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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.

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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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CHIEF EDITOR'S NOTE ON THE NEW RUSSIAN LAW ON GROUP LITIGATION

DMITRY MALESHIN,

Lomonosov Moscow State University (Moscow, Russia)

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Three Russian procedural codes – the Civil Procedural Code of 2002, the Arbitrazh (Commercial) Procedural Code of 2002 and the Code of Administrative Litigation of 2015 – were amended in 2019 by the provisions concerning group litigation. These amendments may be treated as one of the most important steps in the recent reform of Russian civil procedure.

Historically, class actions were not admitted in Russia, as was also the case in many other continental European countries. The main argument underpinning this position was the existence of joinder of parties which allows effectively protecting the violated rights of a group of people. Then in the middle of the 1990s scholars began to discuss the introduction of class actions in Russia. In that period, a special drafting committee started to prepare the new Civil Procedural Code, which finally came into force in 2003. Class actions were not included in the code at that time. It took sixteen years to convince the Russian legislator to introduce class actions.

The 2019 amendments introduced the "pure" model of class actions that exists in many Anglo-Saxon countries. If we compare Russia with other continental European countries such as Germany or France, we find that in Russia there are no restrictions on the use of class actions, there are no limitations imposed by any specific field of law, as is the case in Germany, for example. Therefore, it may be said that the Russian model of class actions is the most radical among other continental European countries.

Special chapter 22.3 "Considering Cases Concerning Group Litigation" was amended in the Civil Procedural Code, which came into force on 1 October 2019. The same chapter was amended in the Arbitrazh (Commercial) Code and the Code

of Administrative Procedure. According to Article 244.20, the certification of the group has the following features: (1) one defendant for all the members of the group; (2) all the members have commonality of interests and rights; (3) there are common facts in the basis of the action; and (4) all the members use the same type of dispute resolution. The representative of the group can be either a citizen or an organization. And the opt-in model has been introduced. This means that all the members should accept the invitation to join the group before the beginning of the stage of arguments during the judicial hearings. Furthermore, the case should be considered in eight months; preliminary hearings are obligatory in this kind of cases, where a judge considers the certification of the group; the representative of the group concludes an agreement with all the members of the group; and the agreement should be concluded in a notary form.

In spite of the fact that many Russian legal scholars were disappointed with the idea of introducing class actions, I am sure that group litigation will be successful in Russia. For there are also cultural reasons for the effective use of class actions. One of the particularities of Russian civil procedure is the active role of the state authorities, which has different procedural forms – the activities of the judge and the specific procedural participation of the procurator are examples of this state overwatch. This may be seen as the paternalistic character of Russian civil procedure, where the state authorities are on duty to guard the rights of less-protected groups of citizens. The reason for this is cultural collectivism, which is still widespread in Russian society. One of the advantages of group litigation is also the protection of citizens who do not have the resources to protect themselves. Again, that is why group litigation may be treated as an example of a paternalistic type of civil procedure.

There are really no reasons why the future of group litigation in Russia should not be successful.

ARTICLES

"BRICS LAW": AN OXYMORON, OR FROM COOPERATION, VIA CONSOLIDATION, TO CODIFICATION?

ROSTAM NEUWIRTH,
University of Macau (Macau, China)

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In the global arena, the cooperation between the BRICS countries – Brazil, Russia, India, China and South Africa – covers around 42% of the world's population and some of the world's most dynamic emerging economies. Initially, the BRICS cooperation was suggested as an idea, and it was later welcomed as a new addition to the global governance debate about the future. The BRICS countries have already held ten consecutive summits of heads of state plus a large number of meetings at the ministerial level. The cooperation describes itself as a "cooperation and dialogue" platform, but it has nonetheless signed a number of binding treaties and, notably, established the New Development Bank (NDB) as a permanent institution headquartered in Shanghai (China).

The cooperation has also met with resistance, criticism and problems caused by the overall complexity of global affairs in a rapidly changing world. The diversity and remote locations of the BRICS countries have also been thought of as an obstacle to their successful cooperation and their ability to play an active part in global governance in the twenty-first century. The main challenge thus lies in their ability to overcome their differences and to make a difference in designing the future global political and economic world order. Against the backdrop of the global governance debate, the present paper therefore asks whether the BRICS cooperation constitutes a novel model of regionalism with multilateral aspirations, and what role law and, notably, the "rule of law" can play in this important task. The paper includes a discussion of the extent to which the BRICS cooperation needs to be upgraded in legal and institutional terms, and possibly to proceed from cooperation via consolidation to the codification of its most important sources of global law.

Keywords: BRICS cooperation; BRICS law; BRICS secretariat; global governance; international rule of law; legal certainty; sources of international law; comparative law; oxymora.

Recommended citation: Rostam Neuwirth, *"BRICS Law": An Oxymoron, or from Cooperation, via Consolidation, to Codification?*, 6(4) BRICS Law Journal 6–33 (2019).

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Introduction

> *[T]he law can provide the "mortar" for an entire edifice to be built by individual bric(k)s, to use a metaphor for the challenge of creating a new global legal order for the twenty-first century.*[1]

The cooperation between the so-called "BRICS countries," Brazil, Russia, India, China and South Africa, was largely born as an economic idea, and later emerged as a concept that was discussed in international relations circles. As in the global governance debate in general, the role of law is often under-represented. However, paradoxically, in most legal systems the problems of over-regulation are also deplored,[2] as over-regulation often leads to fragmentation, a lack of coherence and even conflicts of norms.[3]

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[1] Rostam J. Neuwirth, *The Enantiosis of BRICS: BRICS La(w)yers and the Difference That They Can Make* in *The BRICS-Lawyers' Guide to Global Cooperation* 8, 20–21 (R.J. Neuwirth et al. (eds.), Cambridge: Cambridge University Press, 2017).

[2] *See, e.g.*, John H. Barton, *Behind the Legal Explosion*, 27(3) Stanford Law Review 567 (1975); Bruno Oppetit, *Les tendances régressives dans l'évolution du droit contemporain* [*Regressive Trends in the Evolution of Contemporary Law*] in *Mélanges dédiés à Dominique Holleaux* [*Essays in Honour of Dominique Holleaux*] 317, 317 (J.-F. Pillebout (ed.), Paris: Litec, 1990), and Andreas Heldrich, *The Deluge of Norms*, 6(2) Boston College International and Comparative Law Review 377 (1983).

[3] On "fragmentation," *see, e.g.*, Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31(4) New York University Journal of International Law and Politics 791 (1999); *see also The Prospects of International Trade Regulation: From Fragmentation to Coherence* (T. Cottier & P. Delimatsis (eds.), Cambridge: Cambridge University Press,

Generally, the precise role of law is defined as part of a sensitive process of balancing the role of law with the objectives formulated by a community, the benefits of regulation with those of deregulation, and legal flexibility with legal certainty and predictability as warranted by the rule of law. These are but a few of some relevant pairs of opposites and, in view of the current rapid change and drastic technological innovations, it is perhaps even time for a careful rethinking of the dichotomies and underlying modes of dualistic thinking altogether. Put briefly, the present era, now more frequently called the Anthropocene, calls for new ideas on the future of law and its role in society as well as the world as a whole, and on the concretization of law through related concepts like, notably, the rule of law and sources of law.

After ten years of successful BRICS summits of heads of state held between 2009 and 2018, and many important achievements resulting from the BRICS cooperation, it is therefore also an opportune moment to examine the role of law in the cooperation between the BRICS countries against the backdrop of global developments and trends.

This paper is based on a recent publication of a compendium of BRICS texts and materials that aims to make available in a systematic way the most pertinent documents produced by the BRICS countries in different settings. Besides discussing the different stages in the evolution of the BRICS, from cooperation (Section 1) via consolidation (Section 2) to codification (Section 3), which roughly match the temporal distinctions of "past, present and future," the present paper aims to address the following two fundamental questions. First, has the time come for the BRICS cooperation, as a "cooperation and dialogue platform," to aim to consolidate its large existing body of materials and treaties through the codification of core legal principles? The second, and related, question concerns the issue of finding the most adequate institutional support for the BRICS, which would lie within the range of the existing flexible system of annually rotating chairpersonships, through a virtual or a real BRICS secretariat, to a permanent BRICS institution, the name of which would still need to be found and agreed upon.

1. The Rule of Law in a Time of Linguistic and Cognitive Change

> *The problems of law (or the rule of law) in embracing "change" seem to be tied to conceptual problems related to our understanding of space and time.*[4]

The concepts of "law" and the "rule of law" are often described as "essentially contested concepts,"[5] in the sense that people generally agree on their existence

2011). On "norm conflicts," *see* Valentin Jeutner, *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma* (Oxford: Oxford University Press, 2017).

4 Rostam J. Neuwirth, *Law in the Time of Oxymora: A Synaesthesia of Language, Logic and Law* 156 (New York: Routledge, 2018).

5 *See* Walter B. Gallie, *Essentially Contested Concepts*, 56(1) Proceedings of the Aristotelian Society 167 (1956).

but diverge on their concrete meaning.[6] The two concepts are closely related to each other, and one is often used to enlighten the meaning of the other, which is why they need to be considered together or brought closer.[7] A third important concept that should be included in this discourse is that of "sources of law." The rule of law has also been said to mean different things to different people, but also to serve a wide variety of political agendas.[8] More broadly still, even the view that all concepts are essentially contested can itself be subject to contestation.[9]

Thus, the same concepts are also often subject to different understandings in different times and places. For instance, over time the rule of law has frequently been transformed,[10] although some may argue that change itself is in conflict with the rule of law.[11] Nevertheless, it may be that the same person will change her understanding of the meaning of "the rule of law" and of most other concepts, in spite of the maxim "*venire contra factum proprium (non valet)*," which means "to come against one's own fact (is not allowed)."[12] In terms of space, and based on a comparison, the rule of law may be understood differently in different continents of the world, although – paradoxically – it may yet remain contested in each one of them.[13] Some may also contest the assertion that the rule of law has a role to play

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6 For law, *see, e.g.*, Ronald Dworkin, *Taking Rights Seriously* 103 (Cambridge, Mass.: Harvard University Press, 1978) and for the rule of law, *see, e.g.*, Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97(1) Columbia Law Review 1 (1997), and Margaret J. Radin, *Reconsidering the Rule of Law*, 69(4) Boston University Law Review 791 (1989).

7 *See* footnote 8 in Jeremy Waldron, *The Concept and the Rule of Law*, 43(1) Georgia Law Review 5 (2008).

8 *See, e.g.*, David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68(3) Law & Contemporary Problems 127 (2005); Randall Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion* in *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* 1 (R. Peerenboom (ed.), London: Routledge, 2004), and George J. Andreopoulos et al., *Introduction: Rule of Law in an Era of Change – Challenges and Prospects* in *The Rule of Law in an Era of Change* 1 (G.J. Andreopoulos et al. (eds.), Cham: Springer, 2018).

9 *See* Frederick Schauer, *Necessity, Importance, and the Nature of Law* in *Neutrality and Theory of Law* 17, 23 (J. Ferrer Beltrán et al. (eds.), Dordrecht: Springer, 2013).

10 *See, e.g.*, Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), and Eric W. Orts, *The Rule of Law in China*, 34(1) Vanderbilt Journal of Transnational Law 43 (2001).

11 *See generally* on the rule of law and the principle of *stare decisis*, Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111(1) Michigan Law Review 1 (2012).

12 *See* Aaron X. Fellmeth & Maurice Horwitz, *Guide to Latin in International Law* 290 (Oxford: Oxford University Press, 2009); *see also* Hans Josef Wieling, *Venire contra factum proprium und Verschulden gegen sich selbst* [*Venire Contra Factum Proprium and Fault Against Oneself*], 176 Archiv für die civilistische Praxis 334 (1976).

13 *See also* Randall Peerenboom, *Competing Conceptions of Rule of Law in China* in *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.*, *supra* note 8, at 130, and Bahrin Kamarul & Roman Tomasic, *The Rule of Law and Corporate Insolvency in Six Asian Legal Systems* in *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* 128, 129–131 (K. Jayasuriya (ed.), London: Routledge, 1999).

in the global arena.[14] However, the rule of law is also being discussed and applied in various regional contexts, such as the European Union and the Belt and Road Initiative.[15] Even the argument about the rule of law being a "universal human good"[16] can be contested.

In sum, establishing a consensus on the meaning of the rule of law is rendered more difficult by the context. In the broadest sense possible, our context is defined by our scientific understanding of space and time,[17] which are intrinsically linked in the "space–time continuum" of the three dimensions of space and one dimension of time. In other words, the understanding of the rule of law is and has been contested everywhere and at all times.

More recently, however, the general culture of contestation could be said to have undergone an important shift in spatial and temporal terms. This shift may be related to an overall trend in our cognitive perception, which has been described as an acceleration of the pace of change.[18] In temporal terms, this acceleration is recognized by a sensation of the "shrinking of time," which – in spatial terms – is paralleled by a view that we live in a shrinking world, or a "global village."[19]

The perceptions of the trends of both shrinking place and shrinking time as the result of a faster pace of change pose a serious problem in and for the law. This problem has been circumscribed by the question of "how can law preserve its integrity over time, while managing to address the newly emerging circumstances that continually arise throughout our history?"[20] Attempting to answer this question is of particular relevance for what has been termed "the central tenet of the rule of law as understood around the world," which is "legal certainty."[21] With regard to the

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[14] *See generally* Janne E. Nijman, *Images of Grotius, Or the International Rule of Law Beyond Historiographical Oscillation*, 17(1) Journal of the History of International Law 83 (2015); *but see* Jeremy Waldron, *The Rule of International Law*, 30(1) Harvard Journal of Law & Public Policy 30 (2006).

[15] *See, e.g.*, European Commission, Further Strengthening the Rule of Law within the Union: State of Play and Possible Next Steps, COM(2019) 163 final, 3 April 2019, and *International Governance and the Rule of Law in China Under the Belt and Road Initiative* (Y. Zhao (ed.), Cambridge: Cambridge University Press, 2018).

[16] Tamanaha 2004, at 137–141.

[17] *See also* Stephen Kern, *The Culture of Time and Space 1880–1918* 1 (Cambridge, Mass.: Harvard University Press, 1983).

[18] *See also* Jean Gebser, *Ursprung und Gegenwart. Erster Teil* 107 (2nd ed., Schaffhausen: Novalis, 1999), and James Gleick, *Faster: The Acceleration of Just About Everything* 6 & 53 (New York: Vintage Books, 2000).

[19] *See* Marshall McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man* (Toronto: University of Toronto Press, 1962).

[20] Mark L. Johnson, *Mind, Metaphor, Law*, 58(3) Mercer Law Review 845 (2007).

[21] *See* James R. Maxeiner, *Some Realism About Legal Certainty in the Globalization of the Rule of Law*, 31(1) Houston Journal of International Law 27 (2008); *see also* Danilo Zolo, *The Rule of Law: A Critical Appraisal* in *The Rule of Law: History, Theory and Criticism* 3 (P. Costa & D. Zolo (eds.), Dordrecht: Springer, 2007).

future, the latter is so important because the rule of law and legal certainty also contribute to, and are intrinsically related to, legal predictability.[22]

Perhaps the two most important ways to provide legal certainty and predictability, even when the world is rapidly changing, are set out in what follows. The first way is for the law to adapt to changes, through legal reform and changes in the law as it is (*lex lata*). As a second way, it means that we must equally ponder about how the "law should be" (*lex ferenda*). The distinction between *lex lata* and *lex ferenda* thus connects the present with the future (while also considering the evolution in the past that led to the present status quo). At the same time, the distinction has been described as the most fundamental rule of law and achievement of legal science,[23] and has also been related to the work of international organizations and the system of sources of international law.[24] This last point marks the direct transition from the role of legal reform to the role of institutions in safeguarding the rule of law by providing legal certainty and predictability. The nexus between the law, institutions and change also includes the understanding of the rule of law as a process.[25]

For the BRICS cooperation, I outlined this connection by writing that

> [T]he law can provide the "mortar" for an entire edifice to be built by individual bric(k)s, to use a metaphor for the challenge of creating a new global legal order for the twenty-first century.[26]

As the metaphorical reference indicates, there is, arguably, one more important, more comprehensive and, at the same time, more deeply rooted factor that holds all of these "bricks" or building blocks of a future global legal order together. This factor is the cognitive level; when a cognitive shift occurs at this level, changes in context can be encompassed by the law and by the institutions as they are. Moreover, a cognitive shift is perhaps the *conditio sine qua non* if legal change and institutional reform are to materialize. It has, in fact, been stated and shown (for the multilateral

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22 *See, e.g.*, José M. Maravall & Adam Przeworski, *Introduction* in *Democracy and the Rule of Law* 1, 2 (J.M. Maravall & A. Przeworski (eds.), Cambridge: Cambridge University Press, 2003), citing as the most valuable effect of the rule of law is that "it enables individual autonomy" and "makes it possible for people to predict the consequences of their actions and, hence, to plan their lives"; *see also* Lutz-Christian Wolff, *Law and Flexibility – Rule of Law Limits of a Rhetorical Silver Bullet*, 11 Journal Jurisprudence 553 (2011) ("Legal certainty is a direct result of predictability").

23 *See, e.g.*, Michel Virally, *A propos de la "lex ferenda"* [*On Lex Ferenda*] in *Mélanges offerts à Paul Reuter: le droit international: unité et diversité* [*Essays in Honour of Paul Reuter: International Law – Unity and Diversity*] 519 (Paris: A. Pedone, 1981).

24 *Id.* at 532.

25 *See also* Maxwell O. Chibundu, *Globalizing the Rule of Law: Some Thoughts at and on the Periphery*, 7(1) Indiana Journal of Global Legal Studies 79 (1999).

26 Neuwirth 2017, at 20–21.

trading order) that "transformational change in the institutions … goes hand in hand with *cognitive* change."[27] Furthermore, institutional change is correlated with cognitive evolution and tends "most likely to be the result of a dynamic process of change in collective understandings."[28]

The imminence of such a cognitive shift can, in fact, be deduced from important linguistic changes related to the rise of essentially oxymoronic concepts. After all, it has also been found that "law changes as language changes – perhaps because language changes."[29] In cognitive and linguistic terms, shifts in both cognition and language also affect the perception of time and space, and can be summarized by a gradual move from essentially contested concepts to so-called "essentially oxymoronic concepts." Essentially oxymoronic concepts include the rhetorical devices of oxymora, *contradictiones in adiecto* (or *enantiosis*) and paradoxes – that is, they are concepts that express contradictions to varying degrees.[30] Their use has been found to be on the rise in recent decades, and has lent itself to the definition of the present era as the "Age of Paradox"[31] or the "Time of Oxymora."[32] It has also been mentioned that these concepts have a crucial role in designing the future, as "the prospects for global governance in the decades ahead is to discern powerful tensions, profound contradictions, and perplexing paradoxes."[33]

As a matter of fact, many new challenges in law, economics, politics and technology are being framed by way of such essentially oxymoronic concepts. In law, it is possible to cite "soft law,"[34] "pure law,"[35] and "substantive due process"[36] as a few examples of legal oxymora. These examples not only suggest a change in the

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27 *See* Andrew T.F. Lang, *Reflecting on "Linkage": Cognitive and Institutional Change in the International Trading System,* 70(4) Modern Law Review 529 (2007).

28 *See* Emanuel Adler, *Cognitive Evolution: A Dynamic Approach for the Study of International Relations and their Progress* in *Progress in Postwar International Relations* 43, 55 (E. Adler & B. Crawford (eds.), New York: Columbia University Press, 1991).

29 *See* the Foreword by Adolph S. Oko in Nathan Isaacs, *The Law and the Law of Change* 6 (Miami: Hardpress, 2012).

30 Rostam J. Neuwirth, *Essentially Oxymoronic Concepts*, 2(2) Global Journal of Comparative Law 150 (2013).

31 *See* Charles Handy, *The Age of Paradox* (Boston: Harvard Business School Press, 1995).

32 *See* Neuwirth 2018.

33 James N. Rosenau, *Governance in the 21st Century*, 1(1) Global Governance 13 (1995).

34 *See, e.g.*, John F. Murphy, *The Evolving Dimensions of International Law: Hard Choices for the World Community* 20 (Cambridge: Cambridge University Press, 2010), and Anthony C. Arend, *Legal Rules and International Society* 25 (New York: Oxford University Press, 1999).

35 *See* Ontario Superior Court of Justice, *Jackson v. Vaughan (City)*, 2010 O.N.S.C. 969, 13–14 (2010), and Ontario Superior Court of Justice, *Silveira v. Ontario (Minister of Transportation)*, 2011 O.N.S.C. 4272, 22 (2011).

36 *See Ellis v. Hamilton*, 669 F.2d 510, 512 (7th Cir. 1982), and *United States v. Carlton*, 512 U.S. 26, 39 (1994); *see also* James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16(2) Constitutional Commentary 315 (1999), and Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120(3) Yale Law Journal 408 (2010).

logic underlying reasoning (the transcendence of various legal dichotomies), but also an extension of the consideration of law from the formation of social to the crystallization of legal norms (that is, an understanding of law as a process).

In economics, recent additions include "sustainable development," "sharing economy," "inflationary deflation," or "culture industry." In politics, there are "glocalisation," "fragmegration," "soft power," and "*zoon politicon*."[37] In the field of technology, the following concepts have all been designated as oxymora: "artificial intelligence,"[38] "synthetic biology,"[39] "(big) raw data,"[40] and "virtual reality."[41]

It is noteworthy that a common feature of oxymora and their rhetorical counterparts is that they transcend many taxonomies and lines of distinction drawn between scientific categories of disciplines. They have also been said "to represent instances where current knowledge may be deficient" but at the same time it is said that they allow us "to test models and conceptual frameworks, and to enable true 'paradigm shifts' in certain areas of scientific inquiry."[42]

At the cognitive level, they may also "carry a silent criticism of the limitations imposed by dualistic reasoning and binary logic," and their inherent contradictions may provide the keys for better ways tackle the complex challenges of the present.[43] In sum, they highlight and accurately describe some of the fundamental challenges related to the governance of global affairs in the future. In this global governance debate, which still remains a mystery in many ways,[44] an important question is also the kind of role that "law," and, notably, a future "global rule of law," is called on to play.

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[37] *See, e.g.*, Johannes Thumfart, *Ist das Zoon Politikon ein Oxymoron?: Zur Dekonstruktion des Begriffs von Biopolitik bei Giorgio Agamben auf der Grundlage einer Wiederlektüre des Aristoteles* [*Is Zoon Politikon an Oxymoron?: On the Deconstruction of the Giorgio Agamben's Concept of Biopolitics on the Basis of Rereading Aristotle*] (Saarbrücken: VDM Verlag Dr. Müller, 2008).

[38] *See, e.g.*, Ronald Chrisley, *General Introduction: The Concept of Artificial Intelligence* in *Artificial Intelligence: Critical Concepts. Vol. 1* 1, 3 (R. Chrisley & S. Begeer (eds.), New York: Routledge, 2000), and Jennifer Gidley, *The Future: A Very Short Introduction* 99 (Oxford: Oxford University Press, 2017).

[39] *See, e.g.*, Georg Toepfer, *The Concept of Life in Synthetic Biology* in *Synthetic Biology Analysed: Tools for Discussion and Evaluation* 71, 84 (M. Engelhard (ed.), Cham: Springer, 2016) ("For many contemporary authors 'artificial life' is an oxymoron, a contradiction in terms, the one belonging to nature, the other to human culture").

[40] *See, e.g.*, Geoffrey C. Bowker, *Memory Practices in the Sciences* 184 (Cambridge, Mass.: The MIT Press, 2006); *see also* Lisa Gitelman & Virginia Jackson, *Introduction* in *"Raw Data" Is an Oxymoron* 1, 2–3 (L. Gitelman (ed.), Cambridge, Mass.: The MIT Press, 2013).

[41] *See, e.g.*, Gabriel Weimann, *Communicating Unreality: Modern Media and the Reconstruction of Reality* 330 (London: SAGE, 2000) ("The phrase virtual reality is an oxymoron, a contradiction in terms. Virtual means not in fact; reality means in fact. VR, then, means not in fact fact").

[42] *See* Narinder Kapur et al., *The Paradoxical Nature of Nature* in *The Paradoxical Brain* 1 (N. Kapur (ed.), Cambridge: Cambridge University Press, 2011).

[43] *See* Neuwirth 2018, at 178.

[44] *See also* David Kennedy, *The Mystery of Global Governance*, 34(3) Ohio Northern University Law Review 831 (2008).

Against the backdrop of drastic changes, this paper will address the question about the rule of law in the future of global governance by a casting a closer look at the cooperation between the BRICS countries, Brazil, Russia, India, China and South Africa, from its inception as an idea and then notably during the years 2009–2018. Among the reasons why the BRICS cooperation exemplifies the most important questions about the rule of law in the global governance debate of the twenty-first century, one can mention the following.

First, it is noteworthy that the BRICS were initially born out of an idea formulated in 2001, which predicted that the share of Brazil, Russia, India and China in the world's GDP would grow and that this would raise important questions about the impact of these countries on economic, fiscal and monetary policies.[45]

Second, the BRICS countries have been hailed as an important emerging driver of global change, mixed with hopes for an alternative world vision, and as having the potential "to challenge the unipolar hegemony of the United States and its Western allies, and to alter significantly the dynamics of global order."[46] At the same time, the BRICS countries were also seen at some times to challenge the Western model, while at other times they were seen to play along.[47] They have made important contributions to the realm of international economic law.[48] They have possibly already directly or indirectly affected the global perception of what is now oxymoronically called "the Global South," or the so-called "developing world," notably by critically challenging and undermining the "developing–developed country" dichotomy.[49] This linguistic change became most obvious when the World Bank *finally* abandoned the misleading terminology of "developing countries" and banned the phrase for the first time from its 2016 Development Indicators report.[50]

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45 *See* Jim O'Neill, *Building Better Global Economic BRICs*, Goldman Sachs Global Economics Paper No. 66, 30 November 2001 (Oct. 1, 2019), available at https://www.goldmansachs.com/insights/archive/archive-pdfs/build-better-brics.pdf.

46 *See, e.g.*, Cedric de Coning et al., *Introduction* in *The BRICS and Coexistence: An Alternative Vision of World Order* 1 (C. de Coning et al. (eds.), London: Routledge, 2015), and Sonia E. Rolland, *The BRICS' Contributions to the Architecture and Norms of International Economic Law*, 107 Proceedings of the ASIL Annual Meeting 164 (2013).

47 *See* Patrick Bond & Ana Garcia, *Introduction* in *BRICS: An Anti-Capitalist Critique* 1, 1–3 (P. Bond & A. Garcia (eds.), London: Pluto Press, 2015).

48 *See* Rolland 2013, at 164–170.

49 *See also* Rostam J. Neuwirth, *The End of "Development Assistance" and the BRICS* in *International Development Assistance, China and the BRICS* 15 (J.A. Puppim de Oliveira & Y. Jing (eds.), New York: Palgrave, 2019); Rostam J. Neuwirth, *Global Law and Sustainable Development: Change and the "Developing-Developed Country" Terminology*, 29(4) European Journal of Development Research 911 (2016); Christiaan De Beukelaer, *Developing Cultural Industries: Learning from the Palimpsest of Practice* (Amsterdam: European Cultural Foundation, 2015); Christiaan De Beukelaer, *Creative Industries in "Developing" Countries: Questioning Country Classifications in the UNCTAD Creative Economy Reports*, 23(4) Cultural Trends 232 (2014); Rostam J. Neuwirth, *Global Governance and the Creative Economy: The Developing Versus Developed Country Dichotomy Revisited*, 1(1) Frontiers of Legal Research 127 (2013), and Rostam J. Neuwirth, *A Constitutional Tribute to Global Governance: Overcoming the Chimera of the Developing-Developed Country Dichotomy*, European University Institute (EUI) Working Paper LAW 2010/20 (2010) (Oct. 1, 2019), available at https://cadmus.eui.eu/handle/1814/15704.

50 *See* World Bank, 2016 World Development Indicators (Washington: The World Bank, 2016), at iii.

Third, the term "BRICS cooperation" can also be understood as a kind of "quintuple oxymoron," or, to be more precise, an enantiosis.[51] Enantiosis has been defined as a figure of speech "by which things very different or contrary are compared or placed together, and by which they mutually set off and enhance each other."[52] The reason for comparing the BRICS to an oxymoron is that the cooperation between BRICS countries has been called into question recently because, among other reasons, the countries are too different to be able to cooperate effectively.[53] By contrast, the qualification of the BRICS as an enantiosis can also be read to mean that their diversity is not an obstacle but an incentive for closer cooperation. In other words, the principal task and probably one of the strongest arguments for BRICS cooperation is "whether or to what extent they can make a difference and how."[54]

This principal task is closely tied to the question of the role that law and the rule of law should play in their cooperation, and of the sources of law on which that role should be based. Ultimately, it is also important to ask whether there is or should be such a thing as "BRICS law" – that is, to ponder the question from a *de lege lata* and a *de lege ferenda* perspective. For the reasons outlined above, this question is also closely linked to the question of whether the BRICS cooperation should or should not vest itself with permanent institutional support in the form of one or more regional organizations like the NDB. Hence this paper will not only consider the relevance of the rule of law for the BRICS in an era of change, but will also consider the possibility that the rule of law could be an agent of change.[55]

2. BRICS Cooperation: A Short Anthology and Contextual Analysis

> *We have agreed upon steps to promote dialogue and cooperation among our countries in an incremental, proactive, pragmatic, open and transparent way*.[56]

A legal analysis of the BRICS cooperation, a kind of *lex lata* assessment of where the BRICS stand in terms of their achievements so far, is not easy to undertake, particularly in these times of rapid change and increasing complexity. While at the

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51 *See* Neuwirth 2017, at 8.

52 Thomas Gibbons, *Rhetoric; or, a View of Its Principal Tropes and Figures, in Their Origin and Powers* 248 (London: J. & W. Oliver, 1767).

53 *See, e.g.*, Francesca Beausang, *Globalization and the BRICs: Why the BRICs Will Not Rule the World for Long* (London: Palgrave Macmillan, 2012); Christian Brütsch & Mihaela Papa, *Deconstructing the BRICS: Bargaining, Coalition, Imagined Community, or Geopolitical Fad?*, 6(3) Chinese Journal of International Politics 299 (2013), and Harsh V. Pant, *The BRICS Fallacy*, 36(3) Washington Quarterly 91 (2013).

54 Neuwirth 2017, at 17.

55 *The Rule of Law in an Era of Change*, *supra* note 8.

56 The Joint Statement of the BRIC Countries' Leaders, Yekaterinburg, Russia, 16 June 2009, at 15.

beginning the BRIC stood as a mere concept, and possibly as offering economic advice on investment, with the addition of South Africa in 2011 the stage was set for regional multilateral cooperation and a platform for dialogue to make concrete the objectives that had been formulated.

In the beginning, scholars and their research focused mainly on economic, investment and political issues.[57] Legal science did not seem to take much notice, except for a first article focusing on the legal nature of the cooperation.[58] At around the same time, the *BRICS Law Journal* was created and its first volume was published.[59] Similarly, the BRICS Legal Forum held its first meeting and adopted the first of what are now five declarations.[60] The rising interest of legal scholars and practitioners probably received an impetus from the plan to establish a first permanent BRICS institution, the New Development Bank (NDB) or "BRICS Bank," with the founding treaty of the NDB being signed at the sixth BRICS summit meeting held in Fortaleza, Brazil in 2014. At the same summit, a second important legal document, the *Treaty for the Establishment of a BRICS Contingent Reserve Arrangement* (CRA) was signed, and this entered into force upon ratification by all BRICS states, as announced at the seventh BRICS summit in July 2015. In 2015, the third legally binding BRICS document, the *Agreement between the Governments of the BRICS States on Cooperation in the Field of Culture* was signed in Ufa in Russia.

From a legal science perspective, *The BRICS-Lawyers' Guide to Global Cooperation*, published in 2017, was the first comprehensive edited volume.[61] The book and its sixteen different chapters aimed to show that the diversity of the BRICS countries was not an insurmountable obstacle to legal cooperation, and that there were already steps that had been taken in several distinct areas ranging from international trade, investment, arbitration and contract law to intellectual property, outer space, culture and education.

Thus, during the first decade of BRICS cooperation, which began with the first BRICS summit of heads of state held in Russia in 2009 and has continued until the most recent one, the tenth BRICS summit, which was held in 2018 in South Africa, a large and continuously growing number of meetings have been held at different levels of government.[62] The BRICS cooperation has also gradually begun to include more and more private stakeholders and a focus on people-to-people exchanges.

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57 *See, e.g.*, Brütsch & Papa 2013.

58 *See* Lucia Scaffardi, *BRICS, a Multi-Centre "Legal Network"?*, 5(2) Beijing Law Review 140 (2014).

59 *See* the BRICS Law Journal's Homepage (Oct. 1, 2019), available at https://www.bricslawjournal.com/jour/index.

60 The five BRICS Legal Forums were held in Brazil (2014), in China (2015), in India (2016), in Russia (2017) and in South Africa (2018), *see also* the webpage of the 5th BRICS Legal Forum (Oct. 1, 2019), available at https://bricslegalforum2018.org.

61 *The BRICS-Lawyers' Guide to Global Cooperation*, *supra* note 1.

62 *See* the overview in *The BRICS-Lawyers' Guide to Global Cooperation*, *supra* note 1, at 4–57.

With a decade of cooperation complete, the recent tenth anniversary of the first BRICS meeting of heads of state provided a good opportunity to try to create a more systematic collection of the principal BRICS texts that had been adopted. It was for this occasion that the recent publication, *The BRICS-Lawyers' Guide to BRICS Texts and Materials*, was prepared. This – after three explanatory chapters – contains a comprehensive compilation of the most important BRICS documents adopted so far.[63]

The principal rationale for the publication of the book was precisely the growing scope and amount of BRICS cooperation, which is reflected in the growing set of texts that have been adopted. Given that the BRICS cooperation and dialogue platform does not (yet) have the support of a permanent institution, but is instead governed by an annually rotating temporary "presidency" or "chairpersonship,"[64] there is no single and authoritative source of BRICS documents. Instead, most BRICS-related documents are scattered around different websites of governmental and non-governmental organizations, or can no longer be found at all, even though a memorandum of understanding was signed in Ufa (Russia) in July 2015 that foresaw the creation of a "joint website to cover BRICS activities" as a free online public resource.[65] With the BRICS Portal, this website seems to have been initiated, but it appears not to be maintained regularly or to provide complete coverage of BRICS activities.[66]

This may be a problem related to the absence of permanent institutional support, like a BRICS secretariat or a similar kind of organization, for the BRICS cooperation. In fact, the idea of setting up a virtual BRICS secretariat has even been circulating, but this has not yet materialized. The intrinsic connection between a website and a secretariat surfaces, for instance, in the following paragraph in the 2015 Ufa Declaration:

> 75. We welcome the signing of the MoU on the Creation of the Joint BRICS Website among our Foreign Ministries. It will serve as a platform for informing people of our countries and the wider international community about BRICS principles, goals and practices. We will explore the possibility of developing the BRICS Website as a virtual secretariat.[67]

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63 *See* Rostam J. Neuwirth & Alexandr Svetlicinii, *The BRICS-Lawyers' Guide to BRICS Texts and Materials* (Macau: BRICS-Lawyers, 2019).

64 *See* Neuwirth & Svetlicinii 2019, at 126 (Fn 38), writing that "designating the rotating BRICS chairpersonship, the 2018 BRICS Summit Johannesburg Declaration uses the term 'chairship' (para 101), whereas the 2017 BRICS Summit Xiamen Declaration refers to 'chairmanship' (para 67) and the 2018 BRICS trade ministers joint communique uses the term 'presidency' (para 12)."

65 *See* the Memorandum of Understanding on the Creation of the Joint BRICS Website, Ufa, Russia, 9 July 2015.

66 *See* the BRICS Information Portal (Oct. 1, 2019), available at http://infobrics.org. But note that the most important documents available on the same homepage only cover the years 2009 until 2016; *see* the BRICS Information Portal, Documents (Oct. 1, 2019), available at http://infobrics.org/documents/.

67 *See, e.g.*, the Ufa Declaration 2015, para. 75.

Overall, it is believed that the present difficulties in gaining access to important BRICS documents have serious repercussions. First of all, they render scholarly research on BRICS activities more difficult. This also hampers debates about these activities in times of dynamic and rapid change.

Secondly, the widening scope of BRICS activities also increases the likelihood of an "unnecessary duplication" of these activities, to the detriment of greater policy coherence. In times of rapid change and increasing specialization with growing complexity, in particular, policy coherence appears as the *conditio sine qua non* for effective and successful cooperation within and across different policy fields.

This is, therefore, the level of cooperation at which thoughts about the consolidation of the existing legal and non-legal documents acquire greater significance and relevance.

3. BRICS Consolidation: *Lex Lata* and *Lex Ferenda*

> *We reviewed the progress of the BRICS cooperation in various fields and share the view that such cooperation has been enriching and mutually beneficial and that there is a great scope for closer cooperation among the BRICS. We are focused on the consolidation of BRICS cooperation and the further development of its own agenda*.[68]

Generally, the successful consolidation of any body of documents or materials requires a consensus on the systematic qualification of their precise nature. This is generally the task of taxonomy, the activity of scientifically naming, defining and classifying different sets of data. Taxonomy is as important in legal science as it is in any other scientific discipline.[69] In the particular context of BRICS cooperation, however, this type of taxonomy is difficult, given the vast and growing amount of documents adopted by the different BRICS authorities.

The difficulties stem, on the one hand, from the growing number of documents, in combination with the absence of centralized and permanent institutional support, like a BRICS secretariat, which may be real or virtual (a so-called "e-BRICS secretariat"). On the other hand, it is also a cause for concern that the classification of existing BRICS documents requires a clear consensus on what constitutes a "source of law" in general, or a source of so-called "BRICS law" in particular. Reaching such a consensus is also, as was mentioned at the outset, closely related to the understanding of the concept of law and the rule of law. This consensus is, however, not within reach, as "law" and the "rule of law" are considered to be essentially contested concepts. It is very difficult even to delimit law within its wider context, such as the field of politics,

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[68] *See* the Sanya Declaration, BRICS Leaders Meeting, Sanya, Hainan, China, 14 April 2011, para. 27.

[69] *See also* Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45(1) American Journal of Comparative Law 5 (1997).

especially in times when "soft law" sources are being increasingly used. Finally, even just within the legal realm, the question of sources of law is being contested and has never been exhaustively answered.

For instance, a comparative study of the sources of the laws adopted by different regional and multilateral organizations does not reveal a consensus in any of them, let alone a consensus between them.[70] In the case of international law, itself a strongly contested and probably outdated concept,[71] in particular, the exact classification of formal and material sources has been described as difficult, and has met with uncertainty.[72] Again, even the need for such a classification of sources of law has been contested.[73]

Given the increasing levels of interaction and the resulting growth in legal complexity in general, the legal systems of most countries, or even of their sub-units, today defy a precise classification in terms of the taxonomies used for legal families, such as civil and common law, or Talmudic, Islamic, or Hindu, as well as chthonic, law.[74] There is a clear trend towards so-called "mixed" or "hybrid" systems.[75] Paradoxically, a parallel trend of harmonizing and unifying law globally can be observed, while nationally the law is becoming more specialized and further distinguished to the level of talking about "*sui generis*" legal systems. This is the same paradoxical trend that is known from the debate about regulatory diversity versus regulatory harmonization,[76] or from the convergence of markets, businesses and technologies and the divergence of law and regulations in global comparison.[77]

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70 *See* Neuwirth & Svetlicinii 2019, at 58–115.

71 *See also* Neuwirth 2018, at 87–88.

72 *See, e.g.*, Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15(3) European Journal of International Law 523 (2004), and Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57(2) American Journal of International Law 279 (Fn 2) (1963).

73 *See* Gerald G. Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, (1958) Symbolae Verzijl 153, reprinted in Martin Dixon et al., *Cases & Materials on International Law* 23, 24 (Fn 3) (6th ed., Oxford: Oxford University Press, 2016).

74 *See, e.g.*, H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (5th ed., Oxford: Oxford University Press, 2014).

75 *See Mixed Legal Systems, East and West* (V.V. Palmer et al. (eds.), Farnham: Ashgate, 2015), and Ignazio Castellucci, *Legal Hybridity in Hong Kong and Macau*, 57(4) McGill Law Journal 665 (2012).

76 *See, e.g.*, Jonathan R. Macey, *Regulatory Globalization as a Response to Regulatory Competition*, 52(3) Emory Law Journal 1353 (2003); Daniel C. Esty, *Regulatory Competition in Focus*, 3(2) Journal of International Economic Law 215 (2000); Alan O. Sykes, *Regulatory Competition or Regulatory Harmonization? A Silly Question?*, 3(2) Journal of International Economic Law 257 (2000); Joel P. Trachtman, *Regulatory Competition and Regulatory Jurisdiction*, 3(2) Journal of International Economic Law 331 (2000); Michael Trebilcock & Robert Howse, *Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics*, 6(1) European Journal of Law and Economics 5 (1998), and Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34(1) Harvard International Law Journal 47 (1993).

77 *See, e.g.*, Rostam J. Neuwirth, *Global Market Integration and the Creative Economy: The Paradox of Industry Convergence and Regulatory Divergence*, 18(1) Journal of International Economic Law 21 (2015).

In addition to the growing diversity and resulting complexity, rapid change and, especially, new technologies also provide new challenges in the consolidation of legal sources. Most importantly, this is because new actors, such as (multinational) corporations, private individuals or equally plants and animals, have entered the global arena, and are being, or are still struggling to be, recognized as so-called "subjects of international law."[78]

Further problems arise from the concretization of laws at all levels: laws often become excessively casuistic, meaning that they are designed for individual cases rather than being of universal relevance. The trend of over-regulation, or increased production by legal sources, has been observed for a long time, and is described using different concepts, such as "plethora of law,"[79] a "legal explosion,"[80] "a gigantic legislative and regulatory magma,"[81] or a "deluge of norms."[82] Little, however, has been achieved around the world in successfully containing this problem or in finding new or experimental regulatory approaches to solve the related challenges.[83]

Finally, new technologies are not only taking a more prominent role in global citizens' lives but are also increasingly beginning to enter the realm of law and the legal profession. Rapid progress in innovation and technology also significantly blurs existing lines of distinction, which challenges thinking in terms of dichotomies and binary logic.[84] These new trends are even beginning to challenge the fundamental dichotomy between human and non-human law. From this trend legitimate questions can also be derived about different technologies or technology in general as a potential source of law.[85]

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78 *See, e.g.*, Jose E. Alvarez, *Are Corporations "Subjects" of International Law*, 9(1) Santa Clara Journal of International Law 1 (2011); Mark W. Janis, *Individuals as Subjects of International Law*, 17(1) Cornell International Law Journal 61 (1984); Saskia Sassen, *The Participation of States and Citizens in Global Governance*, 10(1) Indiana Journal of Global Legal Studies 5 (2003) as well as Rolf Schwartmann, *Private im Wirtschaftsvölkerrecht* [*Private Persons and Companies in International Economic Law*] (Tübingen: Mohr Siebeck, 2005). For animal and plants rights, *see, e.g.*, Christopher D. Stone, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*, 45(2) Southern California Law Review 450 (1972); Christopher D. Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (3rd ed., Oxford: Oxford University Press, 2010); Mary Warnock, *Should Trees Have Standing*, 3 Journal of Human Rights and the Environment 56 (2012), and Richard A. Epstein, *Animals as Objects, or Subjects, of Rights* in *Animal Rights: Current Debates and New Directions* 445 (C.R. Sunstein & M.C. Nussbaum (eds.), Oxford: Oxford University Press, 2004).

79 *See* H. Patrick Glenn, *Persuasive Authority*, 32(2) McGill Law Journal 286 (1987).

80 *See* Barton 1975.

81 *See* Oppetit 1990, at 317.

82 *See* Heldrich 1983.

83 *But see* European Commission, Smart Regulation in the European Union, COM(2010) 543 final, 8 October 2010, and Sofia Ranchordas, *Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty?*, 36(1) Statute Law Review 28 (2015).

84 *See also* Rostam J. Neuwirth, *The "Letter" and the "Spirit" of Comparative Law in the Time of "Artificial Intelligence" and other Oxymora*, Canterbury Law Review xx (forthcoming 2020).

85 *See generally* the discussion in Neuwirth & Svetlicinii 2019, at 101–105.

For instance, the Internet has already been discussed as a potential source of law in the context of the harmonization pursued by the Convention on Contracts for the International Sale of Goods (CISG), in the following way:

> With all this use of the Internet directly in practice, can we deem it a source of law in itself, instead of categorising it solely as a resource of information or a source of sources?[86]

As another example, the media, and particularly social media, have not only been identified as an oxymoron but have also been discussed in terms of their ability to be regarded as a source of law.[87]

The blockchain technology underlying many cryptocurrencies has not only been mentioned as a potential disruptive technology for the global financial and banking system but has also been discussed as a potential source of law.[88] Blockchain technologies, however, can also be used for many other legally relevant issues, such as smart contracts, and have been said to have a capacity that allows "complex contracts to be created and automatically enforced."[89] Another term used to discuss technologies as potential legal sources is "algorithmic contracts."[90] Various other technological innovations, widely discussed under the notion of "artificial intelligence," can only be expected to enhance the significance of technologies in the legal realm.[91]

Ultimately, and to cut a long story short, an understanding of the concept of law is closely tied not only to the rule of law but also to the question of "sources of law." This issue of the utmost importance for the governance of any society is rendered more difficult by changes, and possibly by more rapid changes, in recent times. The changes in context also affect the law and our understanding thereof, as was well formulated in the following paragraph:

> From divine or natural law in the classics of our discipline to the general principles of law, principles of justice, *jus cogens* or soft law in more recent

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86 *See* Camilla Baasch Andersen, *From Resource of Law to Source of Law: The Internet as a Source of Law in Unifying the Jurisprudence of the CISG*, 3 Journal of Information Law & Technology (2004) (Oct. 1, 2019), available at https://warwick.ac.uk/fac/soc/law/elj/jilt/2004_3/andersen.

87 *See, e.g.*, Tahirih V. Lee, *Media Products as Law: The Mass Media as Enforcers and Sources of Law in China*, 39(3) Denver Journal of International Law & Policy 437 (2011).

88 *See, e.g.*, Michael Abramowicz, *Cryptocurrency-Based Law*, 58(2) Arizona Law Review 359 (2016).

89 *See, e.g.*, Steve Omohundro, *Cryptocurrencies, Smart Contracts, and Artificial Intelligence*, 1(2) AI Matters 19 (2014), and Mateja Durovic & André Janssen, *The Formation of Blockchain-based Smart Contracts in the Light of Contract Law*, 26(6) European Review of Private Law 753 (2018).

90 *See* Lauren H. Scholz, *Algorithmic Contracts*, 20(2) Stanford Technology Law Review 165 (2017).

91 *See, e.g.*, Lauri Donahue, *A Primer on Using Artificial Intelligence in the Legal Profession*, The Digest of the Harvard Journal of Law & Technology, 3 January 2018 (Oct. 1, 2019), available at https://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession.

> constructions of the law of nations, there has always been a variable in the equation, an external element which did not fit an objective and ordered set of sources.[92]

As in earlier times, one way to bring order to disorder, to harmonize divergent understandings, and to simplify complex and divergent regulatory regimes, is codification. In this regard, the present international legal system, its serious levels of fragmentation, and its important lacunae have for a long time been calling not only for a new understanding of law, possibly beginning with the replacement of the outdated terminology of "international law" by "global law" or, better still, "glocal law," but mostly for fundamental reform through the codification of a new body of laws aimed at governing global affairs.[93] At the regional level and in the context of the BRICS, some of these questions of great significance for the future multilateral and global legal order can be successfully addressed and answered. To this end, it is also important to look at the BRICS cooperation from the angle of the codification of "BRICS law" and a possible institutionalization of its current framework as a "cooperation and dialogue platform."

4. BRICS Codification: Towards a "BRICS Law"?

> *It is at a certain point in time that cooperation, when having continued to widen in scope, also needs to deepen, which can be realized through a compilation and later consolidation of its texts and materials. Eventually, the consolidation of texts and materials can also lead to their codification, which may be beneficial for strengthening the rule of law*.[94]

During the past decade, the cooperation between the BRICS countries has produced a plethora of documents and materials. An exact and exhaustive legal qualification of these documents is not easy. It is, therefore, important to reflect constantly upon the BRICS cooperation in close harmony with the broader global governance debate. This also entails efforts to classify the documents systematically and possibly also to consolidate them, given their growing quantity. The BRICS countries are perhaps also approaching an important point at which their progress

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92 Carlos Iván Fuentes, *Normative Plurality in International Law: A Theory of the Determination of Applicable Rules* viii (Berlin: Springer, 2016).

93 *See, e.g.*, Rostam J. Neuwirth, *GAIA 2048 – A "Glocal Agency in Anthropocene": Cognitive and Institutional Change as "Legal Science Fiction"*, Concept Paper for "Paradise Lost or Found? The Post-WTO International 'Legal' Order (Utopian and Dystopian Possibilities)," 18–19 October 2019, King's College London (UK) (Oct. 1, 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3419953.

94 *See* Neuwirth & Svetlicinii 2019, at 125.

so far invites a question about their future objectives and the means by which they want to pursue and equally realize them.

As a brief summary, one attempt to classify and list the most pertinent BRICS documents has recently been made, and this ordered the documents as follows:

I. BRICS Treaty Law;
II. BRICS Summit Meetings by the Heads of State;
III. BRICS Ministerial Meetings;
IV. Additional BRICS Sources;
V. The BRICS Legal Forums' Declarations.[95]

The first category, BRICS Treaty Law is, as the title reflects, mostly legal and includes the agreements related to the NDB and the Contingent Reserve Arrangement (CRA), and the BRICS Agreement on Culture, all three of which were signed or agreed upon in 2014.[96] The second category contains all the declarations and action plans adopted at BRICS summit meetings held at the level of heads of state, from the first in 2009 in Yekaterinburg to the 2018 BRICS summit held in Johannesburg.[97] In the category of BRICS ministerial meetings are the various documents from the meetings of BRICS ministers with competencies in foreign affairs, trade, agriculture, science, technology and innovation (STI), health, the environment, labour and employment, as well as education.[98] These documents are not complete, in the sense that BRICS ministers have also met to discuss other areas, such as disaster management, finance, industry and migration.[99] The documents related to these meetings, however, are often wholly or partially unavailable.

For the same reasons, a more general fourth category of "Additional BRICS Sources" was added; these documents include a media statement about an informal BRICS meeting at the 2018 G20 meeting, several statements and memoranda of understanding (MoUs) by the BRICS competition authorities, other MoUs on the establishment of a joint website, a BRICS Network University and BRICS Export Credit Insurance Agencies, and a BRICS Cooperation Agreement on Innovation.[100] A final and fifth category of the declarations produced by the meetings of the BRICS Legal Forum concludes the book.[101]

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95 *See* the Table of Contents in *Id.* at ii–iv.

96 *Id.* at 137–197.

97 *Id*. at 198–331.

98 *Id.* at 332–534.

99 *See also* the ministerial documents listed at the University of Toronto, BRICS Information Centre (Oct. 1, 2019), available at http://www.brics.utoronto.ca.

100 Neuwirth & Svetlicinii 2019, at 535–561.

101 *Id*. at 562–574.

These five categories reflect several difficult choices, using criteria such as 1) chronology, 2) legal nature (ranging from soft to hard law), 3) the significance of the subject matter, and 4) availability. Availability is one of the strongest arguments in favour of the consolidation and the later systematic presentation of the BRICS texts and materials through codification. In this context, it must be mentioned that the Memorandum of Understanding on the Creation of the Joint BRICS Website, adopted on 9 July 2015 in Ufa (Russia) foresees the following:

> The Parties will create a joint website to cover BRICS activities. The website will be a free online public resource.[102]

In 2018, however, the so-called "BRICS Information Portal" became available online, and this – in addition to information about the BRICS cooperation – has an icon for "documents."[103] However, the documents listed are diverse and only cover the years from 2009 until 2016. The portal must therefore be deemed inadequate in terms of meeting the expectations arising from the creation of a joint website. This means that at present many documents related to BRICS are either scattered around the internet or are made available on different nationally administered websites (usually by the BRICS country holding the annual chairpersonship) or research or news agency websites. Often, after some time, these documents are not even available online any longer, which was the principal motivation for the publication of *The BRICS-Lawyers' Guide to BRICS Texts and Materials*, to make the most pertinent BRICS documents available in a single compendium. Linked to this was the motivation of engendering debate about the future development of the BRICS cooperation in close harmony with the legal debate about the future role of law (and the rule of law) in BRICS cooperation in particular and global governance in general.

As a result of the absence of such a systematic presentation of BRICS documents and of centralized institutional support, government officials from the BRICS (and other) countries, as well as students, lawyers and scholars interested in BRICS research and journalists and citizens around the world currently face serious difficulties in trying to access reliable and systematically presented sources of information about the BRICS. This point illustrates very well one of the main arguments for codification, which is to ensure the safeguarding of transparency and the rule of law and simply to inform people. Codification has been used since early history and has been described in the following words:

> Codification is a standard means for making the law public and available, as well as for recording the law in written texts. It is a tool known since the law's early development.[104]

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[102] Neuwirth & Svetlicinii 2019, at 544–546.

[103] *See* the BRICS Information Portal (Oct. 1, 2019), available at http://infobrics.org.

[104] *See* Csaba Varga, *Codification as a Social-Historical Phenomenon* i (Budapest: Szent István Társulat, 2011).

In addition, the compendium published in the book mentioned above also reveals that a large number of documents are repetitive of other documents and therefore unnecessarily duplicate a large number of phrases and concepts. An example is the BRICS pledge in relation to the following principles and objectives of global cooperation:

> 6. We recommit ourselves to a world of peace and stability, and support the central role of the United Nations, the purposes and principles enshrined in the UN Charter and respect for international law, promoting democracy and the rule of law. We reinforce our commitment to upholding multilateralism and to working together on the implementation of the 2030 Sustainable Development Goals as we foster a more representative, democratic, equitable, fair and just international political and economic order.[105]

In this respect, a short charter, or so-called "Analects of BRICS Cooperation,"[106] could summarize the fundamental principles and objectives of the cooperation of the BRICS countries, which would make it unnecessary to repeat each of these in every subsequent meeting. Here, a future codification of the fundamental principles and goals of BRICS cooperation could not only reduce the quantity and length of documents produced but, most importantly, could also increase the coherence of the various BRICS initiatives and policies. This point is of the greatest significance in a world of rapid change and growing complexity. Codification can therefore be compared to "big data," defined as "collections of datasets whose volume, velocity or variety is so large that it is difficult to store, manage, process and analyse the data using traditional databases and data processing tools."[107] Simply put, codification can serve as a way to consolidate vast amounts of data and simplify complex phenomena and processes. Unlike artificial intelligence, codification relies on "human and legal intelligence" to try to address complex problems through abstract means and instruments.

Additionally, and based on the understanding gained from simplification, codification, when performed well, can help to create synergies and avoid the unnecessary duplication of policies, or even policies that conflict or cancel each other out.

Ultimately, endeavours to codify the existing body of BRICS documents can also help to contribute to the crystallization of the common goals of the BRICS countries, which – in turn and paradoxically – will support a greater clarity about the objectives that the BRICS cooperation should actually formulate, pursue and successfully realize.

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105 *See* the BRICS Johannesburg Declaration, Johannesburg, South Africa, 25–27 July 2018, para. 6.

106 "Analects" is etymologically defined as follows: "analects, also analecta, n. pl., collected writings; literary gleanings"; *see* Ernest Klein, *A Comprehensive Etymological Dictionary of the English Language. Vol. 1* 69 (Amsterdam: Elsevier, 1966). *Cf.* Confucius, *The Analects* (Beijing: Zhonghua Book Company, 2008).

107 Arshdeep Bahga & Vijay Madisetti, *Big Data Science & Analytics: A Hands-On Approach* 11 (Brooklyn Center: VTP, 2016).

If the opportunities provided by a codification of BRICS law are to materialize, however, a number of important preliminary questions also need to be answered. These questions include considerations of the role of law and of the rule of law in times of rapid change and growing complexity. Codification also requires close observation of new trends in technology, the emergence of new technologies and, particularly, the mutual impact of these technologies, all of which are extremely relevant for the debate about sources of law. It also requires a good understanding of the concept of law, as well as of its linkages with other areas, such as politics, economics and custom or culture. This last debate is well reflected in essentially oxymoronic legal concepts like "pure law" and "soft law."[108] Both of these concepts indicate the need for a new mind-set as well as a more transdisciplinary approach to law. In other words, it means that law must be understood as a process from custom to codification, and must include its context. From a more historical perspective, codification appears as an important stage in every legal system.[109]

In sum, these considerations must therefore be undertaken in a consistent and holistic manner. They should include questions about adequate institutional support in times of rapid change, through a comparative study of regional and multilateral organizations for cooperation or integration.

Conclusion

As for the future of the BRICS countries, the best way of predicting it is to create it.[110]

The future matters to all of us, as it is where we will all spend the rest of our lives.[111] It particularly matters in a time of rapid, and still accelerating, change. Our time is oxymoronic, as the oscillations between opposites are increasing in pace, often causing confusion, uncertainty and an apparent unpredictability. This time has been

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108 Neuwirth 2018, at 67–69 & 86.

109 *See, e.g.*, John A. Lapp, *Codification and Revision of Statutes*, 8(4) American Political Science Review 629 (1914); Manley O. Hudson, *The First Conference for the Codification of International Law*, 24(2) American Journal of International Law 367 (1930); Hersch Lauterpacht, *Codification and Development of International Law*, 49(1) American Journal of International Law 16 (1955); René David, *Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries*, 37(2) Tulane Law Review 188 (1962); Arthur Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, 40(3) American Journal of Comparative Law 683 (1992); Rosalind Thomas, *Written in Stone? Liberty, Equality, Morality and the Codification of Law*, 40(1) Bulletin of the Institute of Classical Studies 59 (1995), and H. Patrick Glenn, *The Grounding of Codification*, 31 U.C. Davis Law Review 765 (1999).

110 Neuwirth 2017, at 23.

111 Nicholas Rescher, *Predicting the Future: An Introduction to the Theory of Forecasting* (Albany: State University of New York Press, 1998).

termed "the Anthropocene," which refers to an epoch in which "human activities are significantly influencing Earth's environment."[112] The Anthropocene, too, has been found to be subject to faster change, which is called the "Great Acceleration of the Anthropocene." This began in the second half of the twentieth century when the "human enterprise" "suddenly accelerated" in many ways, with population growth, increased oil consumption and the increasing interconnectedness of cultures.[113] In sum, a perception of an accelerated pace of change is now a common phenomenon, one that – under the notion of "social acceleration" – is noticeable in all areas of life.[114]

The Anthropocene also stands for serious challenges to the survival of humanity and the planet's ecosystem. A new mind-set will be required to meet these challenges successfully. This new mind-set can be described as "synaesthetic" and "oxymoronic," relying on new sensory modes of perception and expanded forms of reasoning and logic.[115] To exemplify this need, it is important to recall that not all uncertainty that results from a faster pace of change is or must be confusing. One too easily forgets that a faster pace of change also provides greater opportunities and a higher chance of achieving the results one is aiming for.

One also forgets that contradictions are merely a limitation caused by the logic that is applied. Contradictions (and their resulting conflicts) have therefore repeatedly been qualified as problems of the mind and not problems of reality.[116] For instance, we also tend to forget that even uncertainty is not the final word, the end of a story. There can be order in disorder and utopia in dystopia, and even irrational behaviour can allow for the prediction of the (decisions humans take in the) future.[117] In other words, the mind-set can be compared to a cognitive bias that frames the way we perceive. The way we perceive, in turn, also has a measurable impact on how we act and the results we produce.[118] In this respect, the current era of rapid and increasingly rapid as well as drastic changes not only provides serious challenges but equally provides opportunities. While rapid change can mean uncertainty and

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112 *See* Eckart Ehlers & Thomas Krafft, *Managing Global Change: Earth System Science in the Anthropocene* in *Earth System Science in the Anthropocene* 5 (E. Ehlers & T. Krafft (eds.), Berlin: Springer, 2006).

113 *See* Will Steffen et al., *The Anthropocene: Are Humans Now Overwhelming the Great Forces of Nature?*, 36(8) AMBIO: A Journal of the Human Environment 614 (2007).

114 *See also High-Speed Society: Social Acceleration, Power and Modernity* (H. Rosa & W.E. Scheuerman (eds.), University Park: Pennsylvania State University Press, 2009); Hartmut Rosa, *Social Acceleration: A New Theory of Modernity* (New York: Columbia University Press, 2013), and Neuwirth 2018, at 22.

115 Neuwirth 2018.

116 *See, e.g.*, Constantin V. Negoita, *Cybernetics and Society*, 11(2) Kybernetes 98 (1982) ("Conflict is a category of man's mind, not in itself an element of reality").

117 Daniel Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (New York: HarperCollins, 2008); *see also* Neuwirth, *supra* note 93.

118 *See* Terence R. Mitchell & Denise Daniels, *Motivation* in *Handbook of Psychology. Vol. 12* 229 (W.C. Borman et al. (eds.), Hoboken: John Wiley & Sons, 2003).

unpredictability, it can also mean that we have the potential to achieve certain objectives more quickly.

This kind of thinking, however, requires a novel and perhaps a so-called "synaesthetic mind-set," which is a mind-set that transcends boundaries and, notably, dichotomies and their ensuing contradictions. It is one that allows difference to be perceived as unity, continuity to be seen in change (stasis in motion), and certainty to be found in flexibility. In short, it is a mind-set capable of tackling the challenges of global governance in the twenty-first century, as aptly outlined in the following lines:

> It is to search for order in disorder, for coherence in contradiction, and for continuity in change. It is to confront processes that mask both growth and decay. It is to look for authorities that are obscure, boundaries that are in flux, and systems of rule that are emergent. And it is to experience hope embedded in despair.[119]

These challenges well define the great problems of humanity in the twenty-first century as addressed by the global governance debate. In this global debate, the BRICS countries, as a cooperation platform, also have an important role to play.

The role played by the BRICS during the past decade has produced both visible results and other results that certainly exist but are harder to detect (since it is usually easier to detect a problem that has manifested itself than a problem that was avoided). To safeguard the positive impact of the BRICS cooperation on each of the BRICS countries individually and on the world as a whole, the debate must also consider new ideas about the role of law in the future governance of global affairs. This debate must work towards a new understanding of law, of law as a process and of law as being "oxymoronic," in the sense of being a comprehensive process from soft to hard law, from national via regional to supranational and global law, to mention but a few stages. More concretely, it also must reflect upon the BRICS cooperation from a *lex lata* perspective, to the possible consolidation through codification of its vast and growing body of documents.

In this process, codification can fulfil important functions, such as tackling "big data," facilitating research, increasing policy coherence, enhancing transparency and communicating the rule of BRICS law. It can also be expected to have positive effects on the BRICS, cementing their growing role in global governance by making their diversity the basis for the way in which they make a difference. In sum, codification can play an important role in shaping the future itself, as "the best way of predicting the future is to create it."[120] It is in this task that law can help by playing a role in regulating the future.[121]

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119 Rosenau 1995, at 13.

120 Neuwirth 2017, at 23.

121 Rostam J. Neuwirth, *New Technologies: Predicting the Future by Regulating It*, China Global Television Network (CGTN), 21 February 2019 (Oct. 1, 2019), available at https://news.cgtn.com/news/3d3d674d3451444f32457a6333566d54/index.html.

References

Abramowicz M. *Cryptocurrency-Based Law*, 58(2) Arizona Law Review 359 (2016).

Alvarez J.E. *Are Corporations "Subjects" of International Law*, 9(1) Santa Clara Journal of International Law 1 (2011).

Arend A.C. *Legal Rules and International Society* (New York: Oxford University Press, 1999).

Ariely D. *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (New York: HarperCollins, 2008).

Baasch Andersen C. *From Resource of Law to Source of Law: The Internet as a Source of Law in Unifying the Jurisprudence of the CISG*, 3 Journal of Information Law & Technology (2004) (Oct. 1, 2019), available at https://warwick.ac.uk/fac/soc/law/elj/jilt/2004_3/andersen.

Bahga A. & Madisetti V. *Big Data Science & Analytics: A Hands-On Approach* (Brooklyn Center: VTP, 2016).

Barton J.H. *Behind the Legal Explosion*, 27(3) Stanford Law Review 567 (1975). https://doi.org/10.2307/1228327

Beausang F. *Globalization and the BRICs: Why the BRICs Will Not Rule the World for Long* (London: Palgrave Macmillan, 2012). https://doi.org/10.1057/9781137271600

Bond P. & Garcia A. *Introduction* in *BRICS: An Anti-Capitalist Critique* 1 (P. Bond & A. Garcia (eds.), London: Pluto Press, 2015).

Bowker G.C. *Memory Practices in the Sciences* (Cambridge, Mass.: The MIT Press, 2006).

Brütsch C. & Papa M. *Deconstructing the BRICS: Bargaining, Coalition, Imagined Community, or Geopolitical Fad?*, 6(3) Chinese Journal of International Politics 299 (2013). https://doi.org/10.1093/cjip/pot009

Castellucci I. *Legal Hybridity in Hong Kong and Macau*, 57(4) McGill Law Journal 665 (2012). https://doi.org/10.7202/1013028ar

Chibundu M.O. *Globalizing the Rule of Law: Some Thoughts at and on the Periphery*, 7(1) Indiana Journal of Global Legal Studies 79 (1999).

Chrisley R. *General Introduction: The Concept of Artificial Intelligence* in *Artificial Intelligence: Critical Concepts. Vol. 1* 1 (R. Chrisley & S. Begeer (eds.), New York: Routledge, 2000).

Dixon M. et al. *Cases & Materials on International Law* (6th ed., Oxford: Oxford University Press, 2016). https://doi.org/10.1093/he/9780198727644.001.0001

Dupuy P.-M. *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31(4) New York University Journal of International Law and Politics 791 (1999).

Durovic M. & Janssen A. *The Formation of Blockchain-based Smart Contracts in the Light of Contract Law*, 26(6) European Review of Private Law 753 (2018).

Dworkin R. *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978).

Dyzenhaus D. *The Rule of (Administrative) Law in International Law*, 68(3) Law & Contemporary Problems 127 (2005). https://doi.org/10.2139/ssrn.692762

Ehlers E. & Krafft T. *Managing Global Change: Earth System Science in the Anthropocene* in *Earth System Science in the Anthropocene* 5 (E. Ehlers & T. Krafft (eds.), Berlin: Springer, 2006). https://doi.org/10.1007/3-540-26590-2_2

Ely J.W., Jr. *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16(2) Constitutional Commentary 315 (1999).

Epstein R.A. *Animals as Objects, or Subjects, of Rights* in *Animal Rights: Current Debates and New Directions* 445 (C.R. Sunstein & M.C. Nussbaum (eds.), Oxford: Oxford University Press, 2004). https://doi.org/10.4324/9781315262529-29

Fallon R.H., Jr. *"The Rule of Law" as a Concept in Constitutional Discourse*, 97(1) Columbia Law Review 1 (1997). https://doi.org/10.2307/1123446

Fellmeth A.X. & Horwitz M. *Guide to Latin in International Law* (Oxford: Oxford University Press, 2009). https://doi.org/10.1093/acref/9780195369380.001.0001

Fuentes C.I. *Normative Plurality in International Law: A Theory of the Determination of Applicable Rules* (Berlin: Springer, 2016). https://doi.org/10.1007/978-3-319-43929-7

Gallie W.B. *Essentially Contested Concepts*, 56(1) Proceedings of the Aristotelian Society 167 (1956). https://doi.org/10.1093/aristotelian/56.1.167

Gebser J. *Ursprung und Gegenwart. Erster Teil* (2nd ed., Schaffhausen: Novalis, 1999).

Gibbons T. *Rhetoric; or, a View of Its Principal Tropes and Figures, in Their Origin and Powers* (London: J. & W. Oliver, 1767).

Gidley J. *The Future: A Very Short Introduction* (Oxford: Oxford University Press, 2017). https://doi.org/10.1093/actrade/9780198735281.001.0001

Gitelman L. & Jackson V. *Introduction* in *"Raw Data" Is an Oxymoron* 1 (L. Gitelman (ed.), Cambridge, Mass.: The MIT Press, 2013). https://doi.org/10.7551/mitpress/9302.003.0002

Gleick J. *Faster: The Acceleration of Just About Everything* (New York: Vintage Books, 2000).

Glenn H.P. *Legal Traditions of the World: Sustainable Diversity in Law* (5th ed., Oxford: Oxford University Press, 2014). https://doi.org/10.1093/he/9780199669837.001.0001

Glenn H.P. *Persuasive Authority*, 32(2) McGill Law Journal 286 (1987).

Glenn H.P. *The Grounding of Codification*, 31 U.C. Davis Law Review 765 (1999).

Handy C. *The Age of Paradox* (Boston: Harvard Business School Press, 1995).

Heldrich A. *The Deluge of Norms*, 6(2) Boston College International and Comparative Law Review 377 (1983).

High-Speed Society: Social Acceleration, Power and Modernity (H. Rosa & W.E. Scheuerman (eds.), University Park: Pennsylvania State University Press, 2009).

Hudson M.O. *The First Conference for the Codification of International Law*, 24(2) American Journal of International Law 367 (1930). https://doi.org/10.1017/s0002930000180224

International Governance and the Rule of Law in China Under the Belt and Road Initiative (Y. Zhao (ed.), Cambridge: Cambridge University Press, 2018). https://doi.org/10.1017/9781108332651

Janis M.W. *Individuals as Subjects of International Law*, 17(1) Cornell International Law Journal 61 (1984). https://doi.org/10.2139/ssrn.1101693

Jeutner V. *Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma* (Oxford: Oxford University Press, 2017). https://doi.org/10.1093/oso/9780198808374.001.0001

Johnson M.L. *Mind, Metaphor, Law*, 58(3) Mercer Law Review 845 (2007).

Kammerhofer J. *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15(3) European Journal of International Law 523 (2004). https://doi.org/10.1093/ejil/15.3.523

Kapur N.et al. *The Paradoxical Nature of Nature* in *The Paradoxical Brain* 1 (N. Kapur (ed.), Cambridge: Cambridge University Press, 2011). https://doi.org/10.1017/cbo9780511978098.003

Kennedy D. *The Mystery of Global Governance*, 34(3) Ohio Northern University Law Review 831 (2008).

Kern S. *The Culture of Time and Space 1880–1918* (Cambridge, Mass.: Harvard University Press, 1983).

Lapp J.A. *Codification and Revision of Statutes*, 8(4) American Political Science Review 629 (1914).

Lauterpacht H. *Codification and Development of International Law*, 49(1) American Journal of International Law 16 (1955). https://doi.org/10.2307/2194097

Lee T.V. *Media Products as Law: The Mass Media as Enforcers and Sources of Law in China*, 39(3) Denver Journal of International Law & Policy 437 (2011).

Macey J.R. *Regulatory Globalization as a Response to Regulatory Competition*, 52 Emory Law Journal 1353 (2003).

Maxeiner J.R. *Some Realism About Legal Certainty in the Globalization of the Rule of Law*, 31(1) Houston Journal of International Law 27 (2008).

McLuhan M. *The Gutenberg Galaxy: The Making of Typographic Man* (Toronto: University of Toronto Press, 1962).

Murphy J.F. *The Evolving Dimensions of International Law: Hard Choices for the World Community* (Cambridge: Cambridge University Press, 2010). https://doi.org/10.1017/CBO9780511750687

Negoita C.V. *Cybernetics and Society*, 11(2) Kybernetes 97 (1982). https://doi.org/10.1108/eb005611

Neuwirth R.J. & Svetlicinii A. *The BRICS-Lawyers' Guide to BRICS Texts and Materials* (Macau: BRICS-Lawyers, 2019).

Nijman J.E. *Images of Grotius, Or the International Rule of Law Beyond Historiographical Oscillation*, 17(1) Journal of the History of International Law 83 (2015). https://doi.org/10.1163/15718050-12340039

Oppetit B. *Les tendances régressives dans l'évolution du droit contemporain* [*Regressive Trends in the Evolution of Contemporary Law*] in *Mélanges dédiés à Dominique Holleaux* [*Essays in Honour of Dominique Holleaux*] 317 (J.-F. Pillebout (ed.), Paris: Litec, 1990).

Orts E.W. *The Rule of Law in China*, 34(1) Vanderbilt Journal of Transnational Law 43 (2001).

Rescher N. *Predicting the Future: An Introduction to the Theory of Forecasting* (Albany: State University of New York Press, 1998).

Rolland S.E. *The BRICS' Contributions to the Architecture and Norms of International Economic Law*, 107 Proceedings of the ASIL Annual Meeting 164 (2013). https://doi.org/10.5305/procannmeetasil.107.0164

Rosenau J.N. *Governance in the 21st Century*, 1(1) Global Governance 13 (1995). https://doi.org/10.1163/19426720-001-01-90000004

Rosett A. *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, 40(3) American Journal of Comparative Law 683 (1992). https://doi.org/10.2307/840594

Sassen S. *The Participation of States and Citizens in Global Governance*, 10(1) Indiana Journal of Global Legal Studies 5 (2003). https://doi.org/10.1353/gls.2003.0015

Scaffardi L. *BRICS, a Multi-Centre "Legal Network"?*, 5(2) Beijing Law Review 140 (2014). https://doi.org/10.4236/blr.2014.52013

Schauer F. *Necessity, Importance, and the Nature of Law* in *Neutrality and Theory of Law* 17 (J. Ferrer Beltrán et al. (eds.), Dordrecht: Springer, 2013). https://doi.org/10.1007/978-94-007-6067-7_2

Scholz L.H. *Algorithmic Contracts*, 20(2) Stanford Technology Law Review 165 (2017).

Schwartmann R. *Private im Wirtschaftsvölkerrecht* [*Private Persons and Companies in International Economic Law*] (Tübingen: Mohr Siebeck, 2005).

Steffen W. et al. *The Anthropocene: Are Humans Now Overwhelming the Great Forces of Nature?*, 36(8) AMBIO: A Journal of the Human Environment 614 (2007). https://doi.org/10.1579/0044-7447(2007)36[614:taahno]2.0.co;2

Stone C.D. *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*, 45(2) Southern California Law Review 450 (1972).

Stone C.D. *Should Trees Have Standing? Law, Morality, and the Environment* (3rd ed., Oxford: Oxford University Press, 2010).

Sykes A.O. *Regulatory Competition or Regulatory Harmonization? A Silly Question?*, 3(2) Journal of International Economic Law 257 (2000). https://doi.org/10.1093/jiel/3.2.257

Tamanaha B.Z. *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004). https://doi.org/10.1017/CBO9780511812378

The BRICS-Lawyers' Guide to Global Cooperation (R.J. Neuwirth et al. (eds.), Cambridge: Cambridge University Press, 2017). https://doi.org/10.1017/9781108236102

The Prospects of International Trade Regulation: From Fragmentation to Coherence (T. Cottier & P. Delimatsis (eds.), Cambridge: Cambridge University Press, 2011). https://doi.org/10.1017/cbo9780511792496

The Rule of Law in an Era of Change (G.J. Andreopoulos et al. (eds.), Cham: Springer, 2018). https://doi.org/10.1007/978-3-319-89908-4

Thomas R. *Written in Stone? Liberty, Equality, Morality and the Codification of Law*, 40(1) Bulletin of the Institute of Classical Studies 59 (1995). https://doi.org/10.1111/j.2041-5370.1995.tb00464.x

Thumfart J. *Ist das Zoon Politikon ein Oxymoron?: Zur Dekonstruktion des Begriffs von Biopolitik bei Giorgio Agamben auf der Grundlage einer Wiederlektüre des Aristoteles* [*Is Zoon Politikon an Oxymoron?: On the Deconstruction of the Giorgio Agamben's Concept of Biopolitics on the Basis of Rereading Aristotle*] (Saarbrücken: VDM Verlag Dr. Müller, 2008).

Toepfer G. *The Concept of Life in Synthetic Biology* in *Synthetic Biology Analysed: Tools for Discussion and Evaluation* 71 (M. Engelhard (ed.), Cham: Springer, 2016). https://doi.org/10.1007/978-3-319-25145-5_4

Trachtman J.P. *International Regulatory Competition, Externalization, and Jurisdiction*, 34(1) Harvard International Law Journal 47 (1993).

Trebilcock M. & Howse R. *Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics*, 6(1) European Journal of Law and Economics 5 (1998). https://doi.org/10.1023/A:1008691106306

Waldron J. *The Concept and the Rule of Law*, 43(1) Georgia Law Review 5 (2008).

Waldron J. *The Rule of International Law*, 30(1) Harvard Journal of Law & Public Policy 30 (2006).

Williams R.C. *The One and Only Substantive Due Process Clause*, 120(3) Yale Law Journal 408 (2010).

Zolo D. *The Rule of Law: A Critical Appraisal* in *The Rule of Law: History, Theory and Criticism* 3 (P. Costa & D. Zolo (eds.), Dordrecht: Springer, 2007). https://doi.org/10.1007/978-1-4020-5745-8_1

Information about the author

Rostam Neuwirth (Macau, China) – Professor of Law, Head of Department of Global Legal Studies, Faculty of Law, University of Macau (E32, Avenida da Universidade, Taipa, Macau, China; e-mail: rjn@um.edu.mo).

DISMISSAL PROTECTION IN THE BRICS COUNTRIES IN LIGHT OF ILO CONVENTION NO. 158

ELENA SYCHENKO,

Saint Petersburg State University (Saint Petersburg, Russia)

MAURO LARUCCIA,

Jorge Duprat Figueiredo Foundation for Safety and Occupational Health at Work (Fundacentro) and Pontifical Catholic University of São Paulo (São Paulo, Brazil)

DALTON CUSCIANO,

Jorge Duprat Figueiredo Foundation for Safety and Occupational Health at Work (Fundacentro) and Getúlio Vargas Foundation (São Paulo, Brazil)

LI WENPEI,

China University of Labor Relations (Beijing, China)

IRINA CHIKIREVA,

Tyumen State University (Tyumen, Russia)

PAUL SMIT,

North-West University (Potchefstroom, South Africa)

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The BRICS countries have aspirations to achieve sustainable development in their economies and environmental protection. These aspirations have an important social aspect in the area of employment protection as it relates to ensuring fair development. In order to establish national standards for dismissal protection in four of the BRICS countries (Brazil, Russia, China and South Africa) the authors have considered the legislation and relevant national case law. This paper includes a review of International Labour Organisation (ILO) standards of dismissal protection, which are used as a pattern

for comparison. The paper consists of five parts: the first deals with the history and explores the legal standards adopted in the ILO Convention No. 158; the remaining four parts present the research on each of the national dismissal protection systems in the four BRICS countries under study. The authors conclude that even though the national systems are different and have dissimilar scopes in respect of dismissal protection, their regulations are largely in line with the Convention, which has not been ratified by any of the BRICS countries; and that international instruments even without ratification may be a helpful instrument for shaping the national system of dismissal protection, and for providing guidance to policymakers and legislators.

Keywords: dismissal protection; BRICS; ILO; redundancy; justified dismissal; remedy.

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Introduction

The recent development of BRICS cooperation demonstrates that the field of employment protection and achieving social justice is one of the significant spheres for this union. The BRICS countries met in Russia in 2016 to discuss core labor and employment issues. A year later the BRICS Labour and Employment Ministers' Declaration was adopted,[1] which underlined the need to enhance employment protection and ensure the transition to formal labor markets, emphasizing in particular the value of social dialogue. This document was warmly welcomed by International Labour Organisation (ILO) Director-General Guy Ryder, as it is in line

[1] BRICS Labour and Employment Ministers' Declaration, Chongqing, China, 27 July 2017 (Oct. 19, 2019), available at https://www.ranepa.ru/images/media/brics/china2016/BRICS%20MD%200725-EWG%20Meeting.pdf.

with ILO values.[2] The BRICS declaration adopted in Xiamen on 4 September 2017 reflected partly the minister's statements. Thus it reaffirmed the commitment to fully implementing the 2030 Agenda for Sustainable Development.[3] The heads of the BRICS states underlined the aspirations to achieve sustainable development in its three dimensions – economic, social and environmental – in a balanced and integrated manner. It was also stated that the establishment of sustainable peace requires a comprehensive, concerted and determined approach, based on mutual trust, mutual benefit, equity and cooperation, that addresses the causes of conflicts, including their political, economic and social dimensions.[4] These words are consonant to the preamble of the ILO Constitution:

> Whereas universal and lasting peace can be established only if it is based upon social justice; … Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.[5]

Employment protection is traditionally built upon three pillars: antidiscrimination policy, fair and safe working conditions and dismissal protection. The present paper will research the peculiarities of the latter in the BRICS countries, namely in Russia, China, Brazil and South Africa. The analysis of the national legislation and the relevant case law will be organized on the sample of dismissal protection provided by the ILO in the ILO Termination of Employment Convention (No. 158) which was adopted in 1982, entered into force on 24 November 1985. This Convention was not ratified by none of the BRICS states, however, as a certain benchmark, it provides us with standards which will be used for comparing the national approaches to dismissal protection. The paper consists of five parts: the first deals with the history and explore the legal standards adopted in the Convention, other four parts present the research of national dismissal protection systems in the four BRICS countries.

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[2] ILO head praises BRICS countries' commitment to social dialogue, International Labour Organization, 3 August 2018 (Oct. 19, 2019), available at https://www.ilo.org/moscow/news/WCMS_636211/lang--en/index.htm.

[3] This affirmation was also repeated in the most recent 10th BRICS Summit Johannesburg Declaration, adopted on 26 July 2018 (Oct. 19, 2019), available at https://www.mea.gov.in/bilateral-documents.htm?dtl/30190/10th_BRICS_Summit_Johannesburg_Declaration.

[4] BRICS Leaders Xiamen Declaration, Xiamen, China, 4 September 2017 (Oct. 19, 2019), available at https://brics.mid.ru/en_GB/document/-/asset_publisher/VmQiTl1AUALV/content/samen-skaa-deklaracia-rukovoditelej-stran-briks-samen-kitaj-4-sentabra-2017-goda?redirect=%2Fen_GB%2Fdocuments&inheritRedirect=true.

[5] ILO Constitution (Oct. 19, 2019), available athttps://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO. These words were also part of the Nobel lecture delivered by David A. Morse, who spoke on behalf of the International Labour Organisation in 1969 (Oct. 19, 2019), available at https://www.nobelprize.org/prizes/peace/1969/labour/lecture/.

1. ILO Termination of Employment Convention (No. 158)

The traditional rules governing the contract of employment were characterized by a formal symmetry of the rights of the parties to terminate the contract of employment, by giving notice, without either party having to justify its decision. But this approach which is characteristic for civil law could result in insecurity and poverty for the worker and his family, particularly during periods of massive unemployment. The national movements towards workers' protection resulted in an extension of the period of notice, introduction of the payment of a severance allowance and some other measures to restrict the employer's discretionary power to terminate the employment relationship for any reason or without reason.[6] However until 1950 there was no international action in this field and the scope of protection between countries varied greatly. In particular significant differences could be noted in the approach of Soviet and Western blocks of countries, which as two poles, either created a "hyperprotection" scheme, prohibiting the dismissal of some groups of workers even for just reason (Russia), and "laissez faire" scheme, leaving the dissolution of contract at the discretion of the employer (the United Kingdom).[7] The national regulations of other countries could be placed on the line between these poles depending on the level of granted dismissal protection. This was the background for the development of the ILO standards for dismissal.

In a resolution adopted in 1950, the International Labour Conference noted the absence of international standards on the termination of contracts of employment and requested a report on national law and practice on the matter for consideration by the Conference.[8] Following the research of national regulations of dismissal the ILO Conference adopted the Termination of Employment Recommendation (No. 119) in 1963. This document for the first time introduced the general rule of the need to have a "valid reason" for the dismissal and listed the reasons which could not constitute such valid reason (discriminatory reasons and the affiliation with the trade union). It also fixed the obligation to notify about the dismissal, to guarantee some form of income protection and to provide workers with the right to appeal against unjustified dismissal. It also contained provisions concerning the reduction of the work force, which included the obligation of consultation with workers' representatives, consideration of measures alternative to collective redundancy,

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6 *Protection Against Unjustified Dismissal: General Survey on the Termination of Employment Convention (No. 158) and Recommendation (No. 166), 1982* 1 (Geneva: International Labour Office, 1995).

7 *See, e.g.*, the materials of the Royal Commission on Trade Unions and Employers' Associations concerning introduction of dismissal protection regulations which led to the adoption of Industrial Relations Act in 1971. This Act introduced an opportunity to receive compensation for unfair dismissal in Great Britain. Royal Commission on Trade Unions and Employers' Associations, 1965–1968: Report (London: H.M.S.O., 1969).

8 *Protection Against Unjustified Dismissal*, *supra* note 6, at 2.

notification of the competent public authorities in advance in some cases, the rules to establish criteria for selecting workers to be dismissed and the priority of re-engagement by the employer when he again engages workers.

The personal scope of this Recommendation was very limited as the following groups might be excluded: (a) workers engaged for a specified period of time or a specified task in cases in which, owing to the nature of the work to be effected, the employment relationship cannot be of indeterminate duration; (b) workers serving a period of probation determined in advance and of reasonable duration; (c) workers engaged on a casual basis for a short period; and (d) public servants engaged in the administration of the State to the extent only that constitutional provisions preclude the application to them of one or more provisions of the Recommendation.

Though providing limited personal scope, this instrument, according to the ILO Committee of Experts, had played an important role in encouraging protection against unjustified termination of employment, and thereby favoring the promotion of employment security which is an essential aspect of the right to work.[9] Provisions of this kind could be found also in countries which previously sought to limit the

> discretionary power of the employer through concepts of abuse of right or abusive dismissal and in other countries, in all regions of the world, at all stages of economic development and of all political complexions.[10]

Based on the positive experience of the implementation of the Recommendation, in 1979 the ILO decided to put on the agenda the adoption of the Convention on dismissal protection, which was indeed adopted in 1982.

The ILO Termination of Employment Convention (No. 158), compared to Recommendation No. 119[11] (considered above) provides a more detailed and more flexible instrument for dismissal protection regulations. It changed the list of workers who might be excluded from the scope of protection, removing civil servants, but fixed an opportunity to exclude from the application of the Convention or certain provisions thereof "categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention" and "other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them." Such derogation might be established after consultation with the organizations of employers and workers concerned, where such exist.

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9 *Protection Against Unjustified Dismissal*, *supra* note 6, at 2.

10 *International Labour Conference: Termination of Employment at the Initiative of the Employer* 7 (Geneva: International Labour Office, 1980).

11 It was replaced with the new edition of Recommendation No. 166 in 1982.

The Convention also stated that temporary absence from work because of illness or injury shall not constitute a valid reason for termination, provided special norms for the notification of trade union and special authorities in case of redundancies and regulated the burden of proof distribution. New norms linked the calculation of the severance payment with the length of service and the level of wages (Art. 12).

Even though the Convention was drafted as a flexible instrument, it was negatively perceived by the employers. Already in 1995 the employers concluded that ILO Convention No. 158 ought to be revised as soon as possible.[12] They pointed out that on the basis of the interpretation given by the Committee of Experts the Convention did not just set minimum standards, but much more due to the extensive interpretations. They supposed that the modest number of ratifications of the Convention, contrasted with the fact that two-thirds of Conference delegates had voted in favor of its adoption, can be explained by the reference to the factual establishment of a higher level of protection for workers then fixed in the text of the Convention.[13]

Indeed, according to the ILO database, ILO Termination of Employment Convention (No. 158) to date has been ratified by thirty-six countries.[14] This is a low ratification indicator, as there are 196 member states in the ILO and at least 130 have voted for its adoption. It is interesting to note that mostly developing countries are on the list of the states which have ratified the Convention. Among developed countries it has been ratified only by Spain, Sweden, Luxembourg, Finland, France, Australia, Cyprus, Latvia, Montenegro and Portugal.

As mentioned before, none of the BRICS countries have ratified the Convention; however, as this paper will demonstrate, even without formal ratification, national regulations largely conform with ILO standards, at least as far as they are fixed in the text of the Convention.

In the next four parts of this paper, these national ways will be considered in more detail and the structure of each section will be determined on the basis of the structure of the Convention. In that way, we will consider the scope of national dismissal protection, justification for dismissal, prohibited grounds and special procedures for some workers, the issue of notifications, and the right to appeal, and, finally, severance payment and possible reinstatement will be analyzed.

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12 *Record of Proceedings, International Labour Conference, 82nd Session, Geneva, 1995* (Geneva: International Labour Office, 1996), at 24/32, para. 88 & 24/36, para. 99 (Oct. 19, 2019), also available at https://www.ilo.org/public/libdoc/ilo/P/09616/09616(1995-82).pdf.

13 *Protection Against Unjustified Dismissal*, *supra* note 6, para. 21.

14 Ratifications of C158 – Termination of Employment Convention, 1982 (No. 158) (Oct. 19, 2019), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312303.

2. BRICS Countries' Regulations Relating to Dismissal Protection

2.1. Brazil

ILO Termination of Employment Convention (No. 158) came into force in Brazil on 10 April 1996 when the Brazilian Parliament ratified the Convention on protection against arbitrary dismissal or termination without just cause.[15,16] On 20 November 1996, after only 224 days in force, Brazil withdrew from the Convention through Decree No. 2.100/1996, an action which raised much discussion over the resulting precariousness of jobs and insecurity at work.

It is important to note that the Brazilian legal system is based on the Roman code, and, since 1 May 1943, Brazil has had a Labor Law Consolidation (Consolidação das Leis do Trabalho (CLT) in Portuguese) under Decree No. 5.452, which is still in force and which was inspired by the *Carta del Lavor*o from Italy, published in 1927, and the *Encyclical Rerum Novarum*, a document of the Catholic Church regarding workers' conditions.[17]

The CLT is the principal body of labor legislation in the private sector in Brazil and with the Brazilian Federal Constitution of 1988, regulates a number of labor provisions such as safety and health at work, entitlements, paid vacations, overtime rates, 13th salary, limiting work hours at night, monthly minimum wage, collective bargaining, and the right to strike in both the public and the private sectors.

As to employee dismissal, Brazilian legislation has changed over time, beginning in 1943 when the Brazilian Labor Law Consolidation was published and the principle of job stability was enshrined in its Articles 492 to 500.[18]

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15 Alexandre A. Belmonte, *Os direitos fundamentais juslaborais e a Convenção nº 158 da Organização Internacional do Trabalhoitle* [*Fundamental Human Rights and Convention No. 158 of the International Labour Organisation*] in *Direito Constitucional do Trabalho: o que há de novo?* [*Constitutional Labor Law: What's New?*] 367 (F.R. Gomes (ed.), Rio de Janeiro: Lumen Juris, 2010).

16 ILO, Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment (2009) (Oct. 19, 2019), available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcms_100768.pdf.

17 Decreto nº 19.841, de 22 de outubro de 1945, promulga a Carta das Nações Unidas, da qual faz parte integrante o anexo Estatuto da Corte Internacional de Justiça, assinada em São Francisco, a 26 de junho de 1945, por ocasião da Conferência de Organização Internacional das Nações Unidas [Decree No. 19.841 of 22 October 1945, promulgates the United Nations Charter, of which the Annex to the Statute of the International Court of Justice, signed at San Francisco on 26 June 1945, on the occasion of the United Nations International Conference, is an integral part] (Oct. 19, 2019), available at http://www.planalto.gov.br/ccivil_03/decreto/1930-1949/D19841.htm; Rerum Novarum: Encyclical of Pope Leo XIII on Capital and Labor (Oct. 19, 2019), available at http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html.

18 Decreto-Lei nº 5.452, de 1º de maio de 1943, aprova a Consolidação das Leis do Trabalho [Decree-Law No. 5.452 of 1 May 1943, approves the Labor Law Consolidation] (Oct. 19, 2019), available at http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm.

Employment stability was guaranteed to industrial and commercial workers after ten years' service, as well as the right to compensation if they were not put on permanent contracts and were unjustly dismissed.

Further, it made clear that any change in the ownership of an establishment or in the management of an enterprise would be without prejudice to employment, as it would not affect length of service calculations for compensation purposes.

In case of bankruptcy or collective insolvency, compensation for dismissal would have priority status. Pay cuts were prohibited, except in case of jeopardy or *force majeure*.

Other equally relevant rights included priority for rehiring or for maintenance of the previous wage in cases where *force majeure* might justify dismissal or reduced earnings. Brazilian Law also established the concept of solidarity among the same economic group, which means that if one employee worked at three different companies belonging to the same economic group, the employers were defined as one single employer for the purpose of calculating years of service.

Over time, employers started to dismiss workers on the eve of reaching job stability status – ten years – which led to intense judicial litigation, and was the reason why the Brazilian Superior Labor Court (Tribunal Superior do Trabalho (TST) in Portuguese), basing its decision on precedents, declared, by its jurisprudential guidance No. 26, that,

> A hindrance to [job] stability is to be presumed in the case of the dismissal, without due cause, of an employee who reaches nine years of service to the enterprise.[19]

This jurisprudential guidance was in force until November 2003.

The Brazilian legislator, aware of the rising tensions between employers and employees over job stability, created on 13 September 1966, by Law No. 5.107, the Length of Service Guarantee Fund (Fundo de Garantia do Tempo de Serviço (FGTS) in Portuguese) that is still in force today. FGTS was the first wave of liberalization of the Brazilian labor market, and the legal embodiment of an employer's right to dismiss, thus ending the job stability after ten years for workers. It is important to note that workers who already had the job stability kept it, for FGTS became mandatory only for all new workers in 1979, that is, between 1966 and 1979 a worker could choose between job stability after ten years and FGTS; after 1979, all employees were obligated to be affiliated with the FGTS system.[20]

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[19] TST, Súmula nº 26 – RA 57/1970, DO-GB 27.11.1970 (Oct. 19, 2019), available at https://www.legjur.com/sumula/busca?tri=tst&num=26.

[20] Carlos A.C. Viegas, *Convenção 158 da OIT: Breves considerações sobre sua aplicabilidade e conseqüências* [*Convention No. 158 of the International Labour Organisation: Brief Considerations on its Applicability and Consequences*], XIII(77) Âmbito Jurídico (2010).

In the FGTS system, employers are required to make contributions to FGTS, in an amount corresponding to 8 percent of an employee's monthly compensation, in a bank account managed by a Federal Government Institution, in the name of each employee, and owing each employee private access to the account. The deposits are to earn a total annual yield of 3 percent plus inflation.

Under the Brazilian Federal Constitution of 1988 and the CLT Brazilian employees also have certain employment rights regardless of the employer activity or employee's position, such as a monthly minimum wage of R$998.00 (effective in 2019), which is equivalent to US$250.00, 13th month salary, annual paid vacation of thirty days with a one-third bonus on the payment, which can be divided into three periods over the course of a year. One period must be longer than fourteen days and the other two periods have to have at least five days each, and the worker's vacation period cannot begin on the two days preceding a holiday, or on weekly rest days, usually Saturdays and Sundays.

Brazilian employees also have the right to one day off per week, preferably on Sundays, and the right of unemployment insurance (established originally in 1986); and to be eligible to receive it, workers must be unemployed and must have been dismissed without cause. They may receive three to five payments, depending on how long they worked on a formal job. For example, if the employee worked at least six months, he has the right to receive three payments; if he worked for twelve months, he has the right to receive four payments; and if he worked for twenty-four months, he has the right to receive five payments. The period between one unemployment insurance request and another must be at least sixteen months.

If an employee is dismissed without cause, he has the right to receive compensation (a fine) from his employer of 40 percent of the balance of his individual accounts in his FGTS during the time of his labor relationship with the company. Since the end of 2001, the employer must also pay additional compensation (a fine) equal to 10 percent of the deposits in the employee FGTS account to the federal government (Complementary Law No. 110/2001).[21]

Causes that may be considered to be justifications for avoiding payment of fines can be divided into three groups: (a) capacity, (b) behavior and (c) needs of the company, establishment or service. These justifications do not apply to certain types of workers protected by the Brazilian Federal Constitution of 1988, such as pregnant women, union leaders, and incumbents and alternates of workers' representation in the Internal Commissions for the Prevention of Accidents (Comissão Interna de Prevenção de Acidentes (CIPA) in Portuguese).

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[21] Lei Complementar nº 110, de 29 de junho de 2001, institui contribuições sociais, autoriza créditos de complementos de atualização monetária em contas vinculadas do Fundo de Garantia do Tempo de Serviço – FGTS [Complementary Law No. 110 of 29 June 2001, institutes social contributions, authorizes credits of monetary restatement supplements to linked accounts of the Length of Service Guarantee Fund] (Oct. 19, 2019), available at http://www.planalto.gov.br/ccivil_03/LEIS/LCP/Lcp110.htm.

The same occurs with the infra-constitutional legislation, either by reception or by means of later edited norms. It includes the differentiated protection of employment for the holders of the representation of the workers in the National Social Security Council, in the FGTS Curatorial Council and in the Previous Conciliation Commissions, in addition to injured workers, the elected officers to the position of management of a cooperative of the employees linked to a certain company, and public servants during the electoral period.

National law also guarantees the employment of the worker in the pre-retirement period. As the Constitution is silent with respect to other workers, it is possible to dismiss without just cause, since the compensatory indemnity of 50 percent of the value of the FGTS is paid.

The cases that constitute grounds for dismissal with justified cause are:

1. Fraud, willful misconduct or dishonest acts, such as stealing corporate material or falsification of documents;

2. Misbehavior, which is a wide category including sexual harassment or using company properties for personal matters without authorization;

3. Competition with the employer or conflict of interest, meaning regular conduct of business by the worker for his own or another person's account, without the employer's authorization, in competition with the employer or to his detriment. Business activity conducted by employees that generates a conflict of interest with the employer also constitute grounds for dismissal;

4. Definitive prosecution of the employee – the employer has the right to dismiss the employee who has been sentenced for having committed a crime, unless the sentence has been suspended;

5. Slothfulness or gross negligence, an extreme carelessness on the part of the employee that shows a reckless disregard for his legal duty that can cause damage to the employer's company, including property or company image;

6. Drunkenness while on duty or drug intoxication – if an employee appears to work drunk or under the influence of drugs, he can be dismissed with justified reason. Also, an employee who usually drinks alcohol at his work place can be dismissed;

7. Breach of company secrets – this consists of the violation of confidential information by the employee;

8. Indiscipline or insubordination occurs when the employee disobeys an order that he was aware of when taking the job or that has already been determined previously;

9. Abandonment of the job for more than thirty days without authorization or justification;

10. Injury, meaning physical or verbal aggression in the workplace against any person, including the employer or a superior, except in self-defense or in defense of third parties;

11. Habitual gambling, since gambling is prohibited in Brazil;

12. Prejudicial Acts to national security; and

13. Loss of a professional license instrumental to the function exercised.

Furthermore, the CLT identifies a series of situations as grounds for the employer to terminate a contract, such as (i) abusive acts (e.g. prevents the access of others to the workplace) committed by strikers during a strike that is recognized as illegal. It is important to say that mere participation in a strike action does not constitute serious misconduct, and (ii) unjustified refusal by the employee to follow legal policies on occupational safety and health or employee refusal on the use of personal protective equipment required by law.[22]

In a dismissal with cause, severance entitlements include only outstanding remuneration, unused vacation time and a one third bonus over unused vacation pay, so the employee does not receive an additional fine, equal to 40 percent of the deposits made in his FGTS account; also he does not receive the proportional 13th salary and the salary regarding prior notice. Additionally, he is not eligible to receive unemployment insurance.

In a termination initiated by the employee, he has to give notice of thirty days to the employer and his severance entitlements include only outstanding remuneration, unused vacation time, a one third bonus over unused vacation pay and a prorated 13th month salary. He also is not eligible to receive unemployment insurance.

In a dismissal without cause, severance entitlements include prior notice equal to thirty days plus three extra days per year of work, limited to sixty days that are equal to twenty years of work relationship in the same company, resulting in a maximum of ninety days, prorated 13th month salary, all unused vacation time with a one-third bonus over all vacation payments, and a 50 percent fine on the employee's balance in the FGTS. The employee who is dismissed without cause has the right to unemployment insurance.

In a termination by mutual agreement, severance is the same as that applicable in a dismissal without cause, but notice is reduced by half, the employer pays a 20 percent fine on the FGTS, and the worker is not eligible to receive unemployment insurance.

If the dismissal was due to just cause or at the request of the worker, the re-admission can be done at any time. In cases of dismissal without just cause, Ministerial Order No. 384/1992 of the Ministry of Labor provides that the employee can only be rehired ninety days after termination. In case of noncompliance with this rule, there may be a characterization of unemployment insurance fraud and fraud in regard to the FGTS.[23]

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[22] Decree-Law No. 5.452 of 1 May 1943, *supra* note 18.

[23] Portaria Ministerial nº 384, de 19 de junho de 1992, dispõe sobre fraude no Fundo de Garantia do Tempo de Serviço – FGTS [Ministerial Order No. 384 of 19 June 1992, provides for fraud in the Length of Service Guarantee Fund] (Oct. 19, 2019), available at http://www.guiatrabalhista.com.br/legislacao/mtb384.htm.

Once notice is given, dismissal becomes effective upon expiration of the respective period of notice. If the employer reconsiders the termination before the end of the notice period, the worker may accept or reject that decision. If the worker accepts or continues to work after the notice period expires, the employment contract will remain valid.

If, during the period of notice given to the employee, he commits any action deemed by law to be a just cause for dismissal, he forfeits the right to wages for the remainder of the period of notice; but if the employer commits any action justifying immediate cancellation of the contract, during the period of notice, he is obliged to pay the wages for the rest of the period of notice, without prejudice to any compensation that may be due.

It is possible to give an advance notice of eight days, if the employee is paid weekly and has less than one year of job tenure in the case of dismissal without a justified reason.

The differences between unemployment insurance and FGTS are significant for understanding the distinctive effects that they have on the intensity of job search and the quality of job adherence. On the one hand, employees can use all of the FGTS money before finding another job, there existing, thus, a greater incentive to more intensively search for a job and a higher risk of job non-adherence. On the other hand, unemployment insurance ensures a search with more job adherence since workers are more selective regarding the kind of work they will accept, which tends to increase the duration of unemployment.

In some cases, employers cannot dismiss without cause some employees' categories because they enjoy job stability, for example pregnant women, a leader of a trade union board, workers' representatives on the CIPA and the employee injured at work.

Pregnant woman have job stability from the confirmation of the pregnancy until five months after the birth of their child – the objective being, besides the protection of the unborn, to guarantee to the future mother a pregnancy with tranquility. The ignorance of the state of pregnancy by the employer does not exclude the right to payment of the indemnity due to job stability, and the guarantee of employment to the pregnant woman only authorizes the reintegration if this occurs during the period of job stability. Otherwise, the guarantee is restricted to salaries and other rights corresponding to the period of job stability.

The employee elected to the position of workers' representatives on the CIPA has provisional job stability from the registration of his candidacy up to one year after the end of his term. The purpose of the norm is to protect the elected employee against possible reprisals of the company, due to possible rigor in the supervision of labor safety standards. If the job stability holder is dismissed without just cause, he is entitled to the reintegration to the position or, in the impossibility of doing so, to the receipt of the compatible indemnification.

The union leader has job stability in employment from the application until one year after the mandate (Art. 543 § 3 CLT), even if he is elected as a substitute, unless he commits a serious misdemeanor.[24]

The employee who suffers an accident at work has a minimum job stability of twelve months in the company, from the end of the sickness benefit granted to the employee. To be entitled to job stability for one year, the removal by accident must have been longer than fifteen days. If the period in which he was removed is shorter, the worker is not entitled to the benefit. If the employee contracted an illness and it is proven that it was due to the activity that he performed, he will also be entitled to the benefit.

In the case of dismissal of workers hired before 1979 who have not opted for the FGTS system, the courts may order full compensation or reinstatement.

The maximum time period after dismissal notification up to which a claim concerning dismissal can be made is twenty-four months (Art. 7(XXIX) of the Brazilian Federal Constitution), and labor claims may be filed for the five-year period preceding the exercise of these rights. An employer ownership change does not affect the rights acquired by employees under the CLT or the Brazilian Federal Constitution, and an employee is not allowed to waive legal rights in an employment contract.[25]

Disputes arising out of relations between employers and employees should be settled by the labor courts. Judges in labor courts are specialists in labor law, and all labor courts are federal courts. The employee claim will be initiated in the jurisdiction of the employee's work place, and judicial procedures for labor lawsuits are basically set in the CLT, but in the absence of provisions therein, the Brazilian Civil Procedure Code will apply.

In the case of appeals, they will be addressed to the Regional Labor Courts (Tribunal Regional do Trabalho (TRT) in Portuguese) that will review with a panel of three judges both factual and all legal decisions made by the lower labor court. In the case of appeal of a Regional Labor Court decision, the matter will be examined by the Brazilian Superior Labor Court, which will review only the breach of federal law or conflict with precedent cases in the decision made by Regional Labor Courts.

2.2. Russia

ILO Convention No. 158 has not been ratified by Russia. The basis for legal dismissal protection in the Russian Federation was formed during the socialist period of the

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[24] Decree-Law No. 5.452 of 1 May 1943, *supra* note 18.

[25] Emenda Constitucional nº 45, de 30 de Dezembro de 2004, altera dispositivos dos arts. 5º, 36, 52, 92, 93, 95, 98, 99, 102, 103, 104, 105, 107, 109, 111, 112, 114, 115, 125, 126, 127, 128, 129, 134 e 168 da Constituição Federal, e acrescenta os arts. 103-A, 103B, 111-A e 130-A, e dá outras providências [Constitutional Amendment No. 45 of 30 December 2004, amends the provisions of Articles 5, 36, 52, 92, 93, 95, 98, 99, 102, 103, 104, 105, 107, 109, 111, 112, 114, 115, 125, 126, 127, 128, 129, 134 and 168 of the Federal Constitution, and adds Articles 103-A, 103B, 111-A and 130-A, and other provisions] (Oct. 19, 2019), available at http://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc45.htm.

development of the USSR. The Labour Code of that period aimed to stabilize labor relations, eliminate unemployment and solve economic and political problems of the state.

Employment protection and dismissal protection are one of the significant spheres for social policy.[26] The current Labor Code of the Russian Federation of 2001 provides a list of grounds for dismissal, prohibited grounds and special procedures for some employees, for example, pregnant women, minors, employees' representatives, the head of an enterprise, his deputies and the chief accountant. It also contains notifications and severance payment in some cases, the right to appeal and possible reinstatement.

The grounds for dismissal should be related to the employer's operational requirements or to the employee's guilty behavior or misconduct. The reason for dismissal affects the number of guarantees for employees.

Dismissal must be lawful and in accordance with the established procedure.

According to Article 81 of the Labor Code of the Russian Federation, the employer may dismiss an employee in the following cases:

1. Liquidation of a company or termination of business by an individual entrepreneur;

2. Job redundancy;

3. Discrepancy of the employee for the occupied position or performed work due to insufficient qualification according to the results of certification;

4. Change of ownership of the organization (only for the head of an enterprise, his deputies and the chief accountant);

5. Duplicative culpable nonperformance of labor duties if the employee has had a disciplinary sanction;

6. Gross misconduct:

– absenteeism that is an employee's absence in the workplace without a good reason during the working day (shift), or in the case of absence without a valid reason for more than four hours during the working day (shift);

– appearance of an employee in a condition of alcoholic, narcotic or other toxic intoxication at his workplace or on the site of the employer's organization or in any place where the employee must perform labor functions according to the employer's instructions;

– disclosure of secrets protected by the law such as civil, commercial, professional, and others, which have become known to the employee in connection with the performance of employment duties, including disclosure of personal data to another employee or employer;

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[26] *See more* in *Лютов Н.Л., Герасимова Е.С.* Международные трудовые стандарты и российское трудовое законодательство [Nikita L. Lyutov & Elena S. Gerasimova, *International Labour Standards and Russian Labour Legislation*] (2nd ed., Moscow: Center for Social and Labor Rights, 2015).

– perpetration of theft (including minor theft) of other people's property, embezzlement, deliberate destruction or damage, established by court verdict or order of a judge, a body, an official empowered to deal with cases on administrative offences;

– violation of labor protection rules and requirements if the violation results in grave consequences (industrial accident, crash, disaster) or knowingly created a true threat of effects established by the Commission for the protection of labor or by the occupational safety Commissioner;

7. Commitment of fault actions by an employee who is working with monetary or commodity values if these actions lead to loss of trust of an employer in the employee;

7.1. The employee's failure of taking measures to prevent or resolve the conflict of interests of which he is a party; in other words: failure or submission of incomplete or inaccurate information on their income, expenses, the costs of assets and liabilities of property, failure or submission of deliberately incomplete or inaccurate information on income, expenses, assets and liabilities of property of their spouse and minor children, on the opening accounts (deposits), storage of cash and property in foreign banks located outside the Russian Federation, on possession and/or use of foreign financial instruments employed by their spouse and minor children in cases stipulated by the Labor Code, other Federal Laws, normative legal acts of the President of the Russian Federation and the Government of the Russian Federation, if these actions give rise to a loss of confidence on the part of the employer in the employee.

This point is applied for employees of the Central Bank of the Russian Federation, state corporations, public law companies, the Pension Fund of the Russian Federation, the Social Insurance Fund of the Russian Federation, the Federal Compulsory Medical Insurance Fund in compliance of the Federal Law of 25 December 2008 No. 273-FZ "On Counteracting Corruption";

8. Commitment of immoral transgression by an employee who is performing pedagogical functions incompatible with the continuation of this work;

9. Adoption of unjustified decision by the head of the organization (branch, Representative Office), his deputies and the chief accountant, causing the violation of property, its unlawful use or other damage to the property of the organization;

10. A single gross violation by the head of the organization (branch, representative office), his deputies of their duties;

11. Employee's submission of fake documents to an employer when entering into an employment contract;

12. In cases specified in a labor contract with the head of an organization or members of the collegial executive body of an organization;

13. In other cases stipulated by the Labor Code and other Federal Laws.[27]

It is not allowed to dismiss an employee on the initiative of the employer (except in the case of liquidation of the organization or termination of the activities by an individual entrepreneur) during the period of his temporary disability and on holiday.

Dismissal related to discrimination is not allowed.

Article 3 of the Russian Labor Code provides that no one may be restricted in his labor rights and freedoms or receive any benefits on the grounds of sex, race, color of skin, nationality, language, origin, property, family, social or professional status, age, place of residence, attitude towards religion, beliefs, membership or non-membership of public associations or any social groups as well as other circumstances unrelated to an employee's professional qualities.

Discrimination does not include distinctions, exceptions, preferences, as well as limitation of the rights of employees, determined by the specific requirements of a particular job, established by federal law, or attributable to special care extended by the State to persons in need of increased social and legal protection, either established by the Labor Code or, in the cases to ensure national security, the maintenance of an optimal balance of labor resources in priority employment of citizens of the Russian Federation and to address other problems of domestic and foreign policy of the State.

Russian labor legislation provides for special protection against dismissal for pregnant women, employees under the age of eighteen, heads (and their deputies) of elected collegial bodies of primary trade union organizations, members of the trade union organization, as well as employees elected to the labor dispute commission.

The termination of labor contracts with pregnant employees is not allowed, excluding the event of company liquidation or cessation of activities of the individual entrepreneur.

The employer has the right to terminate a labor contract with an employee under the age of eighteen at the initiative of the employer (except for cases of liquidation of an organization or termination of the activity by an individual entrepreneur) only upon an agreement of the appropriate State Labor Inspection and Commission on Juvenile Affairs and the Protection of their Rights in addition to the general procedure.

Dismissal of the heads (and their deputies) of elected bodies of the primary trade union organizations not exempt from the main work, in case of job redundancy, insufficient qualifications and duplicative culpable nonperformance of labor duties, if the employee has a disciplinary sanction, is possible only with the prior consent of the appropriate higher elected trade union body in addition to the general procedure.

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[27] Трудовой кодекс Российской Федерации от 30 декабря 2001 г. № 197-ФЗ // Собрание законодательства РФ. 2002. № 1 (ч. 1). Ст. 3 [Labor Code of the Russian Federation No. 197-FZ of 30 December 2001, Legislation Bulletin of the Russian Federation, 2002, No. 1 (part 1), Art. 3].

These guarantees for the heads of the elected body of the primary trade union organizations and its deputies remain in effect for two years after the end of their term of office.

Dismissal of ordinary members of a trade union organization as well as employees elected to the labor disputes commissions in case of job redundancy, insufficient qualifications and duplicative culpable nonperformance of labor duties, if the employee has a disciplinary sanction, is possible only taking into account the reasoned opinion of the relevant elected trade union body in addition to the general procedure.

Dismissal of employees in connection with their participation in a collective labor dispute or in a strike is not allowed.

The employer has the right to dismiss an employee without taking into account the decision of the appropriate higher elective trade union body if such a decision is not filed within the prescribed period or if the decision of the appropriate higher elective trade union body on a disagreement with the dismissal recognized by the court as unjustified on the basis of the employer's statement.

Article 144.1 of the Criminal Code of the Russian Federation provides for criminal liability for unjustified dismissal from work on the grounds of reaching their pre-retirement age, i.e. the age prior to five years before the appointment of an old-age pension, i.e. women over fifty-five years old and men over sixty years old.[28]

The employer must comply with the dismissal procedure, depending on the reasons for dismissal:

– offer a transfer to another job during job redundancy and insufficient qualifications;

– notification of dismissal in advance in the case of liquidation of a company and job redundancy;

– obtain a trade union's reasoned opinion in the case of dismissal due to job redundancy, insufficient qualifications and duplicative culpable nonperformance of labor duties if the employee has a disciplinary sanction.

The employee is entitled to severance pay at dismissal in case of liquidation of a company and job redundancy and change of the owner of the property of the organization (only for the head of an enterprise, his deputies and the accounting manager).

The employee shall not be dismissed for reasons related to his conduct or work performance until he is provided with the opportunity to defend himself against the allegations by written explanation.

The employee who considers that he has been the subject of an unjustified dismissal measure will have the right to appeal against that measure before a court.

Employees turning to the court with claims arising out of employment relations shall be exempted from payment of duties and court expenses.

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[28] Уголовный кодекс Российской Федерации от 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].

In the case of recognition of illegal dismissal by the court, the employee shall be restored to his post.

The body considering an individual labor dispute shall determine the average salary for the employee for all the time of forced absenteeism or the difference in pay for all the time of performance of the lower paid job.

The body considering an individual labor dispute shall determine the average salary for the employee for forced absenteeism or the difference in pay for all the time of performance of the lower paid job.

In the case of illegal dismissal or illegal dismissal procedure, the court may, upon the employee's claim, decide to grant compensation for moral damage caused to the employee by such actions. The court shall determine the amount of the compensation.[29] These measures provide protection against illegal dismissal.

2.3. China

Protection against dismissal is a system of restrictions on the lawfulness of termination of existing employment relationships by the employer. It is an important part of the Chinese labor law system, and mainly reflected by the substantive or procedural restrictions placed on the employer's right to dismiss employees. The Chinese rules of protection against dismissal are prescribed mainly in the Labor Law of the People's Republic of China and the Labor Contract Law of the People's Republic of China (hereinafter referred to as the "Labor Contract Law"; other Chinese laws listed below will be abbreviated without the name of the country). In China's labor laws and regulations, dismissal consists of fault dismissal,[30] no-fault dismissal[31] and economic dismissal.[32] In order to prevent the employer from abusing its right to dismiss employees and maintain the stability of labor relations, the law has stipulated relevant conditional and procedural restrictions, in which protection against dismissal plays an important role.

The Chinese rules of protection against dismissal are relatively strict.[33] According to the Organisation for Economic Co-operation and Development (OECD) Employment Outlook Report 2013, China ranked first among thirty-four OECD member countries and nine emerging economies in terms of the comprehensive level of protection against individual and collective dismissal. Specifically, protection against individual

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[29] Articles 193, 261, 269, 373, 374, 375, 394, 415 of the Labor Code of the Russian Federation.

[30] Stipulated in Article 39 of the Labor Contract Law of the People's Republic of China (Oct. 19, 2019), available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/76384/108021/F755819546/CHN76384%20Eng.pdf.

[31] Stipulated in Article 40 of the Labor Contract Law of the People's Republic of China.

[32] Stipulated in Article 41 of the Labor Contract Law of the People's Republic of China.

[33] *See more* in 邱婕.《劳动合同法》十周年回顾系列之八《劳动合同法》之解雇保护制度研究[J].中国劳动, 2018(08): 82–88 [Qiu Jie, *The Eighth Anniversary of the Labor Contract Law: The Eighth Review of the Labor Contract Law of the Dismissal Protection System*, 8 China Labor 82 (2018)].

dismissal in China is obviously at a high level, and higher than the average level of OECD member countries. Protection against collective dismissal in China is slightly higher than the average level of OECD member countries.[34]

Regarding reasons for dismissal, China adopts a strictly restrictive, enumerative model.[35] Reasons for dismissal consist of reasons for fault dismissal, reasons for no-fault dismissal and reasons for economic dismissal.

Firstly, there are six reasons for fault dismissal, stipulated in Article 39 of the Labor Contract Law. They are as follows:

> (1) the laborer is proved during the probation period not to satisfy the requirements of employment;
>
> (2) the laborer materially breaches the Unit's rules and regulations;
>
> (3) the laborer commits serious dereliction of duty or practices graft or corruption, causing substantial damage to the Unit's interests;
>
> (4) the laborer has additionally established a labor relationship with another Unit which materially affects the completion of his tasks or refuses to rectify the matter when brought to his attention by the Unit;
>
> (5) the laborer uses such means as fraud, coercion or taking advantage of the Unit's unfavorable position to sign or change the labor contract against its genuine will, causing the labor contract to be invalid; or
>
> (6) the laborer has his criminal liability investigated in accordance with the law.

Secondly, there are three reasons for no-fault dismissal, stipulated in Article 40 of the Labor Contract Law.[36] They are as follows:

> (1) after the regulated period of medical leave for an illness or non-work related injury expires, the laborer is incapable of performing his original work or is incapable of performing a new job as arranged by the Unit;
>
> (2) the laborer is proved incompetent and remains incompetent after training or adjustment of his position; or
>
> (3) a major change in the objective circumstances relied upon at the time of conclusion of the labor contract hinders continued fulfillment of the

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[34] OECD, "Chapter 2: Protecting Jobs, Enhancing Flexibility: A New Look at Employment Protection Legislation" in *OECD Employment Outlook 2013* (Paris: OECD, 2013) (Oct. 19, 2019), also available at http://www.oecd.org/els/emp/Employment-Outlook-2013-chap2.pdf.

[35] 黎建飞.解雇保护:我国大陆与台湾地区之比较研究[J].清华法学, 2010, 4(05): 5–14 [Li Jianfei, *Dismissal Protection: A Comparative Study of Mainland China and Taiwan*, 4(5) Tsinghua Law Journal 5 (2010)].

[36] 姜颖,沈建峰.正确评估《劳动合同法》适时修改《劳动法》[J].中国劳动关系学院学报, 2017, 31(03): 53–59 [Jiang Ying & Shen Jianfeng, *Correctly Evaluating the Labor Contract Law to Amend the Labor Law in Time*, 31(3) Journal of China Institute of Industrial Relations 53 (2017)].

original contract and, after consultations, the Unit and laborer are unable to reach agreement on amending the labor contract.

Finally, there are four reasons for economic dismissal, stipulated in Article 41 of the Labor Contract Law. They are as follows:

(1) restructuring pursuant to the Enterprise Bankruptcy Law;
(2) serious difficulties in production or business operations;
(3) staff reduction is still necessary after modification of contract due to changes in the enterprise's production, major technological innovation or adjustment of the business operation style; or
(4) other major changes in the objective economic circumstances relied upon at the time of conclusion of the labor contracts, rendering them non-performable.

The prohibition of the dismissal clause is at the core of the system of protection against dismissal. In China, a complete system of protection against dismissal has been developed based on the prohibition of the dismissal clause.[37] Article 42 of the Labor Contract Law addresses the prohibition of dismissal by the employer.[38] It stipulates:

A Unit may not dissolve a labor contract pursuant to Article 40 (no-fault dismissal) or Article 41 (economic dismissal) hereof if the laborer:
(1) is suspected of being exposed to occupational hazards;
(2) has suffered an occupational disease or a work-related injury;
(3) is in the mandatory medical treatment period;
(4) is a female employee in her pregnancy, delivery, or lactation period;
(5) has been working for the Unit continuously for no less than 15 years and is less than 5 years away from his mandatory retirement age;
(6) finds himself in other circumstances stipulated in laws or administrative regulations.

China's labor laws and regulations contain many provisions protecting the legitimate rights and interests of specific groups of workers, especially female workers. Thus, according to Article 42 of the Labor Contract Law, a Unit may not unilaterally dissolve a labor contract pursuant to Article 40 (no-fault dismissal) or Article 41 (economic dismissal) if the laborer is a female employee in her pregnancy, delivery or lactation period.

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[37] *See, e.g.*, Zengyi Xie, *Labor Law in China: Progress and Challenges* 91–94 (Berlin: Springer, 2015).

[38] 李凌云.解雇保护水平国际比较研究[J].中国劳动, 2016(21): 9–14 [Li Lingyun, *International Comparative Study on the Level of Dismissal Protection*, 21 China Labor 9 (2016)].

Notice of dismissal is an important part of protection against dismissal, as well as a powerful legislative measure to protect employees' rights.[39] Notice of dismissal is a procedure widely adopted in ILO conventions and the labor laws of many countries. In Article 40 (no-fault dismissal) of the Labor Contract Law, a Unit may dissolve a labor contract by giving the laborer thirty days' prior written notice, or one month's wage in lieu of notice. That is to say, in China the employer shall give the laborer thirty days' notice in case of no-fault dismissal. The employer does not need to give notice to the laborer in case of fault dismissal.

According to Article 43 of the Labor Contract Law, when a Unit is to dissolve a labor contract unilaterally, it shall give the labor union notice of the reasons in advance and listen to the opinions of the labor union.[40] However, in practice it is quite common for enterprises to dismiss employees without notifying trade unions. Judicial treatment of this practice is a problem. Is dismissal without notice of the trade union legally effective? The Supreme People's Court's Interpretation of Several Issues Concerning the Application of Law in Trial of Labor Dispute Cases (IV) gives the final conclusion on this issue. Article 12 of the Interpretation stipulates that any dismissal conducted by an enterprise without notifying the trade union is unnecessarily invalid because the enterprise may give a supplementary notice before prosecution. That is to say, even if an employee applies to the arbitration committee for illegal dismissal with procedural defects (assuming there is no dispute over other substantive rights) after a Unit dismisses him without notifying the trade union, and the arbitration supports the employee, the dismissal is still effective as long as the Unit remedies the procedural defects by giving a supplementary notice to the trade union before prosecution.

Articles 77 and 79 of the Labor Law stipulate: in case of labor disputes between the employer and laborers, the parties concerned can apply for mediation or arbitration, bring the case to courts, or settle them through consultation. Once a labor dispute occurs, the parties involved can apply to the labor dispute mediation committee of their unit for mediation; if it cannot be settled through mediation and one of the parties asks for arbitration, application can be filed to a labor dispute arbitration committee for arbitration.[41] Either party can also directly apply to a labor dispute arbitration committee for arbitration. The party that has objections to the ruling of the labor arbitration committee can bring the case to a people's court.

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[39] *See, e.g.*, 李国庆.预告解雇制度的解释论基础[J].福建江夏学院学报, 2013, 3(02): 61–66 [Li Guo-qing, *Interpretation Theory Based on Dismissal with Notice*, 3(2) Journal of Fujian Jiangxia University 61 (2013)].

[40] 董保华.我国劳动关系解雇制度的自治与管制之辨[J].政治与法律, 2017(04): 112–122 [Baohua Dong, *Discussion on the Autonomy and Regulation of Labor Dismissal System in China*, 4 Political Science and Law 112 (2017)].

[41] *See, e.g.*, Haina Lu, *New Developments in China's Labor Dispute Resolution System: Better Protection for Workers' Rights?*, 29(3) Comparative Labor Law & Policy Journal 247 (2008).

Thus, after a labor dispute occurs, the parties can make remedies through consultation, mediation or labor arbitration, which can be chosen in no particular order. But labor arbitration comes before prosecution. That is to say, a party can only bring the case to a people's court after it applies to a labor dispute arbitration committee and has objections to the ruling of the committee. But there is one exception – "final ruling." According to Article 47 of the Law of the People's Republic of China on Labor Dispute Mediation and Arbitration, arbitral awards regarding disputes concerning the recovery of remuneration for work, medical expenses for work-related injuries, economic compensation or damages, which does not exceed the twelve-month amount of the local minimum monthly wage standard, and disputes over work hours, rest and leaves, social insurance, etc., due to the implementation of the national labor standards shall be final and the awards shall become legally effective as of the date of issuance. However, the final ruling only applies to the employer. If the employer has objections to the ruling, it can only apply for cancellation of the arbitration award to the intermediate people's court where the labor dispute arbitration committee is located within thirty days from the date of receiving the award. If the laborer has objections to the ruling, he can still bring a lawsuit to the people's court within fifteen days from the date of receiving the arbitration award.

Article 46 of the Labor Contract Law stipulates:

> In any of the following circumstances, the Unit shall pay economic compensation to the laborer:
>
> (1) the laborer resigns due to the Unit's fault;
>
> (2) the labor contract is dissolved after such dissolution was proposed to the laborer by the Unit and the parties reached a consensus thereon;
>
> (3) fault dismissal;
>
> (4) economic dismissal;
>
> (5) a fixed term labor contract is terminated upon expiration, except in the case where the laborer does not agree to renew the contract even if the Unit proposes to renew the labor contract while maintaining or improving the conditions stipulated in the current contract;
>
> (6) the labor contract is terminated because the Unit is declared bankrupt, has its business license revoked, is ordered to close down or decides to dissolve ahead of schedule; or
>
> (7) other circumstances specified in laws or administrative laws and regulations. It can be seen that the employer does not need to give economic compensation to the laborer if the labor contract is dissolved due to the subjective fault of the laborer, and shall give economic compensation to the laborer if the labor contract is dissolved by the employer not due to the laborer's subjective fault or due to the employer's fault.

In addition, Article 47 of the Labor Contract Law stipulates the criteria for economic compensation. There are mainly two types. For the first type:

> The economic compensation calculation rate is based on the number of years the laborer worked in the Unit. Economic compensation equivalent to one month's wage[42] should be paid to the laborer for every one year he has worked in the Unit. The economic compensation for a laborer who worked less than one year but more than six months is equivalent to the calculation based on one year of work; the economic compensation for a laborer who has worked for less than six months is equivalent to half of the above monthly wage. No maximum limit is set.[43]

For the second type:

> If a laborer earns a monthly wage that is more than 3 times the average monthly wage of the municipality or in the city with districts where the Unit is located, the economic compensation rate paid should be 3 times the average monthly wage, and the years of service counted for economic compensation shall not exceed 12 years.

Article 48 of the Labor Contract Law stipulates:

> If a Unit dissolves or terminates a labor contract in violation of this Law and the laborer demands continued performance of such contract, the Unit shall continue performing under the contract. If the laborer does not demand continued performance of the labor contract or if performance of the labor contract has become impossible, the Unit shall pay compensation to the laborer according to this Law.

So, if a Unit dissolves or terminates a labor contract in violation of the law, the laborer can possibly be reinstated, but in China it is difficult to implement reinstatement. According to a social survey, employees usually leave the company voluntarily within three years after reinstatement, and there are few cases of normal continuation of service, which makes compensation the most-adopted measure. In the absence of trust between the employers and employees, employers usually prefer to resolve the problem through compensation.

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[42] Monthly wage refers to the concerned laborer's average monthly wage for the last 12 months prior to termination of the labor contract.

[43] *See* Samir R. Chatterjee, *Impact of Labor Contract Law 2008 on Human Resource Practices in China: Balancing Social Harmony and Market Efficiency*, 6 Amity Global HRM Review 16 (2016).

2.4. South Africa

South African dismissal law is mostly regulated by the Labour Relations Act 66 of 1995 (LRA)[44] which must be interpreted in terms of constitutional rights; it does not deal with lawful or unlawful dismissals but with fair or unfair dismissal.

In order to understand and consider the personal and material scope of protection offered to employees in South Africa, it is important first of all make an evaluation of the principles of protection as stipulated in specific sections of the South African Constitution.[45]

Section 9 of the Constitution deals with the equality of all citizens:

> Equality
>
> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 23 of the Constitution is headed "Labour Relations" and establishes a set of broadly expressed labor rights that accrue to a variety of parties including but not limited to employers, workers and their respective representative organizations.[46] This is the most important section in the South African Constitution relating to work. These fundament labor rights are:

> (1) Everyone has the right to fair labour practices.
>
> (2) Every worker has the right –
>
> (a) to form and join a trade union;

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[44] Labour Relations Act 1995 (Act No. 66 of 1995) (Oct. 19, 2019), available at https://www.wipo.int/edocs/lexdocs/laws/en/za/za091en.pdf.

[45] Constitution of the Republic of South Africa (Act No. 108 of 1996) (Oct. 19, 2019), available at https://www.gov.za/sites/default/files/images/a108-96.pdf.

[46] André Van Niekerk et al., *Law@work* 37 (3rd ed., Durban: LexisNexis, 2015).

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right –

(a) to form and join an employers' organisation, and

(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right –

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining.

(6) National legislation may recognise union security arrangements contained in collective agreements.

These fundamental rights and their interpretation by the courts have resulted in the development of a significant constitutional jurisprudence relevant to workers, employers and their representative bodies.

Section 39 of the Constitution:

Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum –

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

Section 231 of the Constitution:

International agreements

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

Section 232 of the Constitution:

Customary international law

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Section 233 of the Constitution:

Application of international law

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The Constitutional bill of rights in section 9 and the labor rights in section 23 have the potential to affect labor law in three ways. They can be used to:

1. Test the validity of legislation that seeks to give effect to fundamental rights;[47]
2. Interpret legislation to give effect to fundamental rights;[48] and
3. Develop the common law.[49]

It is also clear that sections 39, 231, 232 and 233 of the Constitution of the Republic of South Africa ensure that international law and international agreements, which include ILO conventions are applicable and enforceable in the Republic of South Africa.

Article 4 of ILO Convention No. 158 provides that an employee shall not be dismissed unless there is a valid reason for such termination. This reason must be

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47 In *South African National Defence Union v. Minister of Defence & Another* (1999) 20 I.L.J. 2265 (CC) the Constitutional Court considered whether the absence of a justifiable duty to bargain in the LRA infringed the constitutional right to engage in collective bargaining.

48 In *Sidumo and Another v. Rustenburg Platinum Mines Ltd. and Others* [2007] 12 B.L.L.R. 1097 (CC) the Constitutional Court relied on the constitutional right to fair labor practices.

49 In *Old Mutual Life Asurance Co. SA Ltd. v. Gumbi* [2007] 8 B.L.L.R. 699 (SCA) the Supreme Court of Appeal held that the common law contract of employment has been developed in accordance with the Constitution to include the right to a pre-dismissal hearing.

related to the capacity or the conduct of the employee or for reasons based on the operational requirements of the employer.[50]

Section 188(1) of the LRA provides that:

> [a] dismissal that is not automatically unfair, is unfair if the employer fails to prove –
> (a) that the reason for dismissal is a fair reason –
> (i) related to the employee's conduct or capacity; or
> (ii) based on the employer's operational requirements; and
> (iii) that the dismissal was effected in accordance with a fair procedure.

This is also reflected in Schedule 8, item 2(1) of the LRA which stipulates that a dismissal is unfair if it is not effected for a fair reason. The reasons for a dismissal relate to substantive fairness. South African labor legislation does not specify what actions or reasons can justify a dismissal; it only stipulates that it has to be for a fair and valid reason. The LRA, however, states that the following types of misconduct by an employee *might* justify dismissal: gross dishonesty; willful damage to the property of the employer; willful endangering of the safety of others; physical assault on the employer, client or customer and gross dishonesty but subject to the rule that each case must be judged on its own merits.[51] Should the employer fail to prove that the dismissal was for a fair and valid reason the dismissal will be considered to be an unfair dismissal. If the dismissal of the employee is determined to be unfair, the employer can be ordered, by the labor dispute resolution tribunal to do one or more of the following:[52]

> Re-instate the employee;
> Re-employ the employee; and
> Pay compensation to the employee up to a maximum of twelve months' wages.[53]

Certain types of dismissal in South Africa are considered to be automatically unfair and such dismissals are viewed in a very serious light; and the employee

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[50] Engeline G. van Arkel, *A Just Cause for Dismissal in the United States and the Netherlands: A Study on the Extent of Protection Against Arbitrary Dismissal for Private-Sector Employees Under American and Dutch Law in Light of Article 4 of ILO Convention 158* 322 (The Hague: Boom Juridische Uitgevers, 2007); S.W. Kuip, *Ontslagrecht met bijzondere aandacht voor de dringende reden* [*Dismissal Law with Special Attention to the Urgent Reason*] 280 (Deventer: Kluwer, 1993); E. Sims, *Judicial Decisions Concerning Dismissals: Some Recent Cases*, 134(6) International Labour Review 675 (1995).

[51] Schedule 8 ("Code of Good Practice: Dismissal"), item 4 of the LRA.

[52] The labor dispute resolution tribunal in South Africa is known as the Commission for Conciliation, Mediation and Arbitration (CCMA).

[53] S 193(1)(a–c) of the LRA.

can get up to twenty-four months' wages as compensation, whereas for a normal unfair dismissal compensation is limited to twelve months' wages. Should the reason for dismissal be related to any of the following, the dismissal will be considered automatically unfair:

– The employee was dismissed for participation in a protected strike;
– The employee was dismissed because he refuses to do the work of an employee who is on strike;
– The employee was dismissed because he exercised his rights in terms of the LRA, an example being a member of a trade union;
– The employee was dismissed for being pregnant, intended pregnancy or any reason related to pregnancy;
– The reason for dismissal was related to discrimination; and
– The reason for the dismissal is related to the transfer of a business.[54]

In line with Article 4 of ILO Convention No. 158, South African dismissal law states that a dismissal must be for a fair and valid reason, relating to the capacity and conduct of the employee or the operational requirements of the employer. South African dismissal law does not specify for which reasons an employee can be dismissed or what the prohibited grounds for a dismissal are; it does, however, draw a distinction between an unfair dismissal, for which an employee can get a maximum of twelve months' wages as compensation, and an automatically unfair dismissal, for which an employee can get a maximum of twenty-four months' wages as compensation.

If the dismissal relates to the operational requirements of the employer, the employer must pay the employee at least one week's remuneration for every year of completed service as the minimum severance pay. This amount is over and above notice pay and all other statutory payments which can include leave pay for any leave credits the employee might have and wages for the time the employee has worked for which he has not yet been paid.

Article 7 of ILO Convention No. 158 states that an employee may not be dismissed for reasons based on conduct or performance before he is provided with an opportunity to defend himself against the allegations made.

This is the only pre-dismissal procedure required by the Convention. A closer look shows that the employee must merely be afforded an opportunity to defend himself against allegations. Article 7 does not provide any further guidance on details regarding pre-dismissal procedures, and it can only be presumed that the intention was that it would be left to the devices of individual countries to establish their own guidelines in this regard. One aspect that is clear, however, is that formal procedures akin to court procedures were not envisioned when the Convention was introduced.

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[54] S 187(1)(a–h) of the LRA.

It has become standard practice in South Africa that in terms of most disciplinary codes and procedures the right to defend oneself means more than some *pro forma* meeting at which a supervisor politely listens to the excuses for the misconduct as tendered by the employee.[55] In 1986, the former Industrial Court of South Africa in *Mahlangu v. CIM Deltak*[56] interpreted the right to defend oneself to include a checklist of strict court-like procedures.

However, with the implementation of the LRA and Schedule 8 in 1995, the South African legislature has made an attempt to move away from over-proceduralizing disciplinary enquiries. Schedule 8 introduced a break with the traditional formalistic checklist approach, which had been developed for disciplinary enquiries by the Industrial Court.[57]

Schedule 8, item 4(1) states the following:

> The employee should be allowed the opportunity to state a case in response to the allegations.

The wording in Schedule 8 in this regard is very similar to that found in ILO Convention No. 158.

In the *Avril Elizabeth Home for the Mentally Handicapped v. Commission for Conciliation Mediation and Arbitration and Others*[58] judgment, the right to state a case was summarized by Van Niekerk to mean the following:

> [I]t means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss.

The *Avril Elizabeth Home for the Handicapped* judgment indicates a clear and definite break with the court-like procedures of the formal Industrial Court and especially with the procedural requirements as laid down in the *Mahlangu v. CIM Deltak* matter. It is submitted that the *Avril Elizabeth Home for the Handicapped* judgment interprets item 4(1) of Schedule 8 correctly. ILO Convention No. 158 does not require a strict formal procedure either. The main reason for a disciplinary enquiry is to determine the real reason for a dismissal; and if the real reason can be

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55 According to James R. Redeker, *Discipline: Policies and Procedures* 26 (Washington, D.C.: Bureau of National Affairs, 1983). *See also Cycad Construction (Pty) Ltd. v. Commission for Conciliation Mediation and Arbitration and Others* [1999] Z.A.L.C. 186, where the court stated that requiring the employer to hear both sides of the story limits the harm that a wrong decision can cause. It is also not a requirement for a disciplinary enquiry to be strict and formalistic.

56 (1986) 7 I.L.J. 346 (IC) at 365.

57 Bruno P.S. Van Eck, *Latest Developments Regarding Disciplinary Enquiries*, 26(3) South African Journal of Labour Relations 24, 26 (2002).

58 (2006) 27 I.L.J. 1466 (LC).

determined in an informal disciplinary process, it is sufficient. This is exactly what the judgment in *Avril Elizabeth Home for the Handicapped* states.

The right of an employee to respond against the allegations of his employer is contained in South African dismissal law.

Item 4(1) of Schedule 8 expands on this principle and provides that before an employee can respond against the allegations made by the employer the employer merely has to:

i. notify the employee of the allegations;

ii. provide a notice in a form or language that the employee can reasonably understand;

iii. provide the employee must have reasonable time to prepare him- or herself, and

iv. provide the employee the opportunity to be represented by a fellow employee or trade union representative; and

v. after the enquiry the employee must be informed of the decision taken and reminded of his or her right to refer a dispute to the CCMA or a bargaining council.

Article 7 of the Convention also states that an employee must be given an opportunity to defend himself "unless the employer cannot be reasonably be expected to provide this opportunity." Just as in Article 7 of the Convention, Schedule 8, item 4(4) also provides that in exceptional circumstances the employer may dispense with the pre-dismissal procedures.

It is submitted that South African dismissal law, without doubt, complies with Article 7 of the Convention. Item 4(1) of Schedule 8 even goes beyond Article 7 and provides guidance on how the right to respond against the allegations made by the employer should occur. Despite this, Schedule 8 retains an informal and reasonably open-ended character.

The third core principle contained in ILO Convention No. 158 relates to the right to appeal. Article 8 of the Convention states that an employee who feels that his dismissal was unjustified "shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator."

Article 8 refers to the right of appeal to an impartial body, and it does not refer to a higher level of appeal within the organization or a higher level of management after the opportunity to defend himself has been given.

As is the case with ILO principles, there is no explicit statutory right to an internal appeal hearing in South African dismissal law. However, item 4(3) of Schedule 8 provides that

> the employee should be reminded of any rights to refer the matter to a council with jurisdiction or the Commission or to any dispute resolution procedures established in terms of a collective agreement.

This can be viewed as an external appeal.

From the above it is clear that the employer is obliged to remind the employee of his right to refer a dispute to an appropriate bargaining council or the CCMA. This in fact reminds the employee of his right to appeal in accordance with Article 8 of ILO Convention No. 158 against his dismissal to an impartial body. The arbitration process at the CCMA is a *de novo* process[59] and is regarded as an adequate substitute for an internal appeal hearing.

Conclusion

The research on the national systems of dismissal protection in the four BRICS countries under study revealed the variety of levels and means of workers' protection used by the states. It also demonstrates that these national regulations are largely in line with ILO Convention No. 158. This observation leads us to the conclusion that the international instruments even without ratification may be a helpful instrument for shaping the national system of dismissal protection, being the guiding star for the policymakers and legislators.

Finally, we would like to express the view that the developed dismissal protection should not be an obstacle for investment in a particular country. Even though some scholars in economics express the opposite view and even though the report of the World Bank provides a ranking of business regulations and their enforcement across 190 countries which includes redundancy rules and redundancy costs. This approach was heavily criticized by lawyers in general and labor scholars in particular. A thorough calculation of the redundancy payments levels says little about the stability of the employment relations and the productivity of labor under just conditions. It has been empirically proven that fair labor conditions are the factor increasing the productivity of labor, and dismissal protection, in our view, makes up an important part of these conditions. Therefore, concluding this paper we emphasize that dismissal protection in the BRICS countries considered here is largely in line with ILO standards and contributes to the establishment of fair labor relations, and thus constitutes an investment advantage for these states.

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[59] *Malelane Toyota v. Commission for Conciliation Mediation and Arbitration and Others* [1999] 6 B.L.L.R. 555 (LC).

References

Belmonte A.A. *Os direitos fundamentais juslaborais e a Convenção nº 158 da Organização Internacional do Trabalhoitle* [*Fundamental Human Rights and Convention No. 158 of the International Labour Organisation*] in *Direito Constitucional do Trabalho: o que há de novo?* [*Constitutional Labor Law: What's New?*] 367 (F.R. Gomes (ed.), Rio de Janeiro: Lumen Juris, 2010).

Davis K.E. & Kruse M.B. *Taking the Measure of Law: The Case of the Doing Business Project*, 32(4) Law & Social Inquiry 1095 (2007). https://doi.org/10.1111/j.1747-4469.2007.00088.x

Deakin S. et al. *The Evolution of Labour Law: Calibrating and Comparing Regulatory Regimes*, 146(3-4) International Labour Review 133 (2007). https://doi.org/10.1111/j.1564-913X.2007.00011.x

董保华.我国劳动关系解雇制度的自治与管制之辨[J].政治与法律, 2017(04): 112–122 [Dong B. *Discussion on the Autonomy and Regulation of Labor Dismissal System in China*, 4 Political Science and Law 112 (2017)].

李国庆.预告解雇制度的解释论基础[J].福建江夏学院学报, 2013, 3(02): 61–66 [Guo-qing L. *Interpretation Theory Based on Dismissal with Notice*, 2 Journal of Fujian Jiangxia University 61 (2013)].

黎建飞.解雇保护:我国大陆与台湾地区之比较研究[J].清华法学, 2010, 4(05): 5–14 [Jianfei L. *Dismissal Protection: A Comparative Study of Mainland China and Taiwan*, 5 Tsinghua Law Journal 5 (2010)].

Kuip S.W. *Ontslagrecht met bijzondere aandacht voor de dringende reden* (Deventer: Kluwer, 1993).

李凌云.解雇保护水平国际比较研究[J].中国劳动, 2016(21): 9–14 [Lingyun L. *International Comparative Study on the Level of Dismissal Protection*, 21 China Labor 9 (2016)].

Lu H. *New Developments in China's Labor Dispute Resolution System: Better Protection for Workers' Rights?*, 29(3) Comparative Labor Law & Policy Journal 247 (2008).

Sims E. *Judicial Decisions Concerning Dismissals: Some Recent Cases*, 134(6) International Labour Review 675 (1995).

Van Eck S. *Latest Developments Regarding Disciplinary Enquiries*, 26(3) South African Journal of Labour Relations 24 (2002).

姜颖,沈建峰.正确评估《劳动合同法》适时修改《劳动法》[J].中国劳动关系学院学报, 2017, 31(03): 53–59 [Ying J. & Jianfeng S. *Correctly Evaluating the Labor Contract Law to Amend the Labor Law in Time*, 3 Journal of China Institute of Industrial Relations 53 (2017)].

Information about the authors

Elena Sychenko (Saint Petersburg, Russia) – Associate Professor, Law Faculty, Saint Petersburg State University (7 22nd Line of Vasilievsky Island, Saint Petersburg, 199106, Russia; e-mail: e.sychenko@spbu.ru).

Mauro Laruccia (São Paulo, Brazil) – Associate Professor of Business, School of Economics, Business and Accounting, Pontifical Catholic University of São Paulo (710 Capote Valente St., São Paulo, 05409-002, Brazil; e-mail: mauro.laruccia@fundacentro.gov.br).

Dalton Cusciano (São Paulo, Brazil) – Ph.D. Candidate, Getúlio Vargas Foundation, Adjunct Professor, Getúlio Vargas Foundation and National School of Business and Insurance (710 Capote Valente St., São Paulo, 05409-002, Brazil; e-mail: dalton.cusciano@fundacentro.gov.br).

Irina Chikireva (Tyumen, Russia) – Associate Professor, Labor Law and Entrepreneurship Department, Tyumen State University (38 Lenina St., Tyumen, 625000, Russia; e-mail: i.p.chikireva@utmn.ru).

Li Wenpei (Beijing, China) – Professor, Vice Dean of the Law School, China University of Labor Relations (45 Zengguang Rd., Haidian District, Beijing, 100048, China; e-mail: wenpei.Lee@outlook.com).

Paul Smit (Potchefstroom, South Africa) – Associate Professor of Labor Relations, School of Industrial Psychology and Human Resource Management, Faculty of Economic and Management Sciences, North-West University (11 Hoffman St., Potchefstroom, 2520, South Africa; e-mail: paul.smit@nwu.ac.za).

UNILATERAL SANCTIONS – A VESTIGE OF A UNIPOLAR WORLD: THE CONCEPTUALIZATION OF THE LEGAL POSITION OF THE BRICS COUNTRIES

ANATOLY KAPUSTIN,

Institute of Legislation and Comparative Law under the Government of the Russian Federation (Moscow, Russia)

BULAT KHABRIEV,

Central Economic and Mathematical Institute of the Russian Academy of Sciences (Moscow, Russia)

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The efforts of the BRICs countries to establish a fair international legal order determine the scholarly interest in conceptualizing the legal position on the inadmissibility of the use of unlawful unilateral coercive measures in international relations. This paper adopts an interdisciplinary approach to the study of the phenomenon of combating discriminatory sanctions policies of individual states and international organizations, including elements of economic, legal and international legal analysis. The subject of the authors' interest is not the methodology of "economic analysis" of legal phenomena, which is recognized in legal science; rather, it is an attempt to synthesize the methods of various disciplines, allowing a comprehensive assessment of the possibility of countering "sanctions threats" to the state sovereignty of Russia as one of the members of BRICS. The main directions of the economic policy of the state in the conditions of the "sanctions regime," the features of acts of Russian legislation aimed at protecting sovereignty from illegal unilateral restrictive measures, in the historical context, and taking into account modern views, the doctrinal approaches to the concept of "sanctions" in the science and practice of international law are all analyzed. As a result, it is found that the pluralism of approaches to the definition of "sanctions" is maintained, which is explained by the insufficient level of international legal regulation of international coercion and the continuing decentralization of the system of international law. The grounds for the legitimacy of sanctions mechanisms operate in the system of collective security of the U.N., based on the analysis of the provisions of the U.N. Charter and the normative array of recommendatory norms of the U.N. General

Assembly. The evolution of the mechanism of non-military coercive measures of the U.N. Security Council is analyzed, and the parameters of the legitimacy of sanctions by regional international organizations on the basis of the provisions of the U.N. Charter are determined. Normative contours of "soft regulators" of counteractions to illegitimate unilateral coercive measures are established.

Keywords: BRICS; unilateral restrictive measures; countermeasures; sanctions; U.N. Charter.

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Introduction

Modern international relations are characterized by increased competition between the leading states and their unions. This competition manifests itself in various spheres (security, economy, information interaction, etc.) and often leads to the complication of bilateral inter-state relations, the aggravation of old contradictions and the emergence of new conflict centers. Increasingly, states and their associations use coercive means and methods in foreign policy to achieve their goals.

International law of the 20th century acquired its appearance largely under the influence of a number of global factors that manifested themselves during the century – two world wars, the collapse of the colonial system, the Cold War, the

collapse of the world socialist system, the scientific and technological revolution, etc. Along with the increase in the number of subjects of international law from among former colonies and the disintegration of certain federal and unitary states with a multinational composition, and a number of internal subjects, there was an increase in the number of international intergovernmental, supranational organizations, as well as various kinds of informal inter-state associations that had an impact on the development of international relations, international law and domestic law.

For centuries, legal theorists and other specialists in national law have been dismissive of the regulatory possibilities of international law in view of the almost complete absence in its system of "sanctions," that is to say, a means of coercion to lawful behavior, which they attributed to the most significant characteristics of law as a social regulator. International lawyers responded with the idea of the "special nature of international law," noting that this is not a flaw, but rather a fundamental virtue of international law, determined by its conciliatory nature and the decentralized character of its system, as well as the system of international relations, which allows the sovereignty of states, the main participants in international relations and the subjects of international law, to be maintained and preserved.

Structural changes in the world economy are gradually changing the weight and place of emerging economies, some of which are becoming drivers of economic growth. There is a tendency to move from a monopolistic to a multipolar world. There are new risks to the international legal order that the international community needs to learn how to manage. BRICS, an inter-state association established in the 21st century, is among the new institutions of global governance. BRICS opposes restrictive measures in the world economy that hinder the development of relations between states and the establishment of a fair law and order regime. In this regard, it is important to develop an interdisciplinary approach that encompasses economic, legal and international legal concepts to counter unfair and discriminatory international practices. One such practice is the recently negative policy of unilateral restrictive measures, often referred to as "sanctions." At the same time, the subject of our interest is not the use of the methodology of "economic analysis" of legal phenomena, which is gaining recognition in legal science. Rather, it is the attempt to synthesize the methods of various disciplines, allowing a comprehensive assessment of the possibility of countering the "sanctions threats" to the state sovereignty of Russia as one of the BRICS member states.

This article examines the legal status and legal position of BRICS member states on the illegality of unilateral restrictive measures in international relations, the economic and legal measures taken by Russia in response to "sanctions pressure"; it describes the international legal characteristics of the various doctrines of sanctions, making it possible to differentiate legitimate sanctions from unlawful unilateral restrictive measures.

1. BRICS Is Against Unilateral Restrictive Measures

An important place in the contemporary international agenda is the activities of BRICS – the international association of countries that have, in the terminology of the experts of the World Bank, the largest and fastest-growing emerging markets.[1] Despite the fact that BRICS includes only five states (Brazil, Russia, India, China and South Africa), their economic potential gives analysts a reason to predict the transformation of this inter-state union into the largest global trade bloc by the middle of the 21st century. The presence of common interests in the world economy and trade has become an important factor in the search for forms of political dialogue between the BRICS member states.

An important characteristic of inter-state associations, which allows predicting with a high degree of reliability the degree of their influence on the legal systems of the state parties and the potential of their own legal regulation, is their international legal status. With regard to BRICS, we can state the following: on the one hand, the organizational and legal structure of BRICS does not even remotely resemble international intergovernmental organizations (IIOs), the form of which is often chosen by states to coordinate their activities in the foreign policy or foreign economic sphere. BRICS does not have the usual international legal features (a charter, a permanent organizational structure with a Secretariat as an expression of the administrative unity of the association, as well as a headquarters and other attributes of permanent international institutions). Clearly, therefore, there is no reason to assume possession of a BRICS international legal personality, which is characteristic of the vast majority of IIOs. Accordingly, BRICS does not have the authority to adopt its own international legal acts. This fact suggests the high status of the national legislation of the member states in the implementation of the stated goals of BRICS. Of course, at the international level, state parties can develop joint positions and coordinate their actions to implement them at the global and regional levels.

On the other hand, BRICS activities are not limited to occasional contacts. We can say with confidence that the annual format of the BRICS summits, as well as meetings and negotiations at other official and non-governmental levels, is clearly established and well developed. In the documents adopted at the summits, the participating states express their commitment to multilateral diplomacy with the central role of the United Nations in the fight against global challenges and threats. Without setting

[1] More detailed information, in Jim O'Neill, *Building Better Global Economic BRICs*, Goldman Sachs Global Economics Paper No. 66, 30 November 2001 (Oct. 5, 2019), available at https://www.goldmansachs.com/insights/archive/archive-pdfs/build-better-brics.pdf. In April 2019, Jim O'Neill published an article in which he compared the initial forecast for 2001 (for 2001–2010) with the results of the past decade. Despite the contradictory tendencies that have occurred in world economics, he considers that mainly his forecasts have been confirmed and that they will be reliable for the coming decade (2021–2030). Jim O'Neill, *BRICS and the Future of Economic Growth*, BRICS Information Portal, 18 April 2019 (Oct. 5, 2019), available at http://infobrics.org/post/28454/.

the task of introducing any "near–legal" definition, we can propose to consider the BRICS to be a kind of institutional mechanism for inter-state cooperation[2] which is beginning to play the role of one of the leading institutions of global governance. In addition, BRICS cannot be positioned as a regional inter-state association, since it includes the states of three continents (Eurasia, Africa and South America), states which are the leaders of four economically important regions, and states which also have significant integration potential and opportunities for economic growth.[3]

In their official documents, the BRICS member states set out their own vision of the international legal foundations of the modern world order. In particular, starting with the joint statement of the leaders of these countries, adopted in Yekaterinburg in 2009 (then in the BRIC format, because South Africa joined the association later), BRICS has repeatedly confirmed its position about the need to establish a more democratic and just multipolar world order based on the international rule of law, equality, mutual respect, cooperation, coordinated action and collective decision-making by all states.[4]

The Johannesburg Declaration from the BRICS Summit of 2018 declared that cooperation between the participating states is developing in three key areas: economy, peace and security and humanitarian exchanges. In the same document, BRICS confirmed the recognition of the central role of the universal system of collective security, enshrined in the U.N. Charter, and stressed the importance of working on the formation of an international system based on international law, the cornerstone of which is the U.N. Charter, and which contributes to strengthening cooperation and stability in a multipolar world order.[5]

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[2] S.E. Naryshkin suggests that BRICS may be considered to be the progressive form of institutionalized international cooperation – like an intensively strengthened global forum of partner dialogue and interactivity of states. More detailed information, in *Нарышкин С.Е.* К читателю // БРИКС: контуры многополярного мира: Монография [Sergey E. Naryshkin, *To the Readers* in *BRICS: The Contours of the Multipolar World: Monograph*] 11, 11–12 (T.Ya. Khabrieva (ed.), Moscow: Institute of Legislation and Comparative Law under the Government of the Russian Federation; Yurisprudentsiya, 2015). G.D. Toloraya judges BRICS to be the first inter-civilizational project of implementation of norms of global coexistence. Additional information, in *Толорая Г.Д.* Россия в БРИКС: перспективы и возможности [Georgiy D. Toloraya, *Russia in BRICS: Perspectives and Possibilities*] in *BRICS: The Contours of the Multipolar World*, *supra*, at 50, 53.

[3] Russia is a leader in the Commonwealth of Independent States (CIS) and a participant in the European-Asian Economic Union; the Republic of South Africa is a member of the African Union, starting from 2020 it will chair this organization and use the opportunity to enter the African continental zone of free trade, the agreement of which was signed in 2019; Brazil is a participant in the Amazon Act, the Latin American Integration Association and MERCOSUR. China and India do not participate in any integration associations but are involved in cooperation with neighbor states and their international organizations (ASEAN and others).

[4] Совместное заявление лидеров стран БРИК // Президент России. 16 июня 2009 г. [The Joint Declaration of the BRICS Member States' Leaders, President of Russia, 16 June 2009] (Oct. 5, 2019), available at http://www.kremlin.ru/supplement/209.

[5] In the Johannesburg Declaration of 26 July 2018, the member states supported the main role of the U.N., its goals and principles, fixed in the U.N. Charter, observation of international law provisions and advancing democracy and the rule of law. They confirmed their support to promote the principles of versatility and also expressed their readiness to work together towards fulfilling the goals in the

In the face of international security challenges that require the joint efforts of the BRICS member states, they reiterated their commitment to the formation of a more honest, fair and representative multipolar world order for the prosperity of all mankind, one which fully complies with the universal ban on the use of force and excludes the use of unilateral coercive measures in violation of the U.N. Charter.[6]

It seems that the emphasis on the need to exclude unlawful unilateral coercion from inter-state relations is not accidental. The practice of recent years shows that a number of BRICS member states have been affected to some extent by the so-called sanctions of individual states and international organizations. Since 2014, Russia has been subject to sanctions pressure from the United States, other Western countries and the European Union. In September 2018, the USA imposed sanctions against China for the purchase of ten SU-35 fighter jets and S-400 missile defense systems from Russia.[7] In April 2019, India decided to acquire five S-400 systems and expressed the hope that the U.S. administration had heard and understood its position on the transaction and would not apply sanctions against it.[8]

In the scholarly and journalistic literature, unilateral coercive measures are often defined as economic sanctions because they most often affect the economic interests of states. This is rightly seen as a threat to sovereignty. Under recent circumstances, Russia has been at the epicenter of the struggle against unlawful unilateral coercion, referred to in the media as sanctions pressure. It was noted above that at the domestic level, BRICS member states have the right to introduce the necessary legislative, socio-economic and other measures to protect and strengthen their sovereignty in the economic sphere. Of course, these measures should be taken within the framework of existing international law in full compliance with the requirements of the U.N. Charter, which harmoniously fits into the normative and conceptual framework of the rule of law at the international and national levels, proclaimed in the Declaration of the High-level Meeting of the U.N. General Assembly on the Rule of Law at the National and International Levels in 2012.[9]

field of stable development for the period up to 2030 and for advancing the establishment of a more presentable, democratic, equal, fair and honest political and economic order. 10th BRICS Summit Johannesburg Declaration, adopted on 26 July 2018 (Oct. 19, 2019), available at https://www.mea.gov.in/bilateral-documents.htm?dtl/30190/10th_BRICS_Summit_Johannesburg_Declaration.

6 More detailed information, in 10th BRICS Summit Johannesburg Declaration. *Id.*

7 More detailed information, in США ввели санкции против КНР за покупку вооружений у России // Российская газета. 21 сентября 2018 г. [The USA Applied the Sanctions Towards China for Purchasing Arms from Russia, Rossiyskaya Gazeta, 21 September 2018] (Oct. 5, 2019), available at https://rg.ru/2018/09/21/ssha-vveli-sankcii-protiv-knr-za-pokupku-vooruzhenij-u-rossii.html.

8 More detailed information, in US "Heard, Understood" India on Russian Missile Deal: Nirmala Sitharaman, BRICS Information Portal, 17 April 2019 (Oct. 5, 2019), available at http://infobrics.org/post/28459.

9 More detailed information, in U.N. General Assembly, Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, U.N. Doc. A/RES/67/1, 30 November 2012 (Oct. 5, 2019), available at https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf.

Here, it seems appropriate to analyze, at least briefly, the economic and legal possibilities of countering the illegal sanctions actions of Western states and a number of intergovernmental organizations on the example of domestic measures that the Russian Federation has been forced to take to protect its sovereignty.

2. Economic Measures to Counter the "Sanctions Challenges" to the Sovereignty of Russia

Relations between major world players (primarily between the USA and China) have moved into the phase of hybrid wars (information, trade, financial, etc.), during which the interests of Russia are affected.

In addition, sanctions imposed by a number of foreign countries have created a problem vis-à-vis the state sovereignty of Russia due to a variety of factor com-ponents (including financial, technological, economic, information, scientific and educational).[10]

The fundamental question is whether Russia will be able to strengthen its state sovereignty in isolation. Another related task is to achieve the goals outlined in the Decree of the President of the Russian Federation of 7 May 2018,[11] including ensuring economic growth above the world average, contributing to Russia's entry into the top five economies of the world, as well as accelerating the technological development of our country, in particular, a sharp increase in the number of organizations engaged in technological innovation.

In the work of V.L. Makarov, A.R. Bakhtisin and B.R. Khabriev,[12] it was shown that taking into account the current political situation, in which the prospect of lifting sanctions and ending the concomitant isolation, as well as the clearly insufficient volume of foreign direct investment necessary for the rapid development of our country, in order to strengthen state sovereignty it is extremely important to reorient to the search for domestic sources of investment and to the priority directions of socio-economic policy, among which are:

1. Diversification of the economy, including the development of the innovative sector of the Russian economy (additional funding for science and education, as well as enterprises and organizations engaged in technological innovation);

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[10] *Якунин В.И., Багдасарян В.Э., Сулакшин С.С.* Западня: новые технологии борьбы с российской государственностью [Vladimir I. Yakunin et al., *Trap: New Technologies in Combating Russian Statehood*] (Moscow: Nauchnyy ekspert, 2010).

[11] Указ Президента России от 7 мая 2018 г. № 204 «О национальных целях и стратегических задачах развития Российской Федерации на период до 2024 года» [Decree of the President of Russia No. 204 of 7 May 2018. On National Goals and Strategic Tasks of the Russian Federation Development for the Period up to 2024] (Oct. 5, 2019), available at http://kremlin.ru/acts/bank/43027.

[12] *Макаров В.Л., Бахтизин А.Р., Хабриев Б.Р.* Оценка эффективности механизмов укрепления государственного суверенитета России // Финансы: теория и практика. 2018. № 22(5). С. 6–26 [Valery L. Makarov et al., *Estimation of the Effectiveness of the Mechanism of Strengthening the State Sovereignty of Russia*, 22(5) Finance: Theory and Practice 6 (2018)].

2. Reduction of differentiation of regions in terms of socio-economic development (differentiated reduction of rates of basic taxes and increase in investment for a number of "problem" regions);

3. Increasing social protection of the population, including increasing benefits (e.g. temporary disability, pregnancy and childbirth) for the least-protected groups of the population;

4. Stimulation of domestic demand (reduction of the refinancing rate, as well as state-regulated prices).

This is not a complete list, but these priorities are quantitatively justified using a model complex.

The indicated directions of socio-economic policy of the state imply significant investments on the part of the state (the mechanisms of their attraction are described, for example, in the works of A.G. Aganbegyan[13]), and the main task of this study is to make a quantitative assessment of the implementation of these measures, which, as already noted, are aimed at strengthening the independence of the country.

All the priorities have been quantified using the model complex of the Central Economic and Mathematical Institute of the Russian Academy of Sciences, and calculations, in particular, show that the strengthening of state sovereignty is necessary to create effective mechanisms for the recovery of the monetization of the economy, and we are talking about significant financial investments (and not in differentiated support for individual enterprises), with the simultaneous introduction of exchange controls and reduction of the refinancing rate. The calculations also show that almost any monetary infusion into the real sector leads to an increase in GDP due to the significant demonetization of the Russian economy.

At the same time, due to increased external threats, the issue of developing software and analytical systems that allow analyzing social and economic processes for all the countries of the world (or most of them) at various levels (global, individual country, region or industry) and tracking the emerging multiplicative effects that are manifested for all countries involved in international relations is acute.

Taking into account the above, on 15 January 2019 in Guangzhou (China) an agreement was signed on the establishment of a multilateral international laboratory for assessing the consequences of inter-country trade wars. Among the signatories present were IT Company Guangzhou Milestone Software Co., Ltd., national supercomputer center of China, representatives of the Academy of Social Sciences of China and big business from Hong Kong, including the Managing Director of Fok Ying Tung Ming Yuan Development Co., Ltd. and the Managing Director of PricewaterhouseCoopers Ltd. in Hong Kong. From the Russian Federation, the agreement was signed by the staff of the Central Economic and Mathematical Institute of the Russian Academy of Sciences.

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[13] *Аганбегян А.Г.* 25 лет новой России. Экономический и социальный уровень: топтание на месте // Экономические стратегии. 2018. № 1. С. 6–21 [Abel G. Aganbegyan, *Twenty-Five Years of New Russia, Economic and Social Level: Marking Time*, 1 Economic Strategies 6 (2018)].

The laboratory is expected to provide consulting services in the field of analysis of the consequences of inter-country trade wars. The coalition of the abovementioned organizations also plans to further develop software and analytical systems to assess the consequences of government management decisions taken during inter-country economic wars, and their use in the system of distributed situation centers of Russia, created in accordance with the Decree of the President of the Russian Federation of 25 July 2013 No. 648.

In this regard, the priority should also be the further development of the existing system of distributed situation centers of public authorities and local self-government, modernization of their functional and technological basis as the most effective tool for coordinating strategic planning and improving the efficiency of public administration, and monitoring the progress of national goals and the implementation of national projects. It is also extremely important to establish a standard set of models, algorithms, methods for solving problems of multivariate analysis, forecasting, current planning (sectoral and territorial), strategic planning, management of federal and regional programs, including quantitative assessment of the consequences of their implementation.

Thus, along with the adaptation of Russian legislation to the task of reorienting social and economic policy to priority areas that will allow neutralizing the negative effects of sanctions, it is also necessary to adjust the regulatory legal acts regulating the work of situation centers, designed, among other things, to become effective tools for quantifying the consequences of international legal sanctions.

3. Legislative Measures to Counter Sanctions Challenges to the Sovereignty of Russia

International law and the doctrine of state sovereignty allow for situations in which, in response to unfriendly actions by other states or regional international organizations, states and other subjects of international law are entitled to take retaliatory restrictive measures (retorsions), which are generally considered to be lawful.[14]

[14] A textbook prepared by the specialists of the Diplomatic Academy of the Ministry of Foreign Affairs explains that retorts are the response to restrictive measures. They may be used not only as the reply to international legal infringements, but also as a response to any unfriendly act which formally is not violating international law. Международное право: Учебник [*International Law: Textbook*] 294 (S.A. Egorov (ed.), Moscow: Statut, 2016). The authors of a private international law textbook confirm this point of view and say that retorts are legal according to international law because they are coercive acts of states in response to the acts of other states deliberately violating the rights and interests of persons and institutions. Международное частное право: Учебник [*Private International Law: Textbook*] 70 (N.I. Marysheva (ed.), 5th ed., Moscow: Institute of Legislation and Comparative Law under the Government of the Russian Federation; Law Firm "Contract," 2018). According to the meaning put forward by T. Ruys, retorts consist of impolite or unfriendly measures vis-à-vis another state, but they are not incompatible with any international obligations of a state applied by it. He agrees with J. Crawford who, however, verifies the understanding of retorts as, under his meaning,

Faced with unprecedented sanctions pressure in the last decade, the Russian Federation has been forced to pay attention to improving its legislation on countering unfriendly acts in the political and economic spheres. Russian legislation provides in some cases for the application of restrictive measures (retorts)[15] in response to the actions of a foreign state that has taken discriminatory measures against the Russian state, its legal entities and citizens.

According to Article 1194 of the Civil Code of the Russian Federation, the government of the Russian Federation may establish retorts in respect of property and personal non-property rights of citizens and legal entities of those states that have established special restrictions on property and personal non-property rights of Russian citizens and legal entities.[16]

A number of other federal laws also provide for the possibility of retaliatory restrictive measures. Thus, according to Article 40 "Response Measures" of Federal Law of 8 December 2003 No. 164-FZ "On the Basis of State Regulation of Foreign

a freedom but not a right of a state if there is the absence of a universal international treaty, and he admits that retorts are not regulated by international law in a decisive way. Such a broad and extensive understanding of retorts gives the opportunity to T. Giegerich to state that retorts contain the component of repression. Tom Ruys, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework* in *Research Handbook on UN Sanctions and International Law* 19, 24 (L. van den Herik (ed.), Cheltenham: Edward Elgar Publishing, 2017). We think that the interpretation of the definitions of retorts created by Crawford and Giegerich are arguable at least, and they do not correspond to the points of view of the authors of the Commentary to the draft articles on the responsibility of states, who understand retorts as, so to say, "unfriendly behavior" which does not contradict the international legal obligations of a state if used as a reaction caused by international legal infringement. *See* International Law Commission, Report on the Work of Its Sixty-Third Session, U.N. GAOR, 66th Sess., Supp. No. 10, U.N. Doc. A/66/10/Add.1 (2011), at 157.

[15] The definition of "retort," according to the Russian Juridical Encyclopedia, has its origin in Latin and means reverse action, and thus explains the lawful coercive actions of a state carried out in response to the unfriendly actions of another state and not being an international legal infringement. More detailed information, in Российская юридическая энциклопедия [*Russian Juridical Encyclopedia*] 862 (A.Ya. Sukharev (ed.), Moscow: INFRA-M, 1999). At the end of the 19th century – beginning of the 20th century, the well-known Russian international lawyer F.F. Martens considered retorts to be less peaceful facilities of international coercion and said that, "This very facility means the application of the Tolion principle by one state towards the other one, the equal mutual payment, unfair acts for unfair acts, according to the Roman rule: *quod quisque in alterum statuerit, ut ipse eodem jureutatur*. Retort is used when one state has violated any interests of the other one, especially the economic ones, and it is aimed … at reminding the state that its behavior was unfair and unfriendly by applying this retort which is uncomfortable for the said state." *Мартенс Ф.Ф.* Современное международное право цивилизованных народов. В 2 т. Т. 2 [Fedor F. Martens, *Contemporary International Law of Civilized Nations. In 2 vols. Vol. 2*] 317 (V.A. Tomsinov (ed.), Moscow: Zertsalo, 2008). Incidentally, Martens himself was not very satisfied with the practice of applying retorts. He admitted that each time a state behaves according to its own laws and its undoubted rights, it does not violate the rights of another state, but only the interests of another state. But a retort cannot be protected and justified according to morality, because a state, using it, deliberately legalizes injustice and it contradicts the law, because a retort violates the rights of private persons and its action is directed against them. *Id.* at 317–318.

[16] Гражданский кодекс Российской Федерации (часть третья) от 26 ноября 2001 г. № 146-ФЗ // Собрание законодательства РФ. 2001. № 49. Ст. 4552 [Civil Code of the Russian Federation (Part Three) No. 146-FZ of 26 November 2001, Legislation Bulletin of the Russian Federation, 2001, No. 49, Art. 4552].

Trade Activity" (as amended on 13 July 2015),[17] the government of the Russian Federation may impose restrictions on foreign trade in goods, services and intellectual property (retaliatory measures) if the foreign state does not fulfill its obligations under international agreements with respect to the Russian Federation. This may be expressed in the fact that such a state takes measures that violate the economic interests of the Russian Federation, subjects of the Russian Federation, municipalities or Russian persons or the political interests of the Russian Federation, including measures that unreasonably close to Russian persons access to the market of a foreign state or otherwise unreasonably discriminate against Russian persons.

These measures are introduced in accordance with generally recognized principles and norms of international law, international treaties of the Russian Federation and within the limits necessary for the effective protection of the economic interests of the Russian Federation, the subjects of the Russian Federation, municipalities and Russian persons.

Federal Law of 30 December 2006 No. 281-FZ "On Special Economic Measures"[18] refers to special economic measures on the commission of actions against a foreign state and/or foreign organizations and citizens, as well as stateless persons permanently residing in the territory of a foreign state, and/or the imposition of obligations to commit these actions, and other restrictions. Such measures may be aimed at suspending the implementation of all or part of programs in the field of economics, technical assistance, as well as military-technical cooperation; the prohibition of financial transactions or the imposition of restrictions on their implementation; the prohibition of foreign operations or the imposition of restrictions on their implementation; termination or suspension of international trade agreements and other international treaties of the Russian Federation in the field of foreign economic relations; changes in export and/or import customs duties; prohibition or restriction of entry into the ports of the Russian Federation, the courts and the use of the airspace of the Russian Federation or its separate areas; the imposition of restrictions on the implementation of tourism activities; the prohibition or refusal of participation in international scientific and scientific-technical programs and projects of scientific and scientific-technical programs, and projects of a foreign state.

Special economic measures are temporary and are applied independently of other measures aimed at protecting the interests of the Russian Federation, ensuring the security of the Russian Federation, as well as protecting the rights and freedoms

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[17] Федеральный закон от 8 декабря 2003 г. № 164-ФЗ «Об основах государственного регулирования внешнеторговой деятельности» // Собрание законодательства РФ. 2003. № 50. Ст. 4850 [Federal Law No. 164-FZ of 8 December 2003. On the Basis of State Regulation of Foreign Trade Activity, Legislation Bulletin of the Russian Federation, 2003, No. 50, Art. 4850].

[18] Федеральный закон от 30 декабря 2006 г. № 281-ФЗ «О специальных экономических мерах и принудительных мерах» // Собрание законодательства РФ. 2007. № 1 (ч. 1). Ст. 44 [Federal Law No. 281-FZ of 30 December 2006. On Special Economic Measures, Legislation Bulletin of the Russian Federation, 2007, No. 1 (part 1), Art. 44].

of its citizens. They should not be more restrictive than necessary to address the circumstances that gave rise to their application.

If we turn to specific legislative acts adopted on the basis of this legislation, the latest example is Federal Law of 4 June 2018 No. 127-FZ "On Measures of Influence (Counteraction) on Unfriendly Actions of the United States of America and Other Foreign States."[19]

Measures of influence (counteraction) can be applied in respect of the USA and other foreign states performing unfriendly actions in respect of the Russian Federation, citizens of the Russian Federation or Russian legal entities, as well as in respect of organizations under the jurisdiction of unfriendly foreign states, directly or indirectly controlled by unfriendly foreign states or affiliated with them, officials and citizens of unfriendly foreign states in the event that these organizations, officials and citizens are involved in unfriendly actions against the Russian Federation.

The following are examples of measures of influence (counteraction) that can be applied: termination or suspension of international cooperation of the Russian Federation and Russian legal entities with unfriendly foreign states, the organizations which are under jurisdiction of unfriendly foreign states directly or indirectly under the control of unfriendly foreign states or affiliated with them according to the decision of the President of the Russian Federation; prohibition or restriction on the importation into the territory of the Russian Federation of products and/or raw materials whose countries of origin are unfriendly foreign states or producers of which are organizations which are under the jurisdiction of unfriendly foreign states, directly or indirectly under the control of unfriendly foreign states or affiliated with them; the ban or restriction on exports from the territory of the Russian Federation of production and/or raw materials by organizations which are under the jurisdiction of unfriendly foreign states, directly or indirectly under the control of unfriendly foreign states or affiliated with them, or citizens of unfriendly foreign states; prohibition or restriction on participation of organizations which are under the jurisdiction of unfriendly foreign states, directly or indirectly under the control of unfriendly foreign states or affiliated with them, or citizens of unfriendly foreign states in the privatization of state or municipal property, and also in performance of works by them, rendering services in the organization on behalf of the Russian Federation of the sale of federal property and/or implementation of functions of the seller of federal property; and other measures according to the decision of the President of the Russian Federation.

International practice proceeds from the fact that the introduction of retorts by a state is usually aimed at restoring the principle of reciprocity. From the point of

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[19] Федеральный закон от 4 июня 2018 г. № 127-ФЗ «О мерах воздействия (противодействия) на недружественные действия Соединенных Штатов Америки и иных иностранных государств» // Собрание законодательства РФ. 2018. № 24. Ст. 3394 [Federal Law No. 127-FZ of 4 June 2018. On Measures of Influence (Counteraction) on Unfriendly Actions of the United States of America and Other Foreign States, Legislation Bulletin of the Russian Federation, 2018, No. 24, Art. 3394].

view of international law, retorts are lawful coercive actions of a state committed in response to discriminatory acts of another state, that is, acts which specifically violate the rights and interests of citizens and organizations or the interests of the state itself. The purpose of retorts is to induce the state that committed a discriminatory act to abandon it, to restore the normal practice of international communication, and thus the act of retort is adopted for a certain period.

According to Russian law, these restrictive measures (a) are imposed by the government of the Russian Federation; (b) must be proportionate, adequate ("symmetrical") restrictions imposed because of a discriminatory act; (c) are established in the form of retaliatory restrictions and, therefore, cannot be pre-emptive or preventive; (d) and are allowed only in response to special restrictions on the rights of citizens and legal entities, that is, restrictions discriminating against Russian citizens and legal entities.[20]

Appearing often in the media recently are assessments on the negative impact of the sanctions policy of the West, which required the adoption of retorsion measures from the Russian side, with the result that the states participating in the sanctions policy have suffered large financial losses.[21] Other estimates are found regarding the impact of sanctions on the Russian economy. Despite certain negative aspects, the Russian economy as a whole has withstood the "sanctions blow," was able to adapt to the new conditions and has seen the actual rise of certain industries. This demonstrates, among other things, the effectiveness of the economic and legal measures taken by Russia to counter discriminatory sanctions policies.

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[20] *Звеков В.П.* Международное частное право: Учебник [Victor P. Zvekov, *Private International Law: Textbook*] (2nd ed., Moscow: Yurist, 2004); Комментарий к Гражданскому кодексу Российской Федерации, части третьей [*Commentary to the Civil Code of the Russian Federation, Part Three*] (V.P. Mozolin (ed.), Moscow: NORMA; INFRA-M, 2002); Комментарий к Гражданскому кодексу Российской Федерации, части третьей (постатейный) [*Commentary to the Civil Code of the Russian Federation, Part Three (Article-by-Article)*] (N.I. Marysheva & K.B. Yaroshenko (eds.), 4th ed., Moscow: Law Firm "Contract," 2014).

[21] The Special Rapporteur of the United Nations on the Negative Impact of the Unilateral Coercive Measures Idriss Jazairy declared that the losses of the EU, the USA and the other countries that have applied the sanctions against Russia are more than the losses of Russia due to the European sanctions. The economies of the countries that have applied the sanctions against Russia have lost about US$100 billion and the economy of Russia has lost approximately 50% less. В ООН оценили потери России и «противников» от санкций в три ВВП Эфиопии // РБК. 28 апреля 2017 г. [The U.N. Has Estimated the Losses of Russia and the "Enemies" Due to the Sanctions as Equal to Three Times the GDP of Ethiopia, RBC, 28 April 2017] (Oct. 5, 2019), available at https://www.rbc.ru/economics/28/04/2017/590332b69a7947ae385244b0. Similar thoughts have been expressed by representatives of the European business community. The Vice-Head of the Italian-Russian Chamber for Trade and Industry Vincenzo Trani notes that over the period of the sanctions the EU has lost billions of euros and, on the contrary, Russia has made progress in developing its own domestic economy, which can be seen in, for example, the impressive growth of Russian industry and agriculture. More detailed information, in РФ нанесла удар по экономике Евросоюза // Howto-News.info. 8 апреля 2019 г. [The Russian Federation Has Powerfully Struck the EU Economies, Howto-News.info, 8 April 2019] (Oct. 5, 2019), available at https://howto-news.info/v-italii-rasskazali-kak-rf-nanesla-udar-po-ekonomike-evrosoyuza/.

4. The International Legal Estimation of Sanctions

While noting the overall positive impact of anti-discrimination legislation, it should be recognized that domestic measures alone cannot be limited to creating reliable legal barriers to inappropriate sanctions policies. Sanctions, since they are an instrument of the foreign policy of states and international organizations, belong to the sphere of international relations. Accordingly, the need to create international legal conditions for the exclusion of illegal unilateral actions is no less important than the improvement of national legislation in the field of combating foreign economic discrimination.

International law is created by states to regulate mutual relations, which is its content and is accepted by all researchers as an indisputable truth.[22] The question of the functions of international law, which receive different interpretations in the scholarly literature, is much more complex.[23] Generally speaking, it can be assumed that the most important function of international law is to maintain inter-state relations in a certain stable balance, ensuring the coexistence and peaceful development of states. Accordingly, in the event of challenges or threats to the international legal order, international law must respond to negative developments in international relations, or at least be able to contribute to the development of means to neutralize them in the future.

From this point of view, if we consider the problem of unilateral coercive measures that do not meet the requirements of the U.N. Charter, then international legal science faces the task of studying the concept and typology of the mentioned forms of international coercion in the broader context of the established legitimate mechanism of coercion.

International law as a normative regulator of international relations offers options for overcoming differences between states. Domestic international legal doctrine emphasizes the continuing importance of the basic principles of international law as

> the basic and interrelated rules of general international law governing in a generalized form the behavior of states and other subjects of international law in all spheres of international relations.[24]

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[22] Thus, G.I. Tunkin saw international law as regulating inter-state relations in a broad meaning, so to say, as all the inter-state relations between all the subjects of this system of law. *Тункин Г.И.* Право и сила в международной системе [Gregory I. Tunkin, *Law and Power in the International System*] 27 (Moscow: Mezhdunarodnye otnosheniya, 1983). S.V. Chernichenko underlines that international law is traditionally considered to be the system of norms regulating inter-state relations created by its participants. *Черниченко С.В.* Контуры международного права. Общие вопросы [Stanislav V. Chernichenko, *The Contours of International Law. Common Items*] 14 (Moscow: Nauchnaya kniga, 2014). The British lawyer J. O'Brien writes that public international law (to some extent known as "the law of nations") is such a system of law, which, first of all, is connected with the relations between states. John O'Brien, *International Law* 1 (London: Routledge-Cavendish, 2001).

[23] *Капустин А.Я.* Международные организации в глобализирующемся мире [Anatoly Ya. Kapustin, *International Organizations in the Globalized World*] 34–36 (Moscow: RUDN University, 2010).

[24] *Ушаков Н.А.* Международное право [Nikolay A. Ushakov, *International Law*] 54 (Moscow: Yurist, 2000).

The concept of the leading role of the basic principles of international law in the development and strengthening of the legal basis of international relations is now shared by individual representatives of the Western tradition of international law.[25]

Thus, compliance with the basic principles of international law, especially the sovereign equality of states, the non-use of force and the threat of force, the peaceful settlement of international disputes, non-interference in internal affairs, cooperation, respect for human rights and fundamental freedoms, and the faithful fulfillment of obligations under international law, is a necessary condition for overcoming crisis phenomena in international relations. This includes an assessment of the nature and meaning of the concept of "sanctions," which, in the words of T. Ruys, "are a common feature of international relations," but do not have a single authoritative international legal definition.[26] The basic principles of international law make it possible to establish legal limits on the legitimate use of coercion in international relations.

Historically, international legal science has been forced to respond to the emergence and spread of the 19th-century legal positivism of the notion that the defining characteristic of law is the command (order) of the sovereign, supported by force. This point of view, which absolutized state coercion as an inherent feature of the law, was justified by John Austin in his work "The Province of Jurisprudence Determined."[27] The lack of international law of that era, such an important feature of the domestic law of states in comparison with other social regulators, and as the possibility of forcing citizens and organizations to comply with its provisions, gave rise to Austin's argument that it is wrong to name international law as being law.[28]

It can be assumed that F.F. Martens in his famous course on international law, published in the late 19th century – early 20th century, was forced to introduce into use the concept of "the right of international coercion." He regarded the latter as a "sanction" of international law that enforced its norms.[29]

In the 20th century, again, we believe, under the conceptual influence of the theory and practice of the internal law of states, in international legal doctrine the concept of "sanctions" began to be associated with one of the forms of responsibility,

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[25] Thus, A. Cassese supposes that the general principles *jus cogens generalis* are at the top of the scope of international legislation and define the fundamental basic legal standards, which can be considered to be the constitutional principles of the international society. Antonio Cassese, *International Law* 88 (Oxford: Oxford University Press, 2003).

[26] Ruys 2017, at 19.

[27] This work was initially published in 1832. In this work, Austin considered the law precisely to have four characteristics constantly belonging to it: order, sanctions, the obligation of observing the order and the power of sovereignty. More detailed information, in Frédéric Mégret, *International Law as Law* in *The Cambridge Companion to International Law* 64, 73–74 (J. Crawford & M. Koskenniemi (eds.), Cambridge: Cambridge University Press, 2012).

[28] *Id.* at 72.

[29] Martens 2008, at 303.

that is, with the onset of adverse consequences for the commission of an offense. We can refer to the opinion of a member of the USSR Academy of Sciences and the Russian Academy of Sciences G.I. Tunkin that sanctions for offenses in international law are reduced to compensation for damage, which is accompanied by possible coercive measures in case of non-compliance by the state-violator of this obligation.[30] Yu.M. Kolosov expressed a broader view on the problem of sanctions. He believed that sanctions were coercive actions against delinquent entities that had the character of a kind of punishment. They may be applied only in the case of an international intentional tort. The application of sanctions in other cases cannot be considered lawful, since they are essentially a reaction to the intentional deliberate commission of unlawful acts or the intentional infliction of damage.[31]

Currently, we can distinguish domestic doctrinal approaches to the concept of sanctions in international law.

Judge T.N. Neshataeva of the Court of the Eurasian Economic Union defines only one of the possible groups of coercive measures – international legal sanctions of international intergovernmental organizations (IIOs). Sanctions in this case, understood to be all measures of protection of the international legal order, enshrined in the norms of international law, are of a coercive nature and are applied in the case of offenses to the tort state through the institutional mechanism of the IIO.[32] This positive approach is based on the established practice of international legal regulation of the activities of the IIO. However, as will be shown below, in a number of cases sanctions imposed by some regional IIOs may be considered controversial, at best.

A peculiar position is taken by G.I. Kurdyukov. He believes that sanctions are coercive actions carried out by universal and regional international organizations, as well as bilateral and unilateral measures of states, as opposed to forms of international legal responsibility (substantive and non-material). Sanctions, in his view, are coercive retaliatory measures applied when the wrongdoing state voluntarily and in good faith failed to comply with its legal obligations.[33]

S.V. Chernichenko introduced into scholarly circulation a broader concept – "international legal coercion," understood as a system of measures which, depending on

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30 *Тункин Г.И.* Теория международного права [Gregory I. Tunkin, *The Theory of International Law*] 378 (L.N. Shestakov (ed.), Moscow: Zertsalo, 2000).

31 *Колосов Ю.М.* Ответственность в международном праве [Yu.M. Kolosov, *Responsibility in International Law*] 54 (2nd ed., Moscow: Statut, 2014).

32 *Нешатаева Т.Н.* Международные организации и право. Новые тенденции в международном правовом регулировании [Tatiana N. Neshataeva, *International Organizations and Law. New Tendencies in International Legal Regulation*] 141 (Moscow: Delo, 1998).

33 *Курдюков Г.И.* Международные экономические санкции (применение в системе Совета Безопасности Организации Объединенных Наций) // Марийский юридический вестник. 2001. № 1. С. 170–176 [Gennady I. Kurdyukov, *International Economic Sanctions (Application within the Framework of the United Nations Security Council)*, 1 Mari Law Bulletin 170 (2001)].

the grounds for their application, includes sanctions measures (individual and collective) of international legal coercion and measures of an unauthorized character. The first group of sanctions measures of international legal coercion (countermeasures, retorts, reprisals, self-defense measures, individual and collective self-defense, collective non-institutional non-military sanctions measures) is a reaction to a violation of international law, including a violation of obligations *erga omnes*, that is, they can be attributed to measures of international responsibility. The second group is a reaction to any circumstances, situations or actions that do not violate international law. In addition, Chernichenko proposes the concept of "sanctions international legal responsibility," including tangible and intangible forms. Despite the fact that this approach has significantly complicated the understanding of the specifics of sanctions as measures of international law enforcement, it allows separating the form of the international legal response to international crime from other forms of feedback that restrict in any way the rights of other subjects of international law.[34] It also follows that sanctions are considered by Chernichenko to be something inherent in international law as a whole.

In foreign legal science, there is also the spread of approaches to understanding the content of the concept of "international legal sanction." Thus, G. Abi-Saab defines sanctions as

> coercive measures taken pursuant to a decision of a competent social body, that is, a body legally empowered to act on behalf of a society or community that is governed by a legal system.[35]

Without going into detail in the analysis approach, Abi-Saab notes that it is right to take sanctions with competence, which states confer on international organizations. F.M. Mariño Menéndez gives the definition of sanctions from the perspective of the implementation of international responsibility. He believed that when collective countermeasures were taken by the international community in an institutional and centralized form, they could rightly be called international sanctions, especially if the basis for their application was found in proven violations of general peremptory norms of common international law.[36]

Some research approaches the issue in a more pragmatic, limited enumeration of the possible ways of implementation of such activities. For example, the proposal has been put forward to distinguish three approaches to the definition of "sanctions." The first approach focuses on the objectives pursued by the relevant measures in

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[34] Chernichenko 2014, at 495–579.

[35] This opinion of G. Abi-Saab appears in *International Law* 252 (M.D. Evans (ed.), Oxford; New York: Oxford University Press, 2003).

[36] Fernando M. Mariño Menéndez, *Derecho Internacional Público: Parte General* [*Public International Law: General Part*] 569 (Madrid: Editorial Trotta, 2005).

response to violations of international law. Thus, the wrongdoing state is called to international responsibility. The second approach, on the contrary, seeks to identify the subject of action and reduces the definition of sanctions to measures taken by international organizations in accordance with their constituent instruments. Finally, under the third approach sanctions are established by specifying the type of measures taken; they are interpreted as economic in nature and include restrictions on import and export operations against states or the freezing of accounts of specific individuals or entities or other organizations.[37]

We do not deny the admissibility of such a classification, since, with regard to the first type of sanctions imposed by way of international responsibility, it can be agreed that the current level of development of international law makes it possible to recognize the legality of countermeasures as a means of realizing international responsibility in the case of an international offense. However, this type of international enforcement action, as set down in the International Law Commission draft articles on the responsibility of states and international organizations, does not usually give rise to discussion, although the application of the provisions of these instruments may cause difficulties in practice, due to the too general nature of the definitions contained therein. The legality of the second type of coercive measures of international organizations – in view of the large number of these organizations – is not so obvious. Thus, the provisions of the U.N. Charter which enshrine the competence of the Security Council to apply non-military coercive measures within the framework of the universal system for the maintenance of international peace and security established after the Second World War are recognized by all states and the doctrine of international law as a legitimate means of restoring and maintaining international peace and security. At the same time, the use of sanctions in the activities of regional international organizations should be limited both by the provisions of their constituent acts (measures taken against member states that violate the charters of such organizations) and by the rules of the U.N. Charter on the participation of regional international organizations in the system of maintaining peace and security.

At the beginning of the 21st century, the U.N. International Law Commission, which for many decades worked on the problem of systematization of the norms of international responsibility, prepared and submitted to the U.N. General Assembly two documents on international responsibility.[38] It is noteworthy that

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[37] Ruys 2017, at 19.

[38] The documents relate to the draft articles on the "Responsibility of States for Internationally Wrongful Acts" of 2001 and "Responsibility of International Organizations" of 2011. The documents were composed as attachments to resolutions of the U.N. General Assembly, which took them into account and suggested that countries become familiar with their contents, not mentioning the prospects of their possible adoption in the future nor the likelihood of their passage. Up to now, these documents have remained drafts only, which, as they stand, are not obligatory; however, they may be considered to be important and influential documents that interpret the everyday practical activity of states and international organizations.

they use the term "countermeasures" instead of the term "sanctions."[39] At the same time, countermeasures in these instruments serve as a means of implementing international legal responsibility with a view to inducing the state responsible for the internationally wrongful act to comply with its obligations to compensate for the harm caused.

The result of the development by the International Law Commission of the concept of countermeasures as a means of coercion of the state responsible for an internationally wrongful act was the recognition of the need for conservation in international law, the decentralized enforcement mechanism. The use of the concept of "countermeasures" in the context of the implementation of international responsibility does not exclude their doctrinal understanding as a form of measures of international legal coercion, including sanctions coercion.[40]

Summarizing the analysis of doctrinal approaches to the international legal concept of sanctions, we can conclude that considering the problem from the historical aspect, we can note the weakening of the influence of general theoretical views of positivism on the development of modern ideas about the nature of one of the varieties of international legal coercion of lawful coercive measures of a non-military nature. At the same time, we can also note the preservation of the pluralism of doctrinal views on the concept of "sanctions," which can be explained by the fragmentary, episodic and casual international legal regulation of international coercion, the continuing decentralization of the system of international law and the generally low level of international legal regulation of certain branches of international law and spheres of international relations.

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[39] I.I. Lukashuk has determined that the substitution of the definitions took place at the final stage of composing the draft articles devoted to the responsibility of states, and that it happened due to the most substantial role of international judicial practice that was considered at the time. International judicial practice denied the definition of "sanction" in connection with the unilateral measures of states. More detailed information, in *Лукашук И.И.* Право международной ответственности [Igor I. Lukashuk, *The Law of International Responsibility*] 325 (Moscow: Wolters Kluwer, 2004).

[40] Thus, S.V. Chernichenko, naming the countermeasures as the "measures of reliability," supposes that the problem of considering them to be the measures of sanctional coercion, both sanctional and non-sanctional, can be resolved on the basis of interpretation of the definition of "legal reliability" in principle. Chernichenko 2014, at 591. At the same time, I.I. Lukashuk considers reliability and sanctions as phenomena tightly connected with each other. Lukashuk 2004, at 308. In the influential English juridical vocabulary there is the explanation of the difference between the definitions "sanctions" and "countermeasures." Countermeasures are any legal reaction of a state towards the act previously committed by another state which had violated the international obligations in their relationship, and sanctions are the multilateral reactions to the infringements of the obligations to the international society in general or on the occasion of giving assistance to the victim of that infringement. Unilateral countermeasures more and more often are named as sanctions. *The New Oxford Companion to Law* 1045 (P. Cane & J. Conaghan (eds.), Oxford: Oxford University Press, 2008). It goes without saying that it is a very interesting example. There is a quite different conceptual viewpoint concerning these definitions. One should take into account that both definitions are connected with the reaction to the infringements, and this is evidence that in international legal doctrine there is no unanimous understanding of countermeasures and sanctions yet.

5. Sanctions in the U.N. Collective Security Mechanism

Currently, at the universal (worldwide) level, there is a legitimate mechanism provided for by the U.N. Charter for the application of coercive measures by the U.N. Security Council. Despite the abundance of literature on this issue,[41] it is proper here to briefly describe its main features. Coercive measures are imposed by the U.N. Security Council against states that, by their actions, pose a threat to the peace or violate peace and security or commit an act of aggression. Having established the existence of a threat to the peace or its violation, the U.N. Security Council has the right to make recommendations or take a decision on taking measures to maintain or restore international peace and security (Art. 39 of the U.N. Charter), in particular, to require U.N. member states to carry out actions related to the use of armed force and other measures not providing for its use.[42] Non-use of force (non-military measures) coercive measures by the U.N. Security Council in diplomatic practice, in the media and in scholarly literature are often referred to as "sanctions."[43]

The U.N. Charter is an international treaty in which virtually all of the world's states participate; under the Charter, the obligations of U.N. member states prevail over their obligations under any other international treaty. The U.N. Security Council has the primary responsibility for the maintenance of international peace and security and acts on behalf of all U.N. member states. Moreover, the U.N. Charter obliges all members to implement the decisions of the Security Council taken in pursuance of this primary responsibility.

The content of the term "Security Council sanctions," sometimes referred to in the scholarly literature as "collective," "centralized" or "institutional,"[44] has evolved throughout the history of the United Nations. During the Cold War, there were only two cases of non-military sanctions applied by the Security Council. They were

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41 *See, e.g.*, *Михеев Ю.Я.* Принудительные меры по Уставу ООН [Yu.Ya. Mikheev, *The Application of Coercive Measures According to the U.N. Charter*] (Moscow: Mezhdunarodnye otnosheniya, 1967); Актуальные проблемы деятельности международных организаций. Теория и практика [*The Actual Problems of the Functioning of International Organizations. Theory and Practice*] (G.I. Morozov (ed.), Moscow: Mezhdunarodnye otnosheniya, 1982); *Федоров В.Н.* Организация Объединенных Наций, другие международные организации и их роль в XXI веке [Vladimir N. Fyodorov, *The United Nations, Other International Organizations and their Role in the Twenty-First Century*] (Moscow: Logos, 2007), etc.

42 Non-military measures may be connected with the entire or partial break in the economic relationship, in the railway, marine, air, mail, telegraph, radio and the other facilities of inter-state relationships, and also it might be implied in the form of the breaking of diplomatic relations.

43 In the U.N. International Law Commission's Commentary to the draft articles on the responsibility of states, it is underlined that very often the definition of "sanctions" is used in order to explain the acts undertaken by a group of states against one state or by an international organization. But this definition is not correct, because in Chapter VII of the U.N. Charter there is the definition of "measures." More detailed information, in International Law Commission, Report, *supra* note 14.

44 The application of the definition of "institutional," concerning the sanctions of the U.N. Security Council, is not correct. This is so because the coercive institutional measures can be applied also by other international organizations, but the legality of those measures might be disputable.

directed against states[45] and were comprehensive, that is, they applied to the states themselves, their bodies and officials, as well as legal entities and individual sectors of the economy of the states concerned.

Since the end of the Cold War, there has been a change in the conceptual model of U.N. sanctions. Attempts to use the previous model of comprehensive sanctions in the early 1990s were criticized because their negative impact was felt not only by states and their bodies and officials, but also by all of the legal entities and organizations of the country against which the sanctions were imposed. Bans on the importation of food and medicines led to humanitarian disasters among populations.[46] In this regard, a new concept of so-called targeted sanctions was proposed.[47] According to some estimates, this model of targeted sanctions has been the main model since 1994.[48] The difference between targeted sanctions and comprehensive sanctions is that the former are directed against specific individuals and organizations of the state that is the object of the U.N. sanctions.[49] In particular, such sanctions provide for the freezing of financial assets, a ban on visas and travel outside the country for designated persons, and other similar measures.[50] Without going deeper into the analysis of the features of the modern U.N. sanctions mechanism, it can be argued that its action contributes to the strengthening of the international legal order,[51] including through the organizational centralization of the sanctions mechanism in the maintenance of international peace and security.

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[45] One case was dedicated to a non-recognized country – Southern Rhodesia – and Great Britain was responsible for governing its territory.

[46] Authors have held different views on the nature of sanctions of the U.N. Security Council. Since 1960, the possibility of recognizing sanctions as *ultra vires* acts has been considered; since 1990, the discussion on sanctions has focused on their effectiveness, and since 1995 on the humanitarian consequences of sanctions. *See* Mary E. O'Connell, *Debating the Law of Sanctions*, 13(1) European Journal of International Law 63 (2002).

[47] K.O. Kononova names these sanctions as "purposeful" (goal-setting). More detailed information, in *Кононова К.О.* Санкционные резолюции Совета Безопасности Организации Объединенных Наций и их имплементация в национальных правовых системах государств-членов [Ksenia O. Kononova, *Sanctional Resolutions of the U.N. Security Council and Its Implementation in the National Legal Systems of the Member States*] 126 (Moscow: Wolters Kluwer, 2010).

[48] Sue E. Eckert, *The Evolution and Effectiveness of UN Targeted Sanctions* in *Research Handbook on UN Sanctions and International Law*, *supra* note 14, at 52.

[49] On the criteria used to include individuals in the sanctions lists of the U.N. Security Council, *see Economic Sanctions Under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences* 43–67 (A.Z. Marossi & M.R. Bassett (eds.), The Hague: T.M.C. Asser Press, 2015).

[50] For a detailed analysis of the obligations imposed by U.N. Security Council sanctions on states, *see* Jeremy Farrall & Kim Rubenstein, *Sanctions, Accountability and Governance in a Globalised World* (Cambridge; New York: Cambridge University Press, 2009). A lot of work was devoted to the problems of implementation of U.N. Security Council sanctions. *See, e.g.*, *National Implementation of United Nations Sanctions: A Comparative Study* (V. Gowlland-Debbas (ed.), The Hague: Martinus Nijhoff, 2004).

[51] However, from time to time one can hear the critics with regard to this or that application of the sanctions, which are not effective enough. More detailed information, in Fyodorov 2007, at 155.

6. The Parameters of the Legitimacy of the Regional International Organizations Sanctions

The mechanism of U.N. coercive measures is not limited to the provisions of Chapter VII of the U.N. Charter discussed above. Chapter VIII provides for the participation of regional international intergovernmental organizations in such matters relating to the maintenance of international peace and security as are applicable to regional action.

The U.N. Security Council uses, where appropriate, such regional international organizations to carry out enforcement actions under its leadership, and no enforcement action is taken by virtue of such regional international organizations without the authority of the U.N. Security Council.

Member states, when establishing an IIO, confer on them the power to take restrictive measures against those member states that do not comply with the provisions of the constituent instruments (statutes of the IIO). Most often, such measures are to limit the rights of member states to represent or participate in the decision-making (voting) of the IIO, which are introduced in response to a violation of their statutory duties as a member of an international organization.[52] These measures are legitimate because they can be seen as self-restraint voluntarily undertaken by member states of international organizations.

The U.N. Charter does not specify what types of coercive actions of regional international organizations (actions by armed forces or non-military measures) are referred to in Chapter VIII. However, it can be assumed that both types of measures provided for in Chapter VII of the U.N. Charter are meant, that is, coercive measures with the use of armed forces and non-military coercive measures. The provisions of Chapter VIII of the U.N. Charter currently retain their importance for assessing the legitimacy of unilateral coercive measures of a non-military nature, which are quite common in the practice of modern regional international organizations.[53]

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[52] T.N. Neshataeva carried out a detailed analysis of the application of non-military sanctions practice of international organizations and she differentiated the application of the coercive measures for infringement of the material and procedural normative clauses of international law. More detailed information, in Neshataeva 1998, at 148–149. Moreover, the U.N. International Law Commission authors of the Commentary to the draft articles on the responsibility of international organizations say that sanctions which an organization might be authorized to apply against its own members in accordance with its own rules of procedure are legal, and they are not equal to countermeasures. Additional information, in International Law Commission, Report, *supra* note 14, Ch. V, at 133. Despite the abovementioned, which corresponds to the formed and developed practice, there is still the lack of a unanimous, clear theoretical background and justification of the legal character of these restrictive measures of IIOs, and the doctrine of international law has not elaborated any such justifications.

[53] Especially, very often they are applied by the regional and sub-regional international intergovernmental organizations in Africa and in Europe. According to some data received, recently the EU has applied sanctions (restrictive measures) in 48 situations, whereas the African Union in 11 cases. More detailed information, in Ruys 2017, at 22.

The constituent instruments of many regional organizations (League of Arab States, African Union (AU), Organization of American States, etc.) contain provisions on the use of collective measures in the event of an armed attack against any of their members. However, these provisions are often supplemented by special international treaties concluded between the member states of such organizations. For example, Article 2 of the Charter of the Organization of the American States (Charter of the OAS) establishes the principle that the OAS shall ensure joint action by member states in the event of aggression. However, more detailed obligations in this area are established in the Inter-American Treaty of Reciprocal Assistance of 1947 (Rio Pact), which is not formally an act of the OAS, but was concluded as an agreement between its member states. A similar function in the League of Arab States (LAS) is performed by the Treaty on Joint Defense and Economic Cooperation of the League of Arab States member countries established in 1950.

In the practice of regional organizations, the use of combined armed forces for coercive action has never been noted. However, some of them have begun to establish peacekeeping forces. Such actions by regional organizations (LAS, AU, etc.) do not contradict the provisions of the U.N. Charter and can make an important contribution to the settlement of regional conflicts and disputes.

We can state the formation of two approaches in the practice of enforcement measures by regional international organizations: legitimate, based on the provisions of the U.N. Charter and the norms of general international law, and the so-called "autonomous," ignoring the indisputable grounds of the legitimacy of such measures. For example, if the African Union uses sanctions that are established by its charter exclusively against its member states, then there is no reason to doubt their legitimacy; this cannot be said of the autonomous unilateral restrictive measures taken by the EU against third-party states that are not its members.[54] Thus, the "sanctions packages" adopted by the EU against Russia since 2014 in connection with the events in Crimea and Donbas cannot be considered to be legitimate, since they do not comply with the provisions of Chapter VIII of the U.N. Charter. The response of the Russian Federation in this regard is not only natural, but also a legitimate response based on the norms of general international law. The creation of such a long-standing legal situation in Europe undermines the credibility of the EU as a regional international organization based on the rule of international law and has a negative impact on the implementation of pan-European cooperation projects.

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[54] The EU as an advanced member of political worldwide relationships has the consequent economic potential and capacity for completing such a policy. This is quite obvious to political scientists, but not to lawyers. If world leaders consider their goals and interests to be more precious than worldwide recognized international legal values, it means that now there is no basis for constructing a multipolar world, and this policy cannot be used for this aim, because it contradicts international law. It is a method for the creation of new illegal situations and acts.

Coercive measures taken by the EU in pursuance of decisions of the U.N. Security Council, subject to certain conditions, can be considered to be legitimate. Such conditions include an appeal by a Security Council resolution to all states and their regional organizations, as well as compliance with the requirement of proportionality in respect of the scope of the applicable EU restrictions to that established in the U.N. Security Council resolution.

In assessing the sanctions policy of regional international organizations we should take into account not just the policy that was formed in the last century, i.e. the mechanism of coercive measures of the U.N. Charter, which was further developed in the 21st century. An analysis of the conditions and requirements for the use of coercive measures should be carried out in the context of international law, which has also been progressively transformed over the past more than seventy-four years since the signing of the U.N. Charter. In particular, the content of general international law has been affected by two trends – the humanization of international law and the sovereignization of the state in international economic relations. Both are aimed at preserving and strengthening the two most important principles of civilization, that is to say, the human person and the most important means of his or her development – the economy, which can be regarded as the progressive development of international law.

These trends have manifested themselves in the normative activities of the U.N. The provisions of international legal acts on the undesirability of applying or encouraging the use of economic, political or any other coercive measures[55] against other states have been embodied and developed in the publication of two series of U.N. General Assembly resolutions. Some of them declared the use of unilateral economic measures to be in flagrant violation of the principles of international law set forth in the U.N. Charter, as well as the basic principles of the multilateral trading system.[56] Others have found that the application of unilateral restrictive measures creates obstacles to trade relations between states and thus impedes the full realization of the rights set forth in the Universal Declaration of Human Rights and other international human rights instruments, in particular the right of people and nations to development.[57] Moreover, because of the apparent violation since 2007 by unilateral restrictive measures of individual states and international organizations of

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[55] First is the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations 1970 and the Charter of Economic Rights and Duties of States 1974.

[56] The first among the mentioned resolutions of the General Assembly is U.N. 44/215 "Economic Measures as a Means of Political and Economic Coercion Against Developing Countries" adopted on 22 December 1989. Since that time, the resolutions have been adopted annually. They are aimed at supporting the sovereignty of developing countries, which is why the resolutions are less important for the European region.

[57] The first Resolution of the U.N. General Assembly 38/197 "Economic Measures as a Means of Political and Economic Coercion Against Developing Countries" on that subject was adopted on 20 December 1983; since that time they have been adopted annually.

the requirements of international human rights instruments, in 2014 the U.N. Human Rights Council (HRC)[58] decided to appoint a Special Rapporteur on the negative impact of unilateral coercive measures on the implementation of human rights.[59]

Analysis of the content of these resolutions suggests that the U.N. is currently developing a "soft" regulatory framework aimed at the formation of international legal awareness of the inadmissibility and illegitimacy of unilateral use of restrictive measures in international relations. Its main provisions can be summarized as follows. Unilateral coercive measures do not comply with international law, international humanitarian law, the U.N. Charter and the norms and principles governing peaceful relations between states. The resulting extraterritorial effects threaten the sovereignty of states and create obstacles to trade relations among states, thereby impeding the full realization of the rights set forth in the Universal Declaration of Human Rights and other international human rights instruments, in particular the right of people and peoples to development. In other words, "soft regulators" are aimed at establishing legal limits to the legitimacy of coercion that infringes on the sovereignty of the state in other spheres of international relations than the maintenance of international peace and security.

The above list of imperatives of the international legal order, which does not allow the use of unilateral coercive measures without the risk of violation of many international fundamental legal acts on the protection of human rights and peoples' rights, is formulated in the form of international recommendations. In no way does it seek to influence in any way the established mechanism for the distribution of powers among the principal organs of the United Nations. However, as the practice of the U.N. shows, the formation of the conviction of the international community of the need to strengthen the international legal significance of consolidated norms from various treaties and other legal acts can be channeled into the declarations of the U.N. General Assembly.

The term "declaration" in itself cannot indicate the legal binding nature of the document; most often it has a recommendatory character. Nevertheless, the provisions of certain legal acts, titled "declarations," adopted by the U.N. General Assembly as recommendations, could eventually become a reflection of customary international law or become binding as a rule of customary law. Consequently, the mere fact of the adoption of the declaration may be evidence of the conviction of the international community of the importance of an issue.

In the European region, the requirement for the full implementation of the rights set forth in international human rights instruments may be addressed to the EU, which, in order to implement its common foreign policy, resorts to the use of such an instrument, at least legally controversial, without giving due importance in some

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[58] The first Resolution of the U.N. Human Rights Council 27/21 "Human Rights and Unilateral Coercive Measures" was adopted on 26 September 2014. The latest resolution, with the same title and designated 37/21, was approved by the Human Rights Council on 23 March 2018.

[59] HRC Resolution 27/21, *supra* note 58.

cases to the universal mechanisms of the U.N. and the basic principles of international law aimed at guaranteeing the sovereignty of the state in the domestic sphere.

At the same time, the Council of Europe sees the achievement of the rule of law and the protection of human rights as its main task. The Council of Europe has several legal instruments to ensure its objectives in the field of human rights, in particular the European Convention on Human Rights (ECHR), and acting on its basis, the European Court of Human Rights (ECtHR), as well as a number of expert bodies such as the European Commission for Democracy through Law (Venice Commission). To date, the ECtHR has considered a number of cases related to the introduction of U.N. or EU sanctions against individuals, which have become the subject of scholarly research.[60] The specificity of the jurisdictional mechanism of the ECtHR does not allow it to consider complaints of citizens of some member states against other states that impose sanctions regimes, especially since it does not have such competence in respect of EU legal acts.

In these circumstances, it is reasonable to draw attention to unused resources, which could include the Venice Commission.[61] This commission is an advisory body of the Council of Europe in the field of legal guarantees of democracy. Its objectives are to promote the basic values of the rule of law, human rights and democracy.[62] It can therefore be concluded that the issue of the rule of law and the protection of human rights in the European region, which have been subject to restrictive measures as a result of sanctions, may be the subject of a study by the Venice Commission. Taking into account its high authority, the relevant research will provide an impartial and objective, scientifically based position on this problem.

Conclusion

In closing this study, the following conclusions can be drawn.

First, it is necessary to expand the range of interdisciplinary studies of economic and legal instruments to counter the illegal unilateral use of coercive measures that

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[60] *See Корякин В.М.* Невоенные санкции против России: правовой аспект: Монография [Victor M. Koryakin, *Non-Military Sanctions Against Russia: Legal Aspect: Monograph*] 179–180 (Moscow: Yurlytynform, 2015). However, the author hypothetically proposed the possibility for the citizens of Russia and for the Russian entities to apply to the ECtHR and to the Court of Justice of the European Union (CJEU) with their complaints and claims regarding the EU sanctions. More detailed information, in Penelope Nevill, *Interpretation and Review of UN Sanctions by European Courts: Comity and Conflict* in *Research Handbook on UN Sanctions and International Law*, *supra* note 14, at 418. The author analyzed the judicial practice of the European courts, both national and international (ECtHR, CJEU) concerning the hearings on resolving the litigations connected with U.N. Security Council sanctions.

[61] More detailed information about this institution of the Council of Europe, in *Хабриева Т.Я.* Венецианская Комиссия как субъект интерпретации права: Монография [Talia Ya. Khabrieva, *Venice Commission as a Subject of Interpretation of Law: Monograph*] (Moscow: Statut, 2018).

[62] *See* more detailed information, in *Id.* at 23.

have a negative impact on international economic relations and the international legal order as a whole.

Second, it is advisable to continue to develop computer models for assessing the consequences of state management decisions taken during inter-country economic wars, with a view to their further use in the system of distributed situation centers of Russia, designed, among other things, to become effective tools for quantifying the consequences of international legal sanctions.

Third, research interest should be focused largely on gaps and the little-studied problem of the legitimacy of non-military collective coercion practiced by regional international organizations. In order to find mechanisms to overcome undesirable illegal situations that threaten the sovereignty of states, and their complete exclusion from the practice of international relations, it is advisable to explore the possibility of doctrinal development of the legal model of coordination by the U.N. Security Council of various forms of individual and joint coercion.

Fourth, there is a need to continue studying the international legal "soft" mechanisms for limiting the adoption or implementation of unilateral coercive measures by states and regional international organizations that are not in accordance with international law and the U.N. Charter (U.N. General Assembly resolutions), and in the future to move to the development of not just a resolution but a declaration of the U.N. General Assembly, integrating the most important principles of sovereignty in the economic sphere and international human rights standards, including the right to development.

We emphasize the importance of studying the possibility of using the democratic and expert potential of other regional integration associations to conduct relevant studies of the international legal framework for the application of unilateral coercive measures (sanctions), which should serve to achieve the rule of law at the universal and regional level.

References

Cassese A. *International Law* (Oxford: Oxford University Press, 2003). https://doi.org/10.1093/he/9780199259397.001.0001

Eckert S.E. *The Evolution and Effectiveness of UN Targeted Sanctions* in *Research Handbook on UN Sanctions and International Law* 52 (L. van den Herik (ed.), Cheltenham: Edward Elgar Publishing, 2017). https://doi.org/10.4337/9781784713034.00008

Economic Sanctions Under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences (A.Z. Marossi & M.R. Bassett (eds.), The Hague: T.M.C. Asser Press, 2015). https://doi.org/10.1007/978-94-6265-051-0

Farrall J. & Rubenstein K. *Sanctions, Accountability and Governance in a Globalised World* (Cambridge; New York: Cambridge University Press, 2009). https://doi.org/10.1017/cbo9780511776847

International Law (M.D. Evans (ed.), Oxford; New York: Oxford University Press, 2003).

National Implementation of United Nations Sanctions: A Comparative Study (V. Gowlland-Debbas (ed.), The Hague: Martinus Nijhoff, 2004).

O'Connell M.E. *Debating the Law of Sanctions*, 13(1) European Journal of International Law 63 (2002). https://doi.org/10.1093/ejil/13.1.63

Information about the authors

Anatoly Kapustin (Moscow, Russia) – Professor, Scientific Supervisor of the Institute of Legislation and Comparative Law under the Government of the Russian Federation (34 B. Cheryomushkinskaya St., Moscow, 117218, Russia; e-mail: Kapustin@izak.ru).

Bulat Khabriev (Moscow, Russia) – Researcher, Laboratory for Computer Modeling of Socio-Economic Processes, Central Economic and Mathematical Institute, Russian Academy of Sciences (47 Nakhimovsky Av., Moscow, 117418, Russia; e-mail: bulat.kh@hotmail.com).

DIGITAL FINANCIAL ASSETS: SEGMENTS AND PROSPECTS OF LEGAL REGULATION IN THE BRICS COUNTRIES

IGOR SARNAKOV,

Financial University under the Government of the Russian Federation
(Moscow, Russia)

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In the environment of the current trend towards digitalization of the world economy, the issue of the legal regulation of the institute of digital financial assets as well as the activity relating to the generation of these assets is of considerable interest. As practice shows, individual countries face the situation where these assets are already turning over, but there is still no legal regulation. This state of affairs may give rise to cases of illegal turnover of financial assets and fraud in this sphere. Presently, the geopolitical map on digitalization of the economy is fragmented. Some countries have recognized and legalized the turnover of digital financial assets, others have so far not adopted an unambiguous attitude with respect to this new institute, while a third group of countries has not even recognized their legal nature nor their very existence. This ambiguity raises many issues relating to the legitimacy of digital financial assets and the feasibility of the introduction of this new financial product. The article analyzes the state of the legal regulation of the institute of digital financial assets in the BRICS countries, considers the standpoints of legislators and scientists on the legal nature of these financial assets.

Keywords: digital financial assets; cryptocurrency; token; mining; smart contract; blockchain.

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Introduction

Recent global changes in the field of financial technologies and operations have raised a number of important issues for the legislator in Russia and abroad, including not only the need to determine the legal status of digital financial assets and the limits of their legal regulation, but also the possibility of their creation and use. Development of the digital economy at the state level is associated with the resolution of a number of fundamental issues in legal science in order to form a new regulatory legal environment.

Settlement of these issues will affect many spheres of legal regulation in modern society and the state, so it is important to choose the right vector of development, for which purpose it seems necessary to analyze foreign experience.

Earlier studies by individual authors addressed some of the aspects related to digital financial assets. Thus, the time of the emergence of cryptocurrency and the terms to be used were established. The past ten years have seen the creation of a new class of digital instruments that are not issued by a sovereign institution or commercial bank, are not denominated in a sovereign unit and do not have physical counterparts. Since these instruments may be used as a currency, they are variously labeled "electronic cash," "digital currency," "virtual currency" or "cryptocurrency." Additionally, the conclusion was reached that it is necessary to determine the essence and nature of cryptocurrencies as well as their legal status and functions, alongside cash and e-money.[1] 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 the 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 experience of the BRICS and European Union countries in their regulation was

[1] Irina Cvetkova, *Cryptocurrencies Legal Regulation*, 5(2) BRICS Law Journal 128, 152 (2018).

also briefly analyzed by various authors.[2] Others focused solely on the analysis of the situation in the Russian Federation.[3]

At the same time, the considered field of public relations is itself subject to rapid changes, which makes it possible to identify new sides in solving problems related to the legal regulation of digital financial assets, and without depreciating the merits of the performed research, it should be noted that they leave a significant area for discussion and define the need for additional legal analysis. In this case, it seems most promising to focus on an in-depth analysis of the state of regulation of digital financial assets in the BRICS countries, since one cannot but agree with the opinion of the President of the Russian Federation V.V. Putin, who pointed out that:

> In a very short time, this interaction format has proved its relevance and efficiency. Brazil, Russia, India, China, and the Republic of South Africa more and more closely coordinate approaches to key issues on the international agenda, taking an active part in forming a multi-polar world order and developing a modern model of the global financial and trading system.[4]

It is obvious that the rate of integration in strategically important areas, including the financial and banking sectors, is high. Thus, the New Development Bank of BRICS has already been created, the process of creation of BRICS Pay, a unified payment system, is under way, the creation of a cryptocurrency of BRICS is also on the agenda today.[5] At the same time, it should be noted that a unified approach to an understanding of digital financial assets and their regulation in the BRICS countries has not yet been developed, but each path taken by BRICS member states is interesting and unique in its own way.

1. Digital Financial Assets in Brazil

The sphere of legal regulation of financial technologies in Brazil is now emerging. Therefore, in considering digital financial assets one should refer to the bodies that are involved in the process of discussion and development of the main directions related to digital innovations and their influence on the well-established fundamentals of Brazil's monetary policy. First of all, this relates to the Central Bank of Brazil (BCB).

The Central Bank of Brazil made its first statement on this issue on 19 February 2014 when it published a Warning about the risks associated with the acquisition

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[2] Marina Chudinovskikh & Victor Sevryugin, *Cryptocurrency Regulation in the BRICS Countries and the Eurasian Economic Union*, 6(1) BRICS Law Journal 63 (2019).

[3] Anatoly A. Vlasov et al., *Legal Regulation of Cryptocurrency in the Russian Federation*, 34(14) Opcion 1200 (2018).

[4] InfoBrics (Sep. 28, 2019), available at http://infobrics.org/russia/.

[5] InfoBrics (Sep. 28, 2019), available at http://infobrics.org/news/economy/.

of so-called "virtual currencies" or "cryptocurrencies" and settlement of transactions therein.[6] This document points out that virtual money should not be confused with electronic money since the former is not a part of the national payment system and has its own method of denomination not related to the government, it is not guaranteed by the government, it is not secured, but based on trust and confidence that the market will accept and settle transactions therein. Therefore, the risks associated with using virtual currencies are imposed on the users. They are informed of the possibility of a sharp change in the price of virtual currencies, including in the case where the authorities apply measures of prudential regulation, or punitive measures against the users. It is separately noted that virtual currencies can be used in illegal activities. It is obvious that in this statement, the regulator expressed its distrust of cryptocurrency and concern about its use.

The market value for cryptocurrency was almost non-existent 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 customers. In addition, there were Bitcoin traders who use foreign exchanges or trade offline. In particular, the number of 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 US$35 billion for about 500,000 customers, has already registered the company XDEX Intermediacao LTDA with confirmed capital of US$7.3 million. Despite the optimism of investors, Brazil's government institutions are wary of cryptocurrencies. Brazilian legislation in the field of regulation on the use of virtual currencies has been steadily tightening controls since 2015.[7]

Despite the ambiguous and even rather negative attitude towards cryptocurrency, it was still decided to pay special attention to the very technology of the blockchain underlying it. Thus, on 31 August 2017, the Central Bank of Brazil published a Technical Study on the technology of distributed databases, the blockchain.[8] This study examines the concept of blockchain technology, highlights the advantages

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6 Comunicado nº 25.306, de 19 de fevereiro de 2014 [Press Release No. 25.306 of 19 February 2014] (Sep. 28, 2019), available at https://www3.bcb.gov.br/normativo/detalharNormativo.do?method=detalharNormativo&N=114009277.

7 Chudinovskikh & Sevryugin 2019, at 67.

8 Central Bank of Brazil, Distributed Ledger Technical Research in Central Bank of Brazil: Position Report, 31 August 2017 (Sep. 28, 2019), available at https://www.bcb.gov.br/htms/public/microcredito/distributed_ledger_technical_research_in_central_bank_of_brazil.pdf.

and disadvantages of its application, analyzes the experience of other countries, and also describes the experiments that were conducted by the authors of this report in relation to the technology in question. The study concludes that if its disadvantages are overcome, this technology could be useful for application across the state.

On 16 November 2017, the Central Bank of Brazil again issued a Warning on the risks associated with the holding of and negotiating in virtual currencies.[9] In this document, it was emphasized that no government body has issued virtual currencies or guaranteed them, and their value results exclusively from public confidence in the issuer of the cryptocurrency, which means that the users are at risk, especially since the entities offering their services for settlement of transactions in cryptocurrency are not licensed and are not controlled by the BCB. The Central Bank specified that virtual currencies are not legal tender and cannot be equated to electronic money. The document warns of liability in case of use of virtual currency for illegal purposes. It also notes that despite the keen interest in cryptocurrencies in the world, the BCB does not see the need to regulate them as long as there is no danger to the national financial system, although it will monitor the situation and warn about the risks associated with their use.

Interestingly, on 19 September 2018, the Securities Commission (CVM) released a Circular containing explanations on the issue of indirect investment in cryptoassets by investment funds.[10] According to this document, the CVM allowed these funds to make such investments with reference to overseas investments, for example, through the acquisition of quotas for funds and derivatives including assets traded in third-country jurisdictions, provided they are admitted and regulated in these markets. Thus, it is indicated that it is important to fulfill tax obligations and prevent risks associated both with settlement of the transactions and with engagement in fraudulent and other illegal schemes as well as compliance with the requirements set forth in this document.

Brazil's tax authorities also did not want to appear aloof when deciding the fate of cryptoassets in the country so, for example, from 31 October to 19 November 2018 the Federal Revenue Office of the Ministry of Finance of Brazil (Receita Federal do Brazil (RFB)) held public hearings on the provision of information regarding transactions in cryptoassets.[11] First and foremost, this was necessary for the purposes of tax administration and combating money laundering. A draft instruction was prepared. This instruction regulates the provision of information on transactions in

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[9] Central Bank of Brazil, Communiqué 31,379 of 16 November 2017 (Sep. 28, 2019), available at https://www.bcb.gov.br/ingles/norms/Virtual-currencies-Communique-31379-English.pdf.

[10] Ofício-Circular CVM/SIN 11/18, 19 de setembro de 2018 [Circular Letter CVM/SIN 11/18, 19 September 2018] (Sep. 28, 2019), available at http://www.cvm.gov.br/legislacao/oficios-circulares/sin/oc-sin-1118.html.

[11] Consulta Pública RFB nº 06/2018, 30 de outubro de 2018 [RFB Public Consultation No. 06/2018, 30 October 2018] (Sep. 28, 2019), available at http://receita.economia.gov.br/sobre/consultas-publicas-e-editoriais/consulta-publica/arquivos-e-imagens/consulta-publica-rfb-no-06-2018.pdf.

cryptoassets, and it reflects such aspects as: which authority shall be provided with information; in what form and within what time limits; what parameters should be reflected; and liability in case of violation of the provisions of the draft instruction. However, at the present time the actual results of the hearings are still unclear.

Therefore, today in Brazil, not only has a ban not been imposed on transactions in cryptocurrencies, despite warnings from the Central Bank of Brazil about the risks associated with their use, but investment funds are even allowed to make indirect investments in them. And although cryptocurrency exchanges operate in the country, and there is no ban on transactions in cryptocurrencies either, at the same time, there is no legal regulation of this sphere of public relations, there is no consensus regarding cryptocurrency on the part of the authorized bodies and a wait-and-see attitude aimed at studying the experience of other countries and world trends is observed. Given the above, it seems that 2019 may be decisive for Brazil in deciding whether to ban or to implement cryptocurrency in the legal field.

2. Digital Financial Assets in Russia

The first significant legislative attempts in the Russian Federation aimed at the legal regulation of the digital economy appeared just recently, about two years ago. They began in 2017, when the Government of the Russian Federation adopted the Digital Economy Program (Decree No. 1632-p), according to which the Government intended to render significant organizational support for the digitalization of Russia.[12] Subsequently, the Program Passport[13] was approved, and it is intended to continue until the end of 2024 (while it should be noted that Decree No. 1632-p has already ceased to be in force). The functions of implementation of this Program are imposed on the Ministry of Digital Development, Telecommunications and Mass Media.[14]

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[12] Распоряжение Правительства РФ от 28 июля 2017 г. № 1632-р «Об утверждении программы «Цифровая экономика Российской Федерации»» // Собрание законодательства РФ. 2017. № 32. Ст. 5138 [Decree of the Government of the Russian Federation No. 1632-p of 28 July 2017. On Approval of the Digital Economy of the Russian Federation Program, Legislation Bulletin of the Russian Federation, 2017, No. 32, Art. 5138] (ceased to be in force on 12 February 2019) (Sep. 28, 2019), available at http://www.consultant.ru/document/cons_doc_LAW_221756/.

[13] Паспорт национальной программы «Цифровая экономика Российской Федерации» (утв. президиумом Совета при Президенте РФ по стратегическому развитию и национальным проектам 24 декабря 2018 г.) [Digital Economy of the Russian Federation Program Passport (approved on 24 December 2018, by the Presidium of the Council of the President of the Russian Federation for Strategic Development and National Projects)] (Sep. 28, 2019), available at http://www.consultant.ru/document/cons_doc_LAW_319432/.

[14] Постановление Правительства РФ от 2 марта 2019 г. № 234 «О системе управления реализацией национальной программы «Цифровая экономика Российской Федерации»» [Resolution of the Government of the Russian Federation No. 234 of 2 March 2019. On the System for Control of Implementation the Digital Economy of the Russian Federation National Program] (Sep. 28, 2019), available at http://www.consultant.ru/document/cons_doc_LAW_319701/92d969e26a4326c5d02fa79b8f9cf4994ee5633b/.

A major step in the regulation of relations arising in the digital environment is the adoption in March 2019 of Federal Law No. 34-FZ "On Amendments to Parts One, Two and Article 1124 of Part Three of the Civil Code of the Russian Federation"[15] (hereinafter Law No. 34-FZ), the provisions of which will come into force on 1 October 2019. The importance of this law lies in the fact that for the first time in the legislation of the Russian Federation the framework provisions on digital rights and smart contracts are formalized, and also the background civil norms for regulation of circulation of digital rights, settlement and execution of transactions in the so-called digital environment as well as the use of significant arrays of impersonal information are defined. The main definition proposed in Articles 128 and 141.1 of the Civil Code of the Russian Federation is the concept of "digital rights," which means

> the obligations and other rights, the content and conditions for the implementation of which are determined in accordance with the rules of the information system that meets the statutory criteria.

This concept is considered a legal analogue of the term "token" commonly used in the world. At the same time, a person who, in accordance with the rules of the information system, has the opportunity to dispose of this right shall be deemed the holder of the digital right. Implementation, disposal, including transfer, pledge and encumbrance of this digital right by other means, or restriction of disposal of the right, is possible only in the information system without recourse to a third party.

Law No. 34-FZ also secured the so-called smart contracts, which are not a special type of contract, but only a type of terms and conditions concerning automatic performance of any civil law contract.

It should be noted that Law No. 34-FZ does not provide for the definition of the legal regime of cryptocurrency, and the activity for generation of these assets in the territory of the Russian Federation is not defined. We believe that this is primarily due to the fact that Draft Federal Law No. 419059-7 "On Digital Financial Assets" is under review by the State Duma of the Federal Assembly of the Russian Federation. The purpose of this draft is to determine the legal field around the relations arising upon generation (release), storage and turnover of digital financial assets, including cryptocurrency, as well as creation of the legal conditions for attracting investments by Russian legal entities and individual entrepreneurs through the issuance of tokens.

The Bank of Russia draws the attention of nationals and all players in the financial market to the increased risks associated with the use of and investment in cryptocurrencies. Furthermore, it points out that the majority of transactions in

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[15] Федеральный закон от 18 марта 2019 г. № 34-ФЗ «О внесении изменений в части первую, вторую и статью 1124 части третьей Гражданского кодекса Российской Федерации» // Собрание законодательства РФ. 2019. № 12. Ст. 1224 [Federal Law No. 34-FZ of 18 March 2019. On Amendments to Parts One, Two and Article 1124 of Part Three of the Civil Code of the Russian Federation, Legislation Bulletin of the Russian Federation, 2019, No. 12, Art. 1224].

cryptocurrencies are settled outside legal regulation both in the Russian Federation and in most other states.[16]

Another upcoming regulatory act in the field of digitalization of the economy is worthy of mention, namely the Draft Federal Law No. 419090-7 "On Alternative Ways of Attraction of Investments (Crowdfunding)." The purpose of this draft law is to regulate relations for attracting investments by business entities or individual entrepreneurs using information technologies. The draft law also defines the legal basis for the activity of investment platform operators relating to arrangements for retail financing, i.e. crowdfunding. The activity relating to arrangements for crowdfunding is to provide services for granting access to the information resources of the investment platform to its participants. These services consist in combining the demand for investment of the participants in the investment platform attracting investment and the investment proposals of the participants in the investment platform acting as the investors. The specified services are rendered using the investment platform, which is an information system on the Internet. The result of the provision of services for arrangements for crowdfunding is the transfer of funds from the investor to the person attracting investments, which is mediated by conclusion of the contract using the investment platform and the imposition of relevant obligations to the investors on the person attracting investments. Along with the conventional forms of legal relations between the investors and the persons attracting investments (provision of a loan, purchase of securities, acquisition of a member's share in the authorized capital of a limited liability company or a member's share in the share capital of a business partnership), the draft law proposes to use such a new form typical of the modern stage of development of crowdfunding relations as the acquisition of investment project tokens standing for certain property rights, which are recorded in the investor's name in a distributed database. For conclusion and performance of contracts between the investors and the persons attracting investments, the draft law allows the use of smart contracts. The document also provides for contractual regulation of relations concerning arrangements for crowdfunding, offering two options for contractual structures: on the provision of investment attraction services and on the provision of investment assistance services.

The provisions of both of the aforementioned draft laws, if adopted, as well as Law No. 34-FZ are expected to come into force on 1 October 2019.

Despite the active work on the settlement of relations in the field of the digital economy, unfortunately, judicial practice, which so far has only begun to be formed, has not yet developed a unified position when considering cases in this sphere.[17]

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[16] Информация Банка России от 4 сентября 2017 г. «Об использовании частных «виртуальных валют» (криптовалют)» // Вестник Банка России. 2017. № 80 [Information from the Bank of Russia of 4 September 2017 "On Use of Private 'Virtual Currencies (Cryptocurrencies)'," Bulletin of the Bank of Russia, 2017, No. 80].

[17] *See, e.g.*, Апелляционное определение Московского городского суда от 28 ноября 2018 г. по делу № 33-51690/2018 [Appellate Ruling of the Moscow City Court of 28 November 2018 in case

The issue of qualification of cryptocurrency most commonly arises when the courts consider cases on bankruptcy of individuals, in the course of which disputes arise over the possibility of requesting information about the availability of the debtor's cryptocurrency and its inclusion in the bankruptcy assets. Similar disputes may arise in the determination of the composition of the estate or division of the property of spouses. The positions of the courts on whether it is possible to recognize cryptocurrency as property currently differ. Case No. A40-124668/17 considered by the Moscow City Commercial Court appears to be interesting in this regard. The ruling of the court of first instance of 5 March 2018 rejected the financial manager's request to include cryptocurrency in the bankruptcy assets and to force the debtor to provide the password to access the e-wallet. At the same time, the court specified that cryptocurrency does not pertain to objects of civil rights and is outside the legal environment. The Ninth Arbitration Court of Appeal did not agree with such conclusions, overturned the ruling of the court of first instance and obliged the debtor to transfer the access to the e-wallet to the financial manager to include the digital assets in the bankruptcy assets.[18] According to the Court of Appeal, in the context of Article 128 of the Civil Code of the Russian Federation, cryptocurrency can be qualified as other property.[19]

Therefore, it can be noted that Russia is actively developing along the path of gradual legalization of the institute of digital financial assets. However, as judicial practice shows, many more changes need to be introduced in certain regulatory legal acts to eliminate ambiguous and incorrect interpretations of the legal provisions governing this area of economic activity, as well as to create the conditions for the most comfortable development of entities performing this type of activity.

3. Digital Financial Assets in India

It should be noted that in recent years, the Government of India has implemented many initiatives related to digitalization of the economy and helped to finance

No. 33-51690/2018]; Апелляционное определение Санкт-Петербургского городского суда от 4 июня 2018 г. № 33а-12820/2018 по делу № 2-10119/2016 [Appellate Ruling of the Saint Petersburg City Court of 4 June 2018 No. 33a-12820/2018 in case No. 2-10119/2016]; Постановление Девятнадцатого арбитражного апелляционного суда от 25 февраля 2019 г. № 19АП-6454/2018 по делу № А14-18307/2017 [Resolution of the Nineteenth Arbitration Court of Appeal of 25 February 2019 No. 19AP-6454/2018 in case No. A14-18307/2017]; Апелляционное определение Свердловского областного суда от 8 ноября 2018 г. по делу № 33а-19381/2018 [Appellate Ruling of the Sverdlovsk Region Court of 8 November 2018 in case No. 33a-19381/2018] (Sep. 28, 2019), available at ConsultantPlus Legal Reference System.

[18] *See* Постановление Девятого арбитражного апелляционного суда от 15 мая 2018 г. № 09АП-16416/2018 по делу № А40-124668/2017 [Resolution of the Ninth Arbitration Court of Appeal of 15 May 2018 No. 09AP-16416/2018 in case No. A40-124668/2017] (Sep. 28, 2019), available at ConsultantPlus Legal Reference System.

[19] *Филиппов А.Е.* Отдельные правовые аспекты регулирования оборота цифровых активов в России и за рубежом // Арбитражные споры. 2018. № 4. С. 85 [Andrey E. Filippov, *Some Legal Aspects of Regulation of Circulation of Digital Assets in Russia and Abroad*, 4 Arbitration Disputes 85 (2018)].

financial technologies. Moreover, in 2014 the Pradhan Mantri Jan Dhan Yojana program was launched, thanks to which the procedures for using fintech (financial technology) are systematized and simplified. In India, the Bharat Bill payment system was also developed for making cashless payments.

However, the issue of the legal regulation of digital financial assets remains open. It is important to note that this is a very expected event, the occurrence of which has already been postponed several times. The need to regulate cryptocurrencies and the activities of cryptocurrency exchanges is also strongly demanded by India's Supreme Court.[20] At the moment, the Indian authorities state that the draft law intended to settle the cryptocurrency sector, and developed by a committee consisting of representatives of several ministries, will be presented to the public in the very near future.[21]

Although the content of the draft law is still secret, given that India is also a member of the Financial Action Task Force on Money Laundering (FATF), it can be safely assumed that the draft law will take into account the provisions specified in Draft Interpretive Note to FATF Recommendation 15.[22] Of course, this refers to those provisions that will be adopted in the final version. First of all, this concerns the risks associated with money laundering and the financing of terrorism that may arise upon performance of activities related to virtual assets, as well as the need for registration or licensing of the activities of the providers of services of virtual assets and control over them by the authorized bodies. Thus, a constructive exchange of experience and information in this sphere between the FATF members should be ensured.

However, until the draft law is published, and while the Draft Interpretive Note of the FATF is under discussion, we should refer to the few documents that presently affect the cryptocurrency sphere in India.

Thus, on 24 December 2013 the RBI issued a Warning on the risks for the users of virtual currencies[23] which specified that they were not authorized by any central bank or monetary authority, and their issuing entities did not receive any approval, registration or permit to perform these activities, which entail a significant number

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[20] P.H. Madore, *India's Supreme Court Sets 4-Week Deadline for Government to Regulate Cryptocurrency*, CCN, 26 February 2019 (Sep. 28, 2019), available at https://www.ccn.com/indias-supreme-court-sets-4-week-deadline-for-government-to-regulate-cryptocurrency.

[21] *Катрич М.* Правительство Индии близко к тому, чтобы представить криптовалютное законодательство // Coinspot.io. 28 января 2019 г. [Maksim Katrich, *Government of India Is Close to Introduction of Cryptocurrency Laws*, Coinspot.io, 28 January 2019] (Sep. 28, 2019), available at https://coinspot.io/china-and-asia/pravitelstvo-indii-blizko-k-tomu-chtoby-predstavit-kriptovalyutnoe-zakonodatelstvo/.

[22] FATF, Public Statement – Mitigating Risks from Virtual Assets, 22 February 2019 (Sep. 28, 2019), available at http://www.fatf-gafi.org/publications/fatfrecommendations/documents/regulation-virtual-assets-interpretive-note.html.

[23] Reserve Bank of India, RBI Cautions Users of Virtual Currencies Against Risks, 24 December 2013 (Sep. 28, 2019), available at https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/IEPR1261VC1213.PDF.

of risks, including, among others: susceptibility to loss and impossibility of recovery; lack of an established framework for addressing customer problems, disputes or reimbursement; susceptibility to the volatility of their value; uncertainty of the legal status of cryptocurrency exchanges; and the possibility of violation of the laws on combating money laundering and financing of terrorism. At the same time, the RBI stated that work would be organized to ensure a more thorough study of this issue.

On 1 February 2017, the RBI again warned about the risks associated with virtual currencies.[24] However, the statement was brief and, in terms of its content, referred to the text of the Warning of 2013 analyzed above.

On 5 December 2017, due to a significant upward shift in the valuation of many cryptocurrencies and the rapid growth of the initial offers of tokens, the RBI again expressed its concern about the existence and regulation of the cryptocurrency sector, wishing to draw public attention to this problem. It also stressed that it had not granted any licenses or permits to any entities to settle transactions in Bitcoins or any other virtual currencies.[25]

On 29 December 2017, the Ministry of Finance of India also published an official statement,[26] warning people against risks upon investment in virtual "currencies," while comparing them to Ponzi schemes (fraudulent investment scams). First of all, the Ministry pointed out that virtual currency is not legal tender, it does not have the legal status of currency and is not allowed as a medium of exchange; its price depends on speculative activity and is subject to volatility; and it is at increased risk of creating an investment bubble and being used for illegal purposes. Moreover, it emphasized that virtual currencies do not have any regulatory authorization or protection in India and, therefore, investors and other players dealing with them shoulder all the risks and should avoid them.

It should be noted that shortly afterwards, in April 2018, the Reserve Bank of India published a Notice of Prohibition on Dealing in Virtual Currencies[27] in which it prohibited banks and other financial institutions under its regulation and control from settling any transactions therein. The subjects already providing these services were given three months to withdraw from the relationship.

Therefore, it can be said that today only the Reserve Bank of India has repeatedly expressed its official position with regard to virtual currencies. However, the RBI only

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[24] Reserve Bank of India, RBI Cautions Users of Virtual Currencies, 1 February 2017 (Sep. 28, 2019), available at https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR205413F23C955D8C45C4A1F56349D1B8C457.PDF.

[25] Reserve Bank of India, Reserve Bank Cautions Regarding Risk of Virtual Currencies Including Bitcoins, 5 December 2017 (Sep. 28, 2019), available at https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=42462.

[26] Government of India, Government Cautions People Against Risks in Investing in Virtual "Currencies"; Says VCs are like Ponzi Schemes, 29 December 2017 (Sep. 28, 2019), available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=174985.

[27] Reserve Bank of India, Prohibition on Dealing in Virtual Currencies (VCs), 6 April 2018 (Sep. 28, 2019), available at https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11243&Mode=0.

aims to warn users and other entities about the risks associated with cryptocurrencies, but does not clarify the direction of India's policy in this sphere and the legal and economic nature of virtual currencies, nor does it show the possible ways of settlement of disputable situations, although it implies the regulator's concern that this area of public relations is not under strict control and a desire not to allow financial institutions that it controls to be involved in cryptosecurities. It appears that the publication of the draft law on cryptocurrencies will clarify the attitude of the Government of India towards the regulation of cryptocurrencies, which will determine the further development of digital financial assets in the country and India's position on this issue within the framework of BRICS.

4. Digital Financial Assets in China

It is obvious that in the modern world financial technologies attract considerable attention from both the legislator and the potential users. China is not an exception, and in recent years a number of documents have been adopted to help arrangements for legal regulation in this sphere. Therefore, it seems that an analysis of the specified documents will make it possible to determine the position of China in this area of legal relations and to identify the prospects for its development.

At the same time, as regards digital financial assets, it should be noted that in China an ambiguous attitude has been formed towards the legal regime of certain varieties as well as the technologies underlying them. Moreover, no uniform special laws have been developed. For example, Big Data technology is included in the legal field of China and is supported by the Government for the purpose of further improvement and development, but under the laws of China it is not classified as a digital financial asset. Tokens and cryptocurrencies, on the contrary, tend to be limited by the authorities as a potentially dangerous segment since 2017. Thus, the blockchain technology underlying cryptocurrency has a high potential, which will have priority in development, despite the legal fate of cryptocurrency, although concerns about the safety of its use also still exist.

So, the regulatory framework that establishes the legal regulation of financial technologies has been actively formed in China since 2015. The publication of the Guidelines on Promoting Development of Internet Finance[28] may be considered to be the starting point in this development. This document sets forth the basic ideas aimed at the regulation of online payments, online lending, online insurance, stock crowdfunding and online sales of financial products.

Therefore, it seems quite natural that in the 13th Five-Year Plan for Economic and Social Development of China for 2016 to 2020[29] special attention was paid to this area.

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[28] Chen Jia, *China's New Guideline Targets Internet Financing*, China Daily, 20 July 2015 (Sep. 28, 2019), available at http://english.gov.cn/policies/latest_releases/2015/07/20/content_281475150612696.htm.

[29] The 13th Five-Year Plan for Economic and Social Development of the People's Republic of China (2016–2020) (Sep. 28, 2019), available at http://en.ndrc.gov.cn/newsrelease/201612/P020161207645765233498.pdf.

Part III of this Plan (Innovation-driven Development) contains provisions indicating the need for: development of well-regulated funding through the Internet; creation of a mechanism for consolidation of statistics, risk monitoring and management; development of online finance and cross-border financing; and improvement of the system for protection of the rights and interests of the financial consumers. Part IV (The Cyber Economy) specifies the main directions of development of the digital economy in China. They are related to ensuring fundamental understanding of the trends in the development of information technologies; the need to implement the National Cyberspace Development Strategy; accelerating the development of digital technologies; and deepening the integration of information technology in economic and social development. Evidence of the development of plans for future cyber-frameworks, cybertechnology systems and cybersecurity systems as well as the importance of breakthroughs in key Big Data technologies and cloud computing, independently controlled operating systems is not less important within the framework of the topic under consideration.

The national strategy for the development of cyberspace has already been implemented in the Law on Cyber Security, which came into force on 1 June 2017.[30] This law regulates the activities of network resources, and defines the rights and obligations as well as the liability of the participants of Internet resources. The strategic objectives are as follows: protection of the sovereignty of security and interests of the country in cyberspace; ensuring a safe and orderly flow of information on the Internet; improvement of global network connectivity; maintaining peace, security and stability in cyberspace; strengthening the international legal order in cyberspace; promoting the global development of the digital economy; and assistance in the deepening of cultural exchange and mutual learning.

In 2017, the Notice of the Banking Regulatory Commission, the Main Department of Industry and Information Technology, the Central Internet Office of the People's Bank of China "On Prevention of Financial Risks Associated with Issue of Tokens"[31] (hereinafter the Notice) was made public. According to the Notice, tokens are virtual currency, virtual money used upon financing the issue of the same, which are not issued by monetary authorities, do not have such monetary properties as compensation and obligation, do not have legal status equivalent to currency, and cannot and should not be used as a currency for circulation on the market. As a result, trading platforms for tokens were

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[30] International Strategy of Cooperation on Cyberspace, China Copyright and Media, 1 March 2017 (Sep. 28, 2019), available at https://chinacopyrightandmedia.wordpress.com/2017/03/01/international-strategy-of-cooperation-on-cyberspace/.

[31] 中国人民银行 中央网信办 工业和信息化部 工商总局 银监会 证监会 保监会关于防范代币发行融资风险的公告[Notice of the China People's Bank of China, Central Internet Office, Main Department of Industry and Information Technology, General Administration of Industry and Commerce, Banking Regulatory Commission, Securities Regulatory Commission "On Prevention of Financial Risks Associated with Issue of Tokens"] (Sep. 28, 2019), available at http://www.pbc.gov.cn/goutongjiaoliu/113456/113469/3374222/index.html.

subject to closing, and financial institutions and non-bank payment institutions were forbidden to settle transactions related to financial transactions for issue of tokens and their insurance coverage.

On the one hand, due to the provisions contained in the Notice, the legal status of tokens and cryptocurrencies in China was established. Since prior to the entry into force of the Notice cryptocurrency in China was considered to be a commodity, and cryptocurrency exchanges (and other websites related to digital currency) were to be registered with the Telecommunications Bureau, taxes were assessed in accordance with the rules typical of a commodity: transactions in cryptocurrency were subject to income tax, profit tax and capital gains tax, and sales could be subject to the value added tax (VAT).[32] On the other hand, since 2017 cryptocurrency and payment and exchange transactions in cryptocurrency have been banned, which could not but affect the market and the entities involved in its creation and circulation.

It seems interesting that despite the prohibition, economists note that there is a strong effect of the Chinese yuan on all the cryptocurrencies analyzed, if we consider that only for Bitcoin the Chinese yuan did not pass the significance stage of the multivariate regression. There is no doubt that three fiat currencies (Thai baht, Taiwan dollar and Chinese yuan) are strongly connected to the six major cryptocurrencies currently available to investors in the world.[33] This indicates that China should not be left out of account when deciding on the place of cryptocurrency in the world legal order.

Moreover, as of today, the prohibition on cryptocurrencies has not been canceled; the miners continue their work on the mining of digital assets. Additionally, blockchain technology has become legally regulated, in particular, the consolidation of the rule on the need to register real user names using a national identity document or telephone number as well as to check content and store user data.[34]

In general, the law stipulates that China values justice, openness and competition in the market. Continuing its own development, China stands for cooperation and common benefits, and undertakes to promote investment, trade and the strengthening of the digital economy throughout the world. It supports fair and open international trade, resists trade barriers and trade protectionism, and ensures

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[32] Регулирование криптовалют: исследование опыта разных стран (декабрь 2017 г.) [Regulation of Cryptocurrencies: Study of Experience of Different Countries (December 2017)] (Sep. 28, 2019), available at http://www.eurasiancommission.org/ru/act/dmi/workgroup/Documents/digest/Регулирование%20криптовалют%20в%20странах%20мира.pdf.

[33] Angelo Corelli, *Cryptocurrencies and Exchange Rates: A Relationship and Causality Analysis*, 6(4) Risks 111 (2018).

[34] *Антипов Г.* Китай вводит жесткие правила для блокчейн-стартапов и молчит об отмене запрета на крипто // Coinspot.io. 10 января 2019 г. [Gennady Antipov, *China Introduces Strict Rules for Blockchain Startups and Keeps Silence on Repeal of the Prohibition on Crypto*, Coinspot.io, 10 January 2019] (Sep. 28, 2019), available at https://coinspot.io/law/asia-and-africa/kitaj-vvodit-zhyostkie-pravila-dlya-blokchejn-startapov-i-molchit-ob-otmene-zapreta-na-kripto/.

an open and secure environment for the digital economy so that the Internet will serve the economy and innovation. China calls for fair, reasonable and universal access to the Internet, popularization of Internet technologies and diversity of Internet languages, and seeks to expand cooperation and exchange with other countries and regions in the sphere of cybersecurity and information technologies, to develop and innovate Internet technologies, and to ensure equal distribution digital dividends and sustainable cyberspace development.[35]

And according to the National Bureau of Statistics of China, in 2018 investments in high-tech industries increased by 14.9% as compared to 2017, and investments in industrial and technological transformation increased by 12.8%.[36] Thus, in 2017 investments in high-tech industries reached 4,291.2 billion yuan, which is 15.9% more compared to 2016, while investments in industrial technological transformation amounted to 10,591.2 billion yuan, having increased by 16.3%.[37]

Therefore, the objectives set forth in the strategies and developed in the laws have already started to be implemented in practice and obtain financial support, which shows the interest of China's leadership in developing the sphere of financial technologies and the safety of their use as well as ensuring interstate cooperation in the global space, including within the framework of BRICS. Thus, at least it is possible to say that the common legal framework for the digital economy and its security is being actively created. Within this framework, in the future it will be possible to create or isolate a direction related to digital financial assets, but today China is purposefully developing the technologies that underlie digital financial assets, while tokens and cryptocurrencies remain prohibited. At the same time, the logic of the legislator is clear: it is necessary to impose a ban until a safe environment is created, risks are limited and protection of the users and the investors is established. However, one should not forget that the presence of risk is not a reason for prohibiting the emergence and development of new public relations, but the need for their competent settlement. It is another question as to whether there is a need for their development.

5. Digital Financial Assets in the Republic of South Africa

Unlike China, the Republic of South Africa does not have regulations that directly prohibit cryptocurrency and transactions therein. On the contrary, this trend is flourishing in the country. It is important to note that in the Republic of South Africa

35 International Strategy of Cooperation on Cyberspace, *supra* note 30.

36 National Bureau of Statistics of China, Statistical Communiqué of the People's Republic of China on the 2018 National Economic and Social Development, 28 February 2019 (Sep. 28, 2019), available at http://www.stats.gov.cn/english/PressRelease/201902/t20190228_1651335.html.

37 National Bureau of Statistics of China, Statistical Communiqué of the People's Republic of China on the 2017 National Economic and Social Development, 28 February 2018 (Sep. 28, 2019), available at http://www.stats.gov.cn/english/pressrelease/201802/t20180228_1585666.html.

there is the FinTech program, which is a pro-fintech innovation. Important activities in the field of distributed ledger technologies (DLT) and digital currencies are performed. Various startups have developed products secured by virtual currencies, for example the "contracts for difference" that refer to cryptocurrencies as a base product. The number of cryptocurrency exchanges has increased, while the existing ones have expanded to offer new cryptocurrencies.[38]

Nevertheless, digital financial assets have not yet found their positive legal regulation, although in the future it is planned to take this sphere under control. It is noted that no primary or secondary legislation pertaining to virtual currencies has been promulgated in South Africa. No public consultation by which parliament and provincial legislatures consult with the people and interested or affected individuals, organizations and government entities before making a decision has taken place in respect of virtual currencies in South Africa.[39]

It should be noted that in 2014 the first public statement on virtual currencies[40] and the position of the Reserve Bank of the Republic of South Africa (SARB) on this issue were published. They contained general information on virtual currency, provisions on distinguishing it from legal tender, and a warning on risks and liability.[41]

Then, in order to establish taxation on such a dynamically developing market, on 6 April 2018 the South African Tax Service (SARS) posted information on its official website, according to which the standard income tax rules shall be applied to cryptocurrencies, while SARS considers cryptocurrencies to be intangible assets, and income received or accumulated as a result of transactions in cryptocurrency may be taxed on the income account in the "gross income" section, or as capital in kind. In the future, it is also planned to revise the approach to VAT for cryptocurrencies.[42]

The Intergovernmental FinTech Working Group (IFWG) was established for a more detailed study of this issue. Currently, the IFWG activities have begun to bring results. Thus, in early 2019 an advisory document drafted by the group and

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38 According to Регулирование Финтех в Южной Африке // IQ DECISION. 7 февраля 2019 г. [Fintech Regulation in South Africa, IQ DECISION, 7 February 2019] (Sep. 28, 2019), available at https://iqdecision.com/regulirovanie-finteh-v-juzhnoj-afrike/.

39 Annamart Nieman, *A Few South African Cents' Worth on Bitcoin*, 18(5) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 1978, 1988, 1989 (2015).

40 National Treasury of South Africa, User Alert: Monitoring of Virtual Currencies, 18 September 2014 (Sep. 28, 2019), available at http://www.treasury.gov.za/comm_media/press/2014/2014091801%20-%20user%20alert%20virtual%20currencies.pdf.

41 South African Reserve Bank, Position Paper on Virtual Currencies, Position Paper No. 02/2014, 3 December 2014 (Sep. 28, 2019), available at https://www.resbank.co.za/RegulationAndSupervision/NationalPaymentSystem(NPS)/Legal/Documents/Position%20Paper/Virtual%20Currencies%20Position%20Paper%20%20Final_02of2014.pdf.

42 SARS's Stance on the Tax Treatment of Cryptocurrencies, SARS, 6 April 2018 (Sep. 28, 2019), available at http://www.sars.gov.za/Media/MediaReleases/Pages/6-April-2018---SARS-stance-on-the-tax-treatment-of-cryptocurrencies-.aspx.

containing proposals on cryptocurrencies[43] was published. It defined and classified cryptocurrencies, analyzed the risks and benefits of their use, and identified problems and approaches to the legal regulation of cryptocurrency. In particular, this document proposes to use the term "cryptoassets," meaning digital representations or tokens that are accessed, checked, wherein transactions are settled, and that are electronically traded by a community of users. Cryptoassets are issued in an electronic form by decentralized organizations and do not have the status of legal tender, therefore, they are not considered to be electronic money either. Thus, there are no statutory compensation measures related to them. Cryptoassets can be used by the users of cryptoassets for payments (exchange of value) and for investment purposes. Cryptoassets may function as a medium of exchange, and/or unit of account, and/or store of values in the community of the users of cryptoassets.

As a result, we may conclude that the Republic of South Africa proposes digital financial assets to be designated by the term "cryptoassets" and establishes a common understanding and regulation for them, while maintaining a global approach that they cannot have the status of legal tender in the country, and their legal regime should be distinguished from that of electronic money.

The classification of approaches to the legal regulation of cryptoassets given in the IFWG document also seems interesting. According to the document, 150 countries in the world have not yet made a decision on their legal regime and hold the position of ignoring their existence, three countries have officially recognized their existence, but have not developed an approach to regulation (this group includes the Republic of South Africa), twenty-five countries have official recommendations for combating cryptoassets, five countries have guidelines for their use, three countries have developed conditions under which they can be authorized, and eleven countries have imposed a prohibition or ensured integration into the legal environment. Based on these indicators, we may say that the Republic of South Africa has adopted a progressive approach in recognizing the need to regulate this sphere of public relations and may well join the group of countries that have developed their attitude towards digital financial assets in the near future; and given that China has already developed a position, and Brazil, Russia and India will also soon come to a consensus on this issue, it will, in the near future, likely be possible to talk about the possible formulation and settlement of a number of related matters at the BRICS level.

The Republic of South Africa does not currently intend to prohibit the purchase, sale or ownership of cryptoassets or to prohibit cryptoassets for payments, but reserves the right to change its political position; that is to say, the monitoring of the situation continues. In the meantime, the objectives have been developed, such regulatory principles as the risk-based approach, technology neutral and primarily principles-

[43] IFWG – Crypto Assets Regulatory Working Group, Consultation Paper on Policy Proposals for Crypto Assets (Sep. 28, 2019), available at https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/9037/CAR%20WG%20Consultation%20paper%20on%20crypto%20assets_final.pdf.

based, and a unified regulatory approach are proposed. The IFGW also proposes to protect investors, first of all, to officially authorize the service providers with regard to cryptoassets operating in the Republic of South Africa either by registration or by licensing their activities. Thus, they will have to comply with the rules on combating money laundering, which means the need to identify their customers. It should be noted that this is consistent with the provisions set forth in the previously mentioned Draft Interpretive Note to FATF Recommendation 15.[44]

Conclusion

One cannot but agree that the emergence of cryptocurrencies and their active popularization in the world, on the one hand, and the uncertainty surrounding their legal nature, on the other, may have a considerable impact on the national economy due to the need for consistent maintenance of the balance of payments. Modern international processes have such a strong influence on the modern world economy that the economic decisions of individual countries, regardless of their type, influence each other, as well as the overall global development trend.[45]

The performed study on the legal regulation of digital financial assets in the BRICS countries shows that currently there are different approaches to their regulation and the regulation itself in these countries is at different stages. All of the countries agree that it is no longer possible to ignore their presence in the modern world, and thus it is necessary to clearly define the legal regime for their use. For these purposes, research and experiments are performed, possible consequences are analyzed and suggestions are made to prevent anticipated risks. The first steps are aimed at the protection of the population against fraud in this sphere. Thus, in the case of a prohibition on settlement of transactions in digital financial assets, an orientation towards identifying and punishing the guilty parties is formed. And if the transactions in digital financial assets are permitted, it has been shown that it is necessary to establish requirements and restrictions on these transactions, identify the providers of these services, determine the procedure for their registration or licensing and establish a clear difference between digital financial assets and legal tender.

All the same, while there are still a number of other issues and tasks that require understanding and legal regulation – for example, consolidation of the principles of the legal regulation of digital financial assets, creation of new mechanisms to reduce the risks associated with the ownership and circulation of digital financial assets, establishment of liability of entities involved in this kind of relationship, etc. – it can be stated that this institute is supported by the majority of the BRICS countries that

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[44] FATF, Public Statement, *supra* note 22.

[45] Oleg Stepanov & Denis Pechegin, *Legal View on the Introduction of New Technologies*, 6(3) Russian Law Journal 149, 170 (2018).

do not intend to completely prohibit the purchase, sale or ownership of cryptoassets, turnover of smart contracts, etc. And it seems that over time this will make it possible to develop a common BRICS policy with respect to digital financial assets as well as to create a platform for dialogue on improvement of the regulation of this sphere of legal relations, which, undoubtedly, is already transnational in nature. Still, only time will tell how it will ultimately affect the global financial system, money turnover and judicial practice.

References

Chudinovskikh M. & Sevryugin V. *Cryptocurrency Regulation in the BRICS Countries and the Eurasian Economic Union*, 6(1) BRICS Law Journal 63 (2019). https://doi.org/10.21684/2412-2343-2019-6-1-63-81

Cvetkova I. *Cryptocurrencies Legal Regulation*, 5(2) BRICS Law Journal 128 (2018). https://doi.org/10.21684/2412-2343-2018-5-2-128-153

Nieman A. *A Few South African Cents' Worth on Bitcoin*, 18(5) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 1978 (2015). https://doi.org/10.4314/pelj.v18i5.25

Stepanov O. & Pechegin D. *Legal View on the Introduction of New Technologies*, 6(3) Russian Law Journal 149 (2018). https://doi.org/10.17589/2309-8678-2018-6-3-149-171

Vlasov A.A. et al. *Legal Regulation of Cryptocurrency in the Russian Federation*, 34(14) Opcion 1200 (2018).

Information about the author

Igor Sarnakov (Moscow, Russia) – Deputy Dean of the Law Faculty, Associate Professor, Department of Legal Regulation of Economic Operations, Financial University under the Government of the Russian Federation (49 Leningradsky Av., Moscow, 125993, Russia; e-mail: saival@mail.ru).

COMMENTS

THE FIRST CASE OF HUMAN GENOME EDITING: CRIMINAL LAW PERSPECTIVE

DANIL SERGEEV,

Ural State Law University (Yekaterinburg, Russia)

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This article analyzes the legal assessment of the human genome modification experiment at the pre-implantation stage conducted by a group of scientists headed by He Jiankui, professor at the Southern University of Science and Technology (SUSTech) in Shenzhen, Guangdong Province, China, by means of the CRISPR/Cas9 technology. Chinese scholars have different opinions concerning He Jiankui's experiment, but on the whole condemn it as illegal. Though CRISPR/Cas9 has been applied for quite a long time, the legislation of most developed countries is not ready to respond. The author of the article underlines the fact that despite the consolidated opinion of scholars, there is no binding international act which would restrict human genome editing. The author relies on Chinese sources in considering the main approaches to the assessment of He Jiankui's actions in terms of criminal law (illegal medical activity, forgery of documents or fraud). Based on the analysis of Chinese criminal law doctrine, the author offers possible models of classifying separate actions related to human genome manipulation. The following cases of human genome manipulation are considered by the author as publicly dangerous and criminally liable: (a) when the embryo genome is changed by genetic engineering technologies for the purpose of its further implantation in the situation where the child's parents are not aware of such intervention and its possible implications; (b) when genetic therapy or any other gene transfer (transgenesis) is applied to a person who is not aware of the nature of such manipulation and the possible implications of the application of the technology.

Keywords: He Jiankui; genome editing; genetics; criminal law of China; criminal liability; public danger.

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Introduction

The discovery of CRISPR functions – a special locus of bacteria able to cooperate with Cas proteins which complementarily connect RNA with nucleic acids of foreign elements and later destroy these elements – opened a new era in genetic engineering.[1]

CRISPR/Cas9 technology provides the opportunity to edit genetic material rather than simply removing a gene or introducing a new gene in the existing sequence.

The possible application of human genome editing technology has caused a great deal of discussion on the ethical and legal consequences. In 2015, a group of leading scholars published their opinion in *Nature*, calling for agreement among scientists not to edit reproductive cells:

> In our view, genome editing in human embryos using current technologies could have unpredictable effects on future generations. This makes it dangerous and ethically unacceptable. Such research could be exploited for non-therapeutic modifications. We are concerned that a public outcry about such an ethical breach could hinder a promising area of therapeutic development, namely making genetic changes that cannot be inherited. At this early stage, scientists should agree not to modify the DNA of human

[1] Alexandre Loureiro & Gabriela J. da Silva, *CRISPR-Cas Converting a Bacterial Defence Mechanism into a State-of-the-Art Genetic Manipulation Tool*, 8(1) Antibiotics 18 (2019) (Sep. 25, 2019), also available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6466564/.

reproductive cells. Should a truly compelling case ever arise for the therapeutic benefit of germ line modification, we encourage an open discussion around the appropriate course of action.[2]

Ethical and legal questions were discussed at the First International Summit on Human Genome Editing (2015). A special emphasis was put on the difference between the clinical application of somatic cells when mutation is restricted by one individual and germ line cells whose genome defects may be inherited by future generations.[3]

The Summit declaration specifically stated:

> Germ line editing poses many important issues, including: (i) the risks of inaccurate editing (such as off-target mutations) and incomplete editing of the cells of early-stage embryos (mosaicism); (ii) the difficulty of predicting harmful effects that genetic changes may have under the wide range of circumstances experienced by the human population, including interactions with other genetic variants and with the environment; (iii) the obligation to consider implications for both the individual and the future generations who will carry the genetic alterations; (iv) the fact that, once introduced into the human population, genetic alterations would be difficult to remove and would not remain within any single community or country; (v) the possibility that permanent genetic "enhancements" to subsets of the population could exacerbate social inequities or be used coercively; and (vi) the moral and ethical considerations in purposefully altering human evolution using this technology. It would be irresponsible to proceed with any clinical use of germ line editing unless and until (i) the relevant safety and efficacy issues have been resolved, based on appropriate understanding and balancing of risks, potential benefits, and alternatives, and (ii) there is broad societal consensus about the appropriateness of the proposed application. Moreover, any clinical use should proceed only under appropriate regulatory oversight. At present, these criteria have not been met for any proposed clinical use: the safety issues have not yet been adequately explored; the cases of most compelling benefit are limited; and many nations have legislative or regulatory bans on germ line modification. However, as scientific knowledge advances and societal views evolve, the clinical use of germ line editing should be revisited on a regular basis.[4]

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[2] Edward Lanphier et al., *Don't Edit the Human Germ Line*, 519(7544) Nature 410, 410–411 (2015).

[3] On Human Gene Editing: International Summit Statement, The National Academies of Sciences, Engineering, and Medicine, 3 December 2015 (Sep. 25, 2019), available at http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=12032015a.

[4] *Id.*

The ethical consensus reached at the Summit in 2015 soon came under attack in terms of human genome editing technologies applied to human reproductive cells to treat incurable inheritable diseases. Thus, on 6 November 2018 *The CRISPR Journal* published an article under the title "Draft Principles for Therapeutic Assisted Reproductive Technologies."[5] The authors of the article point out that though the pre-implantation genetic diagnosis is rather effective and available, public opinion is not unanimous concerning the possibility of genetic surgery application at the pre-implantation stage, i.e. concerning the possibility to edit the embryo genome before its implantation. The authors express their own opinion on "matters of ethics and red lines," formulating five main principles:

1. Mercy for families in need. The broken gene, infertility or incurable disease should not spoil the life or affect the relations of a loving couple. For some families, early genetic surgery might be the only reliable means to cure a hereditary disease and relieve a child's sufferings.

2. Only for serious diseases, never for vanity. Genetic surgery is a serious medical procedure which must not be resorted to for some esthetic purpose, to improve or choose the gender of a child, or by any other means which can jeopardize the welfare, joy and free will of a child. Nobody has the right to determine the genetics of a child except in the situation where it is necessary to prevent a disease. Potentially, genetic surgery puts a child in a state of risk which may be permanent. The application of genetic surgery is admissible only when the risks of the operation are justified by a serious medical need.

3. Respect a child's autonomy. Life is not restricted to our physical body and DNA. After genetic surgery, a child has equal rights to live freely, to choose his or her future occupation or citizenship, and the right to have a private life. There are no obligations on the parent of such a child, or any organization, including the question of payment for the operation.

4. Genes do not define us. Our DNA does not predetermine our aim in life or what we can achieve. We can prosper by hard work, nutrition and support from society and the people we love. Whatever genes we have, we are all equal in our potential and dignity.

5. Everyone deserves freedom from genetic diseases. The health of a person must not depend on wealth. Organizations developing genetic treatments must be morally obliged to treat a person regardless of origin.

It is likely that the article published in *The CRISPR Journal* pursued the aim of serving as the background for the further events at the Second International Summit on Human Genome Editing held in Hong Kong. On 25 November 2018, one of the authors of the article, He Jiankui, professor at the Southern University of Science

[5] He Jiankui et al., *Draft Principles for Therapeutic Assisted Reproductive Technologies*, 1(6) CRISPR Journal 1 (2018).

and Technology (SUSTech) in Shenzhen, Guangdong Province, China, declared the success of his research experiments on mice and monkey embryos. He also succeeded in working with human embryo stem cells and human embryos with the purpose of specifically removing the CCR5 gene. This gene plays a key role in how the human immunodeficiency virus (HIV) infects cells. The targeted removal of the gene was conducted by the CRISPR/Cas9 "genetic scissors" technology in the process of recombination by means of the DNA-vector by the building-in of the CCR5-Δ32 gene in the chromosome of mutation. The said mutation makes the accession of the virus to the T cell impossible.[6] Certain that the technology used to remove the gene was reliable and safe, the group headed by He genetically edited the human fertilized ovum. The edited embryos were successfully implanted and, as a result, the pregnancy led to the birth of twin sisters, who were named Nana and Lulu.[7] Additionally, He stated that at the time the Summit was held there was one more pregnancy with a similarly genetically edited embryo.[8]

The experiments announced by He Jiankui caused a harsh and negative response among genetic scientists.[9] *The CRISPR Journal* later edited the article "Draft Principles for Therapeutic Assisted Reproductive Technologies"[10] due to a conflict of interest: He was interested in promoting a positive attitude towards human genome editing for therapeutic purposes. It is interesting to note that those who have committed crimes or other offenses often resort to a similar logic to change or justify their purposes so as to classify the actions committed as legitimate.[11] At the same time, the publication of the article by the He group in *The CRISPR Journal* came about just at the right time, since matters of law and ethics when editing the human genome are more than topical. It is quite tempting to conduct the pre-implantation editing of the human genome by means of the rather simple technology of "genetic scissors" and either give desirable

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6 Kristina Allers & Thomas Schneider, *CCR5Δ32 Mutation and HIV Infection: Basis for Curative HIV Therapy*, 14 Current Opinion in Virology 24 (2015).

7 Alice Park, *"They Will Be Studied for the Rest of Their Lives." How China's Gene-Edited Twins Could Be Forever Changed by Controversial CRISPR Work*, Time, 29 November 2018 (Sep. 25, 2019), available at https://time.com/5466967/crispr-twins-lives/.

8 Second International Summit on Human Genome Editing: Continuing the Global Discussion (Workshop Proceedings) (January 2019), at 3 (Sep. 25, 2019), available at https://www.nap.edu/read/25343/chapter/1.

9 *Id.*

10 Retraction of: Draft Ethical Principles for Therapeutic Assisted Reproductive Technologies by He, J et al., CRISPR J 2018; fast track. DOI: 10.1089/crispr.2018.0051, 2(1) CRISPR Journal 65 (2019).

11 *Ратинов А.Р., Ефремова Г.Х.* Психологическая защита и самооправдание в генезисе преступного поведения // Личность преступника как объект психологического исследования: Сборник научных трудов [A.R. Ratinov & G.Kh. Efremova, *Psychological Defense and Self-Justification When Committing a Crime* in *Personality of a Criminal as an Object of Psychological Research: Collection of Scientific Papers*] 44 (Moscow: Publishing House of the All-Union Institute for the Study of Causes and the Development of Crime Prevention Measures, 1979).

features to a child or remove undesirable features. On 10 June 2019, *Nature* published material which said that Russian scholar Denis Rebrikov intended to apply a similar technology in Russia. The article put special emphasis on the fact that to reduce the chances that he would be punished Rebrikov planned first to seek approval from three Russian government agencies, including the Health Ministry.[12]

The commercially attractive technology, which is available and, what is more important, in demand, will lead to new cases of human genome editing, many of which are likely to be unknown to the public. Therefore, we must resolve the ethical and legal questions, especially in terms of criminal law, concerning the assessment of genetic editing of the human genome, because it is a fact we cannot deny.

1. He's Case as a Challenge to International Law?

1.1. Preliminary Remarks

We should mention that at the time of this writing He Jiankui is under house-arrest in Shenzhen and faces criminal prosecution.[13] The present article does not pursue the aim of determining whether He is guilty of what he is or can be charged with. Our aim is to legally analyze the events of the first genetic editing of a human being.

At our disposal we have only data published from the He Jiankui case, which is based on the announcement made by He at the Second International Summit on Human Genome Editing.

Due to the closed nature of the activities of the Chinese law enforcement bodies, detailed information on the accusations made against He are not available. Our conclusions are based on Chinese sources (normative acts, doctrine), publications in Chinese journals and the private opinions of Chinese scholars. In all cases, except where otherwise specifically stated, we have relied on original sources of information.

1.2. Is There an International Ban on Human Genetic Editing?

He's experiment was the first serious violation of the principles on conducting genetic research and practical application of the knowledge received at the Conference on Recombinant Technologies (the Asilomar exhibition complex, Monterey, California) in 1975.[14] These principles are not legal norms but rather rules of professional ethics. At the same time, we cannot say that exactly these principles served as the foundation for legal regulation of issues connected with genetic research and experiments conducted in different countries all over the world. Before the Asilomar Conference,

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[12] David Cyranoski, *Russian Biologist Plans More CRISPR-Edited Babies*, 570(7760) Nature 145, 145–146 (2019).

[13] Elsie Chen & Paul Mozur, *Chinese Scientist Who Claimed to Make Genetically Edited Babies Is Kept Under Guard*, New York Times, 28 December 2018 (Sep. 25, 2019), available at https://www.nytimes.com/2018/12/28/world/asia/he-jiankui-china-scientist-gene-editing.html.

[14] *Кулделл Н., Берштейн Р., Ингрэм К., Харт К.М.* На пути к синтетической биологии [Natalie Kuldell et al., *On the Way to Synthetic Biology*] 91 (Moscow: DMK Press, 2019).

scholars voluntarily refused to conduct experiments with recombinant DNA and their decision was confirmed by the Committee of the National Academy of Sciences of the United States of America. The Committee said that to introduce a moratorium it was enough to demonstrate just the potential risk and not to prove the risk.[15] During the moratorium scholars assessed the risks and formulated rules of safety when conducting experiments with recombinant DNA. In particular, they developed safety measures to prevent the spread of genetically modified organisms outside the laboratories. They also passed a decision to refuse to apply the received results in practice if there were no data on the potential risks or such data were not sufficient enough.[16]

Cloning and the activities of genetic engineers have become possible due to further development of recombinant technologies. Since modern technologies have moved closer to the possibility to change the human genome, there is an increased concern over the necessity to formally regulate the use of new technologies in relation to a human being. In 1993, the International Bioethics Committee (IBC) at UNESCO was established for the purpose of being the first global body on bioethics.[17] In 2005, the UNESCO member states adopted the Universal Declaration on Bioethics and Human Rights offered by the IBC to resolve the ethical questions caused by the rapid changes in medicine and technologies. The Declaration states that the human genome is part of humanity's heritage. The Declaration contains rules to be complied with to respect human dignity, rights and basic freedoms.

In 2015, the IBC published its Report on Updating Its Reflection on the Human Genome and Human Rights.[18] The Report states that

> genetic therapy can become a crucial point in the history of medicine, and editing of the human genome is undoubtedly one of the most promising scientific achievements for the sake of the whole humanity.

However, in the Report experts warn that:

> This development requires specific precautionary measures and causes great concerns, especially if editing of the human genome shall be applied

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[15] Paul Berg et al., *Summary Statement of the Asilomar Conference on Recombinant DNA Molecules*, 72(6) Proceedings of the National Academy of Sciences 1981 (1975) (Sep. 25, 2019), also available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC432675/.

[16] *Id.*

[17] *Хавe Х.Т.* Деятельность ЮНЕСКО в области биоэтики // Казанский медицинский журнал. 2008. Т. 89. № 4. С. 377 [Henk ten Have, *UNESCO Activity in the Sphere of Bioethics*, 89(4) Kazan Medical Journal 377 (2008)].

[18] IBC Report on Updating Its Reflection on the Human Genome and Human Rights (2015) (Sep. 25, 2019), available at https://unesdoc.unesco.org/ark:/48223/pf0000233258.

to the germ line and, consequently, shall introduce hereditary modifications which later may be passed over to further generations.

Therefore, the IBC insisted on introducing a moratorium on this particular procedure, and announced, "Interference with the human genome should be admitted only for preventive, diagnostic or therapeutic reasons and without introducing changes for further generations," the alternative will "jeopardize the inherent and, consequently, equal dignity of all people and will restore eugenics."

Despite the opinion of such an important organization concerning the protection of genetic dignity, the world still does not have a common ban on genetic manipulation with human embryos.

At present, the first internationally binding instrument in the sphere of biomedicine is the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine, Oviedo, 4 April 1997, effective in 1999) ETS No. 164. Pursuant to Article 13 of the Convention, interference with the human genome aimed at its modification can be admitted only for preventive, diagnostic or therapeutic reasons, provided it does not introduce changes into the genome of the person's descendants. The Convention prohibits all forms of discrimination by genetic heritage and allows conducting genetic testing only for medical purposes. The Convention prohibits the use of technologies aimed at rendering medical aid to continue a person's family line, and choosing the gender of a future child, except for such cases where it is done to prevent inheriting some serious hereditary disease by the child. The Convention establishes rules of medical research listing specific conditions, especially in relation to people who are not able to express their consent to such research. It is prohibited to create human embryos for scientific purposes, and when a country allows research on embryos in vitro, it must ensure adequate protection of these embryos. Despite the importance of the provisions of this international instrument, only twenty-nine out of the thirty-five member states that signed the Oviedo Convention have ratified it so far. A large number of developed states actively involved in genetic research and experiments have not signed the Convention yet.[19] Consequently, at the present time there is no common international instrument binding for a large number of states which would limit or prohibit activities on genetic modification of a human being.

[19] The Convention has been signed but not ratified by Luxembourg, the Netherlands, Poland, Ukraine and Sweden; it has been signed and ratified by Albania, Bosnia and Herzegovina, Hungary, Greece, Georgia, Denmark, Iceland, Spain, Cyprus, Lithuania, Latvia, Norway, Portugal, Moldova, Romania, San Marino, Northern Macedonia, Serbia, Slovakia, Slovenia, Turkey, Finland, France, Croatia, Montenegro, Czech Republic, Switzerland and Estonia. It has not been signed by, e.g., Austria, Belgium, Ireland, Great Britain, Germany and Russia (data taken from the official website of the Council of Europe (Sep. 25, 2019), available at https://www.coe.int/ru/web/conventions/full-list/-/conventions/treaty/164).

1.3. Criminal Liability for Human Genome Editing

Some states do impose criminal liability for editing the human genome. Canada has formulated the criminal ban on gene editing in the following way (Sec. 5(1)(e) Assisted Human Reproduction Act 2004[20]):

> No person shall knowingly … alter the genome of a cell of a human being or in vitro embryo such that the alteration is capable of being transmitted to descendants.

The Act itself does not contain any sanctions.

The 1999 Israeli Prohibition of Genetic Intervention (Human Cloning and Genetic Manipulation of Reproductive Cells) Law declares the use of reproductive cells subject to deliberate germ line gene therapy for creation of a human being illegal. In particular, the law prohibits the following actions: (a) Human cloning – human reproductive cloning; (b) Using reproductive cells that have undergone a permanent intentional genetic modification (Germ Line Gene Therapy) in order to cause the creation of a person. The law provides for criminal liability in the form of imprisonment up to four years.[21] The ban introduced in Israel is of a temporary character: initially, it was valid until 1 March 2009; however, its term was prolonged and now it is effective until 23 March 2020.

Under Section 5 of the Embryo Protection Act of the Federal Republic of Germany passed on 13 December 1990 (*Embryonenschutzgesetz*):[22]

> (1) Whosoever artificially alters the genetic information of a human germ line cell shall be punished by up to five years' imprisonment or a fine.
>
> (2) Likewise anyone shall be punished who uses a human germ cell with artificially altered genetic information for fertilization.

The Act contains elements of no fewer than twenty-eight crimes which to a certain extent are likely to affect the genetic dignity of a human being and human embryos: (1) creation of dual motherhood; (2) support of substituted motherhood; (3) creation and use of embryos for unrelated purposes, especially for scientific research; (4) bringing to a pregnancy by more than three embryos; (5) deliberate creation of extra embryos; (6) planning a gender of a future child; (7) deliberate artificial

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[20] Assisted Human Reproduction Act (S.C. 2004, c. 2) (Sep. 25, 2019), available at https://laws-lois.justice.gc.ca/eng/acts/A-13.4/section-5.html.

[21] Prohibition of Genetic Intervention (Human Cloning and Genetic Manipulation of Reproductive Cells) Law, 5758–1999 (Sep. 25, 2019), available at http://www.hinxtongroup.org/docs/Israel.html.

[22] Act for Protection of Embryos (the Embryo Protection Act) (Sep. 25, 2019), available at https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/Gesetze_und_Verordnungen/GuV/E/ESchG_EN_Fassung_Stand_10Dez2014_01.pdf.

fertilization by the sperm of the deceased; (8) cloning; (9) creation of chimeras and hybrids; (10) artificial fertilization, transfer, conservation of embryos not by a doctor; etc.

The Criminal Code of the Federal District (Mexico) contains two provisions criminalizing any genetic intervention. Article 154 imposes imprisonment up to six years, disqualification or removal from office or occupation of those who manipulate human genes to change the genotype for purposes unrelated to, for example, elimination or suppression of a serious disease or condition. This provision also prohibits any genetic modifications for unlawful aims.[23] However, the Federal Criminal Code of Mexico does not provide for criminal liability for human genetic manipulation.

M. Araki and T. Ishii, researchers at Hokkaido University, have analyzed the international regulation of modification of human embryos.[24] They came to the conclusion that many countries prohibit modification of the human germ line gene. Twenty-nine out of the thirty-nine most developed states prohibit modification of germ line genes. The other ten states include nine states with a rather controversial legal status of such modifications (including Russia, the Republic of South Africa, Greece, Slovakia, Chile and Argentina) and the United States (with a special approach to regulating this question at the state level and at the federal level, where a temporary moratorium is in place).

China, India, Ireland and Japan prohibit human genome manipulation in the form of guidelines, which, as mentioned in the research by Araki and Ishii, can be rather easily changed and which have less binding force than laws.

For example, India does not have a specific law that would prohibit genome editing of germ lines. However, in 2017 the Indian Council of Medical Research (ICMR, a state organization accountable to the Health and Family Welfare Ministry) adopted National Ethical Guidelines for Biomedical and Health Research on Human Participants.[25] Under this Act, germ line therapy is prohibited under the present state of knowledge (p. 10.14.7). Additionally, eugenic genetic engineering is also prohibited, as we possess insufficient information at present to understand the effects of attempts to alter or enhance the genetic machinery of humans (p. 10.14.8).

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[23] Código Penal para el Distrito Federal [Penal Code of the Federal District] (Sep. 25, 2019), available at http://www.aldf.gob.mx/archivo-d261f65641c3fc71b354aaf862b9953a.pdf.

[24] Motoko Araki & Tetsuya Ishii, *International Regulatory Landscape and Integration of Corrective Genome Editing into in Vitro Fertilization*, 12(1) Reproductive Biology and Endocrinology 108 (2014).

[25] Indian Council of Medical Research, National Ethical Guidelines for Biomedical and Health Research Involving Human Participants (2017) (Sep. 25, 2019), available at https://www.icmr.nic.in/sites/default/files/guidelines/ICMR_Ethical_Guidelines_2017.pdf.

2. He's Case and Legal Regulation of Genetic Manipulation in China

2.1. Preliminary Remarks on the Legal System of China

First and foremost, it is necessary to make a few preliminary remarks on the system of sources of law in China to understand the importance of different legal documents. The legal system of China has several significant differences, the main one being a relatively small number of laws.

Laws (法) are passed by the National People's Congress (Parliament of the People's Republic of China) on most serious questions.

Rules (条例) are usually developed by ministries and approved by the State Council (Government of the People's Republic of China). It is noteworthy that due to the specific character of the legal system of China rules passed by ministries, in fact, have the same legal force as laws.[26]

The guiding principles passed by different bodies play an important role in the management of different branches, especially in the sphere of health and science. Guiding principles can also be passed in the form of "Ethical Guides" (伦理指导原则), "Ethical Principles" (伦理原则) or "Administrative Measures" (管理办法), which sometimes are translated as "Normative Rules," "Instructions." The aim of administrative measures is to administer specific types of activities. As stipulated by Articles 71 and 82 of Act No. 31 on the Legislation of the People's Republic of China (中华人民共和国立法法) passed on 15 March 2000,[27] administrative measures are rules passed by ministries or other state bodies which are directly controlled by the State Council of the People's Republic of China. They are a source of legal norms and are binding for a ministry or a government body which passes them. Administrative measures concerning scientific or medical research and practice are binding for research institutions and hospitals with an appropriate license.

Another normative document is technical norms (技术规范) or technical standards (技术标准) aimed at securing the safety and efficiency of technologies. Like ethical guiding principles, they can be applied only when permitted by normative acts, laws and administrative measures. It is important to note that many normative or ethical guiding principles in China are introduced as "experimental," "temporary" or "preliminary." However, the temporary character of such a source does not make it non-binding.

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[26] *Трощинский П.В.* Правовая система Китая [Pavel V. Troshchinsky, *The Legal System of China*] 44 (Moscow: IFES RAS, 2016).

[27] 中华人民共和国立法法释义 [*Act on the Legislation of the People's Republic of China*] 436 (Beijing: Legal Publishing House, 2015).

2.2. A Short Overview of Legal Regulation of Genetic Research and Experiments, Clinical Application of Genetic Technologies in the People's Republic of China

Though China is recognized as the world leader in the sphere of biomedical technologies connected with the human genome, China has not yet developed appropriate legislation in this sphere.[28] Priscilla Song states that it is the lack of legal regulation of biomedical research that is a triggering factor in the development of new medical and biological technologies in China.[29] Legal regulation in this sphere represented by a group of normative acts is not consistent.

1. *Act on Medical Practice (*中华人民共和国执业医师法*) of 26 June 1998*[30]

Article 14 of the Act on Medical Practice states that doctors cannot conduct their professional activity without being certified. Furthermore, under Article 26 of the Act, doctors involved in experimental clinical treatment must receive the approval of the hospital and consent from the patient or his or her family.

2. *Rules on Managing Medical Institutions (*医疗机构管理条例*), Order of the State Council of the People's Republic of China No. 149 of 1 August 2005*[31]

Pursuant to Article 25 of the Rules, medical institutions shall comply with corresponding laws, rules and medical technical rules when conducting medical activities. Violations of medical technical rules are equivalent to violations of the Rules and may lead to liability and sanctions.

3. *Decision of the Ministry of Science and Technologies and the Ministry of Health of the People's Republic of China No. 460 of 24 December 2003 approved "Guiding Ethical Principles in Research of Human Embryo Stem Cells" (*科学技术部、卫生部关于印发《人胚胎干细胞研究伦理指导原则》*460* 号*)*

This Act prohibits any research in the sphere of reproductive cloning (Art. 4) as well as selling and buying human gametes, a fertilized ovum, embryos and embryonal tissues. To research human stem cells three special rules are established:

– First, a blastocyst received by in vitro fertilization, the transfer of the somatic cell nucleus, parthogenesis or genetic modification shall not be cultivated for more than fourteen days from the moment of conception or the nucleus transfer;

– Second, blastocysts received in the above said ways cannot be implanted in the reproductive system of a human being or any animal;

– Third, human germ cells shall not be combined with germ cells of other types (Art. 6 of Decision No. 460).

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[28] Tom Hancock & Wang Xueqiao, *China Set to Tighten Regulations on Gene-Editing Research*, Financial Times, 25 January 2019 (Sep. 25, 2019), available at https://www.ft.com/content/a464bd9c-f869-11e8-af46-2022a0b02a6c.

[29] Priscilla Song, *Biomedical Odysseys: Fetal Cell Experiments from Cyberspace to China* 7–8 (Princeton: Princeton University Press, 2017).

[30] 中华人民共和国执业医师法 [Act on Medical Practice] (Sep. 25, 2019), available at http://www.gov.cn/banshi/2005-08/01/content_18970.htm.

[31] 医疗机构管理条例 [Rules on Managing Medical Institutions] (Sep. 25, 2019), available at http://www.gov.cn/banshi/2005-08/01/content_19113.htm.

However, the current rules in China do not prohibit the application of such technologies in relation to an adult person. In particular, to apply genetic modifications technologies (e.g. CRISPR-technologies) in relation to an adult person in China, it is necessary to obtain the approval of the Committee on Ethics of the hospital and the consent of the patient (Arts. 8, 9 of Decision No. 460). Due to the simplicity of such a procedure, technologies such as CRISPR-technologies are more often applied in China than in all other countries taken together.[32]

4. *Instruction of the National Committee on Health and Family Planning No. 11 of 12 October 2016 "On the Order of Considering Ethical Questions Related to Biomedical Research of a Human Being" (*涉及人的生物医学研究伦理审查办法, 第*11*号*)*[33]

This Instruction provides for ethical control over biomedical research of a human being by an independent committee on ethics which must be created in every medical institution. The lack of such control leads to administrative liability under Article 46 of the Instruction.

5. *"Administrative Measures for Clinical Application of Medical Technologies" (*医疗技术临床应用管理办法*) No. 18 of 16 March 2009*[34] *and No. 1 of 1 November 2018*[35]

Article 41 of the 2009 Administrative Measures (effective at the time He was conducting his experiment) states that the medical institution has no right to apply a medical technology which has been rejected or prohibited by the Ministry of Health of the People's Republic of China. The "Administrative Measures on the Application of Auxiliary Human Reproductive Technologies" (人类辅助生殖技术管理办法, established by the Ministry of Health of the People's Republic of China No. 14 of 1 August 2001),[36] prescribe the possibility to apply such reproductive technologies which fully comply with the "Technical Norms on Human Reproductive Technologies" (人类辅助生殖技术规范[37]); consequently, any genetic manipulation with human gametes, zygotes and embryos for reproductive purposes is prohibited.

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[32] Hancock & Xueqiao, *supra* note 28.

[33] 涉及人的生物医学研究伦理审查办法, 第11号 [Instruction No. 11 "On the Order of Considering Ethical Questions Related to Biomedical Research of a Human Being"] (Sep. 25, 2019), available at http://www.nhc.gov.cn/fzs/s3576/201610/84b33b81d8e747eaaf048f68b174f829.shtml.

[34] 医疗技术临床应用管理办法 [Administrative Measures for Clinical Application of Medical Technologies] (Sep. 25, 2019), available at https://baike.baidu.com/item/%E5%8C%BB%E7%96%97%E6%8A%80%E6%9C%AF%E4%B8%B4%E5%BA%8A%E5%BA%94%E7%94%A8%E7%AE%A1%E7%90%86%E5%8A%9E%E6%B3%95.

[35] 医疗技术临床应用管理办法 [Administrative Measures for Clinical Application of Medical Technologies] (Sep. 25, 2019), available at https://www.sific.com.cn/InsidePage/1000/38/8839.html.

[36] 人类辅助生殖技术管理办法 [Administrative Measures on the Application of Auxiliary Human Reproductive Technologies] (Sep. 25, 2019), available at http://www.gov.cn/fwxx/bw/wsb/content_417654.htm.

[37] 人类辅助生殖技术规范 [Technical Norms on Human Reproductive Technologies] (Sep. 25, 2019), available at http://www.zxxyyy.cn/manage/detail/454.html.

The 2018 Administrative Measures part with the blank description of legal regulation of the clinical application of new technologies. Article 4 states that clinical application of medical technologies must comply with scientifically substantiated principles, principles of safety, requirements of standards and ethics, and must be efficient and economical. Medical institutions that are not certain of the effectiveness and safety of a new technology to be applied cannot clinically apply it. Article 9 directly prohibits medical technologies if: (1) their safety and effectiveness are not clear enough; (2) there are serious ethical problems; (3) the application of a technology was prohibited earlier; and (4) new medical technologies are not clinically tested and proved.

2.3. What Criminal Charges Can He Jiankui Face?

First, He Jiankui can be suspected of committing a crime stipulated by Article 336 "Illegal Medical Practice" of the Criminal Code of China.[38] Under this rule, whoever conducts unauthorized birth control, reversal surgery, fake birth control surgery and pregnancy termination surgery, or removes birth control devices from the womb, and when the circumstances are serious, shall be sentenced to not more than three years of fixed-term imprisonment, criminal detention or control, and may in addition or exclusively be sentenced to a fine. Whoever causes serious harm to the health of patients shall be sentenced to not less than three years and not more than ten years of fixed-term imprisonment and a fine. Whoever causes the death of a patient shall be sentenced to not less than ten years of fixed-term imprisonment and a fine.[39]

In accordance with the Clarification of the Supreme People's Court No. 5 "On Separate Issues Concerning Specifics of Law Application When Trying Criminal Cases on Illegal Medical Practice," adopted at the 1446th meeting of the Judicial Committee of the Supreme People's Court on 28 April 2008 (最高人民法院关于审理非法行医刑事案件具体应用法律若干问题的解),[40] the illegal medical practice by people without medical qualification includes: (1) inability to acquire medical qualification or acquiring it by illegal means; (2) conducting medical activity when the certificate permitting the person to conduct medical practice has been revoked under the law; (3) inability to get a certificate to practice as a rural doctor and conducting medical activity in rural areas; and (4) other operations performed by a family obstetrician except for

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[38] 庞九林.贺建奎不是科学家而是罪犯应该立即对其采取强制措施 [Pang Jiulin, *He Jiankui Is Not a Scientist but a Criminal. Enforcement Measures Should Be Taken Against Him Immediately*] (Sep. 25, 2019), available at https://zhuanlan.zhihu.com/p/50991327.

[39] Criminal Code of the People's Republic of China (Sep. 25, 2019), available at https://www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/jdwt/crimelaw/t209043.htm.

[40] 最高人民法院关于审理非法行医刑事案件具体应用法律若干问题的解 [Clarification of the Supreme People's Court "On Separate Issues Concerning Specifics of Law Application When Trying Criminal Cases on Illegal Medical Practice"] (Sep. 25, 2019), available at http://www.court.gov.cn/zixun-xiangqing-33031.html.

child delivery. Aggravating circumstances include: (1) mild dysfunction of a patient and general dysfunction caused by damaged organs and tissues; (2) spread or risk of spreading and epidemic of infectious diseases of class A; (3) use of forged medicine, low quality medication or sanitary materials or medical goods which are not consistent with national standards, thus jeopardizing people's health; and (4) illegal medical practice has been twice punished by the Administrative Department of the Ministry of Health.

The given official interpretation by the court does not allow classifying the actions by He Jiankui as illegal medical practice. Firstly, the professor is an expert in the sphere of medical genetics. Secondly, all instances of manipulation were conducted by the medical staff in the medical center. Thirdly, medical intervention, in fact, concerned only the application of reproductive technologies to implant the embryo. Manipulation to edit a separate gene of the embryo is not a medical act itself and was conducted beyond the medical procedure, thus, in fact, being a scientific experiment.

Second, He Jiankui can be charged with the forgery of licensing documents granted by the Committee on Medical Ethics of the hospital where genetically modified embryos were implanted. Under Article 7 of Instruction No. 11 of the National Committee on Health and Family Planning of 12 October 2016 "On the Order of Trying Ethical Questions Related to Human Biomedical Research," one of the conditions necessary to conduct biomedical activity in respect of a human being is the establishment of an independent committee on ethics. In the opinion of the Chinese lawyer Pang Jiulin,[41] if forgery of documents was committed to deceive the parents of the child and obtain some money, then He's actions can be classified as fraud (Art. 266 of the Criminal Code). But even if there was some degree of forgery in He's case, it must have been caused by those restrictions which concerned manipulation with the human embryo genome and not by money considerations. Thus, his actions fall under Article 280 "Forgery of Documents" of the Criminal Code. In accordance with this provision, whoever forges, alters, trades, steals, forcibly seizes or destroys officials documents, certificates or seals of state organs is to be sentenced to not more than three years of fixed-term imprisonment; when the circumstances are serious, the sentence is to be no less than three years but not more than ten years of fixed-term imprisonment.[42]

Third, some actions may be classified as administrative offenses or neglect of official duty. Thus, Professor He can be charged with violations of Articles 33 and 35 of Instruction No. 11 of 12 October 2016 concerning the informed consent of a patient to perform medical intervention.

Though there are alternatives as to how to classify the actions committed by He Jiankui, Chinese law seems to lack special liability for illegal manipulation of the genome of a human being and other organisms. Professor at Beijing University Wang Yue thinks that He's case has become a watershed between ethical and juridical risks in the sphere of genetic research. Wang Yue considers He's actions to be a risk to the

41 Jiulin, *supra* note 38.

42 Criminal Code of the People's Republic of China, *supra* note 39.

safety of the gene pool of the whole of mankind, therefore he offers to introduce liability in criminal law for crimes committed with the use of new technologies. In his view, one of the factors contributing to the commission of He's actions concerned the fact that it was possible to clinically apply new medical technologies not on the basis of the license but by following the simplified registration procedure of a project. The scholar comes to the conclusion that control in this sphere must only increase. To make such control effective, it is necessary to find a balance between technological freedom and public safety.[43]

Professor at the Criminal Law Institute of the Beijing Pedagogical University Peng Xinlin says that the genetic editing conducted by He Jiankui is scientific research, and though it violates the norms of medical ethics, it is not obvious that it should be classified as a crime. To make a violation of ethical rules a crime, we must see significant public damage and, secondly, such an action must be of a universal character (to be dangerous "by itself" without any additional conditions). Will babies born in such a way pose a threat to the society? He's case contradicts medical ethics, but it does not meet the universality requirement. Peng also mentions that different ideas on amending the legislation which appeared after He's declaration should be treated rationally and with caution.[44]

Professor at the Chinese University of Political Science and Law and Director of the Centre of Legal Research in the health sphere Xie Zhiyun has called the experiment conducted by He Jiankui an insane adventure.[45] In his view, it is difficult to predict the implications of such an experiment and what we may face in the future in terms of ethics, evolution and human reproduction. At the same time, the importance of the very problem convinces Xie Zhiyun of the necessity to impose punishment in this case.[46]

3. He's Case as a Factor Contributing to the Development of Genetic Justice in China and Other Countries

The process of developing and adopting amendments in the criminal legislation of China requires a lot of time and effort,[47] therefore the Chinese legislator is unlikely

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[43] 赵汉斌.面对"科学狂人"，法律应提前归位 [Zhao Hanbin, *In the Face of "Scientific Madman," the Law Should Be Returned to the Place in Advance*] (Sep. 25, 2019), available at http://www.xinhuanet.com/tech/2018-11/28/c_1123777358.htm.

[44] 黄海英.基因编辑婴儿涉及哪些法律问题？专家全面解读 [Huang Haiying, *What Legal Issues Are Involved in Genetic Editing of Infants? Comprehensive Interpretation of Experts*] (Sep. 25, 2019), available at https://tech.sina.com.cn/d/2018-11-28/doc-ihmutuec4251913.shtml.

[45] *Id.*

[46] *Id.*

[47] *See* on criminal legislation in China: *Сергеев Д.Н.* Законотворчество в системе уголовно-правового регулирования // Вестник Пермского университета. Серия: Право. 2018. № 39. С. 125–133 [Danil N. Sergeev, *Law-Making in the System of Criminal Law Regulation*, 39 Perm University Herald. Juridical Sciences 125 (2018)].

to rapidly respond to the events in He's laboratory. While the experiment by He was not shown to be dangerous, the Chinese experience does show that the legal system is not ready to take measures against serious violations of medical and scientific research ethics. The Russian legal system seems also not to be ready for such situations. As in China, in Russia legislation does not consider actions to edit the human embryo and further implant it a crime even if parents are not aware of the genetic editing of their embryo. We observe that even when genetic intervention in the human genome is obviously illegal, such actions cannot be classified as crimes not only in China, but in most of the countries of the world.

The doctrine of Chinese criminal law differentiates two categories in the notion of a crime: the legislative concept of a crime and the judicial (law enforcing) concept.[48] An analogue to the legislative concept of a crime is the crime classification criteria existing in national and international criminal law.[49] The most important criterion of criminalization in Chinese doctrine is social harmfulness (public danger), which serves as the watershed between a crime and other offenses. The moment when the harmfulness of an action turns into a public danger is called the "initiation point." From the viewpoint of public danger, Chinese scholars are not unanimous concerning He's case. Indeed, looking at the general assessment of the scientific progress, we cannot with absolute certainty recognize the activity of human genome manipulation as a public danger.

At present, science does not possess reliable knowledge on the possible damage by such manipulation to an individual or the whole of humanity. By and large, the experiment conducted by He Jiankui pursues a publicly useful purpose to restore genetic immunity in the case of HIV. Additionally, to treat hereditary diseases and defects which once were incurable, genetic therapy is being actively developed. Methods of genetic therapy are now already applied in relation to an adult person and are a form of medical intervention into genetic information. The German Embryo Protection Act mentioned above is often criticized for excessive criminalization of twenty-eight actions with regard to embryos.[50] For this reason, we cannot recognize all possible manipulation of the human genome as activities that are public dangers. At the same time, a public danger does arise in human genome manipulation when: (1) the embryo genome is edited by means of genetic engineering technologies

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[48] 王世洲。现代刑法学（总论）[Wang Shizhou, *Modern Criminal Law (General Part)*] 74–75 (Beijing: Beijing University Press, 2011).

[49] *Верле Г.* Принципы международного уголовного права: Учебник [Gerhard Werle, *Principles of International Criminal Law: Textbook*] 58 (Odessa: Feniks, 2011).

[50] *Рёрихт А.А.* Гюнтер Х.-Л., Таупитц Й., Кайзер П. Закон о защите эмбрионов. Günther H.-L., Taupitz J., Kaiser P. Embryonenschutzgesetz. Stuttgart: Kohlhammer Verl., 2008. 428 s. // Социальные и гуманитарные науки. Отечественная и зарубежная литература. Серия 4: Государство и право. Реферативный журнал. 2010. № 4. С. 104–107 [Alla A. Rerikht, *Günther H.-L., Taupitz J., Kaiser P. Embryo Protection Act. Stuttgart: Kohlhammer, 2008. 428 p.*, 4 Social Sciences and Humanities. Russian and Foreign Literature. Series 4: State and Law. Abstract Journal 104 (2010)].

with further implantation of the embryo in cases where the parents of the child are not aware of the nature of such intervention and its possible implications; (2) application of genetic therapy or any other transgenosis in relation to a person in cases where the person is not aware of the nature of the applied manipulation and possible implications of the applied technology.

As for other human genome manipulation, at present it is difficult to make a determination as to the obvious public danger. If one follows the principle of a "potential danger sufficient for criminalization of an action," then it can have a negative impact on the development of biomedical technologies and genetic science on the whole. For this reason, at present, we do not see legal grounds to make He Jiankui criminally liable.

Should He's experiment pose a risk to the life of Nana and Lulu born as a result of his experiment, and the risk be associated with the fact of genetic editing at the embryonal stage, then even on the basis of current criminal law the actions by He's group may be recognized as criminally punishable.

On 26 February 2019, the Health Ministry of China published a project of the Rules on Administering the Clinical Use of New Biomedical Technologies (关于生物医学新技术临床应用管理条例[51]) for public discussion. As mentioned earlier, the Rules (条例) in fact are equal to the law in the hierarchy of sources of law in China. The adoption of the Rules will significantly increase the level of legal regulation of genetic research and manipulation. The project not only offers positive regulation of such matters, but also introduces liability. As the explanatory note to the project reads:

> It is not possible to enforce legal norms due to ineffectiveness of sanctions imposed under current normative acts, therefore the project introduces sanctions for their violations. Such sanctions include warnings, offering time to remove such violations, fines, cancellation of a license, etc. In case of more serious violations, offenders will be subjected to criminal liability.[52]

Though the explanatory note clearly states that offenders will be criminally liable for violations in the sphere of clinical use of new biotechnologies, the project itself does not impose any criminal rules. It is important to underline that there is no clear understanding of the sources of criminal law in China: alongside the Criminal Code, China has separate normative acts on criminal liability.

The Project offered by the Health Ministry of China divides new medical technologies into three groups of risk, introducing differentiated legal regulation for

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[51] 关于生物医学新技术临床应用管理条例（征求意见稿）公开征求意见的公告 [Announcement on Public Consultation on the Rules on Administering the Clinical Use of New Biomedical Technologies (Draft for Comment)] (Sep. 25, 2019), available at http://www.nhc.gov.cn/yzygj/s7659/201902/0f24ddc242c24212abc42aa8b539584d.shtml.

[52] *Id.*

each type of technologies. New biomedical technologies of high risk are administered by the State Council of the People's Republic of China and are accountable to the managing bodies of health at the All-China level. This group includes technologies connected with genome editing, gene transfer, mitochondrial replacement, etc.; technologies of xeontransplantation and cloning; production of new organisms or biological products, including synthetic bacteria; the use of auxiliary reproductive technologies; and other research projects with high technical risks and difficulties which can have serious implications.

The section of the project on liability has a rather big volume and includes a group of different elements of administrative offenses with huge fines and states that,

> In case of a serious violation, it will be tried under the rules of criminal liability.

Conclusion

He's case has caused many ethical and purely legal problems. If society closes its eyes to the necessity to resolve these issues today, and without delay, the result will be the accumulation of such problems.

At present, it is obvious that human genome editing can be carried out by research scholars "at their own risk," despite all legislative restrictions and the lack of normative legal acts. The lack of a common approach to the legal assessment of human genetic modifications at the international level (provided the human genome is declared the public domain of the whole of humanity) is compensated by the inconsistent regulation of different countries with quite different approaches: from relative freedom in questions of genetic experiments (Brazil, Russia, India, China and South Africa) to criminal bans (Israel, Canada and Germany). The lack of common approaches will trigger medical genetic tourism in those states which allow such experiments (including pre-implantation genetic editing) or to those states which close their eyes to such experiments.

Current criminal law is clearly not ready to assess the degree of danger of different areas of manipulation of the human genome as well as of other related actions, for example, in the sphere of genetic information exchange. In this connection, we find it reasonable to take a cautious approach to the necessity to criminalize such actions. We should prohibit obviously dangerous activities rather than limit ourselves by a general ban.

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References

Allers K. & Schneider T. *CCR5Δ32 Mutation and HIV Infection: Basis for Curative HIV Therapy*, 14 Current Opinion in Virology 24 (2015). https://doi.org/10.1016/j.coviro.2015.06.007

Araki M. & Ishii T. *International Regulatory Landscape and Integration of Corrective Genome Editing into in Vitro Fertilization*, 12(1) Reproductive Biology and Endocrinology 108 (2014). https://doi.org/10.1186/1477-7827-12-108

Berg P. et al. *Summary Statement of the Asilomar Conference on Recombinant DNA Molecules*, 72(6) Proceedings of the National Academy of Sciences 1981 (1975). https://doi.org/10.1073/pnas.72.6.1981

Cyranoski D. *Russian Biologist Plans More CRISPR-Edited Babies*, 570(7760) Nature 145 (2019). https://doi.org/10.1038/d41586-019-01770-x

Loureiro A. & da Silva G.J. *CRISPR-Cas Converting a Bacterial Defence Mechanism into a State-of-the-Art Genetic Manipulation Tool*, 8(1) Antibiotics 18 (2019). https://doi.org/10.3390/antibiotics8010018

Song P. *Biomedical Odysseys: Fetal Cell Experiments from Cyberspace to China* (Princeton: Princeton University Press, 2017). https://doi.org/10.23943/princeton/9780691174778.001.0001

王世洲。现代刑法学（总论）[Shizhou W. *Modern Criminal Law (General Part)*] (Beijing: Beijing University Press, 2011).

Information about the author

Danil Sergeev (Yekaterinburg, Russia) – Associate Professor, Department of Criminal Law, Ural State Law University (21 Komsomolskaya St., Yekaterinburg, 620137, Russia; e-mail: dnse@mail.ru).

LEGAL ENTITIES AS THE MAIN PARTICIPANTS IN BUSINESS ACTIVITY IN RUSSIA AND CHINA

OLGA BERZIN,

National Research University Higher School of Economics
(Nizhny Novgorod, Russia)

EVGENIIA SHLIAGINA,

National Research University Higher School of Economics
(Nizhny Novgorod, Russia)

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The legal entity is one of the most common forms of business activity in the Russian Federation and the People's Republic of China. The regulation of legal entities in Russia and China has changed in recent years, which makes the study of this issue especially relevant. This article explores and compares the concept of business activity, the system of legal entities and several types of particular legal entities in regard to companies found in Russia and China. The research concludes that the system of legal entities in the Russian Federation has an exhaustive regulation that facilitates the interpretation of the civil legislation and allows distinguishing the relevant characteristics of any type of organization. In China, there was no unified system of legal entities until 2017. While the General Provisions of the Civil Law of the People's Republic of China adopted in 2017 is a serious and important attempt to establish a system of legal entities, the law does not contain the essential characteristics of legal entities; additionally, a number of the provisions of the legal acts in force devoted to the regulation of the activities of legal entities have not yet been brought in line with the new law.

Keywords: business activity; legal entities; General Provisions of the Civil Law of the People's Republic of China; Civil Code of the Russian Federation; BRICS.

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Table of Contents

Introduction

Understanding what modern legal families and legal systems are represents one of the main objectives of legal theory in the 21st century. Yet, researchers often come across visible and hidden language and cultural barriers. Without knowing the historical, cultural and mental peculiarities of other peoples, the reasons why an institution has been included in or eliminated from a foreign state's legislation cannot be determined.

Studying the legal systems of other countries is important for lawmaking, because it can provide legislators a clue, based on another country's experience, as to what kind of legal practices are effective and can be borrowed or, conversely, what kind of norms proved inefficient and should be avoided.

So it is not surprising that the legislation of the People's Republic of China (PRC) is of special interest to researchers these days. This is due to a whole range of factors. First of all, China is one of Russia's major strategic partners. The long-standing cooperation between the two countries based on the similarity of political courses is characterized by a steady growth. Russia and China collaborate in various fields including trade and economic relations, humanitarian work and international cooperation in organizations such as BRICS, Shanghai Cooperation Organisation (SCO), Asia-Pacific Economic Cooperation (APEC) and the World Trade Organization (WTO).[1]

The importance attached to Russian-Chinese bilateral contacts is also reflected in Russia's legal acts. For example, the Russian National Security Strategy sets as its priority

> the development of all-embracing partnership and strategic cooperation with the People's Republic of China, as it plays the key role in maintaining global and regional stability.[2]

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[1] Irina Mikheeva & Anastasia Loginova, *WTO Accession of BRICS Countries: The Chinese Experience*, 4(1) BRICS Law Journal 84, 98 (2017).

[2] Указ Президента РФ от 31 декабря 2015 г. № 683 «О Стратегии национальной безопасности Российской Федерации» // Собрание законодательства РФ. 2016. № 1 (ч. 2). Ст. 212 [Presidential Decree No. 683 of 31 December 2015. On the National Security Strategy of the Russian Federation, Legislation Bulletin of the Russian Federation, 2016, No. 1 (part 2), Art. 212].

Moreover, this document demonstrates that Russia understands the crucial importance of strengthening its relationship with its fellow member states of the international organizations mentioned above.[3]

The need for developing legal cooperation is determined by the two countries' active cooperation in a variety of fields. Nowadays, many forums for Chinese and Russian lawyers have been organized, among which, for example, the Russia-China Law Society.[4]

The research into the legal cooperation between Russia and China mainly focuses on each country's legislation and their similarities and differences.

The Chinese legal system is characterized by the following features. On the one hand, it still preserves the tradition originating in Chinese-Soviet cooperation from the period 1940–1950.[5] On the other hand, China appears to have assumed some of the Western legal practices. Chinese lawmakers are implementing more and more the norms of Anglo-Saxon law in their legal system, making it even more distinct from the Russian legal system, but not less interesting a matter of research.

Since one of the priorities in Russian-Chinese cooperation is expanding bilateral economic cooperation, both countries' governments pay close attention to the development of business. In Russia and China, this is in large part represented by the legal entities that are the subject matter of this research.

Considering the latest civil law reforms in Russia and China as well as for the sake of the development of the two countries' economic and legal cooperation, a comparative study of legal entities regulation in Russia and China shall be undertaken.

1. Definition of *Business Activity* in Russia and China

Well-functioning and efficient business encourages the development of society. It favors economic growth, helps attract funds for various economic sectors and creates employment, and besides, it is a huge source of tax revenue. No matter the country, business has its peculiarities depending on existing legal regulation, the custom of business turnover and the population's mentality. However, every country understands the need for constant improvement and expansion of business activities both within the domestic market and internationally.

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[3] Presidential Decree No. 683, *supra* note 2.

[4] The Russia-China Law Society is a non-profit organization created by the Law Faculty of Lomonosov Moscow State University. Our main goal is to develop Russian-Chinese relations in the field of law and to assist in establishing professional contacts between representatives of the legal community of the Russian Federation and the People's Republic of China; information about the Society is available at http://rc-law.ru/association/.

[5] Lei Chen, *The Historical Development of the Civil Law Tradition in China: A Private Law Perspective*, 78(1-2) Legal History Review 159, 174 (2010).

An effective development is only possible provided that there are certain legal mechanisms to ensure the smooth operation and protection of economic activities. The Constitution of the Russian Federation being the state's major normative legal act provides the following guarantees for economic entities.[6] First of all, it guarantees economic freedom and support of competition, this being the main factor for improving the quality of services, works and goods. An integral economic space shall be provided to ensure the free flow of goods, services and financial resources in the Russian Federation (Art. 8). The establishment of any other barriers to the free flow of goods, services and financial resources shall not be allowed in the Russian Federation. Limitations shall only be introduced should it be necessary to ensure security, protect the life and health of the people, protect nature and items of cultural value and in accordance with the procedure specified in the federal laws (Art. 74). In the Russian Federation, recognition and equal protection shall be given to private, state, municipal and other forms of ownership (Art. 8). Everyone shall have the right to make use of their abilities and property for entrepreneurial and other economic activities not prohibited by law (Art. 34).

Thus, there are regulations that ensure the normal operation of business turnover and business activity in Russia.

The Constitution of the People's Republic of China differs from that of the Russian Federation. Firstly, it does not proclaim the freedom of economic activity. Secondly, it does not mention competition, although Chinese legal scientists claim that

> present day business in China is characterized by a quickly growing competitive environment.[7]

China also has its own approach to defining the forms of ownership. China's legislation distinguishes state (owned by the people as a whole) ownership, collective ownership and private ownership.[8] State ownership includes all types of property stipulated by law. The ownership of such property is exercised by a special authorized state institution assigned by the PRC's State Council and by local state-property control bodies. Collective ownership includes the property of collective urban and rural economic organizations. Private ownership has to do with the property that belongs to organizations or individuals.

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[6] Конституция Российской Федерации (принята всенародным голосованием 12 декабря 1993 г.) // Собрание законодательства РФ. 2014. № 31. Ст. 4398 [Constitution of the Russian Federation of 12 December 1993, Legislation Bulletin of the Russian Federation, 2014, No. 31, Art. 4398].

[7] *Шуньхуэй Ч.* Особенности организации предпринимательства в Китае // Экономические науки. 2007. № 2(27). С. 22 [Zhan Shunkhui, *Features of the Organization of Entrepreneurship in China*, 2(27) Economic Sciences 22 (2007)].

[8] Property Law of the People's Republic of China, adopted at the 5th Session of the 10th National People's Congress on 16 March 2007 (Sep. 25, 2019), available at http://www.lawinfochina.com/display.aspx?id=6642&lib=law&SearchKeyword=&SearchCKeyword=.

The Constitution of the PRC prioritizes the state and collective types of ownership over the private type, for it is the socialist communal property (state or collective) which is considered to be the basis on which China's socialist economic system rests (Art. 6), and it is sacred and inviolable. The state-property sector of the economy is believed to be the economy's most important actor. It is that sector that receives the state's benefits and protection.

The Chinese Constitution acknowledges an important role that the non-state sector of the economy based on private ownership plays in the development of the socialist market economy (Art. 11). At the same time, Chinese lawmakers use rather loose wording when it comes to describing the state's responsibilities regarding the non-state sector of the economy. While the government guarantees benefits and development for the state property sector, with the private sector its responsibilities are confined to just encouraging, supporting and directing the sector's development.

Though the Constitution of the PRC does not establish the right to conduct a business and gives priority to state property over private property, data obtained in 2016 shows that the number of private businesses in the country amounted to over 12 million entities at that time while the number of individual entrepreneurs exceeded 44 million.[9] These statistics demonstrate that,

> The private sector forms an important part of the ownership structure and plays a crucial role in China's economy growth.[10]

A basic comparative study of the constitutions of Russia and China leads to the conclusion that in Russia the state offers certain firm guarantees that ensure the normal operation of businesses. The Chinese Constitution, in its turn, does not specify any such guarantees although lawmakers appear to be aware of the need to encourage this type of economic activity.

To get a deeper understanding of what business activity is, first of all, its definition should be analyzed. In Russia, this concept is defined at the legislative level. According to Article 2 of the Civil Code of the Russian Federation, business activity is

> an independent activity performed at one's own risk, aimed at systematically deriving a profit from use of property, sale of commodities,

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[9] Xinhua News Agency, 11 June 2017 (Sep. 25, 2019), available at http://russian.news.cn/china/2017-06/11/c_133399915.htm.

[10] David Ahlstrom & Zhujun Ding, *Entrepreneurship in China: Progress and Challenges* in *Developments in Chinese Entrepreneurship* 1 (D. Cumming et al. (eds.), New York: Palgrave Macmillan, 2015); *Длин Н.А.* Ю.В. Чудодеев. На глазах меняющийся Китай. М.: ИВ РАН, 2008. 160 с. // Восток. Афро-азиатские общества: история и современность. 2010. № 2. С. 215 [Nikolay A. Dlin, *Yu.V. Chudodeev. China Is Changing in Its Eyes. Moscow: Institute of Oriental Studies of the Russian Academy of Sciences, 2008. 160 p.*, 2 East. Afro-Asian Societies: History and Modernity 215, 215 (2010)].

> performance of work or delivery of services by the persons registered in this capacity conforming to the procedure established by law.[11]

And thus, several traits of business activity in Russia can be distinguished and a description of each of them can be provided.

Independence of business activity. The participants in business relations act of their own will and in their own interest. A participant's independence implies the right to choose the type of business, methods of work and contractors; free execution of rights and their protection. Business activity can only be restricted by federal laws.

Risk-bearing character of business activity. In O.M. Oleynik's opinion, business activity risks consist in

> the possibility of not getting the planned or expected positive result as well as the possibility of negative consequences of some actions no matter what they are.[12]

She underlines that, besides not gaining a profit, a businessperson may come across many other risks, e.g. monetary, credit, innovation, investment risks that can consist in not getting a project or an object that has been ordered, etc.[13]

Orientation to systematic profit generation. As I.V. Ershova has rightly stated, the legislation does not offer any criteria to distinguish between systematic and non-systematic profit.[14] However, by analyzing judicial practice certain legal positions which the courts adhere to can be determined. The profit-generation process is of a systematic character if the business entity's objective is not a one-time profit, but rather getting a regular source of profit.[15] The business activity through which the profit is made is of a systematic character, too. At the same time, the lack of profit

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[11] Гражданский кодекс Российской Федерации (часть первая) от 30 ноября 1994 г. № 51-ФЗ // Собрание законодательства РФ. 1994. № 32. Ст. 3301 [Civil Code of the Russian Federation (Part One) No. 51-FZ of 30 November 1994, Legislation Bulletin of the Russian Federation, 1994, No. 32, Art. 3301].

[12] *Олейник О.М.* Понятие предпринимательской деятельности: теоретические проблемы формирования // Предпринимательское право. 2015. № 1. С. 6 [Oksana M. Oleynik, *The Concept of Entrepreneurial Activity: Theoretical Problems of Formation*, 1 Business Law 6 (2015)].

[13] *Id.* at 7.

[14] *Ершова И.В.* Понятие предпринимательской деятельности в теории и судебной практике // Lex Russica. 2014. № 2. С. 163 [Inna V. Ershova, *The Concept of Entrepreneurial Activity in Theory and Judicial Practice*, 2 Lex Russica 160, 163 (2014)].

[15] Постановление Пленума Верховного Суда РФ от 24 октября 2006 г. № 18 «О некоторых вопросах, возникающих у судов при применении Особенной части Кодекса Российской Федерации об административных правонарушениях» // Российская газета. 2006. 8 ноября. № 250 [Resolution of the Plenum of the Supreme Court of the Russian Federation No. 18 of 24 October 2006. On Some Issues Arising from the Courts in the Application of the Special Part of the Code of Administrative Offences of the Russian Federation, Rossiyskaya Gazeta, 8 November 2006, No. 250].

does not mean that such an activity cannot be qualified as a business since profit-making is just an objective of business activity but not its only possible result.[16]

Participants are registered in conformity with the procedure established by law. Persons who are not registered in conformity with the procedure established by law may not participate in a business activity and, depending on the size of the damage or profit, are subject to administrative[17] or criminal[18] sanctions.

Activity consisting in the use of property, sale of commodities, performance of work or delivery of services. According to the Russian judicial practice, Article 2 of the Civil Code of the Russian Federation does not name all the types of economic activity that can be used in business, though at first sight this norm may seem quite exhaustive. For example, non-deliverable forward contracts are considered to be a type of bank business activity by the court in spite of the fact that they do not imply the use of property, sale of commodities, delivery of services or performance of work. The bases for such a position of the Constitutional Court of the Russian Federation are as follows. Firstly, the definition of business activity set by Article 2 of the Civil Code of the Russian Federation "does not have as its goal to cover all types of business activity"[19] while Article 34 of the Constitution of the Russian Federation establishes a general legal principle of freedom to execute any business activity that is not against the law.[20] Secondly, non-deliverable forward contracts are considered business activity since disputes and controversies related to their execution are resolved in the Russian arbitral tribunals that are authorized to consider the cases connected to business activity and other types of economic activity.[21] Another difficulty is to

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16 Письмо Верховного Суда РФ от 14 октября 1997 г. «Некоторые вопросы судебной практики по гражданским делам» // Бюллетень Верховного Суда РФ. 2017. № 10 [Letter of the Supreme Court of the Russian Federation of 14 October 1997. Some Issues of Judicial Practice in Civil Matters, Bulletin of the Supreme Court of the Russian Federation, 1997, No. 10].

17 *See* Кодекс Российской Федерации об административных правонарушениях от 30 декабря 2001 г. № 195-ФЗ // Собрание законодательства РФ. 2002. № 1 (ч. 1). Ст. 1 [Code of Administrative Offences of the Russian Federation No. 195-FZ of 30 December 2001, Legislation Bulletin of the Russian Federation, 2002, No. 1 (part 1), Art. 1], Art. 14.1.

18 *See* Уголовный кодекс Российской Федерации от 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], Art. 171.

19 Определение Конституционного Суда РФ от 16 декабря 2002 г. № 282-О «О прекращении производства по делу о проверке конституционности статьи 1062 Гражданского кодекса Российской Федерации в связи с жалобой коммерческого акционерного банка «Банк Сосьете Женераль Восток»» // Собрание законодательства РФ. 2002. № 52. Ст. 5291 [Determination of the Constitutional Court of the Russian Federation No. 282-O of 16 December 2002. On Termination of Proceedings in the Case on the Verification of the Constitutionality of Article 1062 of the Civil Code of the Russian Federation in Connection with the Complaint of the Commercial Joint-Stock Bank 'Bank Societe Generale Vostok,'" Legislation Bulletin of the Russian Federation, 2002, No. 52, Art. 5291].

20 *Id.*

21 *Id.*

define the services rendered by private notaries and advocates. Although Article 1 of the Fundamental Principles of Legislation of the Russian Federation on the Notariate clearly states that notarial activity is not considered to be business and is not aimed at deriving profit, there is not unanimous agreement on this matter in judicial practice.[22] To resolve the issue, the Supreme Court did not just refer to the principles of the notariate legislation, but it also explained that notaries involved in private practice provide for the protection of the rights and legal interests of citizens and legal entities. As well as public notaries, they exercise particular legal activity on behalf of the state that determines their public legal status.[23]

According to Article 2 of the Federal Law "On Advocacy and the Bar in the Russian Federation," an advocate is a person who obtained the status of advocate in conformity with the existing legal procedure and therefore has the right to exercise legal practice. Advocates may not participate in business activity or register legal entities.[24] Besides judicial practice, it is also reflected in a range of laws. For example, the Labor Code of the Russian Federation indicates the following examples of natural person employers: natural persons registered as established by law as individual entrepreneurs and who are pursuing entrepreneurial activity without the formation of a legal entity, as well as private notaries, advocates who have established legal offices, and other people whose professional activities require state registration and/or licensing according to the federal laws.[25] In other words, the Labor Code of Russia distinguishes between individual entrepreneurs who exercise business activities and advocates. The same conclusion can be made if we consult Articles 23, 31, 54 et al. of the Russian Tax Code that enumerate the types of taxpayers and draw the same distinction as the Labor Code.

The Russian legislation offers a rather detailed description of what business activity is and provides specific characteristics that distinguish it from other types of economic activity. And although there are controversies related to the interpretation and application of the legal definition of business activity,[26] courts whose primary function is to apply the laws have worked out a uniform solution to the interpretation of such issues, as proven by the abovementioned examples.

The Chinese legislation does not provide any definition of business activity. Basic civil provisions (while there are no codes available) were determined in the PRC Law

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22 Определение Верховного Суда РФ от 30 ноября 2016 г. № 307-ЭС16-17860 [Determination of the Supreme Court of the Russian Federation No. 307-ES16-17860 of 30 November 2016].

23 *Id.*

24 Решение Верховного Суда РФ от 19 марта 2003 г. № ГКПИ03-87 [Decision of the Supreme Court of the Russian Federation No. GKPI03-87 of 19 March 2003].

25 Трудовой кодекс Российской Федерации от 30 декабря 2001 г. № 197-ФЗ // Собрание законодательства РФ. 2002. № 1 (ч. 1). Ст. 3 [Labor Code of the Russian Federation No. 197-FZ of 30 December 2001, Legislation Bulletin of the Russian Federation, 2002, No. 1 (part 1), Art. 3].

26 Oleynik 2015, at 10.

"General Principles of the Civil Law in the PRC" adopted in 1986. That law used the term "activity" for all entities involved in economic activity in China and failed to give it any additional qualitative characteristics. Nor does "General Provisions of the Civil Law of the People's Republic of China" adopted in 2017 contain any definition of business activity. It uses the term civil activity in its broad sense towards all situations and subjects connected with civil law relations.

Mention of business activity (business operation) can be found in China's normative legal acts. Their formal interpretation allows one to determine the civil subjects that have the right to exercise business activity. For instance, the Chinese Law "Partnership Enterprise Law of the People's Republic of China" uses the term *business operation* when speaking about a partnership enterprise's liabilities for the execution of business activity (Art. 6). The same law mentions that a partnership enterprise shall obtain a business license (Art. 10).[27] The law regulates their establishment and operation and indicates a partnership's obligation to pay business operation income taxes.[28]

Mention of the term *business activity* (operations) in question can be seen in other legal documents, too.[29] However, the analysis of the Chinese legislation does not allow determination of what that concept implies exactly. According to Chinese legal scientists, such a situation is due to the fact that it took the Chinese government too many years to realize the importance of private business for economic development.[30] At the beginning of the 1980s, some influential economists, actually, argued that the level of business activity did not slow down the pace of a country's development.[31]

On the one hand, considering the slow rate of the modernization of legislation (some acts are amended once in a decade), it is not surprising that there is still no clear definition of business activity in China. On the other hand, the PRC Communist Party calls for mass entrepreneurship and innovation in their declarations.[32]

A survey on how the Chinese understand the concept of business in the PRC, conducted by the Southwest University of Political Science & Law in Chongqing,[33]

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27 Partnership Enterprise Law of the People's Republic of China, amended and adopted at the 23rd Session of the Standing Committee of the 10th National People's Congress of the People's Republic of China on 27 August 2006 (Sep. 25, 2019), available at http://www.lawinfochina.com/display.aspx?id=5428&lib=law.

28 *Id.*

29 Law of the People's Republic of China on Individual Proprietorship Enterprises, adopted at the 11th Meeting of the Standing Committee of the 9th National People's Congress on 30 August 1999 (Sep. 25, 2019), available at http://www.lawinfochina.com/display.aspx?id=6239&lib=law&SearchKeyword=&SearchCKeyword=.

30 David Ahlstrom & Zhujun Ding, *Entrepreneurship in China: An Overview*, 32(6) International Small Business Journal: Researching Entrepreneurship 610 (2014).

31 *Id.*

32 Edward Tse, *The Rise of Entrepreneurship in China*, Forbes, 5 April 2016 (Sep. 25, 2019), available at https://www.forbes.com/sites/tseedward/2016/04/05/the-rise-of-entrepreneurship-in-china/#388438a03efc.

33 There were 80 respondents (between the ages of 21 and 37).

revealed that 95% of the respondents believe that business activity focuses on producing goods, providing services, performing works and using property; 87% of the respondents noted an independent character of business activity; 95% mentioned that it is exposed to risks. Ninety percent of the respondents said that business activity is different from other forms of economic activity due to its systematic profit-making objective, while 98% noted that it should be legally registered (a business undergoes the state registration procedure).

All in all, it is possible to conclude that although the concept of business activity is not legally specified in China, in practice it is understood in the same way as in the Russian Federation.

Understanding what business activity is and differentiating it from other types of activity is of both theoretical and practical importance. It allows avoiding the obligation to pay taxes and abiding by special legal regulations that control the work of the subjects of business activity.

In Russia, the freedom of business activity is stated in the main normative legal act, the Constitution. The concept of business activity has a detailed definition that allows distinguishing all its relevant characteristics. As mentioned before, though there may be difficulties concerning the application of the said norms, the courts manage to resolve the issues by judicial interpretation and by working out a uniform application practice. The Chinese legislators as well as most of the Chinese legal scientists do not reveal much interest in the definition of business activity;[34] nor does the existing Constitution of China mention the right to exercise business activity.

However, despite the fact that there is no clear legal definition of business activity in the PRC, the Chinese, in fact, understand it almost in the same way as the Russians do.

2. Legal Entities Exercising Business Activity in Russia and China

Both in Russia[35] and in China[36] business activity is mainly exercised by means of legal entities. Many legal entities go through the state registration procedure and start their operation every year. An important factor of a legal entity's effective operation is, without doubt, its legal regulation.

Russia's civil legislation has seen considerable changes in recent years and therefore the system of legal entities has been subject to alterations, too.

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[34] Ahlstrom & Ding 2014.

[35] Reports of the Federal Tax Service of the Russian Federation on the work on state registration of legal entities and individuals (Sep. 25, 2019), available at https://www.nalog.ru/rn77/related_activities/statistics_and_analytics/regstats/.

[36] Statistics of state registration of legal entities in China according to the National Statistics Bureau of the People's Republic of China (Sep. 25, 2019), available at http://data.stats.gov.cn/english/easyquery.htm?cn=A01.

First of all, it should be pointed out that the system of legal entities is well defined in the Civil Code of the Russian Federation. All existing types of legal entities are divided into commercial and non-profit organizations. Commercial organizations have the generation of profit as their main objective. Non-profit organizations do not set such a goal and usually aim at achieving

> social, charitable, educational, scientific and managerial purposes, as well as those related to the protection of public health, development of physical culture and sports, satisfaction of the population's spiritual and other nonmaterial needs, and any other purposes that pursue public wellbeing.[37]

They can get involved in profit-making activity only to achieve the objectives they were created for, and thus are not included in the subject matter of our research.

This research focuses on commercial organizations. The division of all legal entities into corporations and non-corporations (unitary) is rather new for the Russian Federation. As for corporate legal entities,[38] their founders possess corporate rights, in particular the right to participate in the management of the corporation, in the appointment of the board of directors, etc. In the case of non-corporate legal entities,[39] the founders have ownership rights to the organization's assets.

As mentioned above, the system of legal entities has not been legally codified in China. An obvious reason for this is the lack of a single civil code that contains all the important provisions of civil law,[40] as is the case in Russia. Thus, a thorough analysis of the Chinese legislation is required in order to determine the types of legal entities that exist in the PRC.

Institutions and norms connected to the general issues of civil law, including the norms regulating the work of legal entities, were included in the General Principles of Civil Law of the PRC. This law was in force from 1986 to 2017, therefore it had a considerable impact on the understanding of legal entities and their nature. The status of legal entities is specified in Chapter 3 of the law and consists of four paragraphs (Arts. 36–53): (1) General provisions; (2) Enterprises as legal entities; (3) Government agencies, institutions, and associations as legal entities; and (4) Joint operations.

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[37] Федеральный закон от 12 января 1996 г. № 7-ФЗ «О некоммерческих организациях» // Собрание законодательства РФ. 1996. № 3. Ст. 145 [Federal Law No. 7-FZ of 12 January 1996. On Non-Profit Organizations, Legislation Bulletin of the Russian Federation, 1996, No. 3, Art. 145].

[38] Corporate legal entities: Companies, Partnerships, Production cooperatives, Economic partnerships, Peasant farms (registered as legal entities).

[39] Non-corporate legal entities: Unitary enterprises (state, municipal).

[40] *Понька В.Ф., Кирсанов А.Н.* Общие положения о юридических лицах в КНР // Транспортное дело России. 2014. № 6. С. 3 [Victor F. Ponka & Alexey N. Kirsanov, *General Conditions on Legal Entities in China*, 6 Russian Transport Business 3, 3 (2014)].

The General Provisions do not focus on the concrete types of legal entities, as they are discussed in other sections of that law. Government agencies, institutions and associations as legal entities are not the subject of our research as they do not consider business activity as their main objective. They are established for economic, cultural and other purposes related to public well-being. One paragraph of the General Principles of the Civil Law is devoted to enterprises as legal entities. There is no legal definition of the concept, but the analysis of the norms allows distinguishing the following types of enterprises: enterprises owned by the people as a whole, Chinese-foreign cooperative joint ventures and foreign-equity joint ventures. The new law adopted in 2017 (General Provisions of the Civil Law of the People's Republic of China) does not mention enterprises, though some special laws devoted to the legal regulation of enterprises are still in force.[41] Enterprises owned by the people as a whole are

> a socialist commodity production and operation unit which shall, in accordance with the law, make its own managerial decisions, take full responsibility for its own profits and losses, and practice independent accounting.[42]

The assets of such an enterprise are considered as owned by the people as a whole and are given to the enterprise for operation and management. The enterprise has the right to possess, make use of and dispose of the said property, in accordance with the law. The enterprise obtains the status of a legal entity in conformity with the law and takes on the liability for the property given to it by the state for operation and management.

There is a similar legal form in Russia called a unitary enterprise. In addition to issues regulated under the Civil Code, issue pertaining to its establishment and operation are regulated by the Federal Law "On the State and Municipal Unitary Enterprises."[43] A unitary enterprise is created for the main purpose of exercising business activity and deriving profit. The participants in such an enterprise have the right to the economic management and use of its assets but do not possess any ownership right to it that in this case belongs to the Russian Federation, a subject of the Russian Federation or a municipal entity. A unitary enterprise has the right to, in its own name and on its own behalf, acquire and realize rights, bear responsibilities, start litigation as plaintiff or participate in litigation as a defendant.

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41 Law of the People's Republic of China of Industrial Enterprises Owned by the Whole People, adopted at the 1st Session of the 7th National People's Congress and promulgated by Order No. 3 of the President of the People's Republic of China on 13 April 1988 (Sep. 25, 2019), available at http://www.lawinfochina.com/display.aspx?id=22757&lib=law&SearchKeyword=&SearchCKeyword=.

42 *Id.*

43 Федеральный закон от 14 ноября 2002 г. № 161-ФЗ «О государственных и муниципальных унитарных предприятиях» // Собрание законодательства РФ. 2002. № 48. Ст. 4746 [Federal Law No. 161-FZ of 14 November 2002. On the State and Municipal Unitary Enterprises, Legislation Bulletin of the Russian Federation, 2002, No. 48. Art. 4746].

In other words, unitary entities in Russia and enterprises owned by the people as a whole in China prove quite similar when it comes to comparing their qualitative characteristics. They are established by the state for the purpose of resolving a state-related issue on a financial basis and are active participants in the economic turnover both in Russia and in China.

One of the widespread forms of business activity exercised by foreign citizens in China is a joint venture company. Chinese-foreign joint ventures are mentioned in Article 18 of the PRC Constitution that

> allows foreign enterprises, organizations and individuals to participate in economic activity in the People's Republic of China.[44]

There is no definition of joint venture in the law, but the analysis of the existing normative legal acts of the PRC[45] allows determining its main characteristics.[46] That is, a joint venture is an enterprise created by a foreign organization or a foreign natural person (foreign participants) together with Chinese companies, enterprises or other types of economic entities (Chinese participants) on the principle of mutual benefit, equality and with the permission of the Chinese government. An interesting fact is that natural person participants are not included on China's side though there are no provisions in the Chinese law that would prohibit natural persons participating in joint venture companies.[47]

In the Russian legislation the term "commercial organization with foreign investment" is used instead of "joint venture."[48] However, some authors believe *joint venture* to be a more convenient and accurate term, as it rightly demonstrates the joint character of the establishment of an enterprise and not just the participation of

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[44] Constitution of the People's Republic of China, adopted at the 5th Session of the 5th National People's Congress and promulgated for implementation by the Announcement of the National People's Congress on 4 December 1982 (Sep. 25, 2019), available at http://www.lawinfochina.com/display.aspx?id=436178e5d0b17482bdfb&lib=law.

[45] Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, adopted at the 2nd Session of the 5th National People's Congress on 1 July 1979 (Sep. 25, 2019), available at http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045777.shtml; Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures, adopted at the 1st Session of the 7th National People's Congress on 13 April 1988 (Sep. 25, 2019), available at http://www.lawinfochina.com/display.aspx?id=6bd209241266ea53bdfb&lib=law.

[46] *Берзинь О.А., Рябинина Е.Н.* Правовые формы ведения бизнеса российскими предпринимателями в Китае // Право. Журнал Высшей школы экономики. 2016. № 2. С. 207 [Olga A. Berzin & Evgeniya N. Ryabinina, *Legal Forms of Running a Business by Russian Entrepreneurs in China*, 2 Law. Journal of the Higher School of Economics 200, 207 (2016)].

[47] *Id.*

[48] Федеральный закон от 9 июля 1999 г. № 160-ФЗ «Об иностранных инвестициях в Российской Федерации» // Собрание законодательства РФ. 1999. № 28. Ст. 3493. [Federal Law No. 160-FZ of 9 July 1999. On Foreign Investment in the Russian Federation, Legislation Bulletin of the Russian Federation, 1999, No. 28, Art. 3493].

a foreign actor in Russian business.[49] That is why the term *joint venture* can be often found in Russian bylaws[50] and court orders.[51]

There are two types of joint ventures in China: equity and contractual (cooperative). Since an equity joint venture takes on the form of a limited liability company,[52] it is subject to the norms regulating LLCs. That is to say, equity joint ventures possess legal entity status in China and the venturers' liability is limited by the size of their contributions into the authorized capital and the distribution of profit is performed in proportion to the value of the participants' respective shares in the authorized capital. Unlike equity joint ventures, the operation of contractual (cooperative) joint ventures is mostly regulated by the contractual enterprise agreement[53] in which the parties to the venture decide whether the company will assume the form of a legal entity, how to distribute risks and profit, what kind of body is going to undertake control over the enterprise – a board of directors or another kind of joint management body.

As for Russia, there are certain similarities between Chinese contractual (cooperative) enterprises and Russian commercial organizations with foreign investment in the form of a partnership, while equity joint ventures correlate to commercial organizations with foreign investment in the form of an LLC.

Neither in the General Principles of the Civil Law of China nor in the General Provisions of the Civil Law of the People's Republic of China has a wholly foreign-owned enterprise been mentioned. However, it is considered a legal entity, too, and has a special law that regulates it.

According to the Chinese Law on Foreign Capital Enterprises, a wholly foreign-owned enterprise is an enterprise established in China by foreign investors, with their own capital exclusively, in accordance with the relevant Chinese laws (not including branches of foreign enterprises set up in China and other foreign economic organizations).[54]

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[49] Olga A. Berzin & Rodion O. Koshelev, *Legal Basis of Russian and Chinese Joint Ventures Establishment and Business Activities: Challenges and Opportunities*, 2 BRICS Law Review 40, 43 (2016).

[50] Распоряжение Правительства РФ от 22 марта 2013 г. № 418-р «О подписании Соглашения между Правительством Российской Федерации и Правительством Китайской Народной Республики о сотрудничестве в строительстве и эксплуатации Тяньцзиньского нефтеперерабатывающего и нефтехимического завода и проектах в сфере разведки и добычи нефти» // Собрание законодательства РФ. 2013. № 12. Ст. 1411 [Order of the Government of the Russian Federation No. 428-p of 22 March 2013. On the Signing of the Agreement Between the Government of the Russian Federation and the Government of the People's Republic of China on Cooperation in the Construction and Operation of the Tianjin Oil Refinery and Petrochemical Plant and Projects in the Field of Oil Exploration and Production, Legislation Bulletin of the Russian Federation, 2013, No. 12, Art. 1411].

[51] Постановление Шестого арбитражного апелляционного суда от 21 октября 2013 г. № 06АП-4381/2013 [Resolution of the Sixth Arbitration Court of Appeal No. 06AP-4381/2013 of 21 October 2013].

[52] Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, *supra* note 45.

[53] Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures, *supra* note 45.

[54] Law of the People's Republic of China on Foreign-Capital Enterprises, adopted at the 4th Session of the 6th National People's Congress, promulgated by Order No. 39 of the President of the People's Republic of China and effective as of 12 April 1986 (Sep. 25, 2019), available at http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045800.shtml.

A wholly foreign-owned enterprise usually assumes the form of a limited liability company. Subject to approval of the Ministry of Commerce of the PRC, any other form of legal organization that does not contradict Chinese law[55] can be chosen, e.g. a company limited by shares.[56]

There is no similar type of entity in Russia. The organization of business entities by foreign investors is subject to a different approach. An economic entity being a wholly foreign-owned one or a Russian-foreign joint venture is called a commercial organization with foreign investment. It has the status of a legal entity and can assume any legal form that is not against the law of the Russian Federation. A foreign participant's contribution to the authorized capital (direct foreign investment) must be no less than 10 percent.[57]

An interim conclusion of our research on Chinese enterprises as legal entities is as follows: enterprises can be both legal entities with the assets that are owned and controlled by the state (enterprises owned by the people as a whole), and private legal entities (cooperative and equity joint ventures).

A complex analysis of the Chinese legislation reveals the dual character of the *enterprise* concept. For some economic entities such as enterprises owned by the people as a whole, it means a certain organizational type of a legal entity. At the same time, when it has to do with cooperative or equity joint ventures, *enterprise* is used as a generic term for an economic entity. For example, equity legal entities and wholly foreign-owned enterprises can have the form of a limited liability company.[58]

One more type of legal entity can be established in China though it was not mentioned in the General Principles of the PRC Civil Law. In the course of the modernization of legislation required for entering the WTO and introducing products to the international market, the laws regulating the operation of this type of legal entity were adopted: the Law on Companies of 1993 and the General Provisions of the Civil Law of the People's Republic of China of 2017.

A *company* is an organization that has the status of a legal entity with a joint authorized capital divided into shares and possesses ownership rights to its assets. Two legal forms of a company are possible according to the law: a limited liability company and a company limited by shares. A limited liability company can be registered by several people as well as by an individual, an organization or the state. Companies in Russia and companies in China have similar characteristics.

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55 Rules for the Implementation of the Law of the People's Republic of China on Foreign-Capital Enterprises (2001 Revision) (Sep. 25, 2019), available at http://www.lawinfochina.com/display.aspx?id=0f762b3680c56b3abdfb&lib=law.

56 *Бажанов П.В.* Ведение бизнеса в Китае: правовые аспекты. Вып. 1: Обзор правовой среды для бизнеса [Pavel V. Bazhanov, *Doing Business in China: Legal Aspects. Issue 1: Overview of the Legal Environment for Business*] 138 (Moscow: Infotropic Media, 2015).

57 Federal Law on Foreign Investment in the Russian Federation, *supra* note 48.

58 Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, *supra* note 45.

Companies in Russia and in China constitute a significant part of both countries' economies. That is why their detailed study must be performed.

The General Provisions of the Civil Law of the People's Republic of China adopted in 2017 changed the general approach to the system of legal entities. There are three types of legal entities mentioned in the law: commercial, non-profit and special. The definition of commercial entities is quite similar to what is found in Russia although the law lists just a limited liability company, a company limited by shares and other corporative legal entities among them.[59] The list looks to be open, there are no detailed characteristics of the commercial legal entities in the law. Non-profit legal entities aim at achieving social welfare and other non-commercial goals. The non-profit legal persons include institutions, social groups, foundations and social service agencies. The special legal entities are: the governmental legal persons, the legal persons of rural collective economic organizations and the legal persons of basic-level people's self-governing organizations, which are allowed to exercise civil activities for achieving their goals.

The analysis of legal entities in China and Russia leads to the following conclusions:

1. The system of legal entities in Russia has a well-defined legal regulation that facilitates the interpretation of the civil legislation and allows distinguishing the relevant characteristics of any type of organization. There was no unified system of existing legal entities in China until 2017. The General Provisions of the Civil Law of the People's Republic of China adopted in 2017 is a very important attempt to establish a system of legal entities, but the law does not contain the essential characteristics of legal entities and, what is most important, a number of the provisions of the legal acts in force devoted to the regulation of the activities of legal entities have not yet been brought in line with the new law.

2. In Russia, the classification of legal entities into commercial and non-profit organizations is specified in the legislation. These two concepts are easily distinguishable. In China there were no such classification until 2017, although in practice it was possible to divide economic entities into those that have profit-making as their main objective and those that do not have such a goal. Such a classification was established by the special law, though the list of commercial organizations remains uncertain to some extent.

3. In both countries, the definition of some types of legal entities represents certain difficulties. For example, in the People's Republic of China there are two types of legal entities that can be established by the state and have similar legal structure and objectives. Those are the enterprises owned by the people as a whole and state (public) limited liability companies. In the Russian Federation, in its turn, the nature of an economic partnership can seem confusing, as it unites the characteristics of

[59] General Provisions of the Civil Law of the People's Republic of China, adopted at the 5th Session of the 12th National People's Congress of the People's Republic of China on 15 March 2017 (Sep. 25, 2019), available at http://www.lawinfochina.com/display.aspx?id=80296634739ab0dcbdfb&lib=law.

a company and a partnership.[60] The lack of unambiguous legal norms and clear definitions of some important concepts results in misunderstanding of the character of some legal entities.

3. Companies in Russia and China: Comparative Analysis of Legal Characteristics

According to the yearly statistics provided by Russian taxation bodies, a company is a very popular type of legal entity in the Russian Federation.[61] More and more people opt for this form of legal organization for their newly registered businesses.

A company is a commercial corporate organization with joint capital to which each member makes a contribution. There are two types of companies: a limited liability company (LLC) and a joint-stock company.

In comparison with other types of legal entities, Russian companies possess a rather detailed legal basis in legislation. General provisions of their establishments can be found in the Civil Code. Additionally, there are two particular laws, "On Limited Liability Companies"[62] and "On Joint-Stock Companies,"[63] that regulate the two types of companies, respectively. The state registration procedure is explained in Federal Law "On the State Registration of Legal Entities and Individual Entrepreneurs."[64] The members of a company make contributions into the authorized capital and thus determine their share in the company. The rights and obligations of the participants are in accordance with their respective contributions into the capital. The property produced at the expense of the participants' contributions or in the process of the company's activity belongs to it by the right of ownership. A company incurs personal liability for the obligations produced in the course of its activity to the extent of all its assets.[65]

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60 *Акимова И.А., Малая Т.Н.* Особенности правового положения хозяйственного партнерства // Огарёв-Online. 2015. № 9(50). С. 5 [Irina A. Akimova & Tatyana N. Malaya, *The Peculiarities of the Legal Status of Business Partnership*, 9(50) Ogaryov-Online 1, 5 (2015)].

61 Reports of the Federal Tax Service of the Russian Federation, *supra* note 35.

62 Федеральный закон от 8 февраля 1998 г. № 14-ФЗ «Об обществах с ограниченной ответственностью» // Собрание законодательства РФ. 1998. № 7. Ст. 785 [Federal Law No. 14-FZ of 8 February 1998. On Limited Liability Companies, Legislation Bulletin of the Russian Federation, 1998, No. 7, Art. 785].

63 Федеральный закон от 26 декабря 1995 г. № 208-ФЗ «Об акционерных обществах» // Собрание законодательства РФ. 1996. № 1. Ст. 1 [Federal Law No. 208-FZ of 26 December 1995. On Joint-Stock Companies, Legislation Bulletin of the Russian Federation, 1996, No. 1, Art. 1].

64 Федеральный закон от 8 августа 2001 г. № 129-ФЗ «О государственной регистрации юридических лиц и индивидуальных предпринимателей» // Собрание законодательства РФ. 2001. № 33 (ч. 1). Ст. 3431 [Federal Law No. 129-FZ of 8 August 2001. On the State Registration of Legal Entities and Individual Entrepreneurs, Legislation Bulletin of the Russian Federation, 2001, No. 33 (part 1), Art. 3431].

65 Civil Code of the Russian Federation (Part One), *supra* note 11.

Russian companies share a similarity with Chinese companies[66] in that they are also a popular legal entity type. A company is a legal entity that has an independent legal personality, possess a number of assets that belong to it by the right of ownership and is liable for its debts to the extent of all its assets.

The PRC Law "On Companies" adopted as a part of China's preparation for the WTO distinguishes two types of companies: (1) limited liability company; (2) company limited by shares.[67]

A limited liability company is a company where the authorized capital is divided into shares in accordance with the articles of association. An LLC must be incorporated by no fewer than two and not more than fifty members being either natural persons or legal entities. The liabilities of the parties are in accordance with their respective contributions into the capital.

By its qualitative characteristics, the Chinese limited liability company is rather close to the Russian limited liability company. The Russian LLC is a company established by one or more persons or entities with the authorized capital divided into shares; the members of a company shall not be liable for its obligations and shall bear the risk of the losses proceeding from the company's activity within the amount of their respective contributions into the company's capital.[68]

Let us compare them in the table below:[69]

Table 1: Comparison of the Chinese and Russian LLC

Limited liability company (China)	**Limited liability company (Russia)**
A commercial legal entity	
Has ownership rights to its assets	
Liable for its debts to the extent of all its assets	
The incorporation document being articles of association	
Has the right to open branches and representative offices	
A limited liability company shall be established by the state, citizens of both Chinese and foreign origin, and legal entities. Total number: 1 to 50.	A limited liability company shall be established by citizens of both Russian and foreign origin and legal entities. Total number: 1 to 50.

66 Сравнительное правоведение: национальные правовые системы. Т. 3: Правовые системы Азии [*Comparative Law: National Legal Systems. Vol. 3: Legal Systems of Asia*] 285 (V.I. Lafitsky (ed.), Moscow: Law Firm "Contract," 2013).

67 Company Law of the People's Republic of China, adopted at the 5th Session of the Standing Committee of the 8th National People's Congress on 29 December 1993 (Sep. 25, 2019), available at http://www.lawinfochina.com/display.aspx?id=e797dd968c30e172bdfb&lib=law.

68 Federal Law on Limited Liability Companies, *supra* note 62.

69 Berzin & Ryabinina 2016, at 207.

A natural person shall establish no more than one limited liability company.	The number of limited liability companies established by one natural person shall not be subject to any limitations.
A limited liability company incorporated by one natural person shall not establish other limited liability companies.	A limited liability company shall not be established by another company consisting of only one natural person or one legal entity.
Besides the original trade name, the full legal name of a limited liability company shall contain the words "limited liability company" as well as indicate its domicile and field and type of activity.	The full legal name of a limited liability company shall contain the original trade name of the company and the words "limited liability."
The amount of the authorized capital, the dates and methods of payment shall be decided by the participants in the incorporation documents, save the companies exercising specific types of activity. There are also requirements for the correlation between the amount of the authorized capital and the total amount of investment.	The authorized capital shall be no less than 10,000 Russian roubles. Each member shall pay the full amount of their contribution with the company within the period stipulated in the incorporation agreement or, if the company is established by a single person, by the decision to incorporate a company. The period of payment shall not exceed four months from the registration date of the company in a corresponding state body.
Participants failing to make the required contributions into the capital shall pay a penalty to the participants who have made in full their capital contributions.	Where a participant fails to make the full amount of the contribution into the capital, the part of their contribution that has not been covered shall be transferred to the other members of the limited liability company. The incorporation agreement can also stipulate a penalty for not covering the contribution in the authorized capital in the full amount and on time.
Management bodies: General meeting as the main control body; a board of directors (3 to 13 members) shall manage the company's activity and is not mandatory in small companies (it can be replaced by an executive director); the director shall ensure that the decisions of the board of directors are implemented, though this position shall not be mandatory; a supervisory board (3 or more people) or a supervisor (in small companies) shall oversee the financial affairs of the company.	Management bodies: General meeting being the main control body; a board of directors shall undertake general management of the company's affairs; it is not a mandatory management body; chief executive body (general director, president, etc.); this position shall be mandatory; collective executive body (governing board, direction, etc.) is not mandatory but can be created along with the chief executive body; a supervisory board (the number of its members shall be stipulated in the articles of association) or a supervisor shall oversee the financial affairs of the company.

The table shows that although there are similarities between the Chinese LLC and the Russian LLC, there are also significant differences.

Russian and Chinese legislation requirements differ when it comes to the company management bodies as well as the authorized capital contributions procedure. In China, the methods and dates of payment as well as the amount of contributions are specified in the articles of association according to the participants' will, except the companies whose scope of activity is subject to specific legal regulation. That is to say, Chinese lawmakers give relative freedom to businesspeople though it has not always been like this. Until 1 March 2014, limited liability companies (with one participant) had the minimum amount of capital of 100,000 yuan while the minimum for joint-stock limited companies was 5 million yuan.[70] There was also the minimum size of capital depending on a company's field of activity, for example for a company engaged in commodity wholesale the amount was 500,000 yuan while for a retail company it was 300,000 yuan.[71] For establishing a company, no less than 20 percent of the contribution had to be covered (and at least 30% of that amount must be covered by financial assets), the rest paid up within two years. However, those rules no longer exist, as Chinese legislators decided to encourage the development of business turnover in the country by introducing more convenient norms.

Chinese legislation is less favorable when it comes to foreigners who would like to start a business in China than when it comes to its own residents. There is a correlation between the amount of the authorized capital and the total amount of investment, that is to say, the money that a business person will need in order to build the production installations, arrange the production or to spend on the expenditures related to the incorporation of a company in China.[72]

For example, if the total amount of investment is 3 to 10 million U.S. dollars, then the authorized capital must amount to no less than 50 percent of that sum.[73] In the case of foreign citizens' companies, there are quite strict requirements with regard to the authorized capital, although it should be considered that,

> The participants of a business can pay their contributions in parts that makes it more convenient a procedure.[74]

A participant failing to make regular contributions into the capital on time has to pay a penalty to the other participants of the limited liability company. In the Russian

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70 Bazhanov 2015, at 36.

71 *Id.*

72 Rules for the Implementation of the Law of the People's Republic of China on Foreign-Capital Enterprises, *supra* note 55.

73 Bazhanov 2015, at 140.

74 Berzin & Ryabinina 2016, at 207.

legislation, a penalty is possible if it is specified in the incorporation agreement of a company.

Despite all the similarities, the managerial systems of the Russian and Chinese limited liability companies also have some important differences. In China, a company's major control body is the general meeting. It is assigned a wide range of rights, such as deciding on the business policy and financial plan of the company, amending the articles of association, adopting resolutions on matters such as the merger, division, transformation and liquidation of the company, etc. Regular general meetings take place as stipulated by the articles of association of a company. A board of directors composed of three to thirteen members is set up by the general meeting and oversees the company's activities. The term of office of the board member is stipulated by the articles of association of the company but may not exceed three years. A reelection of a director is possible. The board of directors exercises the following functions and powers: decides on the company's management, implements the resolutions of the general meetings, elaborates plans for the distribution of profits and losses, makes financial plans, etc. However, unlike in Russia, in China a board of directors is considered to be a mandatory body. At the same time, where a limited liability company has a small number of participants and is comparatively small in size, it may have an executive director instead of a board of directors.[75] A limited liability company can have a manager who is appointed by the board of directors. The manager oversees the company's operation and the implementation of the resolutions of the board of directors to whom the manager is accountable. And while in the Chinese company such a position is optional, in the Russian company appointing the chief executive is mandatory. It turns out that China prefers a collective type of management over an individual one.

The key difference as it seems is the possibility that a company is established by the state alone. A special authorized body (state-owned assets supervision and administration commission of the State Council of the PRC as well as local bodies for state-owned assets supervision) acts on behalf of the state as a company's participant.[76] The operation and management of such a company are regulated by the same rules as in the case of a legal entity and natural person participants, save small peculiarities.

That is to say, there are several types of legal entities in China that can be established by the state and have in their possession state-owned (public) assets, for example industrial enterprises and limited liability companies. In Russia, there are unitary enterprises, which are commercial legal entities that can be founded by the state. Nonetheless, they have nothing to do with companies.

Another legal form of a Chinese company is a company limited by shares. Its authorized capital is divided into a certain number of shares, and shareholders' liability is limited to the value of their shares.

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[75] Company Law of the People's Republic of China, *supra* note 67.

[76] *Id.*

There are two types of joint-stock companies in China. The ones where the owners distribute the shares among themselves are called non-public joint-stock companies. Where a part of the shares is offered to the public (no more than 65% of the total), such companies are called public joint-stock companies.

The minimum number of participants in a joint-stock company amounts to no fewer than five persons of whom more than half must have their domicile within the territory of the People's Republic of China. The main incorporation document is the articles of association. The requirements to the authorized capital are the same as those for a limited liability company. A joint-stock company is managed by the shareholder meeting which determines the business policy and investment plan of the company and controls the company's affairs. The board of directors (five to nineteen members) and the manager accountable to it oversee the management and operation of the company. According to the PRC Law "On Companies," a supervisory board (three members) shall be created to examine the financial affairs of the company and ensure the lawfulness of the board of directors' and the manager's work.

The legal structure of a company limited by shares is familiar to Russian businesspeople, as it completely coincides with that of a Russian joint-stock company. It can also assume two possible forms: public and non-public joint-stock companies. The former offers shares to the general public (by means of an open subscription) while the latter distributes the shares among its founders and participants.

A joint-stock company is an independent legal entity and is liable for its debts to the extent of all its assets. Shareholders assume the risk of incurring losses due to unfavorable changes in the share price. A joint-stock company is managed by an authorized body (a shareholder meeting, a board of directors, a chief executive body, a supervisory commission, etc.), the system being similar to the Chinese one.

The main difference between joint-stock companies in China and Russia is the different requirements to the authorized capital. According to Article 26 of the Federal Law "On Joint-Stock Companies," the minimum amount of the authorized capital of a public company shall be no less than 100,000 Russian roubles while the minimum amount of the authorized capital of a non-public company shall be 10,000 Russian roubles. In China, joint-stock companies are regulated by the same norms as limited liability companies. The amount and method of shareholders' contributions to the capital is specified in the incorporation agreement.

Summarizing the research conducted, we should point out that when comparing companies in Russia and China both similarities and differences can be found. First of all, the Chinese legislation does not specify what a company is. However, the analysis of the legal norms reveals that Russian companies are similar to the Chinese companies with the authorized capital divided into shares; a company's participants are not liable for its obligations and bear the risk of the losses proceeding from the company's activity limited to the total value of their respective shares in the company's capital.

In the People's Republic of China, either a limited liability company or a company limited by shares can be established, and they reveal strong resemblance to Russian limited liability companies and joint-stock companies, respectively. However, despite the seeming similarity, some significant nation-specific differences between them can be observed.

1. In China, a limited liability company can be established by the state alone. In Russia, a specific type of legal entity is created for this purpose.

2. Following the example of the English legal system,[77] the requirements concerning the minimum amount of the authorized capital have been eliminated from the Chinese legislation, while in Russia they still exist.

On the one hand, this ensures more freedom for Chinese businesspeople, as previously the requirements for the authorized capital were too high and hindered many Chinese citizens from exercising business activity.

On the other hand, there is a risk of the situation where a company will not be capable of fulfilling its responsibilities. Similar problems exist in Russia, too, which is why the authorized capital-related norms are often subject to criticism by the legal community. Ten thousand Russian roubles is considered too small a sum for an LLC, as it will not be enough to satisfy the creditors' interests in the absence of other available property. That is to say, Chinese lawmakers usually characterized by a rather conservative and static approach to legal regulation, opted for a more innovative measure. The effectiveness of the said measure is yet to be determined, as very little time has passed since the date of the amendment in 2014.

3. The Chinese tend to give preference to collective management bodies. In Russia, such bodies go together with a one-man executive body.

4. Socialist ideas have permeated into practically all spheres of life in China. So, an organization of the Chinese Communist Party is created and political party activity conducted in every company. Companies in their turn provide all the necessary conditions for such an activity. Russian legal entities do not have to participate in political life.

The similarity of the approaches to the legal regulation of companies and the importance of companies as a legal organizational form can be also proved statistically. The data provided by the surveys show that both Russian[78] and Chinese[79] businesspeople give preference to limited liability companies over joint-stock companies. This popularity is due to simpler conditions of incorporation and operation as well as to

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[77] *Алексеенко А.П., Чэнюань В.* Тенденции развития корпоративного права КНР // Вестник Владивостокского государственного университета экономики и сервиса. 2016. № 2(33). С. 24 [Alexander P. Alekseenko & Wei Chengyuan, *Trends in the Development of Corporate Law of China*, 2(33) Bulletin of the Vladivostok State University of Economics and Service 23, 24 (2016)].

[78] Reports of the Federal Tax Service of the Russian Federation, *supra* note 35.

[79] Bazhanov 2015, at 133.

the fact that the methods of attracting investment into the capital are not limited to the share-issuing procedure.

Conclusion

The study of the norms of the Russian and Chinese legislation, doctrinal provisions of both countries' legal science, as well as judicial practice and empirical data allows fulfilling a comparative analysis of Chinese and Russian legal entities that are the main participants in business activity in both China and Russia.

All in all, the following conclusions can be made.

Understanding what business activity is and how it can be distinguished from other types of activity is not only of theoretical value for it also has a very important practical significance. It allows avoiding the obligation to pay taxes and abiding by special legal regulations that control the work of the participants of business activity.

In Russia, the freedom of business activity is stipulated in the main normative legal act, the Constitution. There is a clear definition of business activity that allows distinguishing its major characteristics. The application of the indicated legal norms can cause certain difficulties, however the courts manage to resolve them by means of judicial interpretation and by working out a uniform application practice.

Chinese legislators as well as most of the Chinese legal scientists do not show much interest in the definition of business activity. Nor does the existing Constitution of China mention the right to exercise business activity.

However, despite the fact that there is no clear legal definition of business activity in the PRC, the Chinese, in fact, understand it almost in the same way as the Russians do.

The system of legal entities in Russia has an exhaustive legal regulation that facilitates the interpretation of the civil legislation and allows distinguishing the relevant characteristics of any type of organization. There was no unified system of existing legal entities in China until 2017. The General Provisions of the Civil Law of the People's Republic of China adopted in 2017 is a very important attempt to establish a system of legal entities, but the law does not contain the essential characteristics of legal entities and, what is most important, a number of the provisions of the legal acts in force devoted to the regulation of the activities of legal entities have not yet been brought in line with the new law.

In both countries, the definition of some types of legal entities represents certain difficulties. For example, in the Russian Federation the nature of an economic partnership can seem confusing, as it combines the characteristics of a company and a partnership.[80]

In the People's Republic of China, in its turn, there are two types of legal entities that can be established by the state and have similar legal structure and objectives. Those are

[80] Akimova & Malaya 2015, at 6.

the enterprises owned by the people as a whole and state limited liability companies. The lack of unambiguous legal norms and clear definitions of some important concepts results in misunderstanding of the character of some legal entities.

In Russia as well as in China, the most popular legal organizational form is a company. The legal acts analysis leads to the conclusion that these two forms show many qualitative similarities despite the differences in the approaches to their legal regulation. These are legal entities with the authorized capital divided into shares and whose participants shall not be liable for its obligations, and shall bear the risk of the losses proceeding from the company's activity limited to the value of their respective shares in the company's capital.

References

Ahlstrom D. & Ding Z. *Entrepreneurship in China: An Overview*, 32(6) International Small Business Journal: Researching Entrepreneurship 610 (2014). https://doi.org/10.1177/0266242613517913

Chen L. *The Historical Development of the Civil Law Tradition in China: A Private Law Perspective*, 78(1-2) Legal History Review 159 (2010). https://doi.org/10.1163/15718 1910x487350

Mikheeva I. & Loginova A. *WTO Accession of BRICS Countries: The Chinese Experience*, 4(1) BRICS Law Journal 84 (2017). https://doi.org/10.21684/2412-2343-2017-4-1-84-99

Information about the authors

Olga Berzin (Nizhny Novgorod, Russia) – Professor, Department of Criminal Law and Criminal Procedure, National Research University Higher School of Economics (25/12 Bolshaya Pecherskaya St., Nizhny Novgorod, 603155, Russia; e-mail: oberzin@hse.ru).

Evgeniia Shliagina (Nizhny Novgorod, Russia) – Senior Lecturer, Department of Civil Law and Civil Procedure, National Research University Higher School of Economics (25/12 Bolshaya Pecherskaya St., Nizhny Novgorod, 603155, Russia; e-mail: eryabinina@hse.ru).

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