative suspension of environmentally hazardous activities) can be very useful in practice.

Conclusion

The above study of the environmental legislation of the BRICS countries reveals a number of general and specific directions in environmental policy by way of which they could enrich each other with positive experience, overcome difficulties in the organization of environmental management and environmental protection, and prevent possible errors in the context of global economic and environmental crises, making recommendations for environmental improvement.

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[46] Gitanjali N. Gill, A *Green Tribunal for India*, 22(3) Journal of Environmental Law 461, 468 (2010).

[47] Harry Woolf, *Are the Judiciary Environmentally Myopic?*, 4(1) Journal of Environmental Law 1, 4–5 (1992).

Improving the legislation of the BRICS countries in the field of legal liability for environmental offenses by taking into account the positive experience of these countries will help to increase the effectiveness of prevention and rectification of the consequences of events that have a negative impact on the environment of both the Russian Federation and the BRICS association as a whole. Consequently, a comparative legal analysis of the peculiarities and specifics of national environmental legislation in BRICS countries suggests that the general principles of responsibility for environmental offenses are inherent in all these countries, despite their fundamental differences in history, culture and geographical location.

In order to improve the mechanisms for the protection of the environment, property and citizens' health from the consequences of environmental offenses, it is important to continuously coordinate the environmental policies of the BRICS countries, the goals of which are to ensure the rights of each person, effective international cooperation, the creation of legal and economic mechanisms that stimulate determination of the procedure for compensation for environmental harm, and consideration of natural, national, legal, social and other features of the BRICS countries. In this article, we carried out a comparative analysis of the environmental legislation of the BRICS countries according to two main criteria. The first criterion was to identify the presence in the state of specialized bodies that deal with cases of bringing violators of environmental legislation to legal responsibility. We have established that in the BRICS countries there is no single body of executive authority that would be responsible for investigating and making decisions on bringing to offenders to responsibility for environmental offenses.

These functions are performed by various public authorities, although the coordinating function of the Brazilian National Council at the Ministry of the Environment is of great interest to Russia. At the same time, we believe that the creation of a single such body would allow for a more efficient and effective consideration of issues related to environmental protection and the use of natural resources, including ensuring the rights of citizens and legal entities to compensate for environmental harm. Of particular interest to Russia is the experience of creating a specialized court that deals with cases in the field of environmental protection and the use of natural resources. And although many organizational and procedural issues of creating such a court require additional discussions, the experience of India, where a specialized environmental court (the National Green Tribunal) has been operating for many years, as well as Brazil, where the High Court of Brazil resolves environmental disputes, deserves special attention.

At the same time, it appears that this experience may be of interest not only to Russia, but also to the People's Republic of China and South Africa, where specialized environmental courts are also absent, which reduces the effectiveness of nature preservation measures.

The second criterion was the analysis of the legal technique of securing the environmental rights of citizens in the constitutions and legislation of the BRICS

countries. We concluded that the constitutions of India and China may be interested in the wording of Article 42 of the Constitution of Russia regarding the environmental rights of citizens. All the BRICS countries will be interested in the unusual type of responsibility (CSR) enshrined in South African law.

Our analysis provided a high-level assessment of the environmental legislation of the BRICS countries, some of whose provisions (if implemented in Russian law) would allow the system of legal liability in the Russian Federation for environmental offenses to be improved, and make it more modern and efficient.

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ELECTRONIC LEGISLATIVE INITIATIVE AS A TOOL TO IMPROVE CITIZENS' PUBLIC ACTIVITY IN CYBERSPACE: COMMON ISSUES IN THE BRICS COUNTRIES, EUROPE AND THE RUSSIAN FEDERATION

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Around the world, parliaments, governments, civil society organizations and even individual parliamentarians are taking measures to make the legislative process more participatory. A key instrument of such measures is e-democracy. In the 1980s, a number of pilot projects on electronic voting and online discussions were introduced. However, only since 2000, with the active development of the Internet, has considerable interest in utilizing electronic initiatives to advance democracy emerge.

Today, researchers warn that despite all the talk about "e-democracy," the circle of actual decision makers is likely to remain as small as it has been heretofore.

In this article, the author analyzes the pros and cons of electronic initiatives in the BRICS countries, Europe and the Russian Federation, and provides practical information for improvement.

The author suggests that the next step needed to improve civil activity in filing legislative initiatives is the application of a regular mechanism to establish the possibility of organizing the process of civil legislative initiative nomination and the collection of signatures in electronic form, in particular via the Internet, with the possible use of crowd sourcing technologies.

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Introduction

One of the necessary conditions for the development of a democratic civil society is the comprehensive realization of the legislative initiative that is created directly by the people. The civil legislative initiative is a form of direct implementation of a part of state power by the people. It is achieved through the introduction of a legislative proposal or the drafting of a proposed law, or repealing or amending previously adopted laws, with a view to the subsequent adoption of such a regulatory act by the legislative body of the appropriate level. Citizens prepare the draft act and collect the signatures, for the very fact that this particular project was considered by the authorized government body. In political terminology, the initiative is a process that enables citizens to bypass their state legislature by placing proposed statutes, and in some states, constitutional amendments, on the ballot.

The civil legislative initiative refers to the initial, primary forms of democracy and lawmaking, the expression by the people of their will, and it comes along with such forms of direct democracy as the referendum and elections. It is the right of a certain group of voters to propose a draft law, which is subject to mandatory review by the legislature.

Citizens' initiatives allow the electorate to vote on a political, constitutional or legislative measure proposed by a number of citizens, not by the government, the legislature or other political authority. To bring an issue to a vote, the proponents of the measure must gather enough signatures in support of it as the law requires. Citizens' initiatives may deal with new proposals, existing laws or constitutional measures, as determined by the particular jurisdiction. Depending on the authorizing law, the result of an initiative vote may be legally binding or advisory. Agenda initiatives are procedures by which citizens can place a particular issue on the agenda of a parliament or legislative assembly. As with citizens' initiatives, in order for the initiative to be

brought forward to the legislature the law generally specifies a minimum number of signatures required. Unlike the procedure for citizens' initiatives, no popular vote takes place when an agenda initiative is brought forward.[1]

For example, in the Russian Federation the official body, generally, can take any decision: to agree with the project, amend it or reject it. In this way, the civil legislative initiative differs both from a referendum, because decisions made via referendum have the force of law, and from the right to appeal to the authorities with proposals (petitions) that presuppose an answer, but do not require mandatory consideration at the legislative level.

The right of legislative initiative can be implemented in the form of a legislative proposal or a ready-made bill. Theoretically, the difference between these two forms follows from the literal sense of the two terms: the first means the idea, the concept of the future law; the second assumes the existence of a text with all of the attributes of a law (preamble, articles, paragraphs, precise formulations, etc.). A more facilitated form of implementation characterizes the legislative proposal (e.g., it can be made orally).

The term "full-scale initiative" is used for initiatives which are followed by a ballot and the term "agenda initiative" is used for initiatives which are dealt with by a representative body. Like referendums, citizens' initiatives are regarded as forms of direct democracy, for they allow citizens to be directly involved in the policy-making process. As already indicated, popular initiatives are often linked to a referendum, although this is not always the case.

Agenda initiatives seem to be more easily acceptable to those who tend to be skeptical about referendums and who trust the capacity of parliamentary institutions and procedures to bring about considered and enlightened decisions. It is also notable that, compared with initiatives leading to referendums, the interests of minority groups could be expected to be considered more in parliamentary procedures which involve deliberative processes, most importantly in committees. The institution of agenda initiative does not conflict with the idea of parliamentary sovereignty and it does not change the distribution of institutional power in representative democracies. In fact, agenda initiatives can often be seen as a compromise between the promoters and opponents of direct democracy, and for this reason they are perhaps a highly viable option for expanding the opportunities for citizen participation. Indeed, agenda initiative institutions are relatively widespread in Europe, and they are also used in some of those U.S. states which do not allow a full-scale initiative.[2]

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[1] Annette M. Fath-Lihic, *The Instruments of Direct Democracy*, International Institute for Democracy and Electoral Assistance, 21 December 2016 (Jan. 3, 2019), available at http://www.idea.int/news-media/news/instruments-direct-democracy.

[2] Georg Lutz, *Switzerland: Citizens' Initiatives as a Measure to Control the Political Agenda* in *Citizens' Initiatives in Europe: Procedures and Consequences of Agenda-Setting by Citizens* 17 (M. Setälä & T. Schiller (eds.), London: Palgrave Macmillan, 2012).

The Swiss institution of popular initiatives on constitutional amendments is a good example of a full-scale initiative, whereas, for example, the Spanish initiative institutions are a clear-cut case of agenda initiative practices. In some countries, such as Austria and Poland, only forms of agenda initiatives are available, whereas Latvia and Switzerland provide only a full-scale initiative. In other countries, both kinds of initiative institutions exist (for example Italy, Lithuania and Slovakia).[3]

The present analysis of the citizens' initiative mechanism includes a description of the current legal situation as well as the current possibility for citizens to exercise their legislation right via the Internet. Additionally, the article includes a review of the citizens' right to exercise their right to direct governance as practiced in previous and current parliamentary terms.

1. The Possibilities of Citizens' E-legislation in the BRICS Countries

Citizens can make a difference. In a parliamentary democracy, the people place their trust in representatives to formulate laws and oversee the executive branch. A major reason for this system is the difficulty of practicing direct democracy in a contemporary mass society. The individual has too weak a voice to have an impact. The level of mistrust in parliaments has increased in recent decades. The most frequent reasons for this vary from the limitations of traditional political representation, which create a democratic deficit, to the lack of the capacity to deal with complex social problems in lawmaking, but additionally corruption and the greater influence of powerful interest groups and corporations in the decision-making process. However, current information and communication technology (ICT) can act as steroids, enabling us to pump up individual voices, and foster a greater and more direct interaction between society and parliaments.

According to the National Portal of **India**,

> India is the largest democracy in the world and citizens here are highly enthusiastic to be a part of Governance.[4]

The Honorable Prime Minister Shri Narendra Modi believes that,

> Success of democracy is impossible without participation of the people.

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[3] Maria Marczewska-Rytko, *Popular Initiative and Referendum in Switzerland (2000–2010)*, 9 Studies in Politics and Society 284 (2012).

[4] Citizen Participation Towards Good Governance, National Portal of India (2014) (Jan. 3, 2019), available at https://www.india.gov.in/spotlight/mygov-citizen-participation-towards-good-governance.

For that reason he initiated the creation of the online platform MyGov to empower the citizens of India to contribute towards *Surajya* ("good governance"). MyGov[5] is an innovative platform launched on 26 July 2014 to ensure citizens' engagement in decision making by the government so that the ultimate goal of "good governance" for building India is achieved. This initiative is an opportunity for citizens and well-wishers from across the world to share their views on key issues directly with the Prime Minister of India.

The interesting point in such cooperation between the Indian government and its citizens is that the MyGov platform encourages the participation not only of the citizens of India but also of people abroad. There are multiple theme-based discussions on MyGov where people from a wide range of backgrounds can share their thoughts and ideas. Furthermore, any idea shared by a contributor will also be addressed in these discussion forums, allowing constructive feedback and interaction among participants.

MyGov aims to establish a link between government and citizens towards meeting the goal of good governance in the country. For those who wish to go beyond discussions and contribute on the ground, MyGov offers several avenues to do so. Citizens can volunteer to engage in various tasks, and submit their entries. The tasks will then be reviewed by other volunteer members as well as experts. Once approved, the tasks can be shared by those who complete the task with other members on MyGov. Every approved task earns credit points for completing the task. The website is hosted and managed by the National Informatics Centre (NIC). The registration process is very simple and quick on MyGov. A person needs only to fill in a simple sign-up form with personal details such as name, e-mail address, a 10-digit mobile phone number and a password.

As of the first week of September 2014, within forty-five days of its launch, 215,000 users were enrolled on MyGov and more than 28,000 users had submitted their ideas on a variety of issues.[6] The platform attracted many users who were not previously engaged in other social media such as Facebook and Twitter. Within fifty days of its activation, more than 23,000 entries were received for seven different government ministries in addition to the Prime Minister's Office through the Creative Corner section of MyGov alone. The Creative Corner is aimed at receiving creative input such as logo creation and wallpaper designs from the public. Users may upload and vote on proposals on the relevant topics. Though the final results are not based on the votes, the votes are considered during the selection process by the selection committee. Thousands of contributions have been received to date.

What also distinguishes the Indian model of citizens' e-participation is that groups and creative corners are an important part of MyGov. The platform is divided into

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5 MyGov (Jan. 3, 2019), available at https://www.mygov.in/.

6 Now, a CEO to Manage Govt's Digital Outreach, Business Standard, 13 September 2014 (Jan. 3, 2019), available at https://www.business-standard.com/search.php?q=search.php.

a number of groups, namely Clean Ganga, Green India, Job Creation, Girl Child Education, Skill Development, Digital India and Swachh Bharat (Clean India). Each group consists of online and on-the-ground tasks that can be taken up by the contributors. The objective of each group is to bring about a qualitative change in that particular sphere through people's participation.

As is emphasized on the National Portal of India, MyGov is a small step towards the larger mission of becoming a one-stop center for citizen engagement in good governance. Over time the number of groups, tasks and discussions will increase. The portal will also be used as a comprehensive knowledge repository, providing important insights from the sharpest and brightest minds across India.

In **Brazil**, the e-Democracia Project was launched in 2009 by the Brazilian House of Representatives.[7] e-Democracia aims at engaging citizens in the lawmaking process to achieve tangible legislative results. Relying on the use of social media, combined with offline legislative events (e.g. committee hearings, conferences), the initiative is intended to reach a broad segment of the public, including citizens, parliamentarians, civil servants, researchers, nongovernmental organizations and interest groups.

The program is a type of crowdsourcing for legislative purposes. In particular, the e-Democracia website attracts and draws together the diffuse participation of individual citizens and minority groups. The main goal is to permit easier access to the decision-making process by citizens who are not associated with strong interest groups or corporations that usually lobby for access to the centers of power in Brasilia where the national government is located.

Brazil's e-Democracia platform is driven by the belief that the lawmaking process can benefit from the convergence of political representation and citizen participation in a virtuous cycle where one model strengthens the other. People in contemporary societies have very diverse interests, experiences, expertise and values. A great challenge in making social participation feasible is to discover how to take advantage of such diversity and incorporate it into the policy-making system. The engine behind e-Democracia is a "multiple participatory mechanism," a kind of electronic, permeable sponge that enables people to share their professional experience and expertise, express their personal and collective interests and values, and foster creative ideas in different forms and intensity, in all phases of the policy-making cycle. That participation may consider any contribution that citizens want to deliver, or are technically able to present. Some people will be interested in merely discussing ideas (solutions) in public forums, whereas others can be engaged in drafting ideas, simply by uploading useful information to describe the problem, or presenting arguments to support their ideas. One can even help to rank better ideas.

[7] e-Democracia (Jan. 3, 2019), available at www.edemocracia.gov.br.

Besides active participants, there will be many other citizens who are satisfied with simply monitoring the legislative discussion.

But the program faces a major hurdle in a huge country with a great digital divide: How do we engage offline Brazilians in the lawmaking process? The actual participation by an Amazon forest native highlights a possible path with which to create direct linkage between out-of-power communities and the legislature. This is explored further below, as it illustrates wonderfully that more inclusive participation to support digital participatory experiments expressed on government websites depends on many issues.[8]

The backbone of the initiative is its website (www.edemocracia.gov.br), which provides multiple participatory mechanisms with which citizens can:[9]

– share information about a problem that needs to be addressed by a law;

– identify and discuss possible solutions to the problem;

– draft the bill itself.

Since June 2009, e-Democracia has acquired five virtual thematic legislative communities (VLC), several forums, more than 100 topics, 700 contributions and 4,000 registered participants. The most successful experiments so far have been a housing policy and the youth statute virtual communities. As a result of the latter, ideas and suggestions delivered by young people throughout Brazil have been taken seriously by (some) policy makers and, in fact, reflected in the draft of the bill, not yet passed.[10]

One important issue that normally causes digital participation to fail is the lack of connection between people's contributions and how laws are actually drafted. Writing legal text involves great technical complexity. e-Democracia has minimized this problem by engaging the assistance of legislative consultants, who serve, essentially, as "technical translators" during the entire participatory process.

Participants in the youth statute discussion have posted comments and discussed several ideas during recent months. Legislative consultants summarized this participatory content and presented it to the lawmaker in charge of drafting the bill. After approval, the legislative consultants transformed the lawmaker's suggestions into legal text. Then, the lawmaker personally submitted it to the Youth Affairs Committee.

Here are some examples of how virtual contributions are reflected in real modifications of the youth policy bill draft (still under discussion):

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[8] Felipe de Paula, *Does Brazil Have a Legislative Policy?*, 4(3) The Theory and Practice of Legislation 329 (2016).

[9] Cristiano Faria, *Can People Help Legislators Make Better Laws?*, Personal Democracy Media, 29 April 2010 (Jan. 3, 2019), available at http://techpresident.com/user-blog/can-people-help-legislators-make-better-laws-brazil-shows-how.

[10] Cristiano Ferri S. Faria, *Collaborative Online Lawmaking: Brazil's e-Democracia*, Participedia, 21 May 2013 (Jan. 3, 2019), available at https://participedia.net/en/cases/collaborative-online-lawmaking-brazils-e-democracia.

1) Participants' contribution – Participants wanted greater investment in internships and other professional programs for undergraduates, as well as greater flexibility in working conditions for students.

Draft bill:

> Article 19. The action of the State to make effective the rights of youngsters to professionalization, labor and income includes the following measures:
>
> III – an offer of special conditions of labor by matching the professional and educational schedule;
>
> VI – the application of instruments of legal accountability for relevant organizations;
>
> VII – the creation of special credit for working students;
>
> IX – the introduction of apprenticeships in public administration.

2) Participants' contribution – Participants have cried out for greater empowerment of the local youth councils, bodies composed of youth representatives, politicians and experts.

Draft bill:

> Article 46. The youth councils are permanent and autonomous bodies committed to formulating policies for the youth and guaranteeing effective implementation of the rights of the youth.
>
> Article 47. The youth council duties are:
>
> I – informing the General Attorney of any criminal infraction committed against youngsters;
>
> IV – requesting information about matters of youth policy from public authorities;
>
> V – advising the government on the formulation of youth policy;
>
> (and other measures).

Since the launching of e-Democracia in 2009, its team has invested in several strategies to promote the website and engage a broader group of participants. First, articles about the e-Democracia initiative were published in the national electronic newspapers. Its website is accessible and open to anyone who completes a simple registration process. There is also a link to the web page on the House of Representative's website.

Second, the e-Democracia team sent out invitations to thematic blogs and social networking websites to engage people (e.g. environmentalists and youngsters) who are interested in those specific subjects. Third, the e-Democracia team posts daily messages to the e-Democracia's accounts at Twitter and Orkut (which is more popular than Facebook in Brazil).

In **China**, the people's congress system is the fundamental system to facilitate political participation. Qiao Shi (1997) proposed a hierarchical structure for the people's congress in China: the National People's Congress (NPC) at the central level, the provincial people's congress and people's congress for municipalities, the people's congress in cities and counties. However, the existing system can hardly meet the citizens' needs to participate in the policy-making process.

Since civil organizations have emerged in the fields of education, public health and poverty reduction to meet the demand for public services that governments may not fully cover, they can serve as a platform where citizens are likely to assembly for participation purposes. However, since China initiated the Government Online Project in 1999 the number of websites with gov.cn registered as their domain reached 52,115 in 2014 and almost all governments at the county level and above have their own web portals (CNNIC, 2014). This growing trend of e-governance has propelled governments to be more open and transparent with data and information, making them more readily available to citizens. As a result, every ordinary citizen is now able to express his views freely on these online platforms, and policy makers can also turn to all of these different channels and platforms to gather feedback from citizens, guide public discourse and fine-tune policies.

In the initial phase of e-participation, some government officials often take on a hostile attitude towards electronic participation and regard "netizens" participation as harboring evil intentions. They think the network is not representative of public opinion, and some government leaders even see e-participation as a contributor to social instability. Hence, some government officials turned to deleting online posts, shutting down sites and tracking down those who are seen as causing social instability on the Internet. However, these strategies did not achieve good results. A few years later, some senior officials came to realize the importance of online opinions.[11] In January 2007, the CPC Central organization held a thematic learning session about the development of network technology in the world and the construction and management of network culture in China. At the meeting, President Hu Jintao suggested that government officials at all levels should focus on mastering Internet knowledge so as to hone their leadership and strive to create a new norm for China's Internet culture.

With the deepening of e-government, some interactive platforms between government and the public began to emerge on government websites at all levels, such as the online leader mailbox, online interviews and the online consultation column. It is currently estimated that more than 90 percent of Chinese government websites have opened up the leader's mailbox to facilitate communication between the government and citizens. The names of the leader mailboxes may vary on different government websites (the mayor-mail, governor-mail), but their functions are

[11] Liu Hui, *Research on Citizens' E-participation in the Policy Making Process of China*, a thesis submitted for the degree of master of social sciences, Department of Political Science, National University of Singapore (2014) (Jan. 3, 2019), available at https://scholarbank.nus.edu.sg/bitstream/10635/119282/1/Master%20Thesis%20LIU%20HUI%20A0095624.pdf.

analogous. For example, the Shanghai Government website provides the resumes, photos and responsibilities of the party secretary and the mayor to guide citizens in writing e-letters. The online consultation channel is put in place with the intention to seek public opinions and suggestions on new or existing laws and policies. Citizens can express their views through a link provided by the website or through e-mail.

In **South Africa**, the current situation differs because the country has just started the process of e-governing. Taking into account the importance of public participation in the law-making process, the Parliamentary Support Programme (PSP) commissioned the Political Information Service of the Institute for Democracy in South Africa (IDASA) to undertake a research study of public participation in the legislative and policy-making process in South Africa.

The aim of the PSP is to promote good governance and democratization in South African legislatures at the national and provincial levels and to assist them in the performance of their responsibilities. These include legislation, policy formulation, executive oversight, constituency work, and public education and outreach. The PSP focuses on the following areas:

– Assisting legislatures with structural support and services;
– Promoting knowledge and legislative skills;
– Facilitating the participation of women;
– Funding and supporting improvements in institutional arrangements;
– Improving representation and responsiveness in the legislatures;
– Enhancing communication and cooperation between legislatures.

Public participation is central to any democracy and needs to go beyond voting at the national, provincial or local level. A dynamic process of engagement should be facilitated to allow the electorate to participate in processes that may affect their lives.

According to the Constitution of South Africa,

> Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

However, there are certain procedures that individuals and/or groups have to follow when petitioning Parliament. The presentation of petitions is governed by the rules of Parliament. The National Assembly requires that a petition be formally presented by a Member of Parliament (MP) for consideration. Therefore the petition must be supported by an MP. A person is entitled to approach any MP by contacting them or by visiting the Constituency Office closest to him to seek their assistance with presenting a petition on his behalf.[12]

[12] Petitions, Parliament of the Republic of South Africa (Jan. 3, 2019), available at https://www.parliament.gov.za/petitions.

The young South African democracy is engaging in the process of public participation. By strengthening and building on the structures and practices that already exist, they can look forward to greater participation – and hence more effective governance – in the future.[13]

Summing up, the most developed platforms of citizens' e-participation legislation processes are in India and Brazil; and in India there is also the possibility to contact government ministers. In China, people can participate by submitting their comments via special online platforms. In South Africa, citizens' e-participation legislation is only an aim of the government. However, this country has the strong intention to develop electronic democracy.

2. Citizens' Legislation Initiatives in the Laws of European Countries

In most foreign countries, the lawmaking initiative of citizens is enshrined in the constitution of the state and is a form of expression of democracy. The concept and the mechanism for implementing the lawmaking initiative of citizens in foreign states were formed much earlier than in Russia, which explains its wider application.

Constitutions, providing the possibility of a people's legislative initiative, establish that in order to introduce a draft law, it is necessary to collect a certain number of voters' signatures whose authenticity should be verified and certified by a notary or local government official (usually this number corresponds to the number of signatures for the referendum initiative).

The legislative acts of a number of countries stipulate that the voters carrying out the people's legislative initiative should represent different parts of the country in a certain proportion. This is done in order to raise the issue to a national, rather than a local level. For example, in Brazil voters initiators are required to submit at least five states (out of 26); in Romania, at least one-quarter of the country's counties. Often there is a time limit for the collection of signatures: it usually is no longer than six months.

The civil legislative initiative, as well as the referendum, is usually not allowed on issues of taxation, amnesty, the budget process, international issues and issues of constitutional reform.

In Switzerland, the people's legislative initiative for partial revision of the constitution must come from 100,000 voters (para. 2 of Art. 139 of the Constitution of 1999).[14]

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[13] Hoosain Kagee, *Acting National Director Parliamentary Support Programme*, A People's Government, the People's Voice (June 2001) (Jan. 3, 2019), available at https://www.parliament.gov.za/peoples-government-peoples-voice.

[14] Союзная конституция Швейцарской Конфедерации от 18 апреля 1999 г. [Union Constitution of the Swiss Confederation of 18 April 1999] (Jan. 3, 2019), available at http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/swiss/swiss--r.htm.

From the beginning of the 1990s, civil or national legislative initiatives as an institution were consolidated everywhere at the communal and land (Länder) levels. Citizens of the Federal Republic of Germany are increasingly using this tool, which presents the opportunity to directly address pressing political issues. In 1993–1994, five eastern lands included civil legislative initiatives and plebiscites in their new communal statutes, and by 1997 "direct democracy" had been implemented everywhere. Six of the eleven states of the former Federal Republic (the "old" Bundesländer) – Bavaria, Berlin, Bremen, Hesse, Nordrhein-Westfalen and Rheinland-Pfalz – incorporated both initiative and referendum into their new constitutions immediately after 1945. Baden-Württemberg and the Saarland followed suit in the 1970s. After 1990, the peaceful revolution in the former GDR unleashed a wave of reforms which meant that by 1994, all sixteen "old" and "new" federal states had introduced elements of direct legislation.[15]

There is a clear trend in Germany towards more direct democracy. However, the road towards a workable popular right to direct participation in decision-making is still long and arduous. The then ruling SPD/Green coalition presented a bill on citizens' initiative and referendum to the Bundestag in the summer of 2002. However, the proposal did not obtain the required supermajority of two-thirds of votes in the parliament. The federal government elected in 1998 – a coalition of the SPD, the citizens' rights party Bündnis 90 and the Greens – had promised to introduce a national right to citizen participation in legislation. Three of the five parties represented in the Bundestag supported this intention, but without the support of the CDU it could not obtain the two-thirds majority required in the Bundestag for constitutional change. There is still a chance that the initiative element of I&R – the right to force parliament to debate a topic chosen by the people – might be introduced. All the parties in the Bundestag promised that there would be a new attempt after the national elections in the autumn of 2002. This was hoped to usher in the first stage of a gradual introduction of direct democracy at the national level.

Reform attempts and successes continue today. For example, individual federal lands have reduced the threshold for consideration of the people's legislative initiative from 20 percent to 10 percent of voters.[16]

The United States uses an institution similar to the people's legislative initiative, the so-called petition referendum: a referendum held at the request of a certain number of voters who have signed a petition for acceptance, cancellation or amendment of the relevant law. In the United States, such a referendum is practiced in a significant number of states. The number of signatures on the petition may be low or very significant: from 2% in Massachusetts, 3% in Maryland, 5% in Arizona,

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15 Ralph Kampwirth, *Direct Democracy in Germany*, Direct Democracy Conference (2004) (Jan. 3, 2019), available at http://www.iniref.org/germany.html.

16 *Id.*

California, Kentucky, Colorado and Michigan to 15%–20% in individual states. In a petition referendum, two institutions of direct democracy are combined: a people's legislative initiative and a referendum.[17]

Today in the United States there is a legislative initiative to incorporate into the national law the possibility for citizens to participate in legislative initiatives at the federal level. The National Citizens Initiative for Democracy (NCID) is a fundamental, one-time legislative proposal that allows citizens, independent of their representatives in government, to propose and vote on laws and amendments. NCID consists of a constitutional amendment and a federal statute.[18]

However, not in all developed European countries are citizens entitled to legislative initiative. For example, the traditional legislative initiative in the United Kingdom belongs only to Members of Parliament. Any legislative proposal should be put in the form of a bill, and the bill submitted to Parliament must necessarily be correctly drawn up. Individuals or organizations can introduce "private" bills only indirectly: during a petition to Parliament in the proper form, then they have to present their point of view at a meeting of the profile committee considering the bill.

In France, the population is given the right to a lawmaking initiative only at the local level. At the same time, in France people have the right to file petitions to the assembles, including the General Assembly. The right of citizens to file petitions has long been known in the French legal tradition, separately allocated is the right to address them to the parliament. In the Constitutions of 1791 and 1793 this right was listed among the basic rights of citizens. However, generally, citizens' appeals to parliament have limited consequences. Basically, the request is forwarded to the relevant authorities, but this right can also be regarded as a warning to parliament and even as a document that is a material expression of civil liberties.[19] At present, this approach has again found its supporters at the European level, after the signing of the Maastricht Treaty of 1992.

According to Article 72-1 of the Constitution of the French Republic,

> The conditions in which voters in each territorial community may use their right of petition to ask for a matter within the powers of the community to be entered on the agenda of its Deliberative Assembly shall be determined by statute.[20]

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17 *Politics in the American States: A Comparative Analysis* (V.H. Gray et al. (eds.), 9th ed., Washington, D.C.: CQ Press, 2008).

18 National Citizens Initiative for Democracy (Jan. 3, 2019), available at http://www.ncid.us/national_initiative.

19 Stéphanie Renard-Biancotto, *Le droit de pétition sous la cinquième République*, 1 Revue de la recherche juridique, droit prospectif 223 (2000).

20 Constitution of 4 October 1958, French National Assembly (Jan. 3, 2019), available at http://www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly#Title11a.

However, the purpose of such an initiative is very limited, since it can only refer to a request at a meeting to discuss the issue and only if it is within the jurisdiction of the assembly. Initially, the draft law provided a genuine right to mandatory inclusion of appeals in the agenda, but senators reduced this right to a simple opportunity. They feared that including such a right would give the most active minorities too much power. Now this right seems more symbolic than real. To overcome this drawback, the mayor of Paris decided to grant such a right to the city residents. However, this initiative failed, because the question arose as to the legality of such actions by the mayor. The courts ruled that petitions in any case should be considered in a specially created committee, only to be able to give an advisory opinion on the possibility of including a petition on the agenda of the Council of Paris.

3. The European Citizens' Initiative (ECI) with Regard to European Participative Democracy

According to the Treaty of Lisbon,[21] 1 million EU citizens, residing in a significant number of Member States, may invite the European Commission to introduce a proposal of EU legislation in a certain area. This is aimed at increasing the involvement of European citizens in the making of EU policies. This would also enlarge the wide range of citizens' rights, adding to the right to elect MPs to the European Parliament (and to be elected oneself), to approach the European Ombudsman and to address requests to EU institutions.

To implement this provision of the treaty, the European Commission, after an extensive public consultation process, presented the draft Regulation on the Citizens' Initiative on 31 March 2010.

Following debates in the framework of the Council of the European Union and of the European Parliament, and negotiations between the two institutions, the draft regulation was adopted, according to the ordinary co-decision procedure, by the European Parliament and the Council in December 2010 and February 2011 respectively. The Regulation on the Citizens' Initiative came into force on 1 April 2011.[22]

A European citizens' initiative is an invitation to the European Commission to propose legislation on matters where the EU has competence to legislate. A citizens' initiative has to be backed by at least 1 million EU citizens, coming from at least seven out of the twenty-eight Member States. A minimum number of signatories is required in each of those seven Member States. A citizens' initiative is possible in

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[21] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Jan. 3, 2019), available at http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12007L%2FTXT.

[22] Regulation (EU) No. 211/2011 of the European Parliament and of the Council of 16 February 2011 on the Citizens' Initiative (Jan. 3, 2019), available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02011R0211-20131008&from=EN.

any field where the Commission has the power to propose legislation, for example environment, agriculture, transport or public health.[23]

In order to launch a citizens' initiative, citizens must form a "citizens" committee' composed of at least seven EU citizens being resident in at least seven different Member States.

The members of the citizens' committee must be EU citizens old enough to vote in the European Parliament elections (18 years old, except in Austria, where the voting age is 16). Citizens' initiatives cannot be run by organizations. However, organizations can promote or support initiatives provided that they do so with full transparency. The citizens' committee must register its initiative online (European Citizens' Initiative, Official Register, http://ec.europa.eu/citizens-initiative/public/basic-facts) before starting to collect statements of support from citizens. Once the registration is confirmed, organizers have one year to collect signatures.

When a citizens' initiative gets 1 million signatures, the Commission will carefully examine the initiative. Within three months after receiving the initiative Commission representatives will meet the organizers so they can explain in detail the issues raised in their initiative. The organizers will have the opportunity to present their initiative at a public hearing in the European Parliament. The Commission will adopt a formal response spelling out what action it will propose in response to the citizens' initiative, if any, and the reasons for doing so or not doing so.

The response, which will take the form of a communication, will be formally adopted by the College of Commissioners and published in all official EU languages. The Commission is not obliged to propose legislation as a result of an initiative. If the Commission decides to put forward a legislative proposal, the normal legislative procedure kicks off: the Commission proposal is submitted to the legislator (generally the European Parliament and the Council or in some cases only the Council) and, if adopted, it becomes law.[24]

One of the major problems early on relates to the difficulty that organizers have faced in setting up an online collection system on a secure data server (necessitated by the strict data protection and privacy requirements for ECIs), which has meant, as noted, that only eight ECIs have begun (just recently) to collect online signatures. ECI organizers are left to invest their own energy and funds to find a host platform, notify data protection authorities, install the software, and prepare and submit risk and business management documents for certification of the online collection system.[25]

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[23] The European Citizens' Initiative: Official Register (Jan. 3, 2019), available at http://ec.europa.eu/citizens-initiative/public/basic-facts.

[24] Regulation (EU) No. 211/2011, *supra* note 22.

[25] Marcel Sangsari, *The European Citizens' Initiative: An Early Assessment of the European Union's New Participatory Democracy Instrument*, Canada-Europe Transatlantic Dialogue: Seeking Transnational Solutions to 21st Century Problems, Policy Paper (January 2013) (Jan. 3, 2019), available at https://carleton.ca/canadaeurope/wp-content/uploads/CETD_Sangsari_ECI_Policy-Paper.pdf.

These actions are costly and not intuitive for citizens without the necessary technical and legal expertise. The European Citizen Action Service (ECAS), which has investigated the possibility of establishing an online collection system on a secure server in Brussels, estimates the cost of setting up one's own secure online system as falling within the range of €20,000 to €30,000, an amount beyond the means of most organizers.

While they have the option of using the Commission's free open-source software for signature collection, organizers recommend that the software should be made more user-friendly. In a recent article, Carsten Berg – Director of the ECI Campaign for a Citizen-Friendly ECI – provided suggestions for making the software more user-friendly for normal citizens and users, including the simple measure of giving signatories the option to check a box if they wish to stay in contact with the ECI organizers to receive updates and to build longer-term networks. Without such a simple feature, ECI organizers are limited in their ability to communicate with supporters of an initiative.[26]

To address these early difficulties and the complaints by ECI organizers and CSOs, the Commission offered, in an exceptional measure, to temporarily install the organizers' online collection system on a platform in the Commission's Datacentre in Luxembourg free of charge and to support organizers in their certification of the system with Luxembourgish authorities. The Commission also extended the period of collection for ECIs registered before 1 November 2012 until 1 November 2013 (ECIs registered after 1 November 2012 have the normal one-year period for signature collection from the date of registration). A fully staffed ECI help center as well as the provision of an improved online collection system, and a permanent host datacenter, would better facilitate the ability of citizens to make use of their new right. Indeed, one registered ECI is calling for the EU to establish a central online collection platform for ECIs, a low barrier tool which works instantly and without the need for technical expertise.[27]

Although it sounds relatively simple to achieve the threshold of 1 million signatures, in fact this is a complex and challenging task, which involves collecting an average of 2,740 signatures a day. To reach the threshold, a successful campaign requires coordinated efforts over an extended period of time before and after the one year allowed to collect signatures.

Fortunately, the digital age and communications technologies are making it possible for individuals to connect across borders in an efficient manner, enabling citizens to

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[26] Chris Delaney, *Amend the Recall and Initiative Law*, The Globe and Mail, 12 August 2010 (Jan. 3, 2019), available at https://www.theglobeandmail.com/news/british-columbia/amend-the-recall-and-initiative-law/article1376908/.

[27] Carsten Berg, *Online Collection System Needs to Be Urgently Up-graded*, The ECI Campaign, 28 October 2012 (Jan. 3, 2019), available at http://www.citizens-initiative.eu/online-collection-system-needs-to-be-urgently-up-graded/.

easily network, and to do so with limited structures and budgets. While not a panacea, social media can be used as a cost-effective way to promote and provide updates on ECIs. Media coverage now reaches beyond borders instantaneously. Online forums, such as initiative.eu, can provide an online space to federate would-be organizers of ECIs sharing similar interests and to foster discussion. Funds can be collected by organizers in one country and rapidly transferred to another country where they are needed. Should a topic resonate well enough with the public, resources could in fact materialize ad hoc through crowd-sourced funding.[28] In short, the capability for mass transnational collaboration facilitated by information communications technologies is within reach for EU citizens wishing to make use of ECI.

4. Possibilities of Electronic Civil Legislation Initiatives in European Countries

Estonia is considered a pioneer in e-democracy: in 2001 the project "Today I Decide" (TID) was created. The idea was to create a portal that allowed citizens to share their suggestions on improving public administration and the legislative system, as well as to discuss new initiatives related to different spheres of social life. According to the initiative's developers, the principal objective was to increase voters' participation in shaping public policy and eliminate the barriers between society and the state.

This tool has proven to be a success, with over 7,010 registered users proposing and discussing 1,187 new initiatives. It has helped citizens' participation by allowing them to launch new ideas and to discuss them in an open forum, while guaranteeing them a concise answer from the decision-making level. Years of experience with this tool have made it clear that it can be a meaningful instrument for all governments and public bodies throughout the European Union.[29]

The present project TID+ is all about disseminating the tool and the lessons learned from it to interested parties in the EU. It re-evaluates and ameliorates the present solution, makes accessible comprehensive documentation on how it can be used optimally, and makes a software solution available free of charge for non-commercial use to all interested actors as a tool to increase citizens' participation. In this light, the main objectives of the project are:

1) to develop and disseminate an online tool, based on open source solutions, that allows for citizens' initiative and participation in proposing and discussing regulation; this tool should be easy to use by citizens, and should be easily adaptable by interested governments and institutions;

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[28] European Citizen Action Service, "European Citizens' Initiatives – A first assessment," Background Discussion Document No. 1 for the Conference "Building the EU Citizen Pillar," 5 November 2012, Brussels, Belgium (Jan. 3, 2019), available at http://www.ecas-citizens.eu/content/view/468/.

[29] The TID+ Project (Jan. 3, 2019), available at http://tidplus.net/project/.

2) to develop and disseminate the necessary documentation and guidelines that allow a productive and effective use of the tool in proposing and discussing regulation; this documentation should include past experiences, information on traps and pitfalls that could render the tool ineffective, and pointers on how best to use the outcomes of citizens' initiatives and participation.

A widely known initiative is the UK's e-petition. Following its launch by the government in 2011, any citizen or UK resident can create an e-petition to support a cause or ask for a change in policy or legislation, as well as sign other people's petitions. Each petition is open for up to one year, after which it will be considered for debate in the House of Commons if it has collected 100,000 signatures. However, the Backbench Business Committee can only consider an e-petition for debate if an MP makes a case for the subject to be debated. In October 2012, the Hansard Society published a review of the first year of e-petitions which showed that 14,092 had been accepted, with 3 million unique signatures. It is important to note, though, that UK e-petitions can easily be dismissed by Parliament.[30]

To optimize lawmaking activities by political activists and representatives of a lobby in the United Kingdom the crowd sourcing platform Jolitics.com was created. This resource copies the model of the work of the British Parliament, it provides for the stages of project introduction, its discussion and voting. Initially, the platform allows citizens to make proposals only in the field of national policy, but in the future it is planned to allow discussion of issues of local importance.

Users of Jolitics will be able to publish on the site a proposal (analogous to a bill) with a length of no more than 140 characters (similar to the entries in Twitter microblogging), as well as a brief description of the proposal. Other users can discuss the "legislative" initiative within four weeks, after which it is put to a vote. If the proposal is approved by more than 50 percent of the voters, it can be sent to a Member of Parliament with the number of voters who voted for it.

Up to the present time, Jolitics uses a closed registration system: in order to register, it is necessary to receive an invitation from a current participant or to register on the waiting list and receive an alert when the network becomes public. Participants who joined the network at an early stage are given the opportunity to transfer their voices to friends with similar political views, as well as to change their decision in voting.

Although this innovation is the introduction of a people's legislative initiative in a limited form – only in the form of a legislative proposal (there is no question of a draft law being drafted) – in this author's opinion, it does not yet achieve the concept of the people's legislative initiative in a purely legal sense.

The UK government is trying to make more information and data available to citizens through several initiatives. The Office of the Parliamentary Counsel (part of the Cabinet

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[30] Jamie Bartlett et al., *Social Media Is Transforming How to View Society…: Vox Digitas* (London: Demos, 2014).

Office) has a Good Law Initiative which aims to make legislation more accessible online by providing simpler language and explanations. The Open Government Partnership UK National Action Plan 2013–2015 states that the government will promptly publish all new primary and secondary legislation on the website legislation.gov.uk, and make legislative data available in an open and accessible format to allow people to re-use content under the terms of the UK's Open Government Licence. Perhaps the most interesting of all is a website called data.gov.uk which hosts around 20,000 government datasets. Just over half of them are available as open data under the Open Government Licence, making £80 billion of government expenditures accessible to the public in detail. However, not all central government departments publish their spending data in a timely manner, in a consistent format or at the same level of richness, and some local authority spending data is missing completely.[31]

In Germany, an interesting platform transforming this traditional way of democratic participation into an e-democracy tool was established in 2005: the e-petition portal of the Bundestag (German parliament).[32]

Sending individual or public petitions to parliament is one of the fundamental rights to be found within the constitution, the German Basic Law. After registering on the website, citizens have the possibility to exercise this right online, making the procedure much more convenient. While the submission of individual non-public petitions relating to personal concerns becomes certainly more comfortable by means of the portal (one just has to fill in an online form), the platform is particularly interesting with respect to public petitions, which can be supported by other citizens. In this regard, instead of going through the exhaustive process of collecting signatures on paper, the petitioner just has to submit the petition on the e-petition platform and other registered users can "sign" it online with just a few clicks. All public petitions appear in the petition forum, which is the centerpiece of the website. Here, the users get an overview of all petitions and can also have a discussion on them.

Since all public petitions submitted are first screened with respect to compliance with several specific rules (e.g. they need to be of public interest and suitable for discussion), it may take some time for a petition to get published and be open for signature and discussion. If the parliamentary commission for petitions is of the opinion that a petition does not comply with the rules for publication, it may still be treated as an individual petition.

Even though the mere number of supporters gathered for a petition has no direct influence on its success in the subsequent parliamentary scrutiny procedure, a large number of supporters makes it of course much easier to be heard. In this respect, there is a quorum of 50,000 signatures that has to be reached within four weeks after

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[31] Bartlett et al. 2014.

[32] E-petitions in Germany (Jan. 3, 2019), available at https://democracyoneday.com/2013/03/07/e-petitions-in-germany/.

the online publication of the petition (traditional paper signatures may be added, but not signatures collected via other non-official online platforms). Having reached this figure, the parliamentary commission for petitions usually holds a public debate on the issue, to which the petitioner is invited and has the possibility to present his or her arguments before the delegates.

Irrespective of whether a petition is an individual or a public petition and whether the quorum has been reached or not, all petitions complying with the general formal rules go through the parliamentary scrutiny procedure conducted by the parliamentary commission for petitions. At that time, the members of the commission debate the issue and request a statement from the respective responsible ministry, which is in turn scrutinized and taken into consideration. Once the commission has come to a decision, it presents a recommendation to the plenum of the Bundestag, which then decides on the issue. Usually this marks the end of the procedure, meaning that the petition is either rejected (e.g. because a change in legislation is not possible) or accepted. Either way, the petitioner receives an explanatory statement outlining the reasons for the decision, whereupon the statements concerning public petitions are published in the online forum. However, the fact that a petition is successful does of course not mean that legislation is now automatically changed according to the petitioner's wishes. Instead, the petition is usually submitted to the government, which might also be requested to take action regarding the issue concerned.

The usefulness and effectiveness of the overall German petition procedure or legislation notwithstanding, the e-petition system of the Bundestag is certainly a simple but very interesting means to modernize a traditional tool of democratic participation.

5. The Modern Possibilities of Citizens' Electronic Initiatives in the Russian Federation

In the Russian Federation until April 2013, the right of civil legislative initiative was not provided for at the federal level. Citizens could submit their own suggestions and projects only through the entitled bodies that have the right to initiate legislative initiative in accordance with Article 104 of the Constitution of the Russian Federation (the President of the Russian Federation, the Federal Council, Members of the Federal Council, Deputies of the State Duma, the Government of the Russian Federation, legislative bodies of the subjects of the Federation, as well as the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation on their jurisdiction).

The need for this step was stressed by V. Putin in his article "Democracy and the Quality of Government"[33] and in the annual message to the Federal Assembly.

[33] *Путин В.В.* Демократия и качество государства // Коммерсант. 2012. 6 февраля. № 20 [Vladimir V. Putin, *Democracy and the Quality of Government*, Kommersant, 6 February 2012, No. 20] (Jan. 3, 2019), also available at https://www.kommersant.ru/doc/1866753.

He points out that it is necessary to be able to respond to the demands of society, which are becoming increasingly complicated, and in the conditions of the "information age" they acquire qualitatively new features. In this regard, he suggests implying a rule of mandatory consideration in the parliament of those public initiatives that will collect 100 thousand or more signatures on the Internet. Of course, for this, he emphasizes, it is necessary to develop an order for the official registration of those who want to become a part of such a system.

Nowadays, the Decree of the President of the Russian Federation of 4 March 2013[34] provides the possibility for citizens to file their legislative proposals through the electronic resource "Russian Public Initiative." Yet it should be noted that citizens showed legislative activity even before introducing such mechanisms in the legal system: for example, the website podkontrol.ru, where an online petition was posted on the adoption of the law "On the Control of Foreign Financing of Non-Governmental Organizations." Within a few days, over 11,000 signatures were collected under the petition. The result of this initiative was the adoption of the relevant law by the State Duma of the Russian Federation. Obviously, the adoption of the relevant presidential decree was a necessary and timely measure.

According to that decree, public initiatives are proposals of citizens of the Russian Federation on issues of social and economic development of the country, state improvement and municipal management, directed with the use of the Internet resource "Russian Public Initiative" (hereinafter the Internet resource) and meeting the established requirements.

Before the initiative will be posted on the Internet, preliminary examination is required, which is carried out by the Information Democracy and Civil Society Development Foundation "Information Democracy Fund." The period of its holding should not exceed two months. At the same time, the presidential decree provides a number of criteria for the inadmissibility of public initiatives: the presence of obscene, offensive language; threats to life or health of citizens; and calls for extremist activities. In the same way, the initiative is considered for compliance with the constitution, the generally recognized principles and norms of international law, etc. The resolution of these questions may completely depend on the personal views of experts. In this case, the possibility to appeal the results of the examination is not provided for.

The rules provide for refusal to place a public initiative when a description of the problem is absent, there is a lack of options for its solution, or because of the unreasonableness of the proposed options. In this author's opinion, the refusal

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[34] Указ Президента РФ от 4 марта 2013 г. № 183 «О рассмотрении общественных инициатив, направленных гражданами Российской Федерации с использованием интернет-ресурса «Российская общественная инициатива»» [Decree of the President of the Russian Federation No. 183 of 4 March 2013. On Consideration of Public Initiatives Directed by Citizens of the Russian Federation Using the Internet Resource "Russian Public Initiative"] (Jan. 3, 2019), available at http://www.pravo.gov.ru.

criteria are fixed too generally. There are no clear requirements for the validity of options for solving the existing problem, and also for their sufficiency.

The public initiative posted on the Internet resource should be supported in the course of voting using the Internet resource. The initiative is considered to be supported when, within one year after its posting on the Internet resource, it received:

1) no fewer than 100 thousand votes of citizens in support of the initiative at the federal level;

2) at least 5% of the votes of citizens permanently living in the territory of the relevant region of the Russian Federation (for regions of the Russian Federation with a population of more than 2 million people – no fewer than 100 thousand votes of citizens permanently living in the relevant region of the Russian Federation) in support of the initiative at the regional level;

3) at least 5% of the votes of citizens permanently living in the territory of the respective municipality, in support of the initiative at the municipal level.

At the same time, the number of opponents of the public initiative that is being discussed is not taken into account in any way, although the site provides for the possibility to vote against the proposed project. This problem is fundamental, since a democratic state, of course, is obliged to take into account the opinion of the minority in order to achieve full objectivity. After all, there may be a situation in which the number of votes in support of the initiative will be less than the number of votes against. However, there are no legal mechanisms for taking into account the opinion of the population in opposition to the project.

Therefore, if the number of those who voted against exceeds 51 percent of the required number of votes, one may suggest posting a survey questionnaire on the website to identify the reasons for disagreement.

It should be noted that the Decree of the President of the Russian Federation does not fix the procedure for the formation of expert groups; it does not even reflect whether representatives of the scientific community or experts in norm-setting are to be included. In addition, the decision-making process of the expert group is not transparent.

Summing up, one may note that the citizens' legislative initiative is one of the most important forms of public initiative, for a well-established mechanism of legislative initiative gives citizens the opportunity to directly exercise their power by creating the laws under which they live, which contributes to the development of civil society and the improvement of the legal system of the country. Therefore, it is very important to regulate the legislative initiative of citizens not only by presidential decree and certain laws of subjects of the Russian Federation, but to adopt a federal law that consolidates these social relations.

Conclusion

Across Europe there is a very broad and sustained trend of citizens losing trust and confidence in the way politics is being done. According to a 2014 Ipsos MORI poll, just 16 percent of Britons trust politicians to tell the truth – a lower number than that given for trust estate agents or bankers. In Germany, 68 percent of the people distrust politicians, while 86 percent of the French share the same view. Despite a small upturn in the most recent poll, the latest Eurobarometer survey shows that just 32 percent of British adults trust parliament, while 28 percent of French citizens, 40 percent of Germans and only 24 percent of Italians trust their government.[35]

Exactly what is behind these trends is not entirely clear. Causation is hard to establish given all the other trends that are affecting trust, from revelations of corruption to the economic crisis of 2008 and its aftermath. But one way that people's digital experiences could be changing their attitudes towards politics is that they interpret the slowness of responses and inaccessibility of processes in that realm as a sign of aloofness, rather than the result of the old technology used in politics. The digital revolution has enabled people to speak their minds far more easily, get more involved in creating information, and interacting with each other.

The overwhelming majority of this sort of online activity is ignored by the political processes. Researchers and academics have long noted this disconnection with the technology of politics, which remains offline and "clunky" by comparison: voting once every few years, responding to consultation documents from time to time, writing to elected officials. For a while, speed looked to be the way to bridge the digital chasm, to make politics more like an e-commerce experience – quick, seamless and easy. Technophiles have also written about the possibility of returning to direct democracy where, thanks to digital technology and processing power, every citizen can vote directly on every single issue and policy.[36]

Others are more skeptical. Political scientist Gerry Stoker points out that most citizens do not care to engage in politics on a regular basis – so the last reform that would interest them is more participation.[37] Indeed, Hansard research found that only 29 percent of British voters think that having more of a say (e.g. more referendums and more consultation) would bring about a significant improvement in the political system.

This author suggests that the answer lies in the quality of engagement, not just speed, ease or the quantity of opportunities. Quality is about how citizens are

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[35] Trust in Professions: Long-term trends, Ipsos MORI, 30 November 2017 (Jan. 3, 2019), available at https://www.ipsos-mori.com/researchpublications/researcharchive/15/Trust-in-Professions.aspx.

[36] Jamie Bartlett & Heather Grabbe, *E-democracy in the EU: The Opportunities for Digital Politics to Re-engage Voters and the Risks of Disappointment* (London: Demos, 2015).

[37] Gerry Stoker, *Building a New Politics* (London: The British Academy, 2011).

involved in the political process. It requires transparency not just in the amount of information put on websites, but that the data is searchable, shareable, discussed and acted upon. If voters feel that the systems and procedures that govern how decisions are taken are aloof, closed, incomprehensible and unaccountable, then they will not value the democratic processes, where their participation is vital. When we experience a better quality of engagement, where we can get involved personally, then we are more likely to trust the interlocutor.

The constitutional development of Russian statehood, aimed at approbation of new forms of public initiatives of citizens and the maintenance of classical institutions of direct democracy, objectively determines research in the field of legal regulation and implementation of public initiatives. As a result of reforms in public administration carried out in the Russian Federation, there is the emergence of modernized forms of public initiatives, especially electronic ones.

These innovations increase the degree of involvement of citizens of the Russian Federation in the public and political life of the country, contribute to increasing the activity of citizens with their participation in public initiatives and ultimately contribute to establishing a constructive dialogue between the authorities and society.

However, in the Russian Federation and in the European countries there are similar issues in the process of modernizing civil legislation initiatives:

1) The dispersion of the rules governing the procedure for considering civil initiatives, on various regulatory legal acts, which makes it difficult to implement such initiatives;

2) The low level of citizens' awareness of the existing forms and mechanisms for the realization of the citizens' right to public initiative;

3) The weak organization of civil society formal institutions. Obviously, the possibilities of associations of citizens with the status of public associations are higher than spontaneous or permanent informal groups formed according to interests or the principle of territorial residence. Public associations are organized, have experience, qualifications, resources, and can more actively and specifically put forward initiatives. But this possibility is not clearly realized by citizens.

Thus, the development of the electronic legislative initiative is a highly topical issue worthy of further research and open to comparative study in respect of the experiences in the Russian Federation and in Europe.

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COMMENTS

REPARATIVE APPROACH TOWARDS VICTIMS OF ARMED CONFLICT: GLOBAL EXPERIENCES AND LESSONS FOR INDIA

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In recent years, relentless efforts have been made worldwide for repairing the past harms done to victims of armed conflict. There has been a paradigm shift in international human rights law to addressing the victims' need for reparation rather than emphasizing punishment for the perpetrators. A rights-based approach has been adopted towards making amends for the harm caused to victims in the past. Reparation is such a rights-based approach, a diverse complementary form of justice to restore the life of the victims/survivors by means of restitution, compensation, rehabilitation, satisfaction and guarantee of non-recurrence of the violations upon the victims. Effective and inclusive response to violations during armed conflict and addressing those wrongs by way of reparation has become a priority within the international community to sustain peace and development in conflict-ridden countries. India, over the last few decades, has faced persistent violence perpetrated through armed conflict in regions such as Jammu and Kashmir as well as the North East. The lives of common people have been unsettled as a result of incessant killings, rapes and other brutalities. This article explores the development of reparation in the regime of international law and its implication for the victims of armed conflict. It underlines the initiatives of countries emerging from armed conflict in addressing the plight of victims by means of a reparative approach and argues that India needs to adopt a framework to reach out to those whose lives have been destroyed as the result of such violence and provide necessary reparation to them.

Keywords: armed conflict; reparation; human rights violations; victims; international law.

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Introduction

Reparation is a right-based comprehensive approach, a diverse complementary form of justice to restore the lives of victims/survivors of violence. The concept of reparative justice is based on the premise that a crime represents a debt owed not only to the state but the victim, the victim's family and the community as a whole.[1] Reparations are owed when (a) one party, the "perpetrator," has wronged another party, the "victim," (b) the perpetrator has thereby harmed the victim, and (c) the perpetrator now can do something to compensate for the crime.[2] In all its forms, reparative activity attempts to undo the moral, psychological, material and relational damage made by wrongdoing.[3]

Reparation is thought to be "the physical embodiment of a society's recognition of, and remorse and atonement for harms inflicted."[4] It is about making amends for damage: it is a mechanism to acknowledge and compensate victims for the harm suffered and the rights violated.[5] Reparation, in a broader sense, in the context of international law, refers to all means that could be employed to remedy the various harms that are inflicted upon victims as a consequence of crimes.[6]

The establishment of the United Nations in response to the "untold sorrow to mankind" brought about during World War II and the adoption of various international instruments laid the basis for a right to remedy and reparation for gross violations of human rights. The international tools where the glimpse of the right to reparation is reflected since the inception of the United Nations are Article 91 of the Additional Protocol I to the Geneva Convention, 1949, Article 3 of the IV Hague Convention,

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1 Dipa Dube & Bhagwan R. Gawali, *Reparative Justice for Rape Victims in India*, 1(3) International Journal of Advanced Research in Management and Social Sciences 257 (2012).

2 Michael Ridge, *Giving the Dead Their Due*, 114(1) Ethics 38 (2003).

3 Rhoda E. Howard-Hassmann & Anthony P. Lombardo, *Framing Reparations Claims: Differences Between the African and Jewish Social Movements for Reparations*, 50(1) African Studies Review 27 (2007).

4 Eric Stover & Harvey M. Weinstein, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (New York: Cambridge University Press, 2004).

5 Navsharan Singh, *Thinking Reparations in the Context of Impunity* in *Landscapes of Fear: Understanding Impunity in India* 300, 301 (P. Hoening & N. Singh (eds.), New Delhi: Zubaan, 2014).

6 *See* the papers in *State Responsibility and the Individual: Reparation in Instances of Grave Violation of Human Rights* (A. Randelzhofer & C. Tomuschat (eds.), The Hague: Martinus Nijhoff Publishers, 1999).

1907, Article 8 of the Universal Declaration of Human Rights (UDHR), 1948, Article 2, clause 3 of the International Covenant on Civil and Political Rights (ICCPR), 1966, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965, Article 14 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), 1984, Article 39 of the Convention on the Rights of the Child, 1989, Article 24(4) of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), 2010 and Article 75(1) of the Rome Statute, 1998. However, for international legal practitioners the challenge remained as to who would fall under the category of victims and what types of violations might be redressed by reparation.

This led to the adoption of the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 which meticulously defined the universally accepted term of "victims." Further, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005 comprehensively interpreted the term "reparation" to constitute rehabilitation, restitution, compensation, satisfaction and guarantees of non-repetition within its ambit.

A number of nations across the globe emerging from armed conflicts[7] have adopted the reparative approach to redress the claims of victims. South Africa, Cambodia, Guatemala, Colombia and others bear evidence of reparative measures undertaken within the legal regime to effectively respond to victims' needs. India, with its long-standing history of conflict in the Kashmir valley and terrains of the North Eastern Region, and the resulting violations of rights and loss of life, has failed to adopt any comprehensive framework for the reparation of victims. The criminal justice system provides several mechanism for compensation and rehabilitation for victims, but the law fails in its reach. The identification of victims of armed conflict as well as the nature of harms perpetrated tends to create an ambivalence whereby redress of victims' rights remains a distant dream. Specific instances of interventions by the executive or judiciary have been noted, but no holistic or comprehensive plan has been developed over the years.

The present paper sifts through the global initiatives in reparation of victims of armed conflict by highlighting the different reparative measures adopted by countries emerging from armed conflict and argues that India needs to take appropriate steps in this direction.

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[7] Here, and throughout this paper, the terms "armed conflict" and "conflict" exclusively refer to *internal* armed conflict, i.e. where the conflict is between the State and rebel forces, and, as such, is not of an international character.

1. Need for Reparation

Reparation is an approach that acknowledges the obligation of the state, or the individuals or groups, to repair the aftermath of violations which were either directly committed upon people or were the result of the failure to protect them.[8] Reparations are needed to amend the damage caused to the victims as a result of the infringement of their rights. It is a known fact that crime has enormous impact and leaves behind tenacious scars in mind and body, disturbing the moral, mental and physical equilibrium of the victims. To many, it becomes a life-changing event, and their struggle to recover themselves from the harm remains a never-ending process. In the fight to penalize the wrongdoer and get justice from the criminal justice system, their recognition as victims and their consequent rights go unnoticed or undermined. Thus, reparation as a measure can reconstruct the moral, physical and emotional equilibrium of the victims which has been disturbed by the offender's infringement of the victims' rights.[9]

Imperatively, reparation as a rights-based approach has the potential to achieve both objectives at once. By way of reparation, victims' rights in a criminal justice system can be recognized as well as their lives restored by empowering them with their rights, on the one hand, and making the responsible parties acknowledge their responsibilities towards the victims and the survivors, on the other, thus decreasing the alienation between victims and the criminal justice system.[10] As argued by Cavadino and Dignan,[11] "Reparation if successfully achieved could prove to be an excellent method of putting into practice the 're-integrative shaming' process for offenders", which John Braithwaite[12] posits as "the key to successful crime control, with resulting benefits to society as a whole," eventually making the criminal justice system more humane for both the victims and the offenders.

It is worth mentioning that in recent times reparations have undoubtedly become an inevitable part of transitional justice processes in redressing victims'

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8 ICTJ, Reparation & Transitional Justice (Jan. 6, 2019), available at https://www.ictj.org/our-work/transitional-justice-issues/reparations.

9 *Cited in* Michael Cavadino & James Dignan, *Reparation, Retribution and Rights*, 4(4) International Review of Victimology 233 (1997); *see also* David Watson et al., *Reparation for Retributivists* in *Mediation and Criminal Justice: Victims, Offenders and Community* 212 (M. Wright & B. Galaway (eds.), London: SAGE Publications, 1989).

10 Cavadino & Dignan 1997, at 235; *see also* Joanna Shapland et al., *Victims in the Criminal Justice System* 53 (London: Gower, 1985).

11 Cavadino & Dignan 1997, at 236; *see also* Michael Cavadino & James Dignan, *The Penal System: An Introduction* 42–44 (London: SAGE Publications, 1992); *see also* James Dignan, *Reintegration Through Reparation: A Way Forward for Restorative Justice?* in *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* 231 (A. Duff et al. (eds.), Manchester; New York: Manchester University Press, 1994).

12 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989).

harm, supplementing the traditional perpetrator-focused criminal justice system.[13] As penned by Pablo de Greiff,

> Reparations are an important part of many transitional justice processes, both in alleviating victims' suffering and to balance concessions and demobilization packages made to combatants.[14]

2. Recognition of Reparation as a Right in International Law

The recognition of reparation as a right or obligation in respect of victims dates back to the famous case *Factory at Chorzow*[15] in 1928 before the Permanent Court of International Justice. The judgment of the court embodied the vital fundamentals which underlie the right to reparation. The court stated:

> It is a principle of international law and even a general conception of law that any breach of an engagement involves an obligation to make reparation in an adequate form… reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself. Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which restitution would bear… Such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

The judgment mainly established two forms of reparation, namely compensation and restitution to the aggrieved party. Primarily these two components lay down the basic foundation for the idea of reparation, which has in turn been advanced through interpretations in human rights jurisprudence, in particular.[16] Though the judgment is basically emphasized in the context of the law of state responsibility, the principles laid out here apply only among private entities. It indicates that the State has an obligation to ensure that individuals whose rights have been violated

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[13] Luke Moffett, *Reparations for "Guilty Victims": Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms*, 10(1) International Journal of Transitional Justice 146 (2016).

[14] Pablo de Greiff, *DDR and Reparations: Establishing Links between Peace and Justice Instruments* in *Building a Future on Peace and Justice* 321 (K. Ambos et al. (eds.), Heidelberg: Springer, 2009).

[15] *Factory at Chorzow (Germ. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 9 (July 26).

[16] Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* 29 (Cambridge: Cambridge University Press, 2012).

should receive reparation from the responsible party.[17] Here, the responsibility of reparation for victims of human rights violations and whose rights have been violated by state agents come into question. In cases of serious violations of human rights, it becomes clearly impossible to achieve *restitutio in integrum*, that is to say, to re-establish the situation that existed before the wrong done.[18] There was no mechanism under international law for individuals to seek redress for violations committed by their own state or state agents. Traditionally it was perceived under international law that the wrongs committed by a State against its own citizens were of domestic importance and would fall within the State's own jurisdiction, whereas wrongs committed by one State against nationals of another State could only be pursued to seek redress for the damage from the other State by those wronged asserting their rights.[19]

However, in the past few decades, with developments in international humanitarian law and human rights law, there have been significant shifts in the recognition of the victim's right to reparation. The establishment of the United Nations and the adoption of the U.N. Charter and the Universal Declaration of Human Rights and the International Covenant on Human Rights paved the way for the victims of human rights violations to claim their legitimate right for reparation under international law. It was recognized that human rights violations were no longer exclusively matters of domestic concern, but rather, in gross violations, the involvement of international law was warranted.[20] Furthermore, international human rights law progressively recognized that the victims of gross human rights violations could pursue their claims for redress and reparation before the criminal justice system of the State to which they belonged and, if necessary, can also pursue their claims before international forums.[21] Gradually, as a result of the normative set up of the international bodies, victims claims to seek remedy and reparation were incorporated within the corpus of the international human rights mechanisms, to which States, in particular, became parties, and thereby legally bound by their principles.

2.1. Reparation Under International Humanitarian Law

Before the recognition of the concept of reparation under international humanitarian law, compensation was prevalent as a mode of reparation to the victim.

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17 Godfrey Musila, *Principles on Court-Ordered Reparations: A Guide for the International Crimes Division of the High Court of Uganda*, Avocats Sans Frontières (October 2016) (Jan. 6, 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=290617.

18 Evans 2012, at 29.

19 OHCHR, Rule-of-Law Tools for Post-Conflict States: Reparation Programmes (2008), at 5 (Jan. 6, 2019), available at https://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf.

20 *Id*.

21 *Id.*

The reference to reparation by means of compensation can be traced back to the IV Hague Convention, 1907,[22] where it is enshrined under Article 3 that,

> A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

The imprint of the same is again reflected in Article 91 of the Additional Protocol I to the Geneva Convention.[23] However, there was a lack of interpretation on Article 91 of the Additional Protocol I, as the right of the victims to seek redress was restricted only to financial compensation provided under the Protocol.[24] There was no comprehensive understanding or interpretation on the notion of reparation under available international humanitarian law, which thus influenced the development of victims' right mechanisms within international human rights law.

2.2. Reparation Under International Human Rights Law

International human rights laws are no less significant in consolidating the legal basis for the victim's right to remedy and reparation in matters of gross human rights violations. The right to remedy and reparation is firmly embodied within the entity of the available human rights mechanisms.[25]

The origins of reparation in human rights law stem from the adoption of the UDHR in 1948,[26] as Article 8 states that,

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by laws.

Article 2, clause 3 of the International Covenant on Civil and Political Rights (ICCPR), 1966 explicitly describes the obligation of the State to ensure effective remedy for the individuals whose rights have been violated. In addition to this, Article 9, clause 5 and Article 14, clause 6 of the ICCPR provide compensation for the victims' of unlawful arrest, detention and conviction.[27] Again, the International Convention

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22 Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277.

23 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3.

24 *Id*.

25 OHCHR, Rule-of-Law Tools, *supra* note 19, at 5.

26 Evans 2012, at 34.

27 U.N. General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171.

on the Elimination of All Forms of Racial Discrimination, 1965, while emphasizing the elimination of any kind of discrimination embodied under Article 6, enunciates the State's responsibility to ensure effective remedy and reparation or satisfaction for any damage suffered as a result of such discrimination.[28] Imperatively, Article 14 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), 1984 entitles victims of torture to receive redress and adequate compensation, which also includes the right to rehabilitation that is as full as possible.[29] The Convention on the Rights of the Child, 1989 recognizes the inalienable rights of the child and child victims. Article 39 of the Convention acknowledges

> the State responsibility to take appropriate measures to ensure rehabilitation and promotion of physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other forms of cruel, inhuman or degrading treatment or punishment; or armed conflicts.[30]

Again, the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), 2010 makes a significant contribution in consolidating the legal basis of reparation in international human rights law.[31] Article 24(4) of the ICPPED affirms the right to reparation for the victims of enforced disappearances. Article 24(4),(5) states:

> Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation. The right to obtain reparation covers material and moral damages and, where appropriate, other forms of reparation, such as (a) restitution, (b) rehabilitation, (c) satisfaction, including restoration of dignity and reputation; (d) guarantees of non-repetition.

2.3. Reparation Under International Criminal Law

A significant development in international criminal law is the establishment of the International Criminal Court under the Rome Statute, 1998. It is the first of its kind to

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[28] U.N. General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 U.N.T.S. 195.

[29] U.N. General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85.

[30] U.N. General Assembly, Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3.

[31] U.N. General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, 2716 U.N.T.S. 3.

explicitly include reparation for victims.[32] The Rome Statute recognizes the victims as an aid to the administration of justice and confers upon them the right to express their views and claim compensation.[33] It gives victims a central position within the international criminal justice system.[34] The Rome Statute creates a regime for reparation under Article 75(1),[35] which provides that the International Criminal Court shall establish principles relating to reparation for victims, including restitution, rehabilitation and compensation. Under Article 79, the ICC shall wherever necessary make an order for reparation to be made through the Trust Fund provided for.[36] With the adoption of the Rome Statute and the creation of the ICC, the inclusion of the victims of abuse of power has turned out to be a source of inspiration in international law.[37]

2.4. Notion of Victims and Their Rights

Reparation as a principle of international law was incorporated in the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985.[38] This document has frequently been hailed as the Magna Charta for victims of crime[39] and has, by now, been widely acclaimed as the "Victims' Bill of Rights."[40] It contains a bill of rights which inspired and continues to inspire many subsequent international and domestic protocols on victims' rights.[41] The Declaration consists of two parts: (A) Victims of Crime and (B) Abuse of Power.

2.4.1. Victims of Crime

According to the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, "victims,"

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32 Jo-Anne Wemmers, *Victim Reparation and the International Criminal Court*, 16 International Review of Victimology 123 (2009).

33 *See* Roy S. Lee, *Introduction* in *Victims and Witnesses in the International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (R.S. Lee (ed.), Ardsley: Transnational Publishers, 2001).

34 Conor McCarthy, *Reparations Under the Rome Statute of the International Criminal Court and Reparative Justice*, 3(2) International Journal of Transitional Justice 250 (2009).

35 U.N. General Assembly, Rome Statute of the International Criminal Court, 17 July 1998 (Jan. 6, 2019), available at https://www.icc-cpi.int/nr/rdonlyres/add16852-aee9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf.

36 *Id.*

37 Wemmers 2009, at 124.

38 U.N. General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Resolution, adopted by the General Assembly, 29 November 1985, A/RES/40/34.

39 *Victims of Crime and Abuse of Power* (E. Vetere & P. David (eds.), Vienna: United Nations Press, 2005).

40 Nirmala R. Umanath, *Nameless Faceless Victims in Criminal Justice System* (Gurgaon: LexisNexis, 2016).

41 Jan J.M. van Dijk, *Benchmarking Legislation on Crime Victims: The UN Victims Declaration of 1985* in *Victims of Crime and Abuse of Power*, *supra* note 39, at 202.

> means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.[42]

A person may be considered a victim, under the Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

Under the Declaration, four basic rights of victims are recognized. They are:

(i) Access to Justice and Fair Treatment

Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harms that they have suffered.[43] Victims should be informed of their right to seek redress through the mechanisms provided by law.[44]

(ii) Restitution

The Declaration makes it obligatory that offenders or third parties responsible for their behavior should, where appropriate, make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.[45]

Governments are bound to review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.[46]

Where it is found that public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted, that the violation was committed by, then the State is responsible for the restitution.[47]

(iii) Compensation

The Declaration provides that States are obliged to pay compensation to the victims if it is not fully available from the offender or other sources. States should

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[42] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 38, para. 1.

[43] *Id.* para. 4.

[44] *Id.* para. 5.

[45] *Id.* para. 8.

[46] *Id.* para. 9.

[47] *Id.* para. 11.

endeavor to provide financial compensation to the victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes and also to the families of the victims.[48] The establishment, strengthening and expansion of national funds for compensation to victims are to be taken up by the States.[49]

(iv) Assistance

The Declaration provides for the creation of a provision for assistance to victims which includes the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.[50] Victims should be informed about the availability of health and social services and other relevant assistance and be readily afforded access to them.[51] States should sensitize the police, justice, health, social service and other personnel concerned through proper guidelines and training to ensure proper and prompt aid.[52] In providing services and assistance to victims, attention should be given to those who have special needs.[53]

2.4.2. Victims of Abuse of Power

States should consider incorporating into national law norms prescribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and compensation, and necessary material, medical, psychological and social assistance and support.[54] States should periodically review existing legislations and practices to ensure their responsiveness to changing circumstances; they should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.[55] The Declaration, therefore, paves the way for holistic support and assistance to victims of crime as well as those abused by state authorities.

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[48] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 38, para. 12.

[49] *Id.* para. 13.

[50] *Id.* para. 14.

[51] *Id.* para. 15.

[52] *Id.* para. 16.

[53] *Id.* para. 17.

[54] *Id.* para. 19.

[55] *Id.* para. 21.

2.5. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

The essential elements that constitute reparation have been reaffirmed in the International Law Commission's Draft Articles on State Responsibility (2001) and the Basic Principles on the Right to Reparation for Victims (2005). Subsequently, the whole concept of reparation was given a broader meaning in 2005 by a U.N. resolution.[56]

In 2005, the U.N. General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[57] The 1985 Declaration basically deals with victims of crime and abuse of power, whereas the 2005 Basic Principles deals with victims of international crimes as instances of violation of international law.[58] The Basic Principles and Guidelines assert that victims have a right to prompt, adequate and effective reparation.[59] This includes – in some combination and as appropriate – restitution, compensation for harm and rehabilitation in mind, body and status.[60] Measures to satisfy victims such as revealing the truth, holding perpetrators accountable and ceasing ongoing violations are also steps that may have a reparative effect. Likewise, actions to prevent recurrence should accompany reparations, as this offers reassurance to victims that reparation is not an empty promise or a temporary stop-gap.[61]

The principles enumerated in the document to benefit the victims include:[62]

• *Restitution*, which refers to those measures that seek to restore the victim to the original situation before the gross violations occurred. Restitution includes, as appropriate, restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.[63]

• *Compensation* "should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances

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56 Kathleen Daly & Gritana Proietti Scifoni, *Reparation and Restoration* in *Oxford Handbook of Crime and Criminal Justice* 207 (M. Tonry (ed.), Oxford: Oxford University Press, 2011).

57 U.N. General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution, adopted by the General Assembly, 16 December 2005, A/RES/60/147.

58 Umanath 2016.

59 Basic Principles and Guidelines, *supra* note 57.

60 *Id.*

61 Lisa Magarrell, *Reparations in Theory and Practice*, International Center for Transitional Justice (Jan. 6, 2019), available at https://www.ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf.

62 Pablo De Greif, *Justice and Reparation* in *The Handbook of Reparations* 451 (P. de Greiff (ed.), New York: Oxford University Press, 2006).

63 Basic Principles and Guidelines, *supra* note 57, at Principle 19.

of each case." The claim for compensation may result from physical or mental harm; lost opportunities, including employment, education and social benefits; material damage and loss of earnings, including loss of earning potential; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services.[64]

• *Rehabilitation* refers to measures that provide social, medical, and psychological care, as well as legal and social services.[65]

In addition to these, the other measures within transitional justice which have potential reparation effects are *satisfaction and guarantee of non-recurrence*:

• *Satisfaction*, which includes effective measures such as cessation of continuous violations; they are especially measures such as the cessation of violations to truth-seeking and verification of the facts. Verification of the facts, and full and public disclosure of the truth, search for the whereabouts of the disappeared, provide judicial and administrative sanctions against perpetrators, institutional reform, public and official apology, including acknowledgement of the facts and acceptance, thereby restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim.[66]

• *Guarantees' of non-recurrence*, ensuring effective civilian control of military and security forces; strengthening the independence of the judiciary; protecting human rights defenders, promoting the standard of human rights in public institutions; promoting mechanisms for preventing and monitoring social conflicts and their resolution.[67]

These measures address the suffering of victims in two different ways: first, by addressing the loss suffered by the individual, the property destroyed and the mental injury incurred thereby and, second, the harm inflicted on the community as a whole, resulting in collective loss of trust in the legal and public institutions.

In its broad understanding, "reparation" that underlies the Basic Principles and Guidelines attempts redress for gross human rights violations of international humanitarian and human rights law. As reparation involves a multifarious approach, there has always been a concern among human rights lawyers worldwide as to what types of violations should be covered within the purview of reparation or which

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64 Basic Principles and Guidelines, *supra* note 57, at Principle 20.

65 *Id.* at Principle 21.

66 *Id.* at Principle 22. *See*, e.g., Theo van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4.Sub.2/1993/8. More recent updates have not changed the categories. For an interesting discussion on the development of these principles, *see* Dinah Shelton, *The United Nations Principles and Guidelines on Reparations: Context and Contents* in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* 11 (K. De Feyter et al. (eds.), Antwerpen: Intersentia, 2005).

67 Basic Principles and Guidelines, *supra* note 57, at Principle 23.

violations should be subject to reparation.[68] Therefore, a universally accepted definition of "victim" was adopted under the U.N. Basic Principles and Guidelines, 2005.[69] Later on, the same definition was adopted by various national reparation programs in different countries.[70] The response towards the reparative approach at the domestic level in many countries shows mixed outcomes due to the existence of the rule of law in each particular country. In some parts of the world where there is an inability to establish regional human rights courts, and in countries which have not acceded to the objectives of U.N. treaty bodies to allow for individual complaints, victims have become more vulnerable for they are unable to claim their rights for remedies, neither at the domestic level nor at the regional or international level.[71] For example, India is not a signatory to the Rome Statute of the ICC and the Additional Protocol II of the Geneva Convention, nor is there any existing national mechanism for individual claims for reparation for gross violations of international humanitarian and human rights law.

On the other hand, in many countries the mass claim for reparation is not fruitful due to lack of proper interpretation of victims within the justice system. For example, the harm inflicted upon individuals with regard to counter-terrorism activities who were extraordinarily tortured and abused in the United States were denied reparations as the courts have routinely said civil claims for reparations cannot proceed in U.S. courts because they would reveal state secrets.[72] At the same time, there have been positive developments as well with regard to mass claims for reparations in other countries. One of the best known attempts to grapple with legacies of gross human rights violations is the South African experience where "Truth and Reconciliation" has been held up as a model for addressing mass atrocities while building a firm foundation for stability and post-conflict reconciliation.[73]

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68 Musila, *supra* note 17.

69 "Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization" (para. 8). "A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim" (para. 9).

70 *See* the reports by the Truth and Reconciliation Commissions in South Africa, Peru and Morocco.

71 Francesca Capone et al., *New Developments in the Law of Reparations*, British Institute of International and Comparative Law, 28 January 2014 (Jan. 6, 2019), available at https://www.biicl.org/documents/206_6820_latest_development_in_reparations_-_event_report_final_-_28_january_2014.pdf?showdocument=1.

72 *Id.* at 3.

73 Traggy Maepa, *The Truth and Reconciliation Commission as a Model of Restorative Justice* in *Beyond Retribution: Prospects of Restorative Justice in South Africa*, Monograph No. 111, Institute for Security Studies, Pretoria, South Africa (T. Maepa (ed.), 2005), at 66 (Jan. 6, 2019), available at https://issafrica.s3.amazonaws.com/site/uploads/Mono111.pdf.

Another significant development in mass claims for reparations is in the countries with internal armed conflict.[74] Those countries, through a transitional justice process, and by means of appointing a Truth and Reconciliation Commission, have attempted to address the post-conflict society that witnessed gross human rights violations (e.g. South Africa, Guatemala, Haiti and Peru).[75] The countries emerging from conflicts are always vulnerable and lack the persistent rule of law and active law enforcement mechanisms. In such a situation, it is pertinent to have a more holistic approach to address the plight of the victims to restore their lives. As the U.N. Secretary-General, in his report on the rule of law and transitional justice in conflict and post-conflict societies, persuasively argued:[76]

> Where transitional justice is required, strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting, and dismissals, or an appropriately conceived combination thereof.

3. Global Initiatives Towards Reparation for Victims of Armed Conflict

It is noteworthy that the implementation of reparative measures is more viable in the transitional justice process while acknowledging the myriad violations and abuses of fundamental rights that take place particularly during conflicts and under arbitrary regimes.[77] A number of countries emerging from conflict have been able to implement reparative measures through diverse approaches each suitable for the particular country. Some of such approaches are discussed below.

3.1. Colombia

With its legislative approach to addressing the victims of armed conflict, Colombia has gained significant attention in implementing a reparation program in its post-conflict society. Colombia has experienced one of the longest civil wars in the world, since the 1960s, and has for decades ranked as having the highest homicide rate in the world.[78] In 2003, the Colombian government resorted to reparation measures for the victims of conflict by adopting specific legislation aimed at reducing the

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74 Reparation to the victims of armed conflict in Guatemala, Cambodia, Colombia, South Africa.

75 OHCHR, Rule-of-Law Tools, *supra* note 19, at 11.

76 U.N. Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General, U.N. Doc S/2004/616, 23 August 2004, para. 26 (Jan. 6, 2019), available at https://www.securitycouncilreport.org/un-documents/document/PCS%20S%202004%20616.php.

77 OHCHR, Rule-of-Law Tools, *supra* note 19, at 11.

78 Evans 2012, at 205.

accountability of perpetrators and establishing a national truth commission.[79] Subsequently, in 2005, the Colombian government introduced the Justice and Peace Law that constructed victimhood and primary responsibility for reparations around crimes committed by illegal armed groups, avoiding responsibility of the state. As the legislation denied state responsibility, subsequently, due to immense pressure exerted by victims groups on the Colombian government, in 2011, the Victims and Land Restitution Law was implemented, under which claims could be made by victims against atrocities committed by the state armed forces.[80] The legislation introduced the requirement that for persons killed by state forces to be eligible to claim reparation, a criminal investigation needed to be completed to determine that the person had not been a member of an illegal armed group.[81]

3.2. Cambodia

In Cambodia, a hybrid tribunal was set up to address victims and establish accountability for those responsible for genocide and gross human rights violations during the Khmer Rouge regime of 1975–1979. During its reign, the regime allegedly caused the deaths of approximately 1.7 million Cambodians, by execution, starvation and forced labor.[82] In 2004, the United Nations and the government of Cambodia engaged in protracted negotiations which were followed with a draft agreement for a hybrid tribunal to be funded by the Government of Cambodia and the United Nations. This draft was subsequently codified as the law on the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) to prosecute the perpetrators involved in crimes during the Khmer Rouge regime.[83] Even though the law was established, it lacked direct mention of a victims unit, whereas such a Victim Support Section was established by the Internal Rules, which was adopted soon after the establishment of the ECCC. The Internal Rules basically provide for moral and collective reparation for the victims.[84] The Internal Rules contain a very innovative

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79 Evans 2012, at 203.

80 Law No. 975 of 2005 (Ley de Justicia y Paz), Arts. 5, 42 & 45; subsequently, Law No. 1448 of 2011 (Ley de Víctimas y Restitución de Tierras), Art. 3. *See also* Moffett 2016.

81 Moffett 2016, at 157.

82 *See* ICTJ, Cambodia: Background – A Long Road to Justice (Jan. 6, 2019), available at https://www.ictj.org/our-work/regions-and-countries/cambodia.

83 Stan Starygin, *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ECCC): Setting an Example of the Rule of Law by Breaking the Law?*, 3(2) Journal of Law and Conflict Resolution 20 (2011); Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006); the law revised previous legislation from 2001 (Jan. 6, 2019), available at https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf. *See also* Lilian A. Barria & Steven D. Roper, *Providing Justice and Reconciliation: The Criminal Tribunals for Sierra Leone and Cambodia*, 7(1) Human Rights Review 5 (2005).

84 ECCC Internal Rules, 5th rev. ver. (February 2010).

feature wherein for the first time in the history of the International Criminal Court the victims were recognized as the civil parties to the case.[85] In 2006, the ECCC began operations to prosecute Khmer Rouge senior leaders and those "most responsible" for genocide, crimes against humanity and other serious abuses during the conflict.[86] Over 30,000 people visited the court to watch the trial hearings and millions more watched the proceedings on television or online.[87] In 2011, the ECCC indicted five people responsible for gross human rights violations and convicted one.[88] In a remarkable move the Trial Chamber of the ECCC on 16 November 2018, convicted the two Khmer Rouge senior leaders Nuon Chea and Khieu Samphen for crimes against humanity and genocide and for grave breaches of the mandates of the Geneva Conventions of 1949 during the Khmer Rouge regime of 1975–1979.[89] The two men were sentenced to life imprisonment.

3.3. Guatemala

Guatemala again stands in a unique row in discharging reparation to victims of armed conflict. Guatemalan history is marked as the most structural injustice and marginalization of the indigenous people of the century, as a result of the thirty-six years (1960–1996) of internal armed conflict between the government and the insurgent groups.[90] Following a peace agreement in 1994, the Truth Commission, formally known as the Historical Clarification Commission (CEH), was agreed to unearth the decades-long internal armed conflict in the country during the years from 1960 to 1996.[91] Subsequently, the CEH was officially set up in 1997. After working for two years, its final report was made public on 25 February 1999.[92] The report estimated 250,000 deaths and disappearances in the three decades. In over 80 percent of all human rights abuses, the victims were native Mayan, and in more than 90

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85 ECCC Internal Rules, Rule 23; *see also* Historic Achievement in International Criminal Law: Victims of the Khmer Rouge Crimes Fully Involved in Proceedings of the ECCC, Statement of the Victims Unit, 4 February 2008 (Jan. 6, 2019), available at http://www.eccc.gov.kh/english.

86 ICTJ, Cambodia, *supra* note 82.

87 *Id.*

88 *Id.*

89 NUON Chea and KHIEU Samphan Sentenced to Life Imprisonment in Case 002/02, ECCC Press Release, 16 November 2018 (Jan. 6, 2019), available at https://www.eccc.gov.kh/sites/default/files/media/20181116%20Case%20002.02%20Press%20Release_ENG_Final.pdf. *See also* Khmer Rouge: Cambodia's Years of Brutality, BBC News, 16 November 2018 (Jan. 6, 2019), available at https://www.bbc.com/news/world-asia-pacific-10684399.

90 *See* ICTJ, Guatemala: Background – Justice Delayed (Jan. 6, 2019), available at https://www.ictj.org/our-work/regions-and-countries/guatemala.

91 Evans 2012, at 149.

92 In total, the complete report of the CEH encompasses twelve volumes and consists of more than 4,000 pages.

percent of all the violations cases the perpetrators responsible were presumed to be state security agents.[93] The report concluded that the violence was fundamentally committed by the State against the poor, Mayans and those who fought for equity and justice.[94] In its recommendations, the CEH established a broad platform for a comprehensive reparation policy as well as for institutional reform. The Commission initially recommended the responsible parties to the conflict acknowledge the violations committed and apologize for the same. The Commission specifically recommended that the reparation program should be based on the principles of restitution, compensation, rehabilitation and satisfaction, and restoration of the dignity of the victims.[95] The Commission further recommended the establishment of a National Commission for the Search of Disappeared Children in response to reported incidences of disappearances during the armed conflict.[96] A recommendation was also forwarded to pass a bill of law whereby forced disappearances would be legally recognized for reparation and other matters of succession. Additional recommendations in the report included provisions relating to guarantees of satisfaction and non-repetition.[97] Initially, civil society and victims' organizations were very reluctant to pursue faithful compliance with the recommendations.[98] It was only with the collaborative commitment of the U.N. Mission, United Nations Development Programme (UNDP) and interested nations that had constructively contributed[99] to the establishment of the Truth Commission in Guatemala, 200 significant cases were initiated before the Inter-American Court on Human Rights by 2000.[100] Subsequently, reparations were awarded by order of the Inter-American Court on Human Rights to the Guatemalan Cases. The Guatemalan reparation program is considered to be the most comprehensive National Reparation Program.

4. India's Approach Towards Reparation for Victims of Armed Conflict

Simply stated, India is yet to initiate any comprehensive reparative approach towards victims of armed conflict in Jammu and Kashmir, and in the North Eastern

93 CEH Report, Vol. 5, Arts. 2 & 15.

94 Evans 2012, at 152.

95 CEH Report, Recommendations, paras. 7–21 (Jan. 6, 2019), available at https://hrdag.org/wp-content/uploads/2013/01/CEHreport-english.pdf.

96 *Id.* para. 24.

97 Evans 2012, at 154.

98 Christian Tomuschat, *Clarification Commission in Guatemala*, 23(2) Human Rights Quarterly 233 (2001).

99 Significantly, countries such as the United States, Spain and the European Union.

100 Evans 2012, at 158.

Region. The decades-long armed conflict, between the state forces and the insurgent groups, have changed the landscape of those areas into conflict zones and hundreds of thousands of civilian people have been victimized due to the protracted armed conflict.[101]

Following in the footsteps of the colonial power, the Government of India adopted the Armed Forces Special Powers Act (AFSPA), 1958 in response to the Naga secessionist movement in the North Eastern States. In other words, it can be said that the Act was introduced to provide legal protection to the army operations aimed at dominating the Independent Naga rebels.[102] Rather than emphasizing the demands of the indigenous people, the central government responded to the disturbed situation with the model used under colonial rule by implementing the AFSPA, initially in the State of Assam and later extended to the entire North Eastern Region, which comprises the states of Manipur, Assam, Meghalaya, Tripura, Arunachal Pradesh, Mizoram and Nagaland.[103] Conferring the same power, another Act, the Armed Forces Special Powers Act, 1990 was enacted and extended to the State of Jammu and Kashmir. This Act conferred unaccountable powers on the security forces to the extent of causing death on suspicion alone, destroying and dumping properties on suspicion that they were sheltering militants or armed volunteers, entering into any premises for search and seizure, and arresting any person without a warrant.[104] Moreover, the security personnel were provided with immunity under the Act[105] and no legal proceedings could be carried out against them without due sanction from the central government.

Powers were specifically conferred on the security forces to act in adverse situations in the disturbed areas and to control any sort of rebel movements. The object was to provide utmost flexibility to the army in its operations against so-called "insurgent" groups – big and small.[106] But the legislators did not foresee how power without accountability would be prone to misuse to the extent of mass killings. With the passage of time, the powers under the Act became an important tool for the

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101 *Landscapes of Fear: Understanding Impunity in India*, *supra* note 5.

102 Sanjib Baruah, *Routine Emergencies: India's Armed Forces Special Powers Act* in *Civil Wars in South Asia: State, Sovereignty, Development* 190 (A. Sundar & N. Sundar (eds.), New Delhi: SAGE Publications, 2014).

103 The North Eastern Region (NER) comprises eight States: Assam, Manipur, Nagaland, Mizoram, Meghalaya, Tripura, Arunachal Pradesh and Sikkim. Initially, AFSPA, 1958 was invoked only in the Naga-inhabited areas of Assam and Manipur. Gradually in 1972 it was extended to the entire North Eastern Region except Sikkim. However, in 2015 the act was revoked in respect of the State of Tripura, removed from Meghalaya in 2018 and at present the act is applicable only to the entire State of Assam, Nagaland, Manipur (except the Imphal municipal areas) and revoked in respect of eight bordering Police Stations of Arunachal Pradesh.

104 The Armed Forces (Special Powers) Act, 1958, sec. 4.

105 *Id.*

106 Baruah 2014, at 192.

security forces to routinely resort to grave human rights violations in the form of extrajudicial killings, custodial deaths, forced disappearances and sexual abuse.

A major concern in the whole spectacle has been the serious apathy shown towards the victims[107] of State oppression. The people affected as the result of the protracted armed conflict have not received due attention of the State to their restitution and rehabilitation. The victims have generally approached the judiciary[108] and human rights commissions for "adequate compensation," and only in a few cases have the same been paid, while in most cases things remain undecided, defeating the purpose of reparation for the poor victims of the region. Another major concern has been the mass casualties committed by the State agencies.

Violations of human rights by the security forces have become a day to day affair for the people of the conflict regions in the past few decades.[109] Human rights violations by state forces engaged in counter-insurgency operations[110] in the region have occurred with depressing regularity over the last five decades; they includes beatings, electric shock and simulated drowning. Arbitrary arrests and extrajudicial executions[111] are common. An early report by the U.N.[112] revealed that the region witnessed mass violations by the armed forces. According to a report by an independent organization,[113] a total of 1,528 people, including 31 women and 91 children, have been killed in the name of "encounters" with militants by security forces between 1979 and May 2012 in the State of Manipur (one North Eastern State). During "Operation Birdie" in 1997–1998, many Khasi tribal women were reportedly raped. The Assam Rifles[114] also used women as human shields, in violation of the laws of war, in a retaliation attack on the

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107 The term "victim" has been defined in the Criminal Procedure Code, 1973 under sec. 2(wa) as a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged. In the context of the present study, the term has been limited to persons who have suffered loss or injury as a result of the unlawful acts of armed forces operating in the North Eastern States.

108 *Naga People's Movement of Human Rights v. Union of India*, (1998) 2 S.C.C. 109; *Extra Judicial Execution Victim Families Association (EEVFAM) and Others v. Union of India and Others*, A.I.R. (2016) S.C. 3400.

109 ACHR, India Human Rights Report 2007 (2007) (Jan. 6, 2019), available at http://www.achrweb.org/reports/india/AR07/asom.htm.

110 Getting Away with Murder: 50 Years of Armed Forces (Special Powers) Act, Human Rights Watch (August 2008) (Jan. 6, 2019), available at https://www.hrw.org/legacy/backgrounder/2008/india0808/.

111 Mandy Turner & Binalakshmi Nepram, *Armed Violence and Poverty in Northeast India*, report for AVPI, Centre for International Cooperation and Security (March 2005) (Jan. 6, 2019), available at https://www.bradford.ac.uk/cics.

112 Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Human Rights Council, U.N. Doc. A/HRC/23/47/Add.1, 26 April 2013 (Jan. 6, 2019), available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.47.Add.1_EN.pdf.

113 Sailajananda Saikia, *9/11 of India: A Critical Review on Armed Forces Special Powers Act (AFSPA) and Human Right Violation in North East India*, 2(1) Journal of Social Welfare and Human Rights 265 (2014).

114 Assam Rifles is the oldest paramilitary force in India.

National Socialist Council of Nagaland (NSCN).[115] Particularly, women in Mizoram were prone to violations by security personnel, including rape, sexual violence and arbitrary detention.[116] Crimes against tribal women by the security forces were a feature of the conflict in Tripura. One of the most widely known incidents was the 1988 gang rape of fourteen tribal women in Ujanmaidan by the Assam Rifles.[117]

Similar incidents are also reported from the Kashmir valley due to the protracted armed conflict between the government security forces and the armed militant groups waging a separatist movement. There have also been widespread complaints of torture and arbitrary detention. Thousands of people have "disappeared" in Jammu and Kashmir since the beginning of the conflict.[118] According to data by the Asian Human Rights Commission, more than 8,000 people have disappeared after they were arrested by law enforcement agencies since 1989 when the armed conflict started in Kashmir. The majority of them were non-combatant Kashmiris.[119] Throughout the years, the actual number of causalities caused is never really known by anyone. People have died in police custody, have disappeared, and with no exact records of their being found. The only official records present on the government portal[120] give the minimum number of causalities in those conflict zones; and the numbers are questionable.

4.1. Initiatives Towards Reparation

While there is no existing reparation policy available in India for the victims of armed conflict, there is a policy document under the Ministry of Home Affairs (MHA) which includes compensation for those affected by extremist attacks, and reimbursement and development initiatives in insurgency-affected regions of the country.[121] The strategy of the policy document is to maintain harmony and peace, fulfilling the prerequisites for the growth of the individual, on the one hand,[122] and fulfilling the aspirations of society and building a strong, stable and prosperous nation, on the other.[123] The document further states that the union government

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115 Report of the Committee to Review the Armed Forces (Special Powers) Act, 1958 (Justice (Retd) B.P.Jeevan Reddy Committee), Part III (2005), at 52 (Jan. 6, 2019), available at http://notorture.ahrchk.net/profile/india/ArmedForcesAct1958.pdf.

116 Getting Away with Murder, *supra* note 110, at 12.

117 *Id.* at 14.

118 Justice: Action Against Enforced Disappearance, Asian Human Rights Commission, 22 April 2003 (Jan. 6, 2019), available at http://www.ahrchk.net/ua/mainfile.php/2003/434/.

119 *Id*.

120 Ministry of Home Affairs, Government of India, Annual Budget Report.

121 Singh 2014, at 307.

122 Outcome Budget, 2010–2011, Ministry of Home Affairs, Government of India (2011) (Jan. 6, 2019), available at https://mha.gov.in/sites/default/files/OB%28E%292010-11.pdf.

123 *Id.*

conjointly with the state governments of Jammu and Kashmir is pursuing a multi-prolonged strategy to bring about peace and harmony.[124] The major element of this framework is the special funds to the State Government by way of reimbursement for various types of Security Related Expenditure (SRE),[125] including expenditure on carriage of constabulary, rent for accommodations, airlift charges, the rising cost of the Indian Reserve Battalion, and various other relief and rehabilitation measures for migrants, widows, orphans and militancy-affected persons.[126]

According to the annual report of 2017–2018,[127] the total amount reimbursed from 1989 to the financial year 2016–17 under Security Related Expenditure (Police)–SRE (P) was 6,871.52 crores. During the financial year 2017–18, up to 31 December 2017 a sum of 627.87 crores had been reimbursed to the Government of Jammu and Kashmir under SRE (R&R).

Fig. 1: Statement of Assistance Provided Under the Security Related Expenditure (SRE) Scheme (Jammu and Kashmir)

Funds Released	Crores
1989–2017	6,871.52
2017–2018	627.87

Source: Ministry of Home Affairs (Annual Report 2017–2018).

Similarly, there are schemes for SRE reimbursement in the North Eastern States that is implemented by the Ministry of Home Affairs in the states of Assam, Nagaland, Manipur, Meghalaya and Arunachal Pradesh, which includes (a) payment of ex-gratia to the next of kin of the state police personnel and civilians killed in militant violence, (b) providing logistics support to the Central Paramilitary Forces, (c) maintenance of designated camps of militant groups with whom the Central Government/State Government have entered into Suspension of Operations agreements, (d) surrender and rehabilitation of militants as per approved schemes, (e) special training for State Police Personnel for counter-insurgency operations and (f) raising of India Reserve BNS.[128]

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124 Outcome Budget, 2010–2011, *supra* note 122, para. 1.6.

125 *Id.* para. 1.8.

126 *Id.*

127 Annual Report, 2017–2018, Ministry of Home Affairs, Government of India (2018) (Jan. 6, 2019), available at https://mha.gov.in/sites/default/files/MINISTRY%20OF%20HOME%20AFFAIR%20AR%20201718%20FOR%20WEB.pdf.

128 Annual Report, 2008–2009, Ministry of Home Affairs, Government of India (2009) (Jan. 6, 2019), available at https://mha.gov.in/sites/default/files/AR%28E%290809.pdf.

Fig. 2: Statement of Assistance Provided Under the Security Related Expenditure (SRE) Scheme (North Eastern States)

Funds Released	Assam	Nagaland	Manipur	Tripura	Meghalaya	Arunachal Pradesh	Total (Crores)
2012–13	112.86	69.36	20.62	11.32	–	50.74	264.90
2013–14	159.18	42.50	25.01	42.18	16.60	4.53	290.00
2014–15	106.69	57.88	37.76	27.23	12.61	18.83	261.00
2015–16	140.07	67.61	45.78	12.98	12.63	0.93	280.00
2016–17	148.70	61.48	31.86	36.62	9.19	12.15	300.00
2017–18 (Up to 31 Dec 2017)	221.51	13.16	9.23	16.60	12.60	10.90	284.00

Source: Ministry of Home Affairs (Annual Report 2017–2018).

In addition to the SREs, there are also development initiative programs introduced by the MHA in the North Eastern States and various schemes for rehabilitation of surrendered militants in the North East. Significantly though, this SRE varies every year, for there is no credible accounting procedure for the amounts.[129] There are no details published on the government portal of the disbursement of the SRE under different headings in the Annual Budget. Therefore, the money allotted for the victims for "Relief and Rehabilitation" from the SRE amounts are not transparent. For instance, where there were disappearances and custodial killings in the North East, compensation was never paid to the victims' families.[130] The SRE has failed to meet the expectations of the victims specifically due to lack of transparency. This is evident in various government reports where the Comptroller and Auditor-General of India (CAG) have censured the state governments for not obtaining audit certificates for SRE or for misuse of funds.[131] Instead of being a proper holistic mechanism for reparation, these have become instruments of impunity in the hands of State forces.

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[129] Singh 2014, at 310.

[130] Researcher's personal interview with the victims' families in Manipur.

[131] *See* Audit Report for the Year Ended 31 March 2006, Security Related Expenditure, Performance Review, para. 3.1.7, p. xi; *see also* CAG Raps J&K Govt for Diverting SRE Funds, The Times of India, 7 April 2002 (Jan. 6, 2019), available at https://timesofindia.indiatimes.com/india/CAG-raps-JK-govt-for-diverting-SRE-funds/articleshow/6161334.cms?.

4.2. Existing Compensatory Measures Under the Criminal Justice System in India

The Criminal Justice System in India is basically concerned with the offender and the crime; therefore, reparation as a whole is still a distant dream in India. As observed by the Supreme Court in *Ratan Singh v. State of Punjab*:[132]

> It is a weakness of our jurisprudence that victims of crime and the distress of the dependents of the victim do not attract the attention of the law. In fact, the victim reparation is still the vanishing point of our criminal law. This is the deficiency in the system, which must be rectified by the legislature.

However, the development of compensatory jurisprudence in India has to some extent consolidated the legal basis for the victim's right to seek remedy. As stated by Justice G. Yethirajulu,[133]

> Compensation to victims is a recognized principle of law being enforced through the ordinary civil courts in India.

Over the years, the court has expanded several provisions of the Constitution and interpreted those provisions in a manner that remedies could be availed for violations of human rights through which the victim's right to compensation could be claimed. Thus, the emergence of compensatory jurisprudence in view of human rights philosophy is a positive signal indicating that the judiciary has undertaken the task of protecting the right to life and personal liberty of all people irrespective of the absence of any express constitutional provision and judicial precedent.[134]

4.2.1. Statutory Provisions

Though the Constitution of India does not grant any enforceable right to compensation, the Supreme Court by interpretation of Articles 14 and 21 of the Constitution has included the rights of the victims, which includes the right to compensation. Likewise, the provision of part IV of the Constitution, the Directive Principles of State Policy, when liberally interpreted covers victims' claims for compensation. Article 38(1)[135] provides that,

> The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which social, economic and political, shall inform all institutions of national life.

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132 *Ratan Singh v. State of Punjab*, (1979) 4 S.C.C. 719.

133 (2004) 7 S.C.C. (J) 49.

134 *Id.*

135 M.P. Jain, *Indian Constitutional Law* 1495 (6th ed., Nagpur: LexisNexis, 2011).

This directive reaffirms what has been declared in the Preamble to the Constitution of India, namely that the function of the Republic is to secure, inter alia, social, economic and political justice.[136] Again, Article 39[137] provides for policies to be followed by the state to ensure economic justice and equality, which, when interpreted in manifold ways, may include victims' claims for compensation. Similarly, Article 41, inter alia, states that the state shall make effective provisions for "securing right to work, education and public assistance in the cases of sickness and disablement and also in other cases of undeserved want." The expressions "disablement" and "other cases of undeserved want" could also be interpreted in a way to cover the victims of crime within its purview, and hence the state in a way would have an obligation to assist the victims by way of compensation and fulfill the fundamental rights guaranteed within the Constitution.[138] Again, under part V of the Constitution of India, Article 51-A makes it a fundamental duty of every citizen of India "to protect and improve the natural environment and to have compassion for living creatures" and "to develop humanism." If empathetically interpreted and imaginatively expanded, we find here the constitutional beginnings of Victimology.[139] Further, the guarantee against unjustified deprivation of life and liberty (Art. 21) has within it elements the obligation placed on the state to compensate victims of criminal violence.[140] The other important provisions are those for constitutional remedies under Articles 32 and 226, which are enforceable before the courts of law for the violation of human rights of an individual, and also extensively applicable to the victims of crime. The manner in which the position of these articles was indubitably established by the Supreme Court with regard to compensatory jurisprudence may be seen through a series of cases[141] which have shifted the court's initial hesitant approach to an assertive and rights-oriented one through the years.

Apart from the constitutional framework, there is legislation that provides for compensation to victims in India: for example, the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985; Consumer Protection Act, 1986; Fatal Accidents Act, 1855; Indian Airlines Non International Carriage (Passenger and Baggage) Regulations, 1980; Indian Railways Act, 1989; Merchant Shipping Act, 1958; Motor Vehicles Act, 1988; Probation of Offenders Act, 1958; Protection of Women from Domestic Violence

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136 *Air India Statutory Corporation v. United Labour Union*, A.I.R. (1997) S.C. 645.

137 Jain 2011, at 1497.

138 *See* Murugesan Srinivasan & Jane Eyre Mathew, *Victims and the Criminal Justice System in India: Need for Paradigm Shift in the Justice System*, 10(2) Temida 51 (2007).

139 *See* R. Seyon, *Criminal Justice System: Contemporary Challenges and Judicial Responses with Special Reference to Victims*, 4(2) International Journal of Research and Analysis 94 (2016).

140 Durga Das Basu, *Constitutional Law of India* (Nagpur: Wadhwa & Co., 2003).

141 *Khatri v. State of Bihar*, A.I.R. (1981) S.C. 928; *D.K. Basu v. State of West Bengal*, A.I.R. (1997) S.C. 610; *M.C. Mehta v. Union of India*, A.I.R. (1997) S.C. 3021; *Nilabati Behera v. State of Orissa*, A.I.R. (1993) S.C. 1960.

Act, 2005; and the Sexual Harassment (Prevention, Protection and Redressal) Act, 2013. These are, however, subject-specific and apply only within the contours of the legislative mandate.

4.2.2. Procedural Laws Governing the Compensatory Mechanism

Section 357 of the Criminal Procedure Code (CrPC), 1973 is a comprehensive provision which deals with compensation for victims. This section was inserted in the 1973 Code on the recommendation of the Law Commission of India[142] to recognize the victims and their rights in the criminal justice system. This provision combines the procedures of both the criminal process and the civil process for it would be just and necessary so as to save time and money, instead of seeking remedies in two different courts.[143] Eventually, the scope and object of Section 357 of the new Code was expanded by the Supreme Court for the first time in *Sawarn Singh v. State of Punjab*[144] wherein it was observed by the Court that:

> The law which enables the Court to direct compensation to be paid to the dependents is found in section 357 of the Code of Criminal Procedure (Act 2 of 1974). Under this Section the court is enabled to direct the accused, who caused the death of another person, to pay compensation to the persons who are, entitled to recover damages from the persons sentenced, for the loss resulting to them from such death.

Further, as explained by the Supreme Court while awarding compensation, the Court must take into account the nature of the crime, the injury suffered and the justness of the claim for compensation and the capacity of the accused to pay, and order relevant circumstances in fixing the amount of fine or compensation.[145] In *Hari Singh v. Sukhbir Singh*,[146] the Court, while explaining the purpose of the provision under section 357 CrPC, observed that:

> It is an important provision, but courts have seldom invoked it, perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to the victim who has suffered by the action of accused. It may be noted that this power of the court to award compensation is not ancillary

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142 K.N. Chandrasekharan Pillai, *R.V. Kelkar's Criminal Procedure* 614 (6th ed., Lucknow: Eastern Book Co., 2014).

143 *Id.*

144 *Sawarn Singh v. State of Punjab*, A.I.R. (1978) S.C. 1525.

145 *Id*.

146 *Hari Singh v. Sukhbir Singh*, (1988) 4 S.C.C. 551.

> to other sentences, but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well as reconciling the victim with the offense. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way.

Thus, Section 357(1)[147] stipulates that compensation is payable to the victim for any loss or injury when the accused is punished, and the court imposes a sentence of fine or a sentence of which fine is a part. However, the amount of compensation cannot exceed the fine amount, as the compensation is to be paid out of the fine recovered from the accused. The amount of fine would depend upon the amount of fine imposed for that particular offense and to the extent to which the court is empowered to impose the fine.

Imperative is the liberal interpretation of Section 357(3)[148] which lays down "that compensation may be awarded to the victim even when the court imposes a sentence of which fine does not form a part." In other words, the power to award compensation is not ancillary to other sentences, but it is in addition thereto. There is also no limit to the amount that may be awarded, which is left entirely to the discretion of the court to decide in each case depending on the facts and circumstances of the case.[149]

4.3.3. Victim Compensation Scheme in India

In an attempt to bring the domestic criminal justice system in line with the 1985 U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Criminal Procedure Code, 1973 was amended in 2008 on the basis of recommendations in the 154th Law Commission of India Report.[150] The word "victim" was defined, for the first time, to mean a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged, and the expression includes his or her guardian or legal heir.[151] Section 357A was inserted in the 1973 Code, obligating the states to provide for compensation to victims out of the victim compensation fund. For that purpose, each of the states is required to develop a Victim Compensation Scheme (VCS). The scheme makes way for

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147 Criminal Procedure Code, 1973, sec. 357(1).

148 *Id.* sec. 357(3).

149 *Rachhpal Singh v. State of Punjab*, A.I.R. (2002) S.C. 2710; *Pankajbhai Nagjibhai Patel v. State of Gujarat*, A.I.R. (2001) S.C. 567.

150 Law Commission of India, The Code of Criminal Procedure 1973, Report No. 154, 22 August 1996 (Jan. 6, 2019), available at http://lawcommissionofindia.nic.in/101-169/Report154Vol1.pdf.

151 Code of Criminal Procedure, 1973, sec. 2(wa).

an institutionalized payment of compensation to the victim by the state for any loss or injury caused to the victim by the offender. In cases where compensation paid by the accused is inadequate or no such compensation is payable on account of acquittal or discharge of the accused or the offender not being traced or identified, the VCS is applicable.[152] Such payment may also be allowed on the specific recommendations of the court, in addition to the compensable payable under section 357 CrPC 1973. Section 357B CrPC 1973 specifically provides that in cases of acid attack (sec. 326A Indian Penal Code, 1860) and gang rape (sec. 376D Indian Penal Code, 1860), the compensation payable by the state shall be in addition to the payment of fine to the victim under the said sections. The District Legal Services Authority (DLSA) or State Legal Services Authority (SLSA) has been authorized to decide the amount of compensation to be awarded to victims under the scheme, subject to the maximum limit prescribed by the State. In addition to payment of compensation, section 357A also attempts to respond to the immediate needs of the victims for first aid or medical benefit as well as any other interim relief, as may be required.

In pursuance to the legislative amendment, the states have adopted the scheme, though after an initial reluctance and prodding by the courts.[153] Presently, all the states have made the scheme applicable within their territorial jurisdiction to provide "funds for victims and their dependents, who have suffered loss or injury as a result of the crime and who require rehabilitation." Thus, the scheme intends to bear significant costs including medical treatment, psychological counselling, etc., of the victims and also provide for their rehabilitation. Unfortunately, however, the word "rehabilitation" has not been defined in the scheme, but left to the discretion of the District Legal Services Authority to decide on the matter. In other words, who requires rehabilitation and what may be included in such rehabilitation have not been spelled out clearly, though through logical inference it may be taken to include medical assistance, psychological counselling, temporary shelter, vocational/professional training in some cases and definitely adequate financial assistance.[154]

Seemingly, it has been noted, there is serious anomaly across the states with regard to the scheme of compensation.[155] From the definition of the word "victim" to the object of the scheme to eligibility criteria for compensation, the procedure for grant of compensation, refusal of the application, etc., in all areas the schemes across the states vary.[156]

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152 Dipa Dube, *An Analysis of Victim Compensation Schemes in India*, 13(2) International Journal of Criminal Justice Sciences (forthcoming).

153 *Suresh v. State of Haryana*, A.I.R. (2015) S.C. 518.

154 Dube, *supra* note 152.

155 Sanjeev P Sahni et al., *Victims' Assistance in India – Suggesting Legislative Reform: A Comprehensive Comparative Policy Review* 23–58 (New Delhi: ANE Publishing, 2016).

156 Dube, *supra* note 152.

It may be stated that the scheme maybe somewhat inapt in its application to victims of armed conflict. In the context of armed conflict, access to justice remains a challenge due to the immunity provided to the security forces. Virtually no FIRs are lodged or even accepted by the civil police of the state for atrocities committed by its forces; thereby investigation and judicial process rarely progress. Even the recognition of victims as "victims" is refuted, thereby negating any possibility of their seeking reparation from the state. Further, to invoke the VCS, the victims need to participate in the criminal justice process and cooperate with the machinery. Where the offense itself is denied, the question of its occurrence does not arise. Furthermore, the schedule to VCS makes it applicable to identified offenses under the criminal law of the land. Incidents of mass killings, fake encounters, enforced disappearances, etc., do not feature as offenses therein, because these are mostly state-sponsored violations. There are few instances where the victims have been facilitated with monetary compensation on the orders of the judiciary or National Human Rights Commission or State Human Rights Commissions. The compensation awarded for the infamous Malom Massacre victims after more than a decade is one rare example where such compensation has occurred.[157] Even the operation of these human rights watchdogs are severely deficient, as, for example, in the State of Manipur where atrocities are high, the State Human Rights Commission is in a defunct state, while in the State of Assam, though it is operative, its function is mostly under political influence, whereby it is reluctant to proceed against the state powers. Thus, victims' access to justice remains mostly tedious and unattainable.

Conclusion

Reparation is a very effective mechanism in addressing the harm perpetrated on victims due to armed conflict. It is also a means to atone for state-sponsored violence against the innocent population. In India, as in many other countries around the globe, the conflicts and consequences therefrom have evolved over the years. Different nations have adopted policies to evaluate the ramifications and provide for appropriate reparation to victims. India, however, has failed to respond to the situation. The criminal law of the land has been grossly inadequate in its application to victims. The rights-based institutions have also failed to redress the harm suffered as a result of armed conflicts. What is needed is a comprehensive victim reparation policy of the state to meet the expectations of victims. Such policy must provide for

[157] *See* for details the compensation awarded to the victims of the infamous Malom Massacre 2000 in Manipur after fourteen years of long wait Alok Pandey & B. Sunzu, *Manipur's Malom Massacre: High Court Orders Rs. 5 Lakh Compensation for Victims' Families*, NDTV, 7 December 2014 (Jan. 6, 2019), available at https://www.ndtv.com/india-news/manipurs-malom-massacre-high-court-orders-rs-5-lakh-compensation-for-victims-families-709536. *See also* Manipur HC Orders Payment of Rs 5 Lakh Compensation to Each Family of Malom Victims, E-Pao, 5 December 2014 (Jan. 6, 2019), available at http://e-pao.net/GP.asp?src=19..061214.dec14.

due recognition of "victims," acknowledgement of wrongs on the part of State in the event of atrocities by its agents, assurances towards security and non-repetition by the State, adequate compensation for harm done, rehabilitation including medical and legal assistance, psychological counselling, shelter, educational expenses, where applicable, employment opportunities, etc. An independent body may be constituted at the regional levels with members of the legislature, executive and judiciary as well as civil society to provide easy access to justice for victims. This body may be entrusted with appropriate powers to hold inquiries into alleged violations, monitor investigation and trial of offenders, provide speedy remedy to victims, etc. This body may further engage in dialogue with State forces working in the region to foster respect for human rights and ensure safety, security and peace in the lives of the local population. A determined state initiative with value strategies to address the current challenges in the conflict-ridden areas will not only redesign but re-engineer the social structure and address the actual needs of the present day conflict scenarios. That will be the beginning of a genuine endeavor for reparation for victims of armed conflict in India.

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CONFERENCE REVIEW NOTES

III SIBERIAN LEGAL FORUM: LEGAL ASPECTS OF THE BRICS COOPERATION IN A GLOBALIZED WORLD

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1. The Siberian Legal Forum Background

The Siberian Legal Forum, initiated by Tyumen State University in 2014, Tyumen, Western Siberia, Russia, is a unique, in-demand and vibrant intellectual discussion platform meant for comprehensive consideration of a broad range of challenging legal issues, including their comparative aspects within an international dimension and the current and new trends in the evolution of the law. The Forum encourages the exchange of academic and practice experiences, and it establishes and strengthens collaboration between national and international legal academia, experts and practitioners.

The first Siberian Legal Forum was hosted on 20 November 2014 by the Institute of State and Law, University of Tyumen and dedicated to the 150th anniversary of the judicial reform by Alexander II along with the current reform of the Russian judicial system and the specialization of the courts and judges in the Russian Federation.

The second Legal Forum, the International Conference "Administrative Justice: The Comparative and Russian Context," held on 29–30 September 2016, focused on the development of administrative proceedings in Russia.[1] Since then, the Siberian Legal

[1] About the Forum (Jan. 15, 2019), available at https://siberiaforum.utmn.ru/eng/about-conference/?fbclid=IwAR2kJJWgfpP0yjCtFOHJ5w90K09DNt2R-cFZvzxB6cQKCe1M8RSh0l4xwAQ.

Forum has become the leading biennial conference held on a regular basis, and it has evolved into a broad framework of discussion marked by significant legal integrity.

Following the success of the first two Forums, the III Siberian Legal Forum, held in Tyumen on 1–3 November 2018, served as an open platform for representatives of the BRICS countries and a valuable instrument in outlining state practices and policies in the development of national and international law in the BRICS countries. It was hosted jointly by the University of Tyumen and the *BRICS Law Journal*.[2]

The Forum offered participants debate and discussion, plenary sessions and side events under the overarching theme of "Digitalization of Society, Economy, and Law" – indeed, an ambitious and multi-faceted undertaking. The organizers designed a diverse and challenging program, comprising two conferences, four panels, four open lectures, four round tables, a discussion session and a forum-discussion along with other events devoted to specific Forum themes.

The program featured keynote research areas embracing:

- Development of competition and antitrust law in the era of the digital economy;
- Legal aspects of the BRICS cooperation in a globalized world;
- Digital technologies, legal culture and civil procedure;
- Development of civil law in a digitalizing world;
- Legal support of digital technologies in the area of public administration;
- Legal regulation of labor and social responsibility issues in the context of a changing economy;
- New trends and mechanisms in criminal law and criminology as anti-corruption measures in the era of the digital economy;
- Export competitiveness and legal mechanisms for export goods and services;
- Institutionalization of non-governmental suppliers in the social field;
- Challenges and prospects of the legal profession in Russia and the Republic of Kazakhstan.

2. Summary of the Conference "Legal Aspects of the BRICS Cooperation in a Globalized World" Within the Framework of the III Siberian Legal Forum

The conference "Legal Aspects of the BRICS Cooperation in a Globalized World," within the framework of the Forum, which brought together academicians from the BRICS countries to address some of the globalized world's most pressing socio-economic and legal challenges and to come up with functional solutions, was hosted jointly by the University of Tyumen and the *BRICS Law Journal* at the School of Advanced Studies, University of Tyumen, on 2 November 2018.

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[2] Call for Participation. III Siberian Legal Forum (Jan. 15, 2019), available at http://www.nkibrics.ru/ckeditor_assets/attachments/5b6bf793627269053477000 0/call_siberian_forum_brics_updated.pdf?1533802387.

The event aimed at providing a high-level international platform for academicians to present their new advances and research results. The thematic discussion covered a broad range of topics most meaningful and significant for the BRICS countries, including global governance of international development, human rights, banking and finance law, challenges of the employment relationship, legal education and environmental security.

The first keynote address was given by Andre de Mello e Souza, Senior Research Fellow, Institute for Applied Economic Research, Brazil, who articulated a thoughtful analysis of how the emergence of BRICS as a political group with the aim of influencing global governance, particularly in the financial sector, was shaped by the 2008 economic crisis and the subsequent creation of the New Development Bank (NDB). He argued that the NDB resulted from failures to significantly reform the Bretton Woods financial institutions in ways that would afford more voice and access to decision-making to rising powers such as the BRICS countries. Additionally, he highlighted that the NDB represents a significant and distinctive achievement by the group. He also argued that the BRICS pushed for reform of global governance structures rather than for overthrowing or revolutionizing them. He concluded with the persuasive argument that global governance structures need to be reformed in order to gain greater legitimacy and efficiency, as well as to motivate compliance by key stakeholders such as the BRICS countries.

The focus on global governance, however, overshadowed equally important issues, such as the protection and realization of human rights in the BRICS countries. Human rights are considered to be at the forefront of the BRICS bloc discussions, since all the BRICS countries face a number of human rights challenges. Within the framework of the conference, the participants addressed some of the presumed currently prevailing issues For example, Nazreen Shaik-Peremanov, JD, Advocate of the High Court of South Africa, opened the discussion with her Skype presentation "Human Rights in BRICS: The Case of Migrants' Right to Health." As she eloquently expressed, the migrants' right to health is to be of crucial significance in combating poverty and inequality, and achieving development and sustainability in the BRICS countries. Though there is no comprehensive legal instrument at the international level that creates a legal framework for the governance of migration, there are several international instruments having a vital role to play in the protection of migrants' rights, including their right to health. To know the relevant norms is the core of their protection and a necessary first step towards their application.

Following this, Patrick Hennely, PhD, Research Assistant, University of Cambridge, United Kingdom, marked the necessity for producers' and consumers' legal rights to be observed. In his presentation "Supply Chain Transformation Enabled by Advanced Technologies: Legal Implications for Producers, Consumers, and Society" he deliberated on how leading world companies are adopting digital technologies and cultivating a digital attitude in order to support the supply chain transformation. He also explored

the way Big Data and cloud computing would combine with alternative production processes. He noted that digital technologies are a driving force for new supply chain models and require the identification of the legal parameters as well as a certain legal instrument to provide for effective regulation and greater visibility, adjustment and integration across an increasingly complex network of multiple partners.

The next speaker to take the floor was Ksenia Ivanova, PhD, Associate Professor, University of Tyumen, Russia. Her presentation titled "Legal Protection of Citizens' Rights to Free Expression in Cyberspace" examined the issues of the modern change of the online protest movement. She offered her reflections on the internet as both an effective tool for coordinating rallies and a new world forming a new public consciousness. She noted that the expansion of the influence of cyberspace has changed the relationship between people dramatically and actually has formed a person of a new type, one who is free and bold, who states his or her position and declares it openly. Therefore, the net appears to be more than a tool for data transfer, but a new environment that requires a separate regulatory legal adjustment.

Professor Ivanova noted that, on the one hand, within a single information space the borders between states and the thinking of citizens are being blurred. One goal could unite people from different continents, providing them with more freedom to express their opinions. On the other hand, the apparent simplicity, when it is enough to put a rainbow on one's profile photo on Facebook as an expression of support, entails a decrease in the citizens' activity in the real world. She expressed her concern in regard to online protests organized via the internet in Russia and a number of European countries in particular regarding a mutated, similar trend that has caused such a negative phenomenon as "hacktivism," when a protest is expressed by illegal methods, for instance, by unauthorized access to websites or the e-mails of public persons. She explained that the key problem is that such a mutation entails a negative attitude towards online protests in general and forces the legislators of most countries, Russia is no exception, to step onto the path of taking tougher measures to prevent online protests. As a result, she called for the creation of the necessary legislative delineation of online opinion expression and hacktivism manifestation, along with improvements in legislation aimed at protecting the legitimate online activities of citizens.

Another highlight was the thematic area dedicated to financial challenges that the BRICS member states are currently witnessing. Within the bloc's global agenda the financial sector has a special focus among prioritized cooperation fronts. In this context, the presentation made by Alexander Molotnikov, JD, Associate Professor, Russia-China Law Society, Russia, was more than important. He contemplated the new trends in the development of financial markets in general and regulatory problems of the BRICS countries in particular. He stressed the strengths and priorities of the development of financial markets, persuasively pointing out the need to keep pace with changes in the global financial arena.

Andrew Haynes, JD, Professor, University of Wolverhampton, United Kingdom, Senior Visiting Research Fellow at the Institute of Advanced Legal Studies, University of London, Honorary Professor, University of Tyumen, in his presentation "Banking Law Issues in the People's Republic of China," shared his insights on the structure and recent developments in the financial system of the People's Republic of China, explored the recent regulatory themes and key regulatory developments in bank governance and the rules guiding the relationships banks have with their customers and other third parties, along with the key compliance requirements for integration into the global financial market. He underlined the work completed so far to improve the regulation of systemically important financial institutions.

The follow-on presentation by Marina Chudinovskikh, JD, Associate Professor, Ural State Economic University, Russia, extended the thematic discussion to the dilemmas of crypto-currency legislative regulation that the BRICS countries and the Eurasian Economic Union face. She reported on the results of a comparative analysis of legislative approaches to crypto-currency regulation in the BRICS countries and the Eurasian Economic Union. The analysis certainly benefited from empirical inquiry blended with the study of the experiences of the BRICS and EEU countries and made it possible to identify three approaches to regulation, namely: conservative, liberal and neutral. To conclude she stressed the need to establish unified requirements for the regulation of crypto-currencies so as to avoid investment and capital migration to the countries that offer a more liberal approach.

In his presentation, Charl Hugo (BA Law, LLB, LLM, LLD), Professor of Banking Law and Director of the Centre for Banking Law, University of Johannesburg, South Africa, emphasized the role of guarantees securing the obligations of parties as critically vital in especially large commercial contracts and focused on the independent (demand) type of guarantee. In this regard, he developed a considerable comparative legal analysis that shows significant differences in laws regulating this issue in the People's Republic of China and the Republic of South Africa. The key difference is that in contrast to South Africa, in the People's Republic of China a number of exceptions to the independence of the guarantee (in other words, situations in which defenses arising from the underlying contract can be raised by the guarantor if the guarantee is called up) are recognized. Driven by the fact that in South Africa independent guarantees are widely used particularly (but definitely not exclusively) in the construction industry and China is heavily involved in construction in Africa, he concluded that a proper understanding of the differences between the Chinese and South African laws relating to (construction) guarantees is of crucial importance.

All the presentations delivered conveyed a strong message on the readiness of the BRICS countries to deepen and consolidate their economic-financial collaboration.

The next thematic area encompassed a diverse mix of labor law and globalization issues relating to the BRICS countries. Eduardo Gomes, PhD, Associate Professor, Department of Political Science, Fluminense Federal University, BRICS Research

Center, Brazil, made a noteworthy contribution with his Skype presentation titled "From State to Market-oriented Intermediation of Labor Conflicts Disputes in Brazil since 1943."

The highly respected researcher stressed Brazil's long-standing labor disputes intermediation and presented it in historical perspective based on the enactment of Brazil's founding legal code in 1943, the Labor Laws Consolidation (*Consolidação das Leis do Trabalho*), on the changes in labor legislation during the so-called Vargas Era, the period of a broad politico-economic crisis, on the analysis of vital changes in respect of labor rights which were introduced by the Constitution in 1988, and on two laws, passed in 2017, that formed the so-called Law of Modernization of Labor Legislation.

He critically assessed Labor Laws Consolidation and asserted that in recapturing and organizing isolated labor laws enacted since the early 20th century, Labor Laws Consolidation is a structured and encompassing labor code, but also has had a number of loopholes, for example the lack of inclusion of rural, domestic and self-employed workers, from the very start. Additionally, while the code had always covered labor issues in the private sector, public employees from municipal, state and federal levels have always had their own political and social labor legislation not dealt with here. His comprehensive analysis of merits, discrepancies and demerits of the Law of Modernization of Labor Legislation deserves close attention.

Professor Gomes closed his presentation with the statement that there seems to be an on-going transition in Brazil from state labor disputes intermediation to a market-oriented one through the legal definition of a new labor bond without outlawing the long-existing one. A somewhat focused reform might resemble a revolution.

The discussion proceeded with the presentation by Svetlana Racheva, PhD, Associate Professor, Master of Laws, University of Tyumen. She provided insights into the findings of a joint deep scientific research project conducted in collaboration with Larisa Zaytseva, JD, Professor, Head of Labor and Entrepreneurship Department, University of Tyumen, and Professor Eduardo Gomes devoted to the study of intermediation as one of the most effective means of AMDR (Alternative Methods of Dispute Resolution) for collective labor disputes settlement.

Built on national and international experiences, the research mirrored a thorough comparative legal analysis of the historical background of conciliation procedure application to collective labor disputes with a specific focus on the current Russian legislation in this field. Professor Racheva put an emphasis on the fact that the analysis of various countries' national legislation revealed similarities in the utilization of intermediation in collective labor disputes settlement concerning, primarily, the goals, objectives and principles, along with significant distinctions, in regard to the bodies and people conducting the procedure, and the degree of compulsion in their decisions. Additionally, she introduced the highly applicable methods of collective labor dispute resolution and schemes of formation of intermediation systems (liberal, state-private and pragmatic), obtained as a result of the study, and

finalized her remarks by pointing out that no collective labor dispute resolution system is perfect; therefore, the search for new methods of collective labor disputes settlement aimed at establishing more productive and harmonious labor relations should be extended.

Marius J. van Staden, Lecturer, Department of Public Law, Faculty of Law, University of Johannesburg, South Africa, in his presentation "Identification of the Parties to the Employment Relationship in the Context of the Fourth Industrial Revolution," explained that the protection afforded by labor legislation is only extended to those who are defined as "employees." Labor laws generally regard employees as vulnerable and in need of legislative protection. In contrast, these laws posit that those who fall outside of the definition are less in need of protection. In the wake of the 'fourth industrial revolution', many will find themselves in new forms of work which bear little resemblance to the archetypal forms of work of the 20th century. Many workers will find themselves in the grey area between employment and self-employment.

Mr. van Staden underlined that identification of the parties to the employment relationship in the context of the rise of atypical or non-standard forms of employment has also become axiomatic as modern mischief which legislation has had to respond to. As the winds of globalization grew ever stronger, it became incumbent upon interpreters (e.g. legislators, judges) to have a thorough understanding of the problems that legislation was designed to respond to. To this end, he considered the rise of non-standard forms of work and argued that interpreters should be mindful of the challenges and global pressures that strain traditional conceptions of "employee" and which serve to move workers from typical to atypical forms of employment. Certainly, these conditions serve as the mischief that labor law has had to respond to. Thus he stressed the importance of accepting on-going changes to the world of work, the existence of a heterogeneous mix of employment situations and the facts with regard to deficits of decent work opportunities, so that creative solutions may be found as to how the situation of workers can be improved.

In his closing comments, Mr. van Staden considered legislative and judicial responses to such globalization pressures and concluded that interpreters need to understand the phenomenon of non-standard employment and new models of employment between employers and employees (or clients and workers), and new work patterns. It will be necessary for interpreters to be aware of the current judicial and legislative responses in order to acknowledge effectively the changing nature of work. He put special focus on the fact that the judiciary has, through its powers of interpretation of the term "employee," an effective weapon to contribute to the protection of workers who find themselves at the periphery of the employment relationship. That will, however, require labor lawyers to be cognizant of the public law requirements of interpreting the concept of "employee."

Presentations continued with Buntu Siwisa, Research Consultant and Associate of the HSRC BRICS Research Center, South Africa, who delivered a talk on "Labour and

Social Justice in South Africa's Rural Landscape: Reviewing the Legislative Framework (1994–2017)" with particular relevance given to divisive labor and social injustices. Mr. Siwisa gave a detailed overview of South Africa's rural landscape, with a population of approximately 19 million people which regrettably remains the site of many severely divisive labor and social injustices. The ideals of the constitution and the progressive legislative framework are out of synchronization with the lived realities of the rural population. The injustices have become more politically inflammatory as the result of land redistribution and land expropriation put in place without first establishing compensation policy and mechanisms.

His presentation explored labor and social injustices experienced by people in rural areas in their capacities as wage laborers, farm workers, entrepreneurs and residents, in pursuit of better livelihoods and better forms of settlements. He examined these grievances in five areas or lenses of inquiry: (i) land redistribution; (ii) human rights abuses; (iii) abuses relating to traditional leaders; (iv) women, land and governance; and (v) mining conditions and community improvement.

The five areas of inquiry were generated from the review work of the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, on which his presentation was mainly based.[3] At the heart of his presentation was an inquiry into the impact of the legislative framework on the labor and social conditions of rural-based people. Mr. Siwisa took into consideration the legislative framework's intention, execution, regulatory mechanisms and accountability measures. He also examined the social and political contextual framework of these challenges, and how South Africa's positioning within BRICS carries the potential of alleviating some of these injustices.

Environmental security and "green energy" issues were designated by the conference participants as a priority field for cooperation, and generated one more thematic area, approached first by David Dusseault, PhD, Professor, School of Advanced Studies, University of Tyumen, with the presentation "It's not Easy Being Greener: Energy in Neo-liberal Times." Professor Dusseault marked the sustainability of the planet's ecosystem as playing an increasingly significant role in political, economic and social policy spectrums and within this context deliberated on the value chains which have underpinned the global economy since the early 20th century and are returning less overall benefit to various groups. He shared his views on one of the most debated issues – to what extent states, businesses and society are prepared to make the jump from business as usual to a greener and hence more sustainable future.

The discussion continued and was endorsed and developed further in the next presentation "Green Energy in the Developing Countries" delivered by Dmitry

[3] Mr. Siwisa was Senior Research Fellow and appointed Lead Researcher, Writer and Rapporteur for Working Group 3 on Social Cohesion and Nation-Building, one of the three working groups of the High-Level Panel. I led on research and management of activities, project design and implementation on diagnostic reporting, and on stakeholder relations management.

Rudenko, PhD, Associate Professor, University of Tyumen, in an interplay with Alexandr Biagioni, LLB, Maastricht University, the Netherlands, who spoke on "Energy Law in Russia." The speakers introduced the basics of the "green energy" concept, emphasized the necessity and the impact of transferring from the industrial to the ecologically responsible development of renewable power sources and pointed out some of the key regularities that postulate and constrain the potential of the BRICS countries to utilize the renewable energy sector in such ways as to benefit from it and to preserve the environment and natural resources for the future generations.

Valeria Vysotskaya, Senior Lecturer, Department of Customs, University of Tyumen, spoke next on "The Customs Administration as an Environmental Security Institute." She argued that the solution to modern environmental problems depends, to a large extent, on the creation of a legal regulation system on the activities of state authorities, aiming to implement the environmental protection functions and ensure the security of the health and lives of people everywhere. Ms. Vysotskaya also noted that the liberalization of foreign economic activities provides the possibility for the movement of environmentally hazardous goods. In this regard, she underscored that the activities of the customs authorities play a large and significant role in ensuring a country's environmental security. The activities of the customs authorities in this area are to be based on the norms of international, national and regional legislation. She took the case of environmentally sensitive commodities, as an example, and informed the audience on the statistics centered around this type of commodities, namely, on the amount of annual damage from their illegal trade, the costs associated with imported environmentally sensitive commodities and the strikingly high number of tons of dangerous goods that are annually imported into the territory of the Russian Federation. She indicated the dangers they cause, the challenges they bring to the customs authorities and gave a detailed talk on the legal documents aimed at regulating the serious issue and the way they are being put in compliance with international standards. Furthermore, she highlighted the environmental security initiatives and events of the BRICS countries that are targeted at confronting environmental challenges.

The thematic focus on the challenges in respect of legal education in BRICS embraced three presentations. Irina Pluzhnik, Doctor of Education, Master of Laws, Institute of State and Law, University of Tyumen, opened the discussion. Her presentation "Going Global: Challenges of Legal Education in Russia" commenced with a meaningful analysis embracing the necessitated aim of contemporary legal education and the factors of the challenges with a primary focus on those that the law faculties face. Within this context she distinguished the need for: contextual teaching, interdisciplinary professors and reinforcement of learning by socio-legal events as an extension of classroom activities, to name only a few. For the challenges, she made a critical assessment of culture, curriculum and habitus, and concentrated on the most crucial issues of a globally accepted organizational format of learning, among

which the retrieving of students' academic progress, cloud learning environment and orientation to the client and the community were noted. Driven by the idea that to go global requires the total rethinking of legal education in Russia, Professor Pluzhnik concluded with several recommendations for current legal education to accomplish, so as to confront the challenges.

Next to speak was Tatyana Pletyago, PhD, Associate Professor, University of Tyumen. Her presentation "Legal Aspects of E-education (A Case Study of the BRICS Countries)" introduced the modern drivers in education with the focus on up-to-date trends in e-education (e-learning) in the global context. Based on a comparative study of digital learning (e-learning) across schools, colleges and universities in the BRICS member states, with a view to, among other objectives, learning and applying lessons from good practices, and supported by the data obtained both from national and from international online platforms, she gave a brief but thoughtful overview on the ranking of MOOCs of BRICS universities and expressed her views on the prospects and initiatives of the BRICS countries within the context of the digital revolution. She ended her presentation with recommendations to respond to a number of the pedagogical and legal challenges caused by new digital trends in higher education.

Elena Gladun, JD, Associate Professor, University of Tyumen, delivered the presentation titled "Legal Education in the BRICS Countries: Changing the Focus in the Changing World." Based on research literature, practitioner literature and legislative sources, she analyzed and contrasted the current goals, objectives, structure and quality of higher legal education in Brazil, Russia, India and China with a particular focus on common and special features of lawyer training in BRICS. She marked the prime similarity of the legal education systems in BRICS and justified the "explosion" in the popularity of legal education that each BRICS country has experienced, and she clarified the urgent need to reform the education process in order to attain better quality and affordability. Professor Gladun's contribution examined the structure and quality of legal education as well as the requirements and monitoring tools that are dependent on several factors: the specific country's ideology, its economic development, its proximity to an "Eastern" or "Western" model, its ability to learn from foreign education systems and its attempts at self-identification in the global educational space. The indicated facets of legal education in Brazil, Russia, India and China were attributed to their national policies as well as the historical development of the educational institutions and their perception of what specific lawyer skills and competencies are demanded by the legal market and national population, which undoubtedly deserve special attention and are worth keeping in mind in the intellectual climate of the contemporary world. At the end, she proposed the modifications required in legal education as the result of globalization, with specific reference to law schools in the BRICS countries of Brazil, Russia, India and China.

The Forum assembled best practices, ideas and suggestions aimed at bringing closer cooperation among the BRICS countries. With its rich discussions from a variety

of perspectives, and explorations of the crucial legal issues and debates, it was a solid, increasingly comprehensive, cooperative success. The organizers and hosts are to be commended for putting together an engaging series of events that have paved the way for the next Forum, which is expected to be equally as intellectually stimulating and practice-relevant as the III Siberian Legal Forum.

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