Volume VII (2020) Issue 1

BRICS Law Journal

The journal's founder is

ISSN 2412-2343 (Online)

ISSN 2409-9058 (Print)

Key title: BRICS law journal (Print)
Abbreviated key title: BRICS law j. (Print)
Variant title: BRICS LJ

Frequency of Publication:
four issues per year

Published by
LLC "Publishing House "Business Style",
119602, Moscow, Troparyovskaya St.,
Bldg. 4, Floor 2, Room 802.
www.ds-publishing.ru

Contacts: bricslaw@gmail.com

"BRICS Law Journal" is registered by the Federal Service for supervision of legislation in mass communications and cultural heritage protection (Russia). Reg. No. FS77-69105 of March 14, 2017.

BRICS LAW JOURNAL (BRICS LJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

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

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

Notes for Contributors

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

Manuscripts should be submitted electronically via the website *www.bricslawjournal.com*. Articles will be subjected to a process of peer review. Contributors will be notified of the results of the initial review process within a period of two months.

Citations must conform to the *Bluebook: A Uniform System of Citation*.

TABLE OF CONTENTS

Articles:

Comments:

ARTICLES

SCIENTIFIC COOPERATION ACROSS THE BRICS

MARINA ASTAKHOVA,

University of Tyumen (Tyumen, Russia)

https://doi.org/10.21684/2412-2343-2020-7-1- 4-26

The creation of the BRICS as a non-traditional international organization in the status of a global forum brings new meaning to the norm-setting of international organizations, including in the field of scientific cooperation. This paper aims to identify and analyze the up-to-date and complete normative framework of scientific cooperation across the BRICS which is a result of the BRICS norm-setting. The achievement of the stated aim is pursued through the identification of the distinctive features of the BRICS norm-setting by comparison with the norm-setting of traditional international intergovernmental organizations and by analysis of the BRICS regulations dealing with issues of scientific cooperation. Within the process of researching this subject the author analyzed the BRICS regulations of different levels from the Joint Statements of the BRICS Countries' Leaders and the Summits Declarations to the BRICS working papers as a framework program. The main finding of the research is that the normative framework of scientific cooperation across the BRICS is a set of non-legally binding norms contained in the regulations adopted at the various meetings of national officials within the BRICS. This finding can contribute to a better understanding of the application of the BRICS norms.

Keywords: norm-setting; scientific cooperation; the BRICS; normative framework; regulations.

Recommended citation: Marina Astakhova, *Scientific Cooperation Across the BRICS*, 7(1) BRICS Law Journal 4–26 (2020).

Table of Contents

Introduction

In our high-technology age, development requires the use of scientific advances. Under current economic conditions, breakthrough research projects often become extremely difficult within a single country because of their complexity, duration, and high cost. One possible way to obtain scientific advances in low-resource settings is for countries to participate in international scientific cooperation.

It should be noted that international cooperation in science has become more significant since the second half of the 20th century. The international conferences of the United Nations on science and technology for development which took place in Geneva in 1963 and in Vienna in 1979 led to the adoption of the World Action Plan in science and technology. This plan contained recommendations concerning the enhancement of international scientific cooperation. By following these recommendations, countries began to develop rules on the effective and mutually advantageous process of receiving and exchanging scientific results. These rules are usually fixed in regulations that together make up a set called a "normative framework" in legal doctrine.

As world experience shows, a normative framework varies according to the geographical location of the countries which are engaged in international scientific cooperation. For example, the normative framework of scientific cooperation between the countries from different parts of the world consists of multilateral international treaties (e.g. the 1982 United Nations Convention on the Law of the Sea and the 1992 Convention on Biological Diversity), acts issued by international intergovernmental organizations (e.g. UNESCO regulations), and international scientific cooperation programs (e.g. the research and innovation program "Horizon 2020"). The normative framework of scientific cooperation between the countries from the same part of the world includes regional agreements (e.g. the 1992 Agreement between The Government of the Russian Federation and The Government of the Republic of Finland on cooperation in science and technology), acts of regional organizations and associations (e.g. the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe), and regional scientific cooperation programs (e.g. the 1987 pan-African Program on the Application of Science and Technology to Development).

The inception of the BRICS as a group of countries from different parts of the world in the format of a global forum prompts us to take a fresh look at the normative

framework of international scientific cooperation. The fact that the BRICS members proclaimed their intention to develop mutual scientific cooperation makes this issue even more compelling.

Understanding the BRICS normative framework of scientific cooperation seems possible by answering the following questions: How does the BRICS status determine the distinctive features of its norm-setting? Which of the BRICS regulations deal with issues of scientific cooperation between the BRICS members? What aspects of scientific cooperation do the BRICS regulations cover?

Attempts to find answers to these questions in existing studies of scientific cooperation across the BRICS have failed due to the fact that the studies mainly focused on issues other than the BRICS normative framework of scientific cooperation. For instance, Finardi (2015) explores the scientific collaboration between the BRICS countries through the analysis of data on co-authored scientific products.[1] As for the normative framework, Finardi fragmentarily analyzes only two, the BRICS Declarations – the Sanya Declaration (BRICS 2011) and the Cape Town Declaration (BRICS 2014). By using a method of political, economic, social, technological, environmental, and legal (PESTEL) analysis, Kahn (2015) determines the prospects for cooperation in science among the BRICS members with an emphasis on the role of South Africa.[2] This author claims the legal analysis as a part of the research method, but analyzes only the Cape Town Declaration (BRICS 2014)[3] and a few bilateral agreements between the BRICS countries. Rensburg, Motala, and David (2015) investigate research collaboration in BRICS using four measurable categories, namely, research capacity, research outputs, ranking, and the number of international collaborations.[4] That study does not address the issues of the normative framework of scientific cooperation. Abashidze, Solntsev, and Kiseleva (2016) study the legal status of BRICS in comparison with similar international forums and trends in such spheres of cooperation of BRICS members as outer space activities and Africa as a continent.[5] Within their paper, the authors analyze only some of the BRICS Declarations in light of the outlined trends. The study by Sokolov, Shashnov, Kotsemir, and Grebenyuk (2017) presents a methodology for the selection of priorities for science and technology cooperation among the BRICS countries based on an analysis of international and

---

1 Ugo Finardi, *Scientific Collaboration between BRICS Countries*, 102(2) Scientometrics 1139 (2015).

2 Michael Kahn, *Prospects for Cooperation in Science, Technology, and Innovation Among the BRICS Members,* 10(2) International Organizations Research Journal 105 (2015).

3 Cape Town Declaration (Cape Town, South Africa, 10 February 2014) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

4 Ihron Rensburg et al., *Opportunities and Challenges for Research Collaboration Among the BRICS Nations*, 45(5) A Journal of Comparative and International Education 814 (2015).

5 Aslan Abashidze et al., *Legal Status of BRICS and Some Trends of International Cooperation*, 36(9) Indian Journal of Science and Technology 1 (2016).

national strategic documents of the BRICS countries and bibliometric analysis of joint publications by researchers from the BRICS countries indexed in the Scopus database.[6] Despite the considerable number of the studied BRICS regulations, that study does not contain a full-scale analytical review of the normative framework of scientific cooperation between the BRICS countries.

In light of the above, the purpose of this paper is to identify and analyze the up-to-date and complete normative framework of scientific cooperation across the BRICS. For this purpose the present paper is organized as follows. The section which follows contains a study of the distinctive features of the BRICS norm-setting based on its comparison with the norm-setting of traditional international intergovernmental organizations. A further section then provides an analytical review of the BRICS regulations that deal with issues of scientific cooperation between the BRICS members. The final section presents the main findings and conclusions of this paper.

1. Distinctive Features of the BRICS Norm-Setting

The intention of the BRICS members to develop mutual scientific cooperation has been demonstrated more than once in their discussions at BRICS meetings and has been reflected in official documents. Thus, the Joint Statement of the BRIC Countries' Leaders (BRIC 2009) declared (p. 11):

> We reaffirm to advance cooperation among our countries in science and education with the aim, inter alia, to engage in fundamental research and development of advanced technologies.[7]

The BRICS official document the Delhi Declaration (BRICS 2012) contains the following provision (p. 40):

> We are convinced that there is a storehouse of knowledge, know-how, capacities and best practices available in our countries that we can share and on which we can build meaningful cooperation for the benefit of our peoples.[8]

Claiming scientific cooperation between the BRICS members as a kind of strategic interaction raises the issue of its normative framework. It seems appropriate to start

---

[6] Alexander Sokolov et al., *Identification of Priorities for S&T Cooperation of BRICS Countries*, 12(4) International Organisations Research Journal 32 (2017).

[7] Joint Statement of the BRIC Countries' Leaders (Yekaterinburg, Russia, 16 June 2009) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

[8] BRICS Leaders Declaration (New Delhi, India, 29 March 2012) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

the study of this issue with the identification of the nature and features of the BRICS norm-setting in general.

An international formation of five countries, BRICS – Brazil, Russia, India, China, and South Africa – was established in 2011. As an actor in international relations, the BRICS cannot be seen as an intergovernmental organization of the 'traditional' type because of the absence of a constituent treaty, headquarters, secretariat, and budget. In legal doctrine, international formations that do not have all the features of an international intergovernmental organization are usually called international quasi-organizations or soft organizations.[9]

The status of the BRICS as a soft organization raises the question of whether the BRICS norm-setting is similar to the norm-setting of traditional intergovernmental international organizations or has some distinctive features. It seems possible to answer this question by comparing the norm-setting of traditional international intergovernmental organizations and the BRICS according to such criteria as legal personality, norm-setting forms, norm-setting competence, norm-setting process, and norm-setting outcomes.

Developing and deepening interstate relations demand a high level of unity of the states' obligatory behavior which could be achieved by norms of international law. The contemporary international law-making process is not limited to the conclusion of international treaties by states and recognition of the practice of the state as international custom, and is characterized by strengthening the norm-setting role of international intergovernmental organizations.

Norm-setting is one of the functions of any traditional international intergovernmental organization.[10] The study of this function should start with the legal personality of international organizations, which is the basis for their norm-setting. It is a fact that general rules which determine the legal personality of international organizations do not exist in international law. Some views regarding the essence of the legal personality of international organizations are expressed in the advisory opinions of international judicial institutions. For example, according to the legal opinion of the Economic Court of the Commonwealth of Independent States (CIS) dated 23 June 1998, the legal personality of CIS is its attribute and does not need additional recognition from the states, including member states, or from other international organizations. CIS acts as the subject of international law because it really exists and works in international relations. As the subject of international law, CIS has certain rights including in the sphere of norm-setting, in particular, CIS has

---

[9] Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press, 2002).

[10] It is important to note that norm-setting of intergovernmental organizations has repeatedly been a subject of scientific research. *See* for more details Hanna Bokor-Szego, *The Role of the United Nations in the International Legislations* (Budapest: North-Holland Publishing Co., 1978); Jesper W. Schneider, *Treaty-Making Power of International Organizations* (Geneva: Librarie E. Droz; Paris: Librarie Minard, 1959).

the right to sign international treaties with states and international organizations; bodies of the CIS make decisions on its own behalf.[11]

In legal doctrine, there are multiple voices and stances on the legal personality of international organizations. According to I. Brownlie, the legal personality of international organizations can be established by interpreting constituent documents and by addressing the doctrine of "implied competences."[12] In the view of I.A. Shearer, international organizations can exercise the legal capacity needed for the implementation of their functions.[13] The international lawyers L. Henkin, R. Crawford, O. Schachter, and H. Smit consider that the practice of international organizations can play a large role in their ability to conclude international treaties.[14] There is another view that by creating the international organizations, the states allocate them the legal capacity, recognizing their ability to have the rights and duties to participate in the creation and use of rules of international law and to control respect for rules of international law by member states. According to this recognition, the states create a new subject of international law which along with them carries out law-making and law enforcement functions in the sphere of international cooperation. The ability of international organizations to make legally valid actions on their own behalf implies that they have isolated legal will. Such will differs from each individual will of the member states. Individual acts of members of the organization cannot be merged or put together. They have to be coordinated, and this coordinated will of the international organization has interstate character.[15]

In light of the above, it can be concluded that the BRICS as a kind of international organization also has a legal personality. Nonetheless, the BRICS legal personality differs from the legal personality of traditional intergovernmental organizations. As an independent actor in international relations, the BRICS may fulfill the norm-setting functions in the sphere of international cooperation between its members. However, the absence of the constituent treaty which implies the law-making and law enforcement functions of the BRICS means the absence of the ability to make legally valid actions. This, in turn, means that the BRICS cannot make the rules of law, but can make the rules of soft law.[16]

---

[11] Консультативное заключение Экономического суда СНГ № 01-1/2-98 от 23 июня 1998 г. [Advisory opinion of the CIS Economic Court № 01-1/2-98 of 23 June 1998 г.] in Решения Экономического суда СНГ (1994–2000 гг.) [*Decisions of the CIS Economic Court (1994–2000)*] 242 (V.G. Zorin (ed.), Minsk: CIS Economic Court, 2000).

[12] Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1998).

[13] Ivan A. Shearer, *Starke's International Law* (London; Boston: Butterworths, 1994).

[14] Louis Henkin et al., *International Law: Cases and Materials* (New York: West Group, 1987).

[15] Международное право [*International Law*] (J. Kolosov & E. Krivchikova (eds.), Moscow: International relations, 2001).

[16] In the doctrine, soft law is defined as the rules of conduct that are not legally binding but can generate practical impact. *See* Francis Snyder, *Soft Law and the Institutional Practice in the European Community*

The norm-setting of the traditional international intergovernmental organizations can be in the form of participation in the law-making of the states or in the form of direct involvement in creating norms of international law. While participating in state law-making, international organizations do not create norms of international law, they only contribute to that process. The most typical cases of support functions in state law-making are development and adoption of draft conventions, technical standards, regulations, and the convening of conferences for signing treaties. While performing support functions in state law-making, international organizations often play the role of the depositary of international treaties which are responsible for the account and storage of international treaties. Thus, under the Charter of the United Nations (Art. 102):

> Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.[17]

Direct norm-setting of the traditional international organizations can be carried out in the following ways:

1. conclusion of international treaties;
2. decision-making, regarding the behavior of member countries in the field of organization activity;
3. decision-making, regarding internal organizational issues or the creation of the internal law.

Concerning the BRICS, its participation in the law-making of the member states is impossible due to the absence of law-making authority. Regarding direct norm-setting across the BRICS, it can be carried out in forms of decision-making in the BRICS fields of cooperation or internal organizational issues.

Whatever the norm-setting form, every international intergovernmental organization should create norms according to its competence within delegated authorities which are derived from international treaties or constituent instruments. Thus, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations provides (Art. 6):

---

in *The Construction of Europe: Essays in Honour of Emile Noël* 197 (S. Martin (ed.), Dordrecht: Springer, 1994); Gregory Shaffer & Mark A. Pollack, *Hard and Soft Law: What Have We Learned?* (2012) (Jan. 28, 2020), available at http://ssrn.com/abstract=2044800; Dinah L. Shelton, *Soft Law* (2007) (Jan. 28, 2020), available at http://ssrn.com/abstract=1003387; Anna Peters & Isabella Pagotto, *Soft Law as a New Mode of Governance: A Legal Perspective* (2006) (Jan. 28, 2020), available at http://ssrn.com/abstract=1668531.

[17] Charter of the United Nations (1945) (Jan. 28, 2020), available at http//www.unitednationscharter.com.

> The capacity of an international organization to conclude treaties is governed by the rules of that organization.[18]

Under Article IV (p. 4) of the Constitution of UNESCO,[19] Article 19 of the Constitution of the International Labour Organization,[20] and part 2 (p. b) of the Convention on the International Maritime Organization (IMO),[21] these organizations have the right to approve drafts of international conventions, agreements, and regulations for ensuring the most effective international cooperation in the areas corresponding to their competence.

The norm-setting competence of an international organization requires the determination and differentiation of the norm-setting competence of its bodies. The charters of most intergovernmental organizations of the U.N. system establish the right of its highest body for the conclusion of international treaties: e.g. Articles X, XI of the Constitution of UNESCO, Articles 69, 70 of the Constitution of the World Health Organization (WHO),[22] and Article 6 the Constitution of the International Telecommunication Union (ITU).[23] In some charters, this function is given to the body of limited representation – executive structure. In practice, the supreme or executive body often transfers its competence to the highest official of the organization – the Secretary-General or the Director-General. The charter of the international institution also may not include the provisions about the treaty competence of the organization. Thus, there are no such provisions in the Universal Postal Union (UPU) Constitution.

Equally important is the issue of the distribution of decision-making competence that is binding upon the member states. The charters of intergovernmental organizations provide that similar decisions can be made by two bodies: the highest and the executive.

The constituent instruments of the World Meteorological Organization (WMO), the World Health Organization (WHO), UNESCO, and the World Intellectual Property Organization (WIPO) provide that the question of development of the obligatory

---

18 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) (Jan. 28, 2020), available at http//www.legal.un.org/InternationalLaw Commision/conventions/1_2_1986.pdf.

19 Constitution of UNESCO (1945) (Jan. 28, 2020), available at http//www.portal.unesco.org.

20 Constitution of the International Labour Organization (1919) (Jan. 28, 2020), available at http//www.ilo.org›rome/ilo-cosa…WCMS_633812/lang…index.htm.

21 Convention on the International Maritime Organization (1948) (Jan. 28, 2020), available at http//www.imo.org/…Conventions…on…Maritime… Organization.aspx.

22 Constitution of the World Health Organization (1946) (Jan. 28, 2020), available at http//www.who.int>governance/eb/who_constitution_en.pdf.

23 Constitution of the International Telecommunication Union (1992) (Jan. 28, 2020), available at http//www.itu.int.council/pd/constitution.html.

decision can be only within the competence of the supreme body of the establishment. This reflects the principle of respect for the sovereign equality of states that is the basis for the legitimate creation and effective functioning of every intergovernmental organization. At the same time, some constituent documents provide that also bodies of a limited membership – executive boards – have rights to develop solutions which are obligatory for member states. Thus, Article 37 of the Chicago Convention on International Civil Aviation states that the International Civil Aviation Organization (ICAO)[24] shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures in civil aviation. According to Article 54 of the ICAO, this falls under the purview of the Council.

In some cases, constituent instruments provide that the competence of the organization is given to both the highest body and the executive body. For example, under Article 7 of the Convention of the World Meteorological Organization,[25] the right to approve the technical rules relating to meteorological procedures and practices is reserved to the Congress of the WMO as the highest body. Between the sessions of the Congress, functions on the elaboration of international rules are conferred on the executive body.

With regard to the BRICS, the absence of the constituent instruments makes it difficult to determine the norm-setting competence of its organization. Based on the general provisions of international law, it seems that the BRICS have the authority to make non-legal norms relating to the member states.

The norm-setting process of the traditional international intergovernmental organizations is a subject of formal regulation. In particular, the general rules of development and adoption of international treaties are established by the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between states and international organizations or between international organizations. Some international organizations have internal procedural documents. For example, UNESCO has, "The rules of procedure concerning recommendations to member states and the international conventions covered under conditions of Paragraph 4 of Article IV of the Charter." The International Labour Organization has "The rules of international labor convention' which establish the procedure of conventions" development. Within the BRICS, the norm-setting process has no formal regulation.

The outcomes of the norm-setting of the traditional international intergovernmental organizations include such types of regulations as international treaties, resolutions, rules, directives, and recommendations. As for the legally binding force of these regulations, it should be determined based on the constituent instruments

---

[24] Chicago Convention on International Civil Aviation (1944) (Jan. 28, 2020), available at http//www.icao.int>publications/Pages/doc7300.aspx.

[25] Convention of the World Meteorological Organization (1947) (Jan. 28, 2020), available at http//www.public.wmo.int.

of the individual international organization. Actually, this legally binding force can vary from optional decisions of a moral and political character, without any obligatory value to legally obligatory decisions. Most of the international intergovernmental organizations are authorized to adopt regulations which have international legal importance. With the exception of U.N. acts, these regulations are generally local, because they apply only to member states or to their bodies and officials (personnel). In some intergovernmental organizations, there are judicial or arbitration bodies given authority to interpret the legal acts issued by these organizations and also to resolve disputes arising between their members by using the internal law of the organizations. Examples of such bodies include the International Court of Justice and the Court of Justice of the EU.

The BRICS format as a global forum means that all its regulations are the result of the BRICS meetings. These meetings are held between officials of various ranks, from heads of state to heads of ministries and departments. Depending on the rank of the rule-makers, the set of the existing BRICS regulations can be divided into three levels.

The first level includes the Joint Statements and the Summits Declarations, which are the normative results of the BRICS Heads of State meetings. Up to the present time, within the BRICS, the following Joint Statements and Summits Declarations have been adopted: Joint Statement of the BRIC Countries' Leaders (BRIC 2009),[26] 2nd BRIC Summit of Heads of State and Government: Joint Statement (BRIC 2010),[27] Statement by BRICS Leaders on the Establishment of the BRICS-Led Development Bank (BRICS 2013),[28] Media Statement: Informal BRICS Leaders' Meeting on the Margins of the G20 Summit (BRICS 2018),[29] Joint Statement on BRICS Leaders' Informal Meeting on the Margins of G20 Summit (BRICS 2019),[30] Sanya Declaration (BRICS 2011), Delhi Declaration (BRICS 2012), Durban Declaration (BRICS 2013),[31] Fortaleza Declaration (BRICS 2014),[32] Ufa Declaration (BRICS 2015),[33] Goa

---

26 Joint Statement of the BRIC Countries' Leaders, *supra* note 7.

27 2nd BRIC Summit of Heads of State and Government: Joint Statement (Brasília, Brazil, 15 April 2010) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

28 Statement by BRICS Leaders on the Establishment of the BRICS-Led Development Bank (Durban, South Africa, 27 March 2013) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

29 Media Statement: Informal BRICS Leaders' Meeting on the Margins of the G20 Summit (Buenos Aires, Argentina, 30 November 2018) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

30 Joint Statement on BRICS Leaders' Informal Meeting on the Margins of G20 Summit (Osaka, Japan, 28 June 2019) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

31 Durban Declaration (Durban, South Africa, 27 March 2013) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

32 Fortaleza Declaration (Fortaleza, Brazil, 15 July 2014) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

33 Ufa Declaration (Ufa, Russian Federation, 9 July 2015) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

Declaration (BRICS 2016),[34] Xiamen Declaration (BRICS 2017),[35] Johannesburg Declaration (BRICS 2018),[36] and Brasilia Declaration (BRICS 2019).[37]

The second level of the BRICS regulations includes the documents which are the normative results of the BRICS heads of government or ministers meetings. The varieties of these documents are the Joint Statements (Goa Statement on Environment: Second Meeting of BRICS Environment Ministers (BRICS 2016),[38] Third Meeting of BRICS Environment Ministers Tianjin Statement on Environment (BRICS 2017),[39] Joint Statement for the 5th BRICS Ministers of Environment Meeting: Contribution of Urban Environmental Management to Improving the Quality of Life in Cities (BRICS 2019),[40] etc.), the Ministers Declarations (Ministerial Declaration of the BRICS Trade Ministers (BRICS 2011),[41] Declaration of the BRICS Industry Ministers (BRICS 2015),[42] Joint Declaration of BRICS Ministers of Agriculture (BRICS 2016),[43] etc.), the Memorandums of Understanding (Memorandum of Mutual Understanding in Energy Saving and Energy Efficiency among the Ministries and Governmental Agencies of BRICS, Responsible for Energy and Energy Efficiency (BRICS 2015),[44] Memorandum of Understanding on the Creation of the Joint BRICS Website (BRICS 2015),[45] etc.),

---

34 Goa Declaration (Goa, India, 16 October 2016) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

35 Xiamen Declaration (Xiamen, China, 4 September 2017) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

36 Johannesburg Declaration (Johannesburg, South Africa, 26 July 2018) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

37 Brasilia Declaration (Brasilia, Brazil, 14 November 2019) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

38 Goa Statement on Environment: Second Meeting of BRICS Environment Ministers (Goa, India, 16 September 2016) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

39 Third Meeting of BRICS Environment Ministers Tianjin Statement on Environment (Tianjin, China, 23 June 2017) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

40 Joint Statement for the 5th BRICS Ministers of Environment Meeting: Contribution of Urban Environmental Management to Improving the Quality of Life in Cities (Sao Paulo, Brazil, 15 August 2019) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

41 Ministerial Declaration of the BRICS Trade Ministers (Geneva, Switzerland, 14 December 2011) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

42 Declaration of the BRICS Industry Ministers (Moscow, Russia, 20 October 2015) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

43 Joint Declaration of the BRICS Ministers of Agriculture (New Delhi, India, 23 September 2016) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

44 Memorandum of Mutual Understanding in Energy Saving and Energy Efficiency among the Ministries and Governmental Agencies of BRICS, Responsible for Energy and Energy Efficiency (Moscow, Russia, 20 November 2015) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

45 Memorandum of Understanding on the Creation of the Joint BRICS Website (Ufa, Russia, 9 July 2015) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

and the Action Plans (Action Plan 2012–2016 for Agricultural Cooperation of BRICS Countries (BRICS 2011),[46] Action Plan for Deepening Industrial Cooperation among BRICS Countries (BRICS 2017), etc.).[47]

The third level of the BRICS regulations includes the regulations which are the normative results of the BRICS authorities meetings. For instance, up to the present time, the Communique of BRICS Heads of Revenue Meeting[48] and the Joint Statement of the Heads of BRICS Competition Authorities have been signed.[49]

2. Normative Framework of Scientific Cooperation Across the BRICS

The analysis of the BRICS regulations suggests that scientific cooperation issues have received extended normative coverage. For example, some aspects of scientific cooperation are regulated in the highest level documents of the BRICS normative framework – the Joint Statements of the BRICS Countries' Leaders and the Summits Declarations. Thus, some of the Joint Statements of the BRICS Countries' Leaders contain intentions regarding mutual scientific cooperation (Table 1).

Table 1: Intentions of the BRICS countries regarding mutual scientific cooperation

Joint Statement	Provisions relating to scientific cooperation
Joint Statement of the BRIC Countries' Leaders 2009	to advance cooperation among our countries in science and education with the aim, *inter alia*, to engage in fundamental research and development of advanced technologies
2nd BRIC Summit of Heads of State and Government: Joint Statement 2010	to advance cooperation among BRIC countries in science, culture, and sports
Joint Statement on BRICS Leaders' Informal Meeting on the Margins of G20 Summit 2019	to continue BRICS scientific, technical, innovation, and entrepreneurship cooperation, including the BRICS Partnership on New Industrial Revolution (PartNIR), iBRICS Network, the BRICS Institute of Future Networks, and Young Scientists Forum

[46] Action Plan 2012–2016 for Agricultural Cooperation of BRICS Countries (Chengdu, China, 30 October 2011) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

[47] Action Plan for Deepening Industrial Cooperation among BRICS Countries (Hangzhou, China, 29 July 2017) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

[48] Communique of BRICS Heads of Revenue Meeting (Moscow, Russia, 19 November 2015) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

[49] Joint Statement of the Heads of BRICS Competition Authorities (Durban, South Africa, 13 November 2015) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

As for the BRICS Summits Declarations, all of them highlight issues of scientific cooperation in two different directions. First, these declarations reflect the strategic intentions of the BRICS members regarding the development of mutual scientific cooperation (Table 2).

Table 2: Strategic intentions of the BRICS countries regarding mutual scientific cooperation

Declaration	Intentions
Sanya Declaration 2011	to explore mutual scientific cooperation
Delhi Declaration 2012	to build meaningful cooperation for sharing knowledge, know-how, capacities, and best practices available in the BRICS countries
Durban Declaration 2013	to promote scientific cooperation between the small and medium-sized enterprises of the BRICS countries
Fortaleza Declaration 2014	to enhance scientific cooperation; to strengthen intra-BRICS dialogue with a view to promote international exchange and cooperation and to foster innovation and research
Ufa Declaration 2015	to strengthen cooperation in science, technology, and innovation with the purposes of: promoting inclusive and sustainable social, and economic development; bridging the scientific and technological gap between the BRICS countries and developed countries; providing a new quality of growth based on economic complementarity; finding solutions to the challenges that the world economy faces today; expanding cooperation in joint research in the field of high-technology products
Goa Declaration 2016	to implement the BRICS Research and Innovation Initiative
Xiamen Declaration 2017	to promote cooperation on science to forge synergy in tapping new growth momentum for BRICS countries' economies
Johannesburg Declaration 2018	to provide the dynamic development of BRICS cooperation in science in view of its importance for sustainable development
Brasilia Declaration 2019	to streamline and intensify the BRICS scientific joint activities

Second, all the BRICS Summits Declarations determine actions aimed at implementing scientific cooperation strategic intentions (Table 3).

Table 3: Actions to implement the BRICS scientific cooperation strategic intentions

Declaration	Actions
Sanya Declaration 2011	to hold the BRICS Think-tank Symposiums; to establish a network of research centers of all BRICS countries; to hold a meeting of senior officials for discussing ways of promoting scientific cooperation in the BRICS format
Delhi Declaration 2012	to hold a meeting of the BRICS senior officials on science and technology
Durban Declaration 2013	to hold a meeting of the BRICS Ministers of Science and Technology and BRICS senior officials on science and technology
Fortaleza Declaration 2014	to sign by the BRICS Ministers of Science and Technology the Memorandum of Understanding on Science, Technology, and Innovation, which provides a strategic framework for cooperation in this field
Ufa Declaration 2015	to cooperate within large research infrastructures, including possible consideration of mega-science projects, to achieve scientific and technological breakthroughs in the key areas of cooperation; to coordinate the existing large-scale national programs of the BRICS countries; to develop and implement a BRICS Framework Program for funding multilateral joint research projects for research, technology commercialization and innovation involving science and technology ministries and centers, development institutes and national regional foundations that sponsor research projects; to establish a joint Research and Innovation Platform
Goa Declaration 2016	to establish the BRICS Working Group on Research Infrastructure, and Mega-Science to reinforce the BRICS Global Research Advanced Infrastructure Network
Xiamen Declaration 2017	to select the BRICS research and development projects under the BRICS STI Framework Program; to enhance cooperation on innovation and entrepreneurship, including by promoting technology transfer and application, cooperation among science and technology parks and enterprises as well as mobility of researchers, entrepreneurs, professionals, and students
Johannesburg Declaration 2018	to implement coordinated BRICS scientific projects aimed at promoting BRICS science, technology, and innovation potential as a contribution to combined efforts in addressing the challenges of the Fourth Industrial Revolution

Brasilia Declaration 2019	to implement scientific joint activities through the BRICS Scientific Technology Innovation Steering Committee

Scientific cooperation issues are also reflected in the BRICS's lower-level regulations. It may be noted that all the declarations resulting from the BRICS Science, Technology, and Innovation Ministers meetings address issues of mutual scientific cooperation.[50]

The Ministers Declarations, similar to the BRICS Summits Declarations, express the intentions of the BRICS countries in the field of scientific cooperation (Table 4).

Table 4: Intentions of the BRICS countries in the field of scientific cooperation

Declaration	Intentions
Cape Town Declaration 2014	to intensify cooperation in the sphere of science; to strengthen and improve the governance mechanisms of scientific cooperation
Brasilia Declaration 2015	to elaborate and establish appropriate mechanisms of scientific cooperation
Moscow Declaration 2015	to build further scientific collaboration
Jaipur Declaration 2016	to intensify, diversify, and institutionalize scientific cooperation
Hangzhou Declaration 2017	to strengthen pragmatic cooperation in science among the BRICS countries, create new cooperation opportunities, expand partnerships, and jointly tackle global challenges
Durban Declaration 2018	to contribute positively to cooperation
Campinas Declaration 2019	to intensify scientific joint activities among BRICS countries and improve the partnerships in progress, to deepen cooperation on innovation

In addition, the Ministers Declarations contain a list of ready solutions and planned actions concerning scientific cooperation between the BRICS countries (Table 5).

[50] Up to the present time, the following declarations have been adopted: Cape Town Declaration (Cape Town, South Africa, 10 February 2014); Brasilia Declaration (Brasilia, Brazil, 18 March 2015); Moscow Declaration (Moscow, Russia, 28 October 2015); Jaipur Declaration (Jaipur, India, 8 October 2016); Hangzhou Declaration (Hangzhou, China, 18 July 2017); Durban Declaration (Durban, South Africa, 3 July 2018); Campinas Declaration (Campinas, Brazil, 20 September 2019) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

Table 5: Ready solutions and planned actions concerning scientific cooperation between the BRICS countries

Declaration	Ready solutions	Planned actions
Cape Town Declaration 2014	– determined the main areas of scientific cooperation: exchange of information on policies and programs and promotion of innovation and technology transfer; food security and sustainable agriculture; climate change and natural disaster preparedness and mitigation; new and renewable energy, energy efficiency; nanotechnology; high-performance computing; basic research; space research and exploration, aeronautics, astronomy and earth observation; medicine and biotechnology; biomedicine and life sciences (biomedical engineering, bioinformatics, biomaterials); water resources and pollution treatment; high tech zones/science parks and incubators; technology transfer; science popularization; information and communication technology; clean coal technologies; natural gas and non-conventional gases; ocean and polar sciences; and geospatial technologies and its applications; – established five priority thematic areas and leadership: Brazil – climate change and natural disaster mitigation; Russia – water resources and pollution treatment; India – geospatial technology and its applications; China – new and renewable energy and energy efficiency; South Africa – astronomy	to sign a Memorandum of Understanding on Cooperation in Science, Technology, and Innovation as a strategic framework for cooperation in priority areas among the BRICS member countries; to establish a BRICS STI training program; to organize meetings of STI ministers, senior officials; to create a network of national coordinators

Brasilia Declaration 2015	– determined the necessity of sharing and exchanging information on science, leveraging contacts and programs aimed at enhancing collaborative innovation projects, joint long-term problem-focused cooperation programs as a central modality of scientific cooperation	to create the BRICS Young Scientists Forum as a platform for sharing scientific research results and experiences; to develop and negotiate a Work Plan of scientific cooperation 2015–2018; to cooperate in the framework of major research infrastructures; to coordinate the existing large-scale national programs of BRICS countries; to set up a Framework Program for funding the multilateral joint project for research, technology commercialization and innovation; to establish a joint Research and Innovation Networking Platform
Moscow Declaration 2015	– determined the necessity of development and implemen-tation of the BRICS Framework Program on multilateral research	to use the possibilities of the New Development Bank as an additional funding instrument to foster further collaboration; to establish the BRICS Network University aimed at developing master's and PhD programs along with joint research projects in priority areas
Jaipur Declaration 2016	– recognized the need in the BRICS science, technology, and innovation Framework Program and the Implementation Plan of the BRICS countries' joint initiative on multilateral interdisciplinary research & innovation	to launch the next BRICS Framework Program for research and innovation

Hangzhou Declaration 2017	– approved the driving of scientific cooperation through existing financing platforms of BRICS countries; – recognized the progress of BRICS scientific cooperation since 2015	to draft the long-terms scientific cooperation plans; to adopt the BRICS Action Plan for Innovation Cooperation
Durban Declaration 2018	– recognized the important role of the Small and Medium-sized Enterprises, State-Owned Companies in the scientific cooperation	to organize meetings of BRICS Ministers of Science and Technology and meetings of BRICS Senior Officials on Science and Technology; to explore the scientific cooperation in the new areas (energy, tourism)
Campinas Declaration 2019	– recognized the importance of establishing a network to encompass some of the main science parks, technology incubators, and accelerators of the BRICS countries	to make the platform a single digital entry point into research infrastructure's basic info and links, partnership, and access calls, contacts, events, and news; to develop joint concrete actions in research, technological development, innovation, and entrepreneurship, in order to produce more knowledge, to transform this knowledge into products and wealth and to improve the quality of life of our populations

Another important BRICS regulation is the Memorandum of Understanding on Cooperation in Science, Technology, and Innovation between the Governments of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa, signed at the II Meeting of Ministers of Science, Technology, and Innovation of the Countries of BRICS[51] in March 2015.

The Memorandum determines number of strategic aspects of scientific cooperation development across the BRICS (Table 6).

Table 6: Strategic aspects of scientific cooperation development across the BRICS

Strategic aspects	**Content**
The main goal of scientific cooperation	to establish a strategic framework for cooperation in science, technology, and innovation among the BRICS member countries; to address common global and regional socio-economic challenges in the BRICS member countries utilizing shared experiences and complementarities in science, technology, and innovation; to co-generate new knowledge and innovative products, services and processes in the BRICS member countries utilizing appropriate funding and investment instruments; to promote, where appropriate, joint BRICS science, technology, and innovation partnerships with other strategic actors in the developing world
Principles of scientific cooperation	voluntary participation; equality; mutual benefit; reciprocity and subject to the availability of earmarked resources for collaboration by each country; voluntary participation; equality; mutual benefit; reciprocity and subject to the availability of resources for collaboration by each country

[51] Memorandum of understanding on cooperation in science, technology, and innovation between the Governments of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa (Brasilia, Brazil, 17 March 2015) (Jan. 28, 2020), available at http://brics.utoronto.ca/docs/index.html.

The main areas of scientific cooperation	exchange of information on policies and programs and promotion of innovation and technology transfer; food security and sustainable agriculture; natural disasters; new and renewable energy, energy efficiency; nanotechnology; high-performance computing; basic research; space research and exploration, aeronautics, astronomy and earth observation; medicine and biotechnology; biomedicine and life sciences (biomedical engineering, bioinformatics, biomaterials); water resources and pollution treatment; high tech zones/science parks and incubators; technology transfer; science popularization; information and communication technology; clean coal technologies; natural gas and non-conventional gases; ocean and polar sciences; geospatial technologies and its applications
Modalities of scientific cooperation	short-term exchange of scientists, researchers, technical experts, and scholars; dedicated training programs to support human capital development in science, technology, and innovation; organization of science, technology, and innovation workshops, seminars and conferences in areas of mutual interest; exchange of science, technology, and innovation information; formulation and implementation of collaborative research and development programs and projects; establishment of joint funding mechanisms to support BRICS research programs and large-scale research infrastructure projects; facilitated access to science and technology infrastructure among BRICS member countries; announcement of simultaneous calls for proposals in BRICS member countries; cooperation of national science and engineering academies and research agencies

The Memorandum of Understanding on Cooperation in Science, Technology, and Innovation served as the basis for preparing such working papers as the BRICS

Science, Technology, and Innovation Work Plan 2015–2018 and the BRICS Science, Technology, and Innovation Work Plan 2019–2022.

Following the fifth meeting of the BRICS Ministers of Science and Technology in July 2017, the BRICS Action Plan for Innovation Cooperation (2017–2020) was adopted. According to this plan, innovation is one of the key driving forces of global sustainable development and plays a fundamental role in promoting economic growth. In accordance with the provisions of the Action Plan, the BRICS countries should enhance cooperation in innovation based on existing mechanisms and joint research programs, encouraging cooperation among science parks and strengthening the training of technology retransfer.

In addition, the Action Plan recommends to the BRICS countries to promote partnerships on youth innovation and entrepreneurship for pragmatic cooperation, to establish inter-BRICS investment instruments, to exchange young scientists and entrepreneurs, and it emphasizes the role of women in science, technology, and innovation.

Other BRICS working papers are the BRICS Scientific Technology Innovation Framework Programs, which were adopted in 2016, 2017, and 2019. They aim to support excellent research on priority areas that can best be addressed by a multinational approach and enhance collaboration within BRICS.

Conclusion

The aim of this paper was to identify the up-to-date and complete normative framework of scientific cooperation across the BRICS. Strategically, the achievement of the stated aim, taking into account that the normative framework is a result of the norm-setting, assumed the identification of the features of the BRICS norm-setting both by comparison with the norm-setting of traditional international intergovernmental organizations and by analysis of the BRICS regulations dealing with issues of scientific cooperation. Tactically, the stated aim could be achieved by answering the following research questions: How does the BRICS status determine the distinctive features of its norm-setting? Which of the BRICS regulations deal with issues of scientific cooperation between the BRICS members? What aspects of scientific cooperation do the BRICS regulations cover? In light of the outlined strategy and tactics, the findings of the paper are the following.

By virtue of its existence, the BRICS as a kind of international organization has a legal personality that is different from the legal personality of any traditional intergovernmental organization. As an independent actor in international relations, the BRICS can be engaged in norm-setting. However, the absence of a constituent treaty which implies the law-making and law enforcement functions means the absence of the BRICS's ability to make legally valid actions and allows the creation of soft law rather than law.

The absence of law-making authority is a barrier to the BRICS participation in the law-making of its members. Because of this, norm-setting across the BRICS can be carried out only in the fields of the BRICS members' cooperation or internal organizational issues. The lack of constituent instruments makes it difficult to determine the norm-setting competence of the BRICS and their norm-setting proceedings. On the basis of the general provisions of international law, it seems that the BRICS are empowered to make non-legal norms relating to member states. As for the BRICS norm-setting process, it has no formal framework.

The BRICS format as a global forum means that all its regulations are the result of the BRICS meetings which are held between representatives of the member states, from heads of state to officials of various ranks. The normative results of these meetings are the Joint Statements, the Summits Declarations, the Ministers Declarations, the Action Plans, etc.

The analysis of the BRICS regulations shows that many of them relate to issues of scientific cooperation. Thus, the Joint Statements and the Summits Declarations as the normative results of the BRICS heads of state meetings reflect such aspects as the strategic intentions of the BRICS members regarding the development of mutual scientific cooperation, and the necessary actions for implementing these intentions. All the declarations resulting from the BRICS Science, Technology, and Innovation Ministers meetings address issues of mutual scientific cooperation. These regulations cover the intentions of the BRICS countries in the field of scientific cooperation, ready solutions, and planned actions in this regard. Scientific cooperation issues are also covered in a number of working papers, such as the Memorandum of Understanding on Cooperation in Science, Technology, and Innovation, the BRICS Science, Technology, and Innovation Work Plans, and the BRICS Scientific Technology Innovation Framework Programs.

Summing up the findings of the study, it can be concluded that the normative framework of scientific cooperation across the BRICS is a set of non-legally binding norms contained in the regulations adopted at the various meetings of national officials within the BRICS. In the future, it will be important to explore the results of the application of the BRICS regulations in mutual scientific cooperation between the BRICS members.

Acknowledgments

The author would like to thank Valeria Evdash, at the Center for Academic Writing "Impulse," University of Tyumen, for her advice during the preparation of this manuscript.

References

Bokor-Szego H. *The Role of the United Nations in the International Legislations* (Budapest: North-Holland Publishing Co., 1978).

Brownlie I. *Principles of Public International Law* (Oxford: Clarendon Press, 1998).

Detter I. *Law-Making by International Organizations* (Stockholm: P.A. Norstedt and Söner, 1965).

Finardi U. *Scientific Collaboration Between BRICS Countries*, 102(2) Scientometrics 1139 (2015). https://doi.org/10.1007/s11192-014-1490-5

Henkin L. et al. *International Law: Cases and Materials* (New York: West Group, 1987).

Kahn M. *Prospects for Cooperation in Science, Technology, and Innovation Among the BRICS Members,* 10(2) International Organizations Research Journal 105 (2015). https://doi.org/10.17323/1996-7845-2015-02-140

Klabbers J. *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press, 2002). https://doi.org/10.1017/CBO9781139165051

Rensburg I. et al. *Opportunities and Challenges for Research Collaboration Among the BRICS Nations*, 45(5) A Journal of Comparative and International Education 814 (2015). https://doi.org/10.1080/03057925.2015.1074823

Schneider J.W. *Treaty-Making Power of International Organizations* (Geneva: Librarie E. Droz; Paris: Librarie Minard, 1959).

Shearer I.A. *Starke's International Law* (London; Boston: Butterworths, 1994).

Snyder F. *Soft Law and the Institutional Practice in the European Community* in *The Construction of Europe: Essays in Honour of Emile Noël* 197 (S. Martin (ed.), Dordrecht: Springer, 1994). https://doi.org/10.1007/978-94-015-8368-8_10

Information about the author

Marina Astakhova (Tyumen, Russia) – Associate Professor, Theory of Law and International Law Department, University of Tyumen (38 Lenina St., Tyumen, 625000, Russia; e-mail: ast-marina@yandex.ru).

THE IMPORT OF INSTITUTIONS TO THE BRICS COUNTRIES

MIKHAIL ZHARIKOV,

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

https://doi.org/10.21684/2412-2343-2020-7-1- 27-58

This article explores the potential approaches to optimising the way the institutions of mutual common use by the BRICS countries are constructed. The topic is time-relevant, for it reveals the need to work out a new institutional basis to understand the workings of the BRICS institutions as a result of recent transformations, such as Brexit, in the phenomenon of international and regional economic integration. The article is founded on the hypothesis that the import of institutions by the BRICS may be a more effective approach to the member countries' convergence than the conventional approach. The originality of the theme lies in the fact that the modern economic literature has not studied to the full extent the impact of this exogenous factor on financial integration. There is also a need for the further development of the least-studied areas of regional monetary integration, namely the lack of the ability of current world institutions to manage the common monetary policies and debt of the member countries. The author proposes principles for creating and operating a virtual contractual republic of the BRICS contrary to the exploitation-state model of the EU. The article rediscovers the institutionalist idea about democratic decisions by a group of subjects such as the member countries of a particular integration agreement. The author maintains that the new institutions of the BRICS may cause dramatic changes in the world monetary system, international liquidity and international reserves. The general conclusions of the article encompass the significance of creating integration institutions on the basis of the experience of the BRICS as a way to more economic and financial stability in the world. The results contribute to the search for opportunities of optimal operation of the BRICS regional debt market. In his closing remarks, the author outlines the prospects of settling the debt problems in the BRICS based on the virtual debt market.

Keywords: BRICS intergovernmental institutions; contractual state (republic); consensual economic policies; regional integration agreement; virtual market; virtual common

monetary instruments; common debt market; common payment infrastructure; common currency; exploitation state.

Recommended citation: Mikhail Zharikov, *The Import of Institutions to the BRICS Countries*, 7(1) BRICS Law Journal 27–58 (2020).

Table of Contents

Introduction: International Economic Integration Today

The early 21st century has seen a number of country groupings come into being that do not classify as regional integration agreements (RIAs) as they were understood by academics in the 1950s and 1960s when, for example, the European Economic Community was created. In the 2000s, economists, professional traders, equity and fund managers, policymakers and others have been quite inventive in creating acronyms for such groupings, such as the BRIC, which encompassed Brazil, Russia, India and China (later renamed the BRICS when South Africa became a member country), Next-11, IBSA, etc. These groupings came into existence as a response to a series of economic and financial crises the world suffered in the first decade of the 21st century, namely the dotcom bust and the sub-prime mortgage crisis that later spilled over into the world economic and financial crisis, as well as from repercussions related to acts of global terrorism. It was as if the very emergence of these groupings questioned the world economic order in the way it was structured after the Second World War.[1]

The post-war era was characterised by liberalisation, decentralisation, easy cross-border trade, investment and various sorts of other global economic transactions.

[1] Pierre-Olivier Gourinchas & Maurice Obstfeld, *Stories of the Twentieth Century for the Twenty-First*, 4(1) American Economic Journal: Macroeconomics 226, 237 (2012).

After years of harsh separatism, countries came closer together and loosed a mania which resulted in hundreds of RIAs that were thought to be a sort of panacea for prosperity and economic growth. However, the challenges of the early 21st century made people realise that there was something wrong in the globalisation and integration trends, and that there were limitations. The limitations of the RIAs were put in place by neoclassical market fundamentalism.[2]

These limitations involve several contradictions. For example, capitalism requires free enterprise, free competition and well-established property rights. However, the RIA in Europe supposes that the European Union (EU) countries will band together to provide financial stability facilities to support and bail out weaker member states such as Greece or Portugal.[3] This common policy means there must be some elements of a command economy present to, in effect, make the rich EU countries pay for the poor countries, which is certainly not capitalism, rather something closer to communism or socialism. Such common policies eventually constrain national sovereignty. Additionally, international and regional integration as part of globalisation bring with it a couple of surprises for economists to think about.

First, the world was shocked by the great European debt crisis that revealed the financial weaknesses of the regional economic integration in Europe. The crisis damaged the image of the euro as a currency that could rival the supremacy of the U.S. dollar in the international monetary system. The euro turned out to be a real disappointment for many traders who had invested heavily in assets denominated in the euro since the start of the 21st century. The euro also disappointed many countries that had diversified their official foreign exchange reserves in currencies other than the U.S. dollar.

As soon as the global financial crisis of 2008 broke out, most countries of the world increased the share of the dollar assets in their portfolios fearing a steeper downturn in the global financial system. They put more trust in the U.S. authority in international financial affairs than in the collective European body (the European Central Bank) that does not even have the authority to issue the common currency (euro). Countries finally decided that at the end of the day a national government is more responsible for keeping the currency safe than a number of governments that have the authority to print the euro all on their very own. As a result, the dollar strengthened as the world's reserve currency, whereas the euro has come to be seen by many as a currency that no one is willing to guarantee as a safe-haven asset.[4]

---

[2] Menzie D. Chinn & Hiro Ito, *A New Measure of Financial Openness*, 3(10) Journal of Comparative Policy Analysis: Research and Practice 309, 319 (2008).

[3] Jacques Miniane, *A New Set of Measures on Capital Account Restrictions*, 51(2) IMF Staff Papers 276, 301 (2004).

[4] Wilhelm Hankel & Robert Isaak, *Brave New World Economy: Global Finance Threatens Our Future* (Hoboken, N.J.: Wiley, 2011).

The blow to the common currency also meant a partial loss of competitiveness for the European Union, an issue that was first seriously and openly addressed by David Cameron, the then British Prime Minister, in January 2013 at the World Economic Forum in Davos, Switzerland and later in a notable speech of his delivered in April that same year. In the speech, he communicated the idea that if the EU did nothing to strengthen its competitiveness, Britain would leave the Union.[5]

That was the second shock for the world community, because it shook the foundations of regional economic integration as something worth undertaking by other countries, and it sent waves of political, economic and social distress across all of Europe. The possibility of Britain's exiting the EU raised the question of whether the EU was as competitive as the European supranational institutions claimed it to be. And many euro proponents, who had supported the introduction of the single currency in the first place, came to believe that there was no evidence for both the EU being a competitive grouping of countries and the European Monetary Union being an optimal currency zone.[6]

These shocks and surprises clearly damaged the reputation of regional integration as a process bringing economic prosperity to weaker countries that join. Instead, the poorer countries of southern Europe went into deep recession in 2010. Today, their economies still greatly lag behind those of the industrial core countries of the EU. And they are likely to find it difficult for their standards of living to catch up with those of their richer neighbours even in the long run.

The problems just mentioned raise the question as to whether it is actually worth creating regional integration groupings of countries altogether. Perhaps it is much more prudent to establish informal groupings such as the BRICS aimed at just coordinating consensual economic policies.

Consensual economic policy implies setting mutually agreed-upon directions for macroeconomic policies and fiscal and budgetary policies without sacrificing national sovereignty.

However, to follow consensual or common economic policies, the BRICS still require the import of some sort of supranational mechanisms and supranational institutions, the ones that do not constrain national sovereignty.

The theory that tries to look into the issue of importing institutions is called institutionalism.

---

5 Hans-Werner Sinn, *Buffering Volatility: A Study on the Limits of Germany's Energy Revolution*, 99 European Economic Review 130, 141 (2017).

6 Wilhelm Hankel et al., *Die Euro-Illusion. Ist Europa noch zu retten?* [*The Euro Illusion. Can Europe Still Be Saved?*] (Reinbek: Rowohlt Tb., 2001).

1. Theoretical Background

1.1. History of the BRICS Countries' Approaches to Importing Institutions

In order to help the developing countries increase the efficiency of their institutions, economists have offered the European way. It is commonly believed that only Western-type institutions can effectively regulate the political, economic and social spheres.

In the 19th century, Western-like institutions were created in Africa, Latin America, Eastern Europe, East Asia and Oceania during the process of colonisation led largely by Great Britain, France and Germany, among others. However, these imported institutions in the colonies showed poor efficiency and brought very few positive results.

For centuries, the countries that form the BRICS have been importing the European-type institutions of governance based on the principles of territorial integrity, liberalism, democracy, convergence and the common interests of trading partners.

The Western techniques used to establish institutions in the BRICS countries met with only partial success. For example, in the late 19th– early 20th century, Brazil imported the institutions of North American federalism, British parliamentarism and liberal democratic principles for the economy and society. At first the country made great progress and became a rapidly developing economy. For quite some time in the early 20th century, the new social and political model laid the foundation for the Brazilian economic miracle. However, a static attitude towards the imported institutions and the reluctance to modify and adapt them to local specifics led to stagnation in the economy of Brazil and required radical reforms in the late 20th– early 21st century.[7]

For a long time, Russia, India, South Africa and China were considered by Western civilisation as barbarian and outdated countries which badly needed European-like institutions. In the 19th century, India and South Africa found themselves under the influence of British missionaries. To some extent, even presently the whole structure of their government, territorial organisation, communications, culture and language resembles the English model.

China had for a long time been an isolated country. Despite this, the teachings of Western missionaries penetrated the country. There were attempts to acquaint the country with the Western lifestyle. But unlike India and South Africa, China vigorously opposed the import of Western-type institutions. The opposition was suppressed only during the opium wars, which led to very poor performance of the Western institutions in China. China was soon converted into a truly underdeveloped country whose future prospects appeared to be bleak.

Contrary to that experience, India and South Africa adopted the English language, created English-like parliaments and established capitalist enterprises, banking institutions and the system of central banks or reserve banks.

---

[7] Mohamed A. El-Erian, *Shrinkage*, 172 Foreign Policy 88 (2009).

Russia in the New Age also imported Western-type institutions and tried to introduce them in all spheres of government, beginning with the reforms of Peter the Great. What distinguished the Russian approach to dealing with foreign institutions from that of the other BRICS countries, though, was that the ruling class and a large part of the elites as well as the largest landlords and aristocracy basically supported the introduction of the new institutions. In most cases, they actually imposed them upon the public. Another important distinction was that the institutions were copied in a chaotic way and simultaneously imported from a number of different European countries. This resulted in setting up Anglo-Saxon collegial government bodies, a Dutch-like commercial fleet, a Swedish-looking army and navy, Amsterdam-like city buildings and Italian-style architecture.

Later, Russia borrowed from Germany ministerial governance, chancelleries and even the uniforms for civil service and military use. However, at the same time Russia remained extremely impervious to democratic principles in politics and parliamentarism. In the end, in this multicultural mosaic, the Russian institutional structure came to be characterised as trying to "compliment the uncomplimentable," i.e. on the one hand, the façade of government was Western-like, but, on the other hand, the rule inside was despotic and totalitarian with the very strong central power of an absolute monarch.

The efficiency of such an import of institutions to Russia has been the subject of heated debate. Some critics say that this policy was a complete failure, and the experiment ended up in a series of revolutions. Yet others speak about big benefits the country gained from Western institutions in manufacturing, education, science and technology. The experiment, they say, was so successful that U.S. President Theodore Roosevelt once described the pre-revolution government system of Russia as the most perfect in the world.

However, a number of dramatic events forced the BRICS countries search for their own path to future development. These included socialist revolutions in Russia and China, the decolonisation process in South Africa and India as well as the world financial crisis of the 1930s and the increasing gap between the rich and the poor in Brazil after World War II that persisted all the way up to the late 20th century. The result of this search in Russia, India and China was the breakaway from socialism. These nations embraced Western-like capitalism, opened their economies to foreign markets and foreign investments, initiated contractual relations and advocated the idea of free enterprise, private property and the principles of a free market economy.

After achieving independence, South Africa continued to operate according to the political, economic and social principles that had been adopted during the colonial period. Today, the country has still not yet discovered fully what its national path to development is.

The Brazilian approach to importing institutions has been mainly attributed to the fact that the country first and foremost came into being as a result of emigration

from Europe. Brazil managed to absorb different institutional models of several European countries, principally Spain and Portugal. Perhaps this is the reason for the circumstance that just as Spain and Portugal are said to be on the periphery of the European Union, so Brazil is thought to be inherently on the periphery of the world economy, despite the fact that its economy is the largest and strongest in Latin America.

The effectiveness of importing institutions to the BRICS countries and other developing countries has been dictated by the willingness of the exporters to reproduce their own government models there in order to eventually create the relationship of a patron-client type and also to restore a semblance of colonial influence in their former colonies in the form of neo-colonialism.

The basic social groups most interested in importing institutions to the BRICS countries include new political elites, who want to keep and strengthen their power, and intellectuals, who would like to break away from traditionalism to a more open-minded way of life. Most notably, this interest on the part of the elites in the BRICS countries revealed itself in China in the late 1970s, and in Russia and India in the early 1990s.

For example, Russian liberal democrats and cosmopolitans carried out radical market reforms that resulted in a deep economic, social and political crises, which necessitated a change of the political regime to strengthen the central power. The economic reform in China in combination with Western technology and capital created an economic boom and helped the country to go global.

However, China and Russia differ greatly in terms of the ways of implementing imported institutions. Russia embraced liberalism in an absolutely illiterate and vulgar sense. To make the transition quickly from central planning to a free market economy, Russia used shock therapy. The government did not make any attempt to localise Western ideas. They were simply implemented without much consideration and whatever the cost; whereas in China, Western institutions and technology were gradually adjusted to the national particularities.

Overall, the transfer and application of foreign institutions are said to have a positive effect on both the exporters and the importers.

First, an exporter benefits from trading with the recipient country, since the convergence of different institutional systems and the application of common standards help reduce transaction costs connected with doing international business and making foreign investments.

Second, an importer benefits from getting technologies that have already been applied elsewhere and proved their reliability. Thus, the importer may avoid the mistakes that would necessarily occur if it had to develop the technologies itself by means of trial-and-error.

Third, the world market has different institutions on offer to choose from. For example, if an importer borrows the American banking system, which prevents

banks from making investments in corporate equities, and it does not properly work in the recipient country, then the latter may make use of the German model, or any other model.

Finally, there are no national and international regulations preventing the importers of institutions from copying them, i.e. they are not obliged to pay compensation or royalties to the countries of origin.

A major factor ensuring the efficiency of imported institutions is the congruency of the recipient country's formal and informal norms which become the basis of their performance.

1.2. What Should the BRICS Do Differently from the EU?

As famously elaborated by John Locke and Thomas Hobbes, states are formed according to the theory of the social contract. The essence of this theory lies in the objective want of the public to delegate certain functions (national defence, social organisation and control, administration, government, etc.) to a higher specialised authority. This authority in turn sets the boundaries of social behaviour and establishes specific institutions to perform necessary functions. According to the theory of civil choice, these set boundaries encompass a collection of legislative norms, from a constitution to simple acts and regulations.[8]

F.A. Hayek's democratic image of society depicts government as built on the sequence of choices in a chain of actions starting from the acceptance of a constitution to acts, regulations and other norms of a bureaucratic procedure.

At the beginning of the regional integration process in Europe in the mid-1950s, policymakers applied the general principles of Locke and Hobbes to set up the European Coal and Steel Community (ECSC). And they continued in this manner until this body eventually transformed into the European Union.

The policymakers who came after them believed that all other integration groupings, international agreements, consulting organisations and forums should also be formed according to the best practices of the EU. However, the Brexit case has shown that there are limits to what extent this theory can go to integrate nations that have developed separately for centuries and have established their own sovereign institutions to perform the conventional functions described above.

Therefore, in the case of the BRICS, it means that they should not necessarily adopt the same approach as the EU. They should not develop a common constitution and common law. This approach characterises the highest form of integration called a political union.

Yet, it is clear today that no grouping of countries, including the EU, will ever reach political integration, at least peacefully, because there is no European state in

---

[8] George G. Kaufman, *Emerging Economies and International Financial Centers*, 4(4) Review of Pacific Basin Financial Markets and Policies 365 (2001).

existence and no sovereign with responsibilities for nations as different as the countries of Europe, although the relations of the member states are regulated by the common and democratically agreed-upon norms and institutions there. The potential to adopt such documents depends on the consensus between the entities wanting to integrate on the issue of delegating respective powers to supranational institutions.[9]

For example, the ratification of a constitution implies the highest degree of consensus between the participants on the key issues of social organisation, political leadership and economic life in a group of countries. A unified super-state breaks political and economic borders, the independence of monetary, fiscal and financial policies as well as national currencies. In the late 20th and early 21st century globalisation and international (or regional) economic integration have forced countries to address such issues.

After seven decades of the seemingly seamless unification process and growing interdependence and interconnectedness in Europe, member states became reluctant to give up full sovereignty to their supranational institutions. This unwillingness was caused by the world financial and economic crisis of 2008 and the euro debt crisis of 2010 which showed that the member states could not stand the test of staying united on the proper actions to take. Some expressed unwillingness to pay for the debts of other countries of the Union. Some were deeply concerned by the inability to control the flow of goods and services, labour and financial capital across their borders. Initially they had wanted this, because they thought that this process was to be voluntary under the Union's agreements.[10]

Finally, some grew seriously weary with the bureaucracy telling the member states what to do and how to do it. They started to look into the past when they could do what they wanted, when they had their own currency, when they produced the goods they were used to, when they exported and imported the goods they required and when budget deficits were covered with no regard for the willingness or unwillingness of other nations to give permission to do so. This is one of the reasons for the currently increasing role of more independent and democratic institutions in the EU which have more rights at the national level, especially parliaments.

Nevertheless, the significance of international consensus and agreement on general issues of national and regional development has not entirely lost the attention of society. That is why the role of consulting groupings such as the BRICS is becoming more significant in the world economy and international economic relations. Groupings such as this usually consist of independent, sovereign states with broad responsibilities given to national legislative and social institutions.

---

[9] Hans-Werner Sinn, *The Euro Trap: On Bursting Bubbles, Budgets, and Beliefs* (Oxford: Oxford University Press, 2014).

[10] Frank Schäffler, *Nicht mit unserem Geld! Die Krise unseres Geldsystems und die Folgen für uns alle* [*Not with Our Money! The Crisis in Our Monetary System and the Consequences for All of Us*] (Munich: Finanzbuch, 2014).

It is purposeless and inefficient for groupings such as the BRICS to work out documents which may lead to the formation of sophisticated monetary or political unions, since a common constitution and law are a standard collection of universal norms and general rules of play that restrict many activities. These rules and regulations are the basis of the interaction between integrating countries that have very specific, hardly complimentary and hardly converging characteristics in the spheres of politics, economy, society, culture and language. All attempts to harmonise these spheres may lead to opposite results contrary to all purposes and expectations. They will eventually produce autarchy or abhorrence. This process also gives birth to nationalist sentiments aimed at restoring independence, national identity and national currency. Britain's exiting the EU is one of the most striking examples of this.[11]

The bottom line is that there is a need to find an alternative approach that can help create the toolkit to achieve a consensus at the international level without establishing groupings such as the EU. This process should be driven only by economic and geopolitical (or geo-economic) benefits for the countries participating in the integration agreements. These benefits may include advantageous conditions for mutual trade, low-cost international transfers, easy access to markets and areas of interest, mutually profitable allocation of wealth and diversification of costs as well as solid economic growth.

Geo-economic benefits can be achieved through effective norms which require unanimous consensus between the participants in the international exchange of goods and services. Their consensus can be achieved on the basis of direct democracy. Otherwise, any attempt to delegate a choice to a third party will lead to a situation in which representative democracy reduces the efficiency of norms and rules of play.

This means that there is a need to develop the norms that will ensure the effectiveness of the decision-making process at the international level. This is very difficult to do, because the choice of effective norms relates to the problem of false infinity. Its essence can be expressed in the following terms: first, adopting an effective, internationally agreed-upon and consensus-based norm first necessitates working out specific bureaucratic procedures and rules; next, an algorithm of those procedures should be created; and finally, specific rules should be developed to guide the algorithm of the above procedures.

Thus, the process of coming to a consensus on something becomes a bureaucratic nightmare or a vicious circle of bureaucratic absurdities that come to life due to the fact that in order to agree on something, the participants require a common ground which is supposed to harmonise different national legislative systems that have existed for centuries, some systems which may sound ridiculous to other nations, but are important to the people of the nation where they are customary.

---

[11] Hans-Werner Sinn, *Auf der Suche nach der Wahrheit* [*In Search of the Truth*] (Munich: Herder, 2018).

The worst thing of all is that one cannot eliminate the peculiarities in the law by creating a new common law for many nations simultaneously. And the harmonisation of the peculiarities will produce more absurdities at the supranational level. These common absurdities will resemble an arithmetic average. The outcome will be more bureaucratic peculiarities and absurdities, because the people of different countries will not be able to accustom themselves to the arithmetic average of their legislative absurdities plus the absurdities of other nations divided by a certain harmonising denominator created by a group of technocrats who do not understand national differences at all.

2. The Model

2.1. The Model We Propose for the BRICS to Optimise Their Decision-Making

To come to a consensus for countries as different as those that constitute the BRICS, a choice has to be made. The choice is based on the regular procedure of people expressing their preferences through votes. This procedure will inevitably lead the countries to confront the Condorcet Paradox or Arrow's 'impossibility' theorem, both referring to making a democratic choice. According to Arrow's Theorem, it is impossible to propose the procedure acceptable to a very diverse group of countries without a non-dictatorial decision by simply ranking their collective preferences in accordance with the degrees of the preferences of individual voters participating in the process of coming to a consensus.[12]

For example, during a hypothetical summit the BRICS are trying to make a choice of which infrastructure project to be built as a first priority and to decide where it should be built. The results of the hypothetical vote are presented in Table 1 below.

Table 1: The procedure of the BRICS collective vote on infrastructure projects

Public good	**Voters' preferences**				
	Russia	South Africa	Brazil	India	China
A school in Brazil	1	1	5	2	3
A park in South Africa	2	5	3	1	4
A road in Russia	5	4	1	3	2
A power station in India	4	3	4	5	1
Residential housing in China	3	2	2	4	5

Source: Compiled by the author

[12] Peter L. Rousseau & Paul Wachtel, *What Is Happening to the Impact of Financial Deepening on Economic Growth?*, 49(1) Economic Inquiry 276, 281 (2011).

Table 1 ranks the BRICS preferences when they choose which of the public goods they want most. And of course, each of the BRICS countries would rather build at home. Under these circumstances, no infrastructure project will be realised. But since the decision must be taken anyway, and the funds are available and ready to be used, the BRICS collectively will choose the construction of an electric power station in India. This happens because Russia, South Africa, India and Brazil rank the power station among their top preferences, and only China ranks it at the very bottom of its preferences.

Thus, the decision to construct the electric power station has been taken. It was comparatively easy to do, since all five countries participated in the election, and the number of electors in this case is enough for the process of democratic election to occur. But if only three of the BRICS participate in the election, on the other hand, then the situation shown in Table 2 would occur.

Table 2: The procedure of the BRICS partial vote on infrastructure projects

Public good	**Voters' preferences**		
	Russia	South Africa	Brazil
A school in Brazil	1	3	2
A park in South Africa	2	1	3
A road in Russia	3	2	1

Source: Compiled by the author

Table 2 demonstrates that Russia and Brazil would prefer a school to a park. Like Brazil, South Africa would also want to build the park. The collective decision would then be that the park is more preferable than the school (P>S). Choosing between the park and a road, three of the BRICS would decide for the road, since Brazil and South Africa prefer it, and only Russia wants the school (R>S). Finally, when choosing between the park and the road, Russia and South Africa would rather prefer the park, whereas Brazil would vote for the road (P>R). So, in this instance, the BRICS will decide to build the park.

The outcome of this partially democratic vote is that the preferences of such a common decision are intransitive. In this vicious circle, a final decision cannot be taken. A paradox emerges, the Condorcet Paradox, which was later subsumed in Arrow's "impossibility" theorem.

The axiom of transitivity means that to take a decision a voter should transfer his or her preferences from one good to another to make their voice heard, e.g. if Russia's preferences prevail over South Africa's preferences, and South Africa's preferences prevail over those of Brazil, then there will always be someone who will have the advantage to take a final decision within the intransitivity. This eventually means

that the final decision will have to be taken directly, according to the bargaining power of the strongest negotiator. In the BRICS, it is China. And although China did not participate in the hypothetical partial vote, the consensual decision of the BRICS may rely on its opinion.

This decision excludes a mutually beneficial consensus. Hence, the BRICS may fall apart, since a large country does not usually want to take into consideration the opinion of a small one, and the latter believes that its interests are being sacrificed for the sake of the common good. This is what most weak countries fear when they think about entering a regional integration organisation such as the EU. And the strong countries are wary of the moral hazard that may result from the inability of the weak member nations to pay for their debts provided by the rich nations.

This may lead one to believe that there is no choice, because at present there is no other mechanism to achieve a consensus but to obey some directive of a supranational institution. This consensus is based on the constitution of the market, i.e. a collection of interacting, interdependent and deterministic norms of behaviour that create the conditions to settle international transactions and to achieve market equilibrium. This means that there is only one instrument in existence which helps take consensual decisions in the BRICS. Its name is the common market which guarantees sufficient freedom for actions to be taken under the conditions of voluntary observed directives and other norms that are declared and agreed upon during the BRICS Summits.

2.2. What Makes the BRICS so Effective Compared to Other Groupings?

Right from the start of its existence the BRICS created a number of institutions of common use that were very effective for the decision-making mechanics. One of them is a consultation body called the BRICS Summit, the first of which was held in April 2010 and which later acquired the status of an informal forum without any underlying legal regulatory framework or specified articles of conduct.

The 2010 BRICS Summit aimed at creating common rules of play to coordinate their relations on a wide range of political, economic, social, cultural and scientific issues in the modern world economy. The economic issues related to the reform of the international financial architecture and the world system of currencies, broader participation of the emerging economies in the global institutions and a new multilateral world economic and political order. The BRICS also discussed poverty, environmental issues and inequality between the developed and developing nations as well as the use of energy preservation technologies.

These goals and objectives are revised and renewed at each of the BRICS Summits and are stated in common documents, mutual declarations and communiques.

The main regulations of the common declarations issued on behalf of the leaders and heads of state of the BRICS are not imperative by nature. They are recommendations similar to most resolutions adopted by the international economic and political institutions that are part of the United Nations.

The BRICS declarations take the shape of additional norms parallel to the existing rules of international commercial, economic and humanitarian law. However, unlike the U.N., the BRICS Summit does not have a strict set of articles of conduct and strictly prescribed procedures to be followed by the member countries. There are other features that distinguish the BRICS Summit from the U.N.

For example, the number of the participants in the BRICS is fixed in comparison with the U.N. The number of the U.N. member states may change depending on the willingness to expel existing members and welcome new states or territories. From this perspective, the consulting body of the BRICS, having a certain similarity to the U.N. General Assembly, is not a flexible format of international cooperation.

The significance of the BRICS Summit in the system of informal international consulting institutions is revealed in the constancy of the membership and mutual declarations. A change in the principle of constancy and sustainability and the introduction of flexibility may lead to the loss of the purpose and the general idea of the BRICS Summit as a closed grouping of countries. From this perspective, the BRICS concept is opposed to open regionalism propagated by the Asian Pacific Economic Cooperation (APEC). On the other hand, the BRICS Summit is open to participation in the resolution of international problems of social and economic inequality and oppression.[13]

Apart from the Summit, the BRICS have set up institutions with functions to regulate specialised activities. Examples of such institutions would be the New Development Bank and the Pool of Foreign Exchange Reserves.

It should specifically be noted that the New Development Bank (or, the BRICS Development Bank) is a financial institution that has the status of a true international organisation whose principles and rules are stated in the articles of conduct. The BRICS Development Bank works in close contact with and parallel to international financial institutions such as the International Monetary Fund and the World Bank.

It was for objective and clear reasons that the BRICS Summit and the BRICS Development Bank emerged. The BRICS Development Bank was founded in response to the global financial crisis of 2008 that showed there was a need to create additional international financial organisations which could address the problems of the troubled developing and emerging countries. The funds provided by the IMF and the World Bank were not sufficient to satisfy the growing demand for investment on the part of the emerging and rapidly growing economies.

Moreover, the way the funds were distributed among the member states of the IMF and the World Bank was seen by many as unjust. Most of the funds were given to the advanced nations, which gave them a competitive advantage. Such allocation of financial capital allowed the advanced countries to more quickly overcome the crisis. The developing countries, on the other hand, had to struggle.

---

[13] Marcos Galvão, *Brand BRIC Brings Change: Brazil, Russia, India and China*, 66(8-9) The World Today 13, 14 (2010).

Thus, it was good timing for the BRICS Development Bank to come up with a more attentive and sensitive approach unlike the existing international financial practices of the IMF and the World Bank. Those two institutions usually represent the interests of the advanced countries due to the simple fact that their funds are distributed according to quotas and voting rights. And the privileged access to the funds is given to the countries that hold the largest quotas, i.e. the advanced countries. It has been thus ever since the mid-1940s, and despite the recent revisions in the quotas, it is still the case.[14]

The BRICS Development Bank has tried to find its own niche in the system of international financial institutions. It has created rules of play and clear boundaries within which it works to provide more flexible conditions for drawing loans and making schedules of repaying debt, etc.

> The flexibility does not mean, however, that the BRICS Development Bank is going to make loans for free. It just does not force upon the borrowing nations the structural adjustment policies and conditionalities. It may also reschedule the repayment of debt if a country is unable to service the debt right now, and charge less than the IMF or the World Bank do.

2.3. Assessment of the Performance of the BRICS's Institutions

We recommend that the BRICS, being an international grouping which largely works on the basis of informal norms, should arrive at a consensus by making use of the principles of a contractual republic. We define the contractual republic of the BRICS as a predominantly virtual area which functions at the supranational level and is formed by trade and economic ties, the digital exchange of information and electronic signatures, cross-border movement of financial capital and labour, a gross settlement transfer system, a common virtual currency, virtual common monetary and fiscal policy, the mechanism of a consensual, agreed-upon rate of refinancing and taxation, the common virtual money market and the common virtual debt market. We think that the contractual republic of the BRICS should be based on the common virtual market which is going to function across borders.

First, there must be clear and specific boundaries of the member countries' activities that should be detailed in common documents and specifications and converted in the rights delegated by the BRICS to the virtual republic. These rights cannot under any circumstances be withheld from the member countries nor the norms and rules on whose basis the apparatus of the contractual republic itself is going to work.

Second, there must be mechanisms for the BRICS member countries to participate in the activities of the contractual republic of the BRICS. These include, for example,

---

[14] Philip R. Lane & Gian M. Milesi-Ferretti, *The External Wealth of Nations Mark II: Revised and Extended Estimates of Foreign Assets and Liabilities, 1970–2004*, 73(2) Journal of International Economics 223, 245 (2007).

political mechanisms, democratic procedures and norms of economic democracy which rely on the sustainable and long-standing traditions of public participation and which constitute the social capital of the member countries, since they are intended to ensure the growth of overall well-being and prosperity.

Third, there must be an institution of a common virtual market as the leading mechanism allocating property rights. The virtual republic of the BRICS should focus on ensuring such property rights allocation across the member countries which could be done by means of the common virtual market under zero transactions costs.

Fourth, there must be alternative mechanisms to specify and protect property rights. This means that each member country should be provided with the alternative option to appeal to other guarantors apart from its vote within the grouping, i.e. it should have the possibility to turn to a third party for conflict resolution. The alternative guarantors within the BRICS may be the previously mentioned institutions and forums, including the BRICS Summit and the BRICS Development Bank, as well as new institutions and bodies that may be created in the future.

The newer the institutions are, the less freedom of action the contractual republic has and the more of aggregate revenue ends up in the hands of the member countries. Thus, the participants can make a choice between the alternatives on the common virtual market of the BRICS.

The newly created institutions should also take into account the alternative rules and norms of the member countries of the BRICS. And, finally, they should analyse analogues from the past and academic research of the BRICS.

The performance of the virtual contractual republic and the common virtual market of the BRICS can be assessed on the basis of comparative analysis of two organisation types – a contractual republic and an "exploitation union" (Table 3). One of these two options can be used to establish a republic or a union of the BRICS.

Table 3: Comparative analysis of the two organisation types for the BRICS

The characteristics of the BRICS as a republic or a union	**Contractual republic**	**Exploitation union**
Purpose	To maximise GDP and GNI, and reduce transaction costs	The most influential member state seeks to maximise the rent in the union through exploitation, including larger tax revenue compared to other member states of the grouping

Objectives (functions)	To set up a guarantor in transactions between the member countries and to ensure their property rights	The leading state of the group aggressively intervenes in economic and social relations in the labour and capital markets that do not play the role of sole guarantors
Means (making use of the monopoly for coercion)	The means are limited by social agreement and consent	The means depend on the political will of the member state which controls the union
Mechanisms used to solve the principal-agent problem	If a principal is a member country, then the mechanisms of democratic control are determined by consensual, agreed-upon rules and by means of looking for alternatives. If, on the other hand, the principal is the virtual contractual republic, then the preference is given to the norms of voluntary subordination on the part of the member countries to the common law, including the tax code	If the principal is a member state, then the mechanisms of democratic control fail. If the principal is the union, it tends to use coercion and power, and it also attempts to use excessive control which leads to an extreme version of exploitation in a union – a totalitarian state
Budgetary constraints	Democratic procedures to agree on a common, consensual budget are very precise	Procedures to adopt a common budget are very lax, and the member states are free to set tax rates and tend to have very broad fiscal competences
Major revenue posts	The member countries generate tax revenue by collecting taxes they receive from their activities on the common virtual market	The revenue is generated mostly through confiscation taxes and non-tax receivables
Major expenditure posts	Much of the budget revenue is spent to ensure justice and social order. The member countries make expenses commonly agreed upon in consensual documents and treaties	Most expenses are committed to defence, social control, police, justice, governance and also to impose obedience to the directives and rules adopted at the supranational level

Regular means to finance budget deficits	To finance budget deficits, the member countries take loans on the common virtual money market	To cover budget deficits, the member states use the loans of a common central bank loaned out to the government as well as loans taken on the inner (or regional) market. Also, the leading member state may evade the obligations to cover the deficits and repay the debts as a type of a confiscation tax

Source: Developed by the author

Taking a closer look at the features that characterise the exploitation union, almost all of them can be attributed to the European Union, because, first of all, the leading EU member states receive the largest benefits from integration. Second, they influence the decision-making process in the supranational bodies and national parliaments. Third, they make weaker member states follow the decisions of their legislative, judicial and administrative institutions. Fourth, the most advanced member states of the euro zone may freely use their printing presses to issue the common currency. And finally, all EU member states are still free to set specific tax rates and pursue independent fiscal and budgetary policies.

The core member states of the Union make weaker members follow austerity programmes, while at the same time they are abundant in financial capital, enjoy parliamentary independence and strictly regulate the flow of goods, services, labour and financial capital flows across their borders. However, this may change when Britain finally exits the EU.

To explain this, a short case study may be helpful.

With Britain still in the EU, the distribution of votes in the Council of Europe between the countries of the North (free-trade rich countries) and the poor countries of the South is approximately equal – 36% and 35% of the total EU population, respectively. Now, with Britain's exit, these shares will change to 26% and 42%, respectively. In such circumstances, the countries of the South will gain the upper hand in the EU. The products of these countries are not sufficiently competitive to be exported to the world market, and they will tend to sell them locally. That may eventually mean that the EU will transform into a closed grouping with little or no connections to the outside world. For this reason, many economists of the more competitive countries of the North, which heavily depend on foreign trade, insist on the revision of the Treaties that were agreed upon at the EU level.[15]

[15] Hans-Werner Sinn, *Der Schwarze Juni: Brexit, Flüchtlingswelle, Euro-Desaster – Wie die Neugründung Europas gelingt* [*Black June: Brexit, Wave of Refugees, Euro Disaster – How the New Start of Europe Succeeds*] (Munich: Herder, 2016).

The exploiting nature of the EU's institutions can also be proven by the fact that, although the European Central Bank has no legal right under its mandate to bail out crisis-hit countries, it does this nonetheless through implicit and explicit measures with little or no public knowledge.

The EU's experience as an exploitation union supports the argument that the concept of the contractual republic is a better choice to create a more lasting grouping of countries. In this sense, the BRICS may build a better foundation for the contractual virtual republic, because this form of a union will allow the member countries to take part in all spheres of the group's social and public life. The contractual republic will also ensure freedom in taking key decisions at the parliamentary level, at the level of the central banks, financial controllers and regulators and other domestic authorities.

Here, it is worth considering an example of administering the state finances of the BRICS built on the principles of the virtual contractual republic by means of the common virtual market. Any country is financially stable if its budget expenditure is equal to its budget revenue and trade deficits are equal to trade surpluses, thus ensuring current account equilibrium, because disequilibrium usually brings financial difficulties and crises with them. Table 4 below shows the BRICS's trade and budget deficits or surpluses by comparing exports and imports as well as budget revenues and budget expenses.

Table 4: The sources of government debt in the BRICS outside integration agreement

Indicator, bln USD, unless otherwise specified	**Brazil**	**Russia**	**India**	**China**	**SAR**
Export	191.1	343.9	264.4	2273.5	69.6
Import	171.4	182.8	390.7	1679.6	79.6
Export-import	19.7	161.1	-126.4	593.9	-10.0
Budgetary revenue, national currency, bln	2,465.8	31,109.9	12,031.3	20,012.8	1,528.5
Budgetary revenue	741.2	510.5	187.5	3,213.6	119.8
Tax revenue of the budget	410.7	257.2	147.2	2,160.6	91.6
Taxation revenue of the budget as a share of the total budgetary revenue, %	55.4	50.4	78.5	67.2	76.5
Budgetary expenses	894.0	498.4	241.3	3,467.2	128.6
Budget balance	-152.8	12.1	-53.7	-253.6	-8.8

State deficit	-152.8	0.0	-180.1	-253.6	-18.8
GDP (nominal)	1,803.6	1,369.1	2,132.8	1,1064.7	316.5
Average weighted tax in the country	22.8	18.8	6.9	19.5	28.9
Expenses as a share of GDP, %	49.6	36.4	11.3	31.3	40.6
Revenue as a share of GDP, %	41.1	37.3	8.8	29.0	37.9
Average annual short-term government bond rates, %	13.3	9.5	6.9	2.3	7.5
Average annual long-term government bond rates, %	13.0	9.1	7.6	3.4	9.7
Budget balance as a share of GDP, %	-8.5	0.9	-2.5	0.0	-2.8

Source: Developed by the author

Table 4 shows that in 2018 the BRICS, apart from Russia, was running budget deficits; current account deficits, though, occurred only in India and South Africa (SAR), and the latter has been chronically running trade deficits for many years. Hence, in combination with the budget deficits, the government debt problem in South Africa is becoming more acute from year to year. On the contrary, Brazil and China have trade surpluses. But their problem is that their surpluses are not sufficient in size to equilibrate the revenues and expenses of the budgets due to very large volumes of deficits. Although in Russia this problem is less acute, a deficit may also develop there at any time in the future, so the relevant authorities in the country should be aware of such an event and take the necessary measures beforehand.

The total government deficit of the BRICS can be presented as the sum of the budget deficits and the current account deficits of each individual member country. According to Table 4, in 2018 this amounted to approximately US$153 billion in Brazil, $180 billion in India, $54 billion in China and $19 billion in South Africa.

It is usually the case that in closed economies and in the absence of a common virtual market, governments cover deficits by domestic means. Unlike the rest of the BRICS, China is more fortunate. It may borrow very cheaply domestically, since its government bond rates are the lowest among the BRICS. However, the rest of the BRICS have to face significant costs, because their government bond rates vary between 7% and 13% (Table 4).

In the absence of the virtual contractual republic and the common virtual market, the BRICS may turn to at least two options to reach equilibrium, namely either raise tax rates or ensure economic growth rates at which the government would be able to collect more taxes without increases in tax rates, because a booming economy generates more GDP, companies get more profits and employees get higher wages.

The first option supposes that the BRICS will have to accumulate more budget revenue by means of higher taxes to keep their share in the aggregate revenue constant. Hence, to achieve fiscal equilibrium, Brazil will have to accumulate about $500 billion in budget revenue, India $190 billion, China $2,300 billion and South Africa $100 billion (Table 4). Although Russia has not been running budget and trade deficits for a couple of years now, for the sake of preventing future financial difficulties, it is worthwhile to take some precautionary measures. Therefore, we have taken an imaginary amount of deficit of $5 billion for Russia to complete the model.

Since tax rates in the BRICS differ both in size and in type, the model takes the weighted average ratio of all taxes in the economy as the basis for the calculations. The average tax in the BRICS is understood as the total amount of taxes collected within one year divided by the cumulative GDP (Table 4).

Table 5 represents the tax rates required to equilibrate the revenues and expenses in the BRICS and cover the deficits. The data show that to do this Brazil will have to increase the average weighted tax rate by almost 5%, and India, China and South Africa by 2%. Russia, a surplus country, may even have to lower the average weighted tax rate by 0.4%.

Rising taxes in the deficit countries may have negative consequences and lead to social unrest. Also, an increase in the tax rates to cover the budget deficits may not be a good option. This may decide the problem in one year, but it does not necessarily mean that in the following year deficits are not going to occur in the BRICS. They still may occur. In that case, the countries will require even higher taxes, which also is not a very popular choice for the fiscal policies in the BRICS.

Table 5: Periods and economic growth rates the BRICS require to automatically finance the government debt at the expense of the common debt market

Indicator	Brazil	Russia	India	China	SAR
Tax revenue to balance the budget with a share of taxes in total budget revenue left constant, bln USD	495.4	252.2	189.4	2,331.2	98.3
GDP required to balance the budget without any increases in tax rates and any changes in the share of taxes in the total budget revenues, bln USD	2,175.6	1,342.4	2,743.5	11,937.9	339.7
GDP growth rates the BRICS require without increasing taxes, %	17.1	-2.0	22.3	7.3	6.8

New tax rates required to balance the budget without any changes in the share of taxes in the total budget revenues, %	27.5	18.4	8.9	21.1	31.1
The number of years required to achieve a new GDP to automatically equilibrate revenues and expenses without any increases in tax rates	6	0	4	1	6

Source: Developed by the author

According to Table 5, the second option seems more attractive, because it is about achieving equilibrium in the BRICS by simply sustaining GDP growth rates high enough to cover the deficits without any increases in tax rates. But for countries such as Brazil, India and South Africa, this option is unrealistic, since to balance the budget and the current account, Brazil will have to grow 17% in one year, India 22% and South Africa 7%. This option would be feasible in these countries only if they grow by stages, i.e. over the course of several years. For example, realistically Brazil and South Africa will be able to grow that much in six years' time. For India to do the same, it will take four years. Among the BRICS, only China will be able to achieve 7% growth rate in one year, and even then it will have to engage all its capacity to do so in view of decreasing GDP growth rates. As for Russia, again, it does not have to grow at all, because it is running surpluses. The country may well balance the budget and the current account deficit with no increases in the GDP growth rates or taxes (Table 5).

Thus, both options have more drawbacks than benefits to finance the deficits in the BRICS.

Consequently, we propose a way to finance the trade and budget deficits by means of the common virtual debt market of the virtual contractual republic of the BRICS (Table 6).

Table 6: Comparative analysis of the variants to finance the debt of the BRICS by means of the common virtual market and internal funds in closed economies

Indicator, bln USD, unless otherwise specified	**Brazil**	**Russia**	**India**	**China**	**SAR**	**BRICS**
Government borrowing to finance the deficit	152.8	5.0	180.1	253.6	18.8	–
Short-term bonds	19.7	2.3	51.2	30.7	16.9	–

Long-term bonds	391.0	9.3	728.6	282.2	9.3	–
Demand curve formulas in the domestic government bond market	y= -0.00087x + 13.31502	y= -0.06341x + 9.666825	y= -0.00108x + 7.6584	y= -0.00455x + 3.571988	y= -0.29858x + 12.4987	–
Domestic average weighted interest rate of government bonds to finance the deficit, %	13.2	9.3	7.5	2.4	6.9	–
Consensual interest rate on the BRICS common debt market, %	2.9	3.5	2.8	2.4	3.5	–
Government debt	1,254.1	176.8	779.8	1,807.0	152.5	4,170.2
Government debt as a share of GDP, %	69.5	12.9	36.6	16.3	48.2	–
Accumulated debt service at domestic interest rates	165.5	16.4	58.5	43.4	10.5	294.4
Accumulated debt in a closed economy	1419.6	193.2	838.3	1,850.4	163.0	4,464.6
Accumulated debt in a closed economy as a share of GDP, %	78.7	14.1	39.3	16.7	51.5	–
Accumulated debt service at the consensual interest rate	36.4	6.2	21.8	43.4	5.3	113.1
Accumulated debt in case of adopting consensual budgetary and fiscal policies	1,290.5	183.0	801.6	1,850.4	157.8	4,283.3
Accumulated debt of an open economy as a share of GDP, %	71.5	13.4	37.6	16.7	49.9	–
Current government debt service at the domestic interest rate	20.2	0.5	13.5	6.1	1.3	41.5
Accumulated current debt of the closed economy	173.0	5.5	193.6	259.7	20.1	651.8
Accumulated current deficit as a share of a closed economy's GDP, %	9.6	0.4	9.1	2.3	6.3	–

Current government debt service at the consensual interest rate	4.4	0.2	5.0	6.1	0.7	16.4
Accumulated current deficit in case of adopting consensual budgetary and fiscal policies	157.2	5.2	185.1	259.7	19.5	626.7
Accumulated current deficit of an open economy as a share of GDP, %	8.7	0.4	8.7	2.3	6.1	–

Source: Developed by the author

Conclusion: The Results of the Research and Recommendations

The BRICS require a general toolkit which will provide the member countries with loans by means of the common virtual debt market. This toolkit is a consensual rate of debt service. It is consensual because the BRICS will have to agree on a mechanism that would help determine the amount of loans demanded and supplied on the market. In theory, it can be calculated by means of the free market price mechanism. In it, the curves of the supply and demand of loans appear in a chart of the common debt market of the BRICS. In the chart, the volumes of loans supplied and demanded are shown along the horizontal axis, and the debt interest rate is set on the vertical axis.

However, we think that an instant introduction of a common rate of debt service for the BRICS can be very dangerous. It may result in a debt crisis like the Greek crisis in 2010. The problem with Greece was that they were too quick to slash interest rates down to an average level of the core countries (such as Germany) of the euro zone. This happened right after the issue of the common currency back in 2002.[16]

The Greeks went immediately into a spending spree, because credit became three to four times cheaper than it had been during the drachma period, and because it became very convenient to purchase neighbour-country, high-quality goods the likes of which had been rare in Greece. The Greeks were also fascinated by the idea that they had no need to exchange currencies or pay duties, for everything was priced in the single currency. Things went well right up to the world financial crisis of 2008. And life seemed very easy in Greece. During the eight years of such spending up to 2010, Greece accumulated huge debts which had to be repaid very dearly and quickly, because failing banks in the U.S. and Europe demanded their cash back.[17]

---

[16] Roland Vaubel, *Das Ende der Euromantik: Neustart jetzt* [*The End of Euromantic: Restart Now*] (Wiesbaden: Springer, 2018).

[17] Jonathan D. Ostry, *Managing Capital Flows: What Tools to Use?*, 29(1) Asian Development Review 83, 84 (2012).

We think that if the BRICS were to introduce a common debt interest rate soon after ratifying some sort of a regional integration agreement, they would eventually suffer a similar debt crisis or perhaps even a worse one, since they are too populous to fail. There was dramatic social unrest in Greece because of the crisis and austerity measures, we can hardly imagine, though, what would happen in the BRICS under the same circumstances.

The instant implementation of a common interest rate is similar to a shock therapy scenario, especially in the case of integrating countries with uneven standards of living and other economic discrepancies. It had been part of the idea behind the European integration plan that to help weaker countries grow faster and catch up with the more industrialised members of the union it was necessary to erase trade barriers, implement common interest rates, introduce a single currency, establish a common system of central banks, etc.

And EU policymakers believed it should be done very quickly. So they employed shock therapy. Surely that was a mistake, because people who get accustomed to buying everything expensive, especially credit, may go crazy over the whole thing, which was what actually happened in several countries of Europe. Greece is just the most notable example of financial mismanagement.[18]

Hence, to prevent a situation such as this from happening in the BRICS, it is necessary to introduce the common rate of debt service and common interest rates very cautiously and by stages. In the beginning of this article we appealed to an approach that economists generally call gradualism. It is crucial to use this approach in very large countries such as the BRICS. Speedy harmonisation in the BRICS may result in complete chaos and be very dangerous not only for the group, but for the entire world as well. It could have far-reaching consequences for future global economic growth and might even provoke another world financial crisis that would be much deeper and more devastating than the recent one.

We propose, therefore, that there must be some sort of an intermediary or a transition rate of debt service for each of the BRICS that should first be introduced at the initial stage of financial harmonisation. It could be called a semi-common, semi-single or semi-harmonised debt interest rate.

Earlier, we mentioned that the lowest interest rates in the BRICS are currently in China. Brazil, Russia, India and South Africa have much higher rates. In these circumstances, there are a number of alternatives as to how harmonisation can be achieved. It is what consensus is for that they agree at least on one of them.

First, the BRICS may together agree on a rate which would be something of an arithmetic average, i.e. it would be higher than the current Chinese rate, but lower than the rates in the rest of the BRICS. For China this may be damaging, because

---

[18] Robleh D. Ali et al., *Towards a Common Financial Language*, 552 Bank of England Speeches 5 (2012) (Feb. 2, 2020), available at https://www.bankofengland.co.uk/-/media/boe/files/paper/2012/towards-a-common-financial-language.

higher rates generally lead to stagnation in economic growth. For the other four countries of the group such a rate would be more attractive, because credit would be cheaper and more available, and not produce a heavy debt burden.

Second, China may not consent to any changes in its domestic rate altogether, because changes in both directions cause economic difficulties. They may stimulate economic activity but also create credit bubbles.

Third, Brazil, Russia, India and South Africa may also not consent to a reduction in their debt service rates, because these rates are part of the capital market mechanism that plays the role of attracting foreign investors, and a decrease in the rates will cause capital flight. Also, the debt service rate is an anchor benchmark to determine the repo rate which is a monetary policy instrument that is used to regulate the supply of money. So, any decrease in the repo rate will lead to a larger supply of money and hence to inflation.

Thus, the above options may be both attractive and unattractive to the governments of the BRICS to agree on the common debt rate. At the end of the day, if the BRICS still attempt to introduce it to the common virtual debt market, the implementation will imply that first the transition rates will be set individually for each of the BRICS using a combination of market-oriented decisions and government policymaking. The market decision is shown in Figure 1 below. As soon as the market decision is taken, the governments then will adjust the resulting rate to the current situation in the BRICS according to macroeconomic circumstances. That means there must be bodies in the BRICS consisting of a group of professionals from different fields including monetary, fiscal, financial and legal authorities. They will conduct surveys of the economies on a quarterly, semi-annual and annual basis, and come to a common decision and set the rate. The purpose of this transition period is to provide the basis for convergence of the individual semi-common rates. As soon as these individual rates get closer to each other, the decision-making process will be entirely left at the door of the virtual common debt market of the BRICS depicted in Figure 2 below. The analytic bodies may still be working even after that, but their responsibility will only be concerned with monitoring the macroeconomic conditions in the BRICS to abide the convergence criteria.

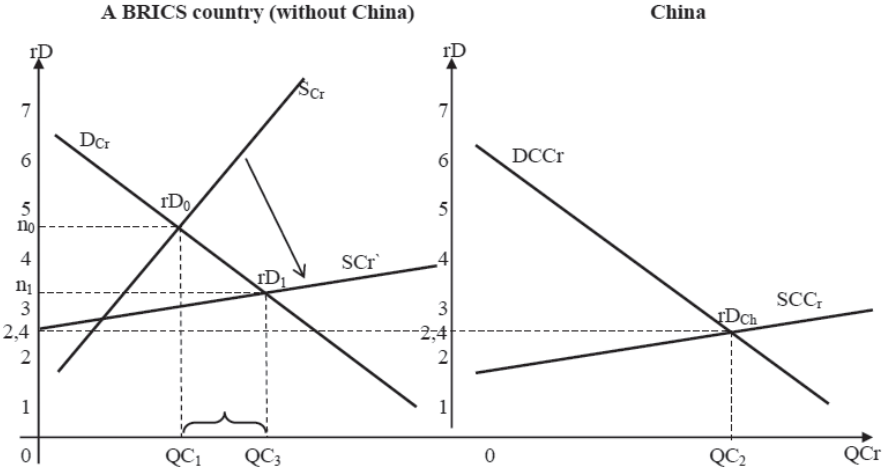
To sum up, the two-stage mechanism of setting the common debt rate in the BRICS means that at first the rate for each individual member of the BRICS will be calculated on the basis of the Chinese average rate of debt service which amounted to 2.4% in 2017. We think that the proposed model should focus on this particular rate since it is the lowest among the BRICS and because China has a competitive advantage in making loans compared to Brazil, Russia, India and South Africa. As is well known, according to the theory of comparative advantage by David Ricardo, countries willing to take part in international trade should export the goods they produce more cost-efficiently and import the goods that cost too dearly to produce domestically. In our example, the expensive good in Brazil, Russia, India

and South Africa is capital. Since their interest rates are higher than China's, they will import Chinese loans through the common virtual debt market of the BRICS to the competitive advantage of China in providing capital.

The setting of the semi-common rate of interest or debt service rate implies that the Chinese credit supply curve should be transferred to the charts of Brazilian, Russian, Indian and South African capital markets. There, the credit demand curves will intersect with China's credit supply curve at an equilibrium point. The result would be four equilibrium rates of debt service in Brazil, Russia, India and South Africa.

According to our calculations, the semi-common interest rate for Russia and South Africa will amount to approximately 3.5%, and that for India and Brazil about 3%. The use of that rate will lead to a significant decline in the cost of borrowed capital in Brazil, Russia, India and South Africa. In Brazil, it will fall from more than $20 billion to about $4.5 billion. In India it will go down from $13.5 billion to $5.0 billion and in South Africa from $1.3 billion to $0.7 billion. If Russia ran a government deficit equal to the previously supposed level of $5 billion, the cost of borrowed capital would fall there from $0.5 billion to $0.2 billion (Table 5).

Figure 1: The setting of an individual semi-common rate of debt service in Brazil, Russia, India and South Africa

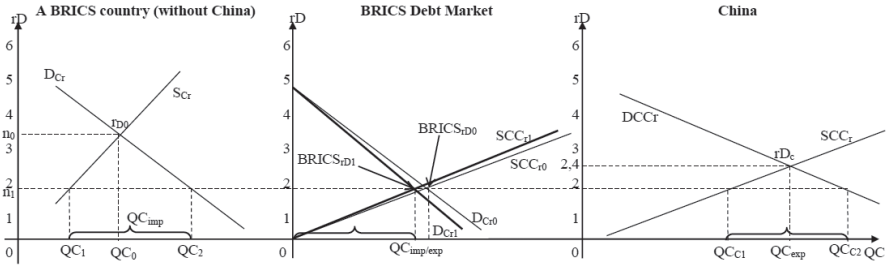


Source: Developed by the author based on the BRICS official government statistics

It may seem that China neither benefits nor suffers from making loans to Brazil, Russia, India and South Africa, because the Chinese rate does not change. However, in reality, Chinese banks do earn interest income from providing access to its excessive credit capacity which may otherwise not be fully used in China at all. It is

true that Chinese consumers and companies might not get any benefits from such operations. They will feel the benefits of this only after the BRICS have introduced the common or single debt interest rate. The final stage of the financial integration of the BRICS would occur when the free market mechanism of credit supply and credit demand has replaced the semi-common debt interest rate, and the eventual rate has settled at a level determined by free market forces. Then the debt interest rate will be unanimously accepted by the BRICS, and our model says the rate will be lower than 2.4% (Figure 2).

Figure 2: The setting of a common rate of debt service in Brazil, Russia, India and South Africa



Source: Developed by the author based on the BRICS official government statistics

At this point, it may seem that this time the Chinese banks will be the ones that will suffer from the introduction of the common interest rate. That may be the case in the short run. In the long run, Chinese banks and the economy on the whole will benefit, because they will be able to export excessive credit capacities to Brazil, Russia, India and China and use the economies of scale.

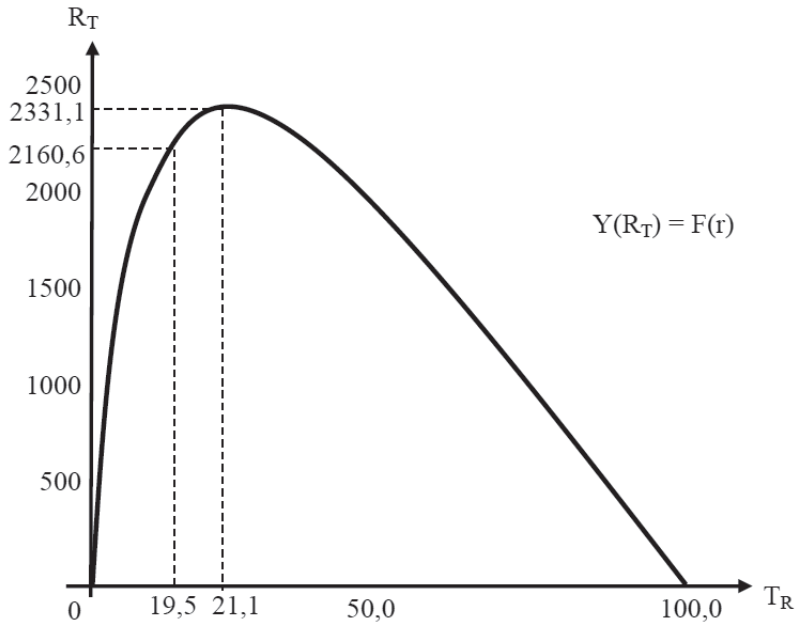
Brazilian, Russian, Indian and South African banks may also suffer from the decreasing interest rates. However, the proposed mechanism supposes that it will be done very gradually and by stages. Thus, the banks and economies of the BRICS will have some time to adjust to new competitive business conditions. We believe that there will be much more harm if the shock therapy approach is used, when the sudden drop in interest rates may have a potentially devastating effect.

One more problem with the common virtual market of the BRICS is that of determining the optimal level of debt which can be considered acceptable for the economies of the group. According to classical economic theory, the optimal size of an economy, household or business enterprise is achieved when their total revenue is equal to their total costs. Hence, an optimal level of deficit for an economy is 0% of GDP. This may sound impracticable. But that is the condition of market equilibrium.

The same goes for the government-debt-to-GDP ratio. When it is equal to zero, there is no deficit or debt in an economy at all. However, governments do

commit expenditures. In the case of a zero-percent-debt-to-GDP ratio they can be understood as fully covered government debts. To cover the debts, a government usually issues bonds which are used to finance expenditures and equilibrate the budget. Now, when one compares the resulting budget expenses with the fully covered government debt, we get the optimal debt-to-GDP ratio for a particular country. It should also be kept in mind that the government expenses may be unproductive. They may increase and not contribute to GDP growth at all. If that is true, then the expenses are not going to be optimal. That leads to the problem of determining an optimal amount of expenses that can be incurred. This depends on how much budget revenue in the form of taxes can be collected. The optimal tax rate is going to be the rate at which the government is able to cover the expenses. This idea is behind an approach to calculate the optimal debt rate for the BRICS. The level of this rate can be found in Table 5 and expresses the amount required to cover the government's deficit. For example, to equilibrate the budget, China needs to increase tax revenue from the current 2.1 trillion dollars to 2.3 trillion dollars. That will require a subsequent increase in the average tax rate in the country from the current 19.5% to 21.1% (Figure 3 below). Figure 3 is constructed on the basis of the Laffer Curve and shows the optimal tax rate for China.

Figure 3: The optimal tax rate (the case of China)



Source: Compiled by the author

As for Russia, its fiscal and budgetary policies are aimed not at achieving the optimal level, but at an increase in the retirement age and tax burden on the population instead of pursuing stimulating economic reforms. The government is doing this despite the fact that the model proposed here shows that there are still opportunities within the economy to equilibrate the budget without realising any debts. A preferred path for the Russian macroeconomic policy would be turning to intensive economic growth making use of advanced factors of production. But they are scarce in Russia. So, this opportunity is quite difficult to use due to the circumstance that extractive industries dominate in the country's GDP and exports. This eventually means that to avoid the accumulation of government debt in terms of exhaustible development the Russian budget will have to be equilibrated at the expense of more taxes, the introduction of new taxes and the increase in the retirement age of the working population.

It should also be kept in mind that debt service in Russia is quite expensive. This is because Russia's government bond rates are higher in comparison with, for example, China's. Thus, with more borrowing, Russia will soon experience an increase in domestic debt. The common virtual debt market of the BRICS could help solve this problem.

The proposed model of the virtual common market corresponds to the contractual (state) republic of the BRICS. For example, cheap credit and low debt service rates will help the GDP and GNI of the BRICS grow, which is one of the objectives of a contractual republic as described in Table 3.

The BRICS have both formal and informal institutions which perform the functions of the contractual republic. Therefore, they may be the guarantors of the common economic policy, including the fiscal and budgetary policies.

None of the BRICS in the proposed model has a monopoly on making anyone follow certain policies. As was said above, at an early stage of financial harmonisation, each of the BRICS will get an individual rate of debt service which is the basis of the virtual common debt market. The rate will determine the consensual fiscal and budgetary policies of the BRICS.

The given model is also the mechanism by which to solve the principal–agent problem, since the virtual debt market offers a democratic way to deal with tax collection. This is going to ensure that the member countries can use the loans provided at a common debt service rate in accordance with market principles.

The straitjacket of financial discipline in the exploitation-state model will lead to sluggish economic growth in the BRICS. It will diminish social security. The governments will have to continually think about reducing expenses in areas such as healthcare, education and national defence if they exceed Maastricht-like limits.

EU-like fiscal and budgetary policies in the BRICS will require pension reforms which will be very unpopular in the society. For example, even without deeper integration within the BRICS, when Russia increased the retirement age in 2018, this added to the

already high level of strain in society which had been caused by international sanctions. EU-like financial integration requires solidarity, which means that a member country is unable to solve internal problems without harming the other member countries or causing a negative response on their part. This inability will unavoidably give birth to growing discontent of the member countries of the BRICS towards each other. At the end of the day, some will lose patience and exit the group.

The model of the contractual republic of the BRICS points out specifically that the member countries will get revenues and commit expenses through the participation in the virtual common debt market built on liberal principles and the common optimal tax rate. Loans in the virtual market of the contractual republic will also be an effective tool to cover deficits.

Finally, the proposed model will work only if transaction costs are close to nothing or amount to zero. Otherwise, to deal with them the BRICS will have to agree on a common budget of the exploitation-state model, the funds of which will be generated by the activities of the common debt market. The transaction costs will also arise because of the necessity to set up additional institutions and guarantors of democratic procedures that will mediate the process of making agreements within the contractual republic.

Acknowledgements

This article was prepared as a result of the studies accomplished through the government funding grant provided to the Financial University under the Government of the Russian Federation, Author ID 1892-8824, Researcher ID WoS http://orcid.org/0000-0002-2162-5056, Author ID Scopus F-6378-2015.

References

Chinn M.D. & Ito H. *A New Measure of Financial Openness*, 3(10) Journal of Comparative Policy Analysis: Research and Practice 309 (2008). https://doi.org/10.1080/13876980802231123

El-Erian M.A. *Shrinkage*, 172 Foreign Policy 88 (2009).

Galvão M. *Brand BRIC Brings Change: Brazil, Russia, India and China*, 66(8-9) The World Today 13 (2010).

Gourinchas P.-O. & Obstfeld M. *Stories of the Twentieth Century for the Twenty-First*, 4(1) American Economic Journal: Macroeconomics 226 (2012). https://doi.org/10.1257/mac.4.1.226

Hankel W. & Isaak R. *Brave New World Economy: Global Finance Threatens Our Future* (Hoboken, N.J.: Wiley, 2011).

Kaufman G.G. *Emerging Economies and International Financial Centers*, 4(4) Review of Pacific Basin Financial Markets and Policies 365 (2001). https://doi.org/10.1142/s0219091501000577

Ostry J.D. *Managing Capital Flows: What Tools to Use?*, 29(1) Asian Development Review 83 (2012).

Sinn H.-W. *Auf der Suche nach der Wahrheit* [*In Search of the Truth*] (Munich: Herder, 2018).

Sinn H.-W. *Buffering Volatility: A Study on the Limits of Germany's Energy Revolution*, 99 European Economic Review 130 (2017). https://doi.org/10.1016/j.euroecorev.2017.05.007

Vaubel R. *Das Ende der Euromantik: Neustart jetzt* [*The End of Euromantic: Restart Now*] (Wiesbaden: Springer, 2018).

Information about the author

Mikhail Zharikov (Moscow, Russia) – Professor, World Economy and World Finance Department, Senior Scientific Employee, Institute of World Economic and International Finance Studies, Financial University under the Government of the Russian Federation (13 Tolstoy St., Lyubertsy, 140013, Russia; e-mail: michaelzharikoff@gmail.com).

CONVERGENCE IN CORPORATE GOVERNANCE: THE CASE OF CHINA AND INDIA

ARJYA MAJUMDAR,
O.P. Jindal Global University (New Delhi, India)

https://doi.org/10.21684/2412-2343-2020-7-1- 59-90

China and India face similar challenges in maintaining their aggressive rates of economic growth. While both countries attained economic independence in the late 1940s, each followed a different path in terms of growth. China preferred to open up its economy to foreign direct investment much earlier and only in recent times has it turned towards domestic capital. India, on the other hand, began by attempting to develop local talent and shifted its focus to foreign participation in 1991. This paper examines the politico-economic background and the resultant corporate governance paths undertaken by each of these countries. These paths, while diverse, lead to a convergence. In particular, given the nature of concentrated shareholdings in Chinese and Indian companies, by the State in China and by family promoters in India, the second agency problem and the requisite protection of minority shareholders assume considerable importance in both jurisdictions. However, given the nature of corporate governance norms having been transplanted from advanced economies to emerging economies, this convergence may not be suitable or even desirable. This paper posits that emerging economies such as China and India ought to develop and implement corporate governance norms that are separate from those of advanced economies to combat the unique issues arising out of shareholding patterns at home.

Keywords: corporate governance; company law; China; India.

Recommended citation: Arjya Majumdar, *Convergence in Corporate Governance: The Case of China and India*, 7(1) BRICS Law Journal 59–90 (2020).

Table of Contents

Introduction

India and China face similar challenges in maintaining their aggressive rates of economic growth. While both states as we know them today came into being at mid-20th century, each has followed a different path in terms of its economic and fiscal policy. China continues to follow a mostly state-centric approach to economic development which at the same time allows the infusion of foreign direct investment (FDI) in the country's financial system. India, conversely, allows private participation in the economy, but was until recently reluctant to open up its doors to foreign participation.[1] While China outpaces India in terms of growth rate, there are comparatively few indigenous Chinese firms that are internationally competitive. Indian firms, on the other hand, are internationally competitive and enjoy a global presence thanks to the focus in India on the development of local talent.

One of the key indicators of sustain able economic growth is that of good corporate governance and its implementation. In terms of backgrounds, both countries have considerable dissimilarities in their approach towards corporate governance.

India follows a system of family capitalism – one of the most common structures of corporate governance[2] – demonstrated by concentrated shareholdings in large corporations by wealthy families. Respected business families can leverage their reputations by controlling many listed companies, and subsequently by having listed companies they hold control blocks of other listed companies, in successive

---

[1] Srabani Roy Choudhury, *Japan's Foreign Direct Investment Experiences in India: Lessons Learnt from Firm Level Surveys*, Indian Council for Research on International Economic Relations, Working Paper No. 243 (December 2009) (Jan. 4, 2020), available at https://icrier.org/pdf/WorkingPaper243.pdf; *see also* Tirupati N. Srinivasan, *Integrating India with the World Economy: Progress, Problems and Prospects* (2001) (Jan. 4, 2020), available at https://pdfs.semanticscholar.org/d3de/e9612d059f3f611d4556b0283a6ebf965305.pdf.

[2] Rafael La Porta et al., *Corporate Ownership Around the World*, 54(2) Journal of Finance 471 (1999).

tiers of intercorporate ownership. Such pyramidal business groups are common in countries where investors' legal rights are weak.[3]

On the other hand, China follows a form of state capitalism, wherein public officials supervise corporate managers and intervene to correct any governance problems.[4] If the bureaucratic overseers are able and altruistic, they can direct corporate decision-making down paths that promote the general good. On the other hand, intractable governance problems arise if the public officials have inadequate ability or knowledge to make such decisions, or skew decisions to benefit politically favored persons or groups.

Corporate governance is critically important to a country's economic growth and stability because it provides the credibility and confidence that is fundamental to capital markets.[5] There are two main categories of shareholders: (*a*) the promoter and the promoter group and (*b*) the public shareholding (financial institutions, companies and individuals). For investors to trust a company enough to buy its securities, they need reassurance that the company will be run efficiently and in a transparent manner. This is where corporate governance becomes critical.[6]

Despite the differences between the corporate governance mechanisms followed in India and China, there seems to be a common ground in terms of establishing corporate governance norms in both countries – that of concentrated shareholding wherein the majority of the shares are held by one individual or a group of individuals.[7] This convergence is attributable in no small measure to the influence of the Sarbanes-Oxley Act of 2002 passed in the United States of America and the Cadbury Committee Report in the United Kingdom.[8]

This paper is divided into three parts. The first part examines the political and economic background and the resultant corporate governance paths undertaken by India and China and posits that these paths, while diverse, necessarily lead to a convergence. The second part describes the efforts made by the Chinese and Indian legislatures to mitigate agency problems in firms and argues that the second agency

---

[3] Randall K. Morck & Lloyd Steier, *The Global History of Corporate Governance: An Introduction*, National Bureau of Economic Research, Working Paper No. 11062 (November 2005).

[4] William Goetzmann & Elisabeth Köll, *The History of Corporate Ownership in China: State Patronage, Company Legislation, and the Issue of Control* in *A History of Corporate Governance Around the World: Family Business Groups to Professional Managers* 149 (R.K. Morck (ed.), Chicago: University of Chicago Press, 2005).

[5] Yong Kang et al., *Chinese Corporate Governance: History and Institutional Framework* (Santa Monica, CA: RAND Corporation, 2008).

[6] *A History of Corporate Governance Around the World*, *supra* note 4, at 5.

[7] Tarun Khanna & Krishna G. Palepu, *The Evolution of Concentrated Ownership in India: Broad Patterns and a History of the Indian Software Industry* in *A History of Corporate Governance Around the World*, *supra* note 4, at 83.

[8] Adrian Cadbury, *The Financial Aspects of Corporate Governance* (London: The Committee on the Financial Aspects of Corporate Governance and Gee and Co. Ltd., 1992).

problem and the requisite protection of minority shareholders assume considerable importance in both jurisdictions. However, given that the Cadbury Committee Report and the Sarbanes-Oxley Act, both of which emanated from jurisdictions which have typically dispersed shareholding patterns, the question arises as to their efficacy in jurisdictions which exhibit a proclivity towards concentrated shareholding patterns, such as is the case in China and India. In the third and final part, the paper argues that, given the nature of shareholding in China and India, the transplantation of Anglo-American corporate governance norms to these countries may not be ideal policy.

1. Political And Economic Background

1.1. China

The strength of Western business organizations was obvious in the first half of the nineteenth century with joint-stock companies like the British East India Company (the most powerful early example) as well as Jardine, Matheson & Co. in the form of other chartered companies. British registered joint-stock companies engaged in the business of shipping with limited liability has been operational in Shanghai since 1875. China's "first modern corporation," the China Merchants' Steam Navigation Company, was an official attempt to move "beyond lineage trusts and partnerships" to public management (*gongsi*). Shanghai had a stock exchange by the 1880s.[9]

In January 1904, the newly created Ministry of Commerce (*Shangbu*) issued China's first-ever Company Law (*Gongsilu*).[10] The 1904 Company Law was the first modern law drafted by the Imperial Law Codification Commission, whose work was part of the Qing government's new reformist policies in the wake of China's humiliation recently suffered at the hands of Japan and the Western powers.[11] In giving highest priority to enacting a law governing the organization of commercial companies, the Qing government had several interlocking objectives. It was also believed to be an important tool for the promotion of industrial development in China.[12] The Chinese felt that only by changing their economic and legal foundations of business relationships could their entrepreneurs compete with their Western and Japanese counterparts.

The idea behind the 1904 Company Law was to overcome the limitations of the partnership form of organization. Perhaps its focus was also to do away with fraudulent

---

[9] William C. Kirby, *China Unincorporated: Company Law and Business Enterprise in Twentieth-Century China*, 54(1) Journal of Asian Studies 46 (1995).

[10] Xusheng Yang, *Securities Regulation in China: A Study of its Path to Market Economy* (August 1997) (unpublished LL.M. thesis, University of British Columbia) (on file with the UBC Library, University of British Columbia).

[11] Kirby 1995.

[12] John H. Farrar, *Developing Corporate Governance in Greater China*, 25(2) University of New South Wales Law Journal 462 (2002).

activity in guarantorship, which had resulted in the banking crisis at the end of the previous century.[13]

The result was a hybrid of Japanese and English company laws in an abridged form that became the *Gongsilu* of 1904. This Company Law consisted of as many as 131 articles, and there were four types of company (*gongsi*) created under it. Three of them, i.e. (*a*) the partnership (*hezi gongsi*), (*b*) the limited partnership (*hezi youxian gongsi*) which is the equivalent of the dormant partnership and (*c*) the simple joint-stock company (*gufen gongsi*) of limited and unlimited liability shareholders, which already existed could now be treated as legal entities and given formal organization rules. The novel creation of the law was the company limited by shares (*gufen youxian gongsi*), wherein the liability of the shareholders was restricted to the value of their respective shares. For the status of a judicial entity with limited liability, it was mandatory to register with the Ministry of Commerce in Peking. The registration fee was assessed as a percentage of the capitalization.[14]

In 1949, the People's Republic of China was founded after the Communist Party took over China. Shortly afterwards all economic sectors were controlled and managed by the government. A very large number of formerly privately owned companies were turned into state-owned companies. Business persons did not have to form entities to carry on their business operations anymore. The state-owned entities had complete financial dependence on the State and did not have to bear their losses or profits independently.[15] The process was followed throughout the 1950s. Most state-owned companies were not profitable entities on their own and the State was occasionally required to support them financially.

The Chinese government has since then been the majority shareholder of a high proportion of publically listed companies – a main characteristic of Chinese public law companies (PLCs).[16] Such state-owned enterprises account for approximately 70 percent of the total number of registered firms in China.[17] The overall impact of state shareholding on corporate value in Chinese PLCs seems to be negative. This appears to be consistent with a number of arguments highlighting the inefficiency of state ownership.[18] To maximize its political and financial interests the government

---

13 Kirby 1995.

14 *Id.*

15 Kingsley T.W. Ong & Colin R. Baxter, *A Comparative Study of the Fundamental Elements of Chinese and English Company Law*, 48(1) International & Comparative Law Quarterly 88 (1999).

16 Andrew Szamosszegi & Cole Kyle, *An Analysis of State-Owned Enterprises and State Capitalism in China, Capital Trade*, U.S.-China Economic and Security Review Commission, 26 October 2011 (Jan. 4, 2020), available at https://www.uscc.gov/sites/default/files/Research/10_26_11_CapitalTradeSOEStudy.pdf.

17 Jiwei Wang, *A Comparison of Shareholder Identity and Governance Mechanisms in the Monitoring of CEOs of Listed Companies in China*, 21(1) China Economic Review 24 (2010).

18 Lihui Tian, *Government Shareholding and Value of China's Modern Firms*, William Davidson Institute, Working Paper No. 395 (April 2001) (Jan. 4, 2020), available at http://wdi.umich.edu/files/publications/workingpapers/wp395.pdf.

shareholder provides both the influencing as well as the facilitating factors to such firms.[19]

The Chinese stock market is composed of the Shanghai Securities Exchange (SHSE) and the Shenzhen Stock Exchange (SZSE), which started operations in December 1990 and July 1991, respectively.[20] The regulatory authority is the China Securities Regulation Commission (CSRC), founded in October 1992. The CSRC stipulates disclosure rules and governance regulations. The Chinese stock market has grown rapidly since the inception of the CSRC. Between 1992 and 1998, the market capitalization increased at the average rate of 84.7 percent per year. At the end of 1998, the total market capitalization was about a quarter of China's Gross Domestic Product (GDP). The number of listed companies grew 62 percent annually, from 53 PLCs in 1992 to 851 PLCs in 1998.[21]

In 1993, another Company Law was enacted. It came into force in 1994 establishing the basic features of corporate governance and marking the third stage of the development of corporate governance in China. The 1994 Company Law was the first attempt to create limited companies without regard to the nature of ownership as a part of a modern economic system.[22] The primary purposes of this Company Law were to restructure the organization and management of state-owned enterprises, address the serious problems of inefficiency, promote competition and productivity and remove the State from management of business operations. However, it provided for control by the State with majority ownership of the largest enterprises. Therefore, privatization was not a part of the agenda of the 1994 Company Law.[23] While another function was to countenance and promote the development of small private companies,[24] the 1994 Company Law envisioned the private sector not as a substitute for state industry but rather as a necessary supplement that would be particularly useful in ameliorating the current problems of unemployment and inefficiency in the economy.[25]

---

19 Qian Sun et al., *How Does Government Ownership Affect Firm Performance? Evidence from China's Privatization Experience*, 29(1-2) Journal of Business Finance & Accounting 1 (2002).

20 H.R. Seddighi & W. Nian, *The Chinese Stock Exchange Market: Operations and Efficiency*, 14(11) Applied Financial Economics 785 (2004).

21 Kirby 1995.

22 James V. Feinerman, *New Hope for Corporate Governance in China?*, The China Quarterly 590 (2007).

23 Ong & Baxter 1999.

24 *See* Company Law of the People's Republic of China, adopted by the 5th Meeting of the Standing Committee of the Eighth National People's Congress of the People's Republic of China on 29 December 1993, effective on 1 July 1994, Arts. 51 & 52. *See also* Nicholas C. Howson, *China's Company Law: One Step Forward, Two Steps Back? A Modest Complaint*, 11(1) Columbia Journal of Asian Law 127, 154 (1997).

25 Cindy A. Schipani & Junhai Liu, *Corporate Governance in China: Then and Now*, Columbia Business Law Review 1 (2002).

With the lack of outright stimulation for the private sector in the 1994 Company Law, it comes as no surprise that there are no individuals or household families owning more than 10 percent of the shares in a Chinese PLC.[26]

There has been a shift away from the traditional Marxist ideology to an early English concessionary approach in establishing the concept of a company in China. England, being a primarily capitalist society, has in many respects moved from a more restrictive concession theory approach to a more liberal contractarian form of capitalism. The concessionary approach asserts that companies within the State are legal fictions and their existence is solely accorded to them by the law of the State. Therefore, state-imposed restrictions on incorporation are justified. China, on the other hand, is a socialist state. Therefore, it is suprising to see China adopt the historical English ideological development towards a more contractarian approach.[27] As a result, China and England both have similar company structures.

1.2. India

The Joint Stock Companies Act of 1866 was the primary piece of corporate legislation in India. The subsequent amendments and replacement legislation broadly mirrored the developments in the United Kingdom. In the years immediately following Indian independence, a comprehensive overhaul of company law was undertaken. This resulted in the enactment of the Companies Act 1956. The most recent corporate legislation is the Companies Act 2013 that replaced the 1956 Act.[28]

Formal institutions of corporate governance in India have been in place for many years, though corporate governance issues came to the forefront only following the adoption of the structural adjustment and globalization program by the government in July 1991.[29] The legal framework for regulating all corporate activities including governance and administration of companies has been in place since the enactment of the Companies Act 1956.[30] However, since then there has been a sustained effort on the part of the Indian regulators to strengthen corporate governance norms and to promote more stringent governance practices among Indian listed companies. These initiatives have been strongly influenced by developments that occurred in other parts of the world. Clause 49 of the Equity Listing Agreement encapsulates

---

[26] Tian, *supra* note 18.

[27] Ong & Baxter 1999.

[28] N. Balasubramaniam, *Strengthening Corporate Governance in India: A Review of Legislative and Regulatory Initiatives in 2013–14*, Indian Institute of Management Bangalore, Working Paper No. 447 (June 2014) (Jan. 4, 2020), available at https://www.iimb.ac.in/sites/default/files/2018-07/WP_No._447_%28Revised%29_0.pdf.

[29] Jayati Sarkar & Subrata Sarkar, *Large Shareholder Activism in Corporate Governance in Developing Countries: Evidence from India*, 1(3) International Review of Finance 161 (2000).

[30] Organisation for Economic Co-operation & Development, *Corporate Governance in Asia: A Comparative Perspective* 249 (Paris: OECD Publishing, 2001).

India's corporate governance norms, and that can be said to owe its genesis to the Cadbury Committee Report in the UK from which it drew broad principles.[31] Subsequent revisions to Clause 49 can be primarily regarded as a reaction to the Sarbanes-Oxley Act of 2002 in the USA.

In India, companies have a concentrated shareholding pattern where the majority shares are held by a few people belonging to the same family[32] and who are also the promoters of the company.[33] Multiple layers of investment in subsidiary companies through stock pyramids[34] or cross-holding[35] is not uncommon in India[36] and it is difficult to inquire into such forms of holding structures. The concentration of shareholding allows majority shareholders to elect and appoint most of the directors to the company. However, in terms of appointment of directors, the 2013 Act enables small shareholders[37] to elect "one" director to the board of a listed company.[38] In spite of this provision for the 'small shareholders director', the cause of the small shareholders in terms of board representation is not furthered. All the decisions of the board require a simple majority (50 percent plus one or more) or a special majority (75 percent or more).

Having majority shareholding, the promoters and promoter group not only influence the board decisions, but they also are in a position to take decisions at shareholder meetings that are beneficial to them without assessing the impact on other minority shareholders.[39] In the absence of special contractual rights, minority

---

31 Umakanth Varottil, *A Cautionary Tale of the Transplant Effect on Indian Corporate Governance*, 21(1) National Law School of India Review 1 (2009).

32 Sarkar & Sarkar 2000.

33 K.S. Chalapati Rao & Atulan Guha, *Ownership Pattern of the Indian Corporate Sector: Implications for Corporate Governance*, Institute for Studies in Industrial Development, Working Paper No. 2006/09 (September 2006) (Jan. 4, 2020), available at http://isid.org.in/pdf/wp0609.PDF. *See also* Marianne Bertrand et al., *Ferreting out Tunneling: An Application to Indian Business Groups*, 117(1) Quarterly Journal of Economics 121 (2002).

34 A pyramid structure is where a controlling-minority shareholder holds a controlling stake in a holding company that, in turn, holds a controlling stake in an operating company. *See* Lucian A. Bebchuk et al., *Stock Pyramids, Cross-Ownership and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights* in *Concentrated Corporate Ownership* 448 (R.K. Morck (ed.), Chicago: University of Chicago Press, 2000).

35 Companies in a cross-ownership structure are linked by horizontal cross-holdings of shares that reinforce and entrench the power of central controllers. *Id.* at 450.

36 Seddighi & Nian 2004.

37 Companies Act 2013, No. 18, Acts of Parliament, 2013 (India), sec. 151. Explanation defines "small shareholders" as shareholders holding shares of nominal value of not more than 20,000 rupees or such other sum as may be prescribed.

38 *Id.*

39 Understanding Shareholding Pattern, The Financial Express, 20 February 2013 (In February 2013, even though a significant number of minority shareholders of ACC and Ambuja Cement voted against the

shareholders are unable to outvote or even veto decisions taken by the majority shareholders.[40] This concentration of ownership and power leads to greater benefits for the controlling shareholders at the expense of the minority shareholders. Such practices can also have an adverse effect on the development of capital markets, as the minority shareholders are considerably exposed to the actions of the controlling shareholders.

Another effect of the concentrated family ownership structure is that management has little or no stake in the company and constitutes less than 5 percent of large, listed companies. It is not uncommon to see majority shareholders and their family members holding positions on the board.[41] In a company managed by owners, there is a very strong motivation for management to work for a long-term share price increase.[42] In a majority of firms there is no separation of chief executive officers and chair, and, therefore, family supremacy is more than covert. This is because the controlling shareholders are in a position to shape the composition of the board of directors. The controlling shareholders are solely responsible for the appointment, renewal and continuance in office of the directors. As a result, all of the directors owe their allegiance to the controlling shareholders. The managers appointed by the board of directors are also indirectly subject to the wishes of the controlling shareholders because they control the board of directors. These characterstics are evident in Indian listed companies, in which significant power rests with the controlling shareholders.[43]

A number of listed companies are also majority owned by multinational companies. Diffused ownership exists only in a handful of Indian listed companies as a matter of exception as opposed to the rule. Examining the ownership aspect empirically, even as late as 2002 the average shareholding of promoters in all Indian companies was as high as 48.1 percent.[44] A more recent study conducted, using data as of June 2015, as issued by the National Stock Exchange, confirms

resolution which was seeking a hike in the royalty payment made to their parent company, Holcim, the resolution was nevertheless passed because the promoters held 50.3 percent and 50.6 percent in ACC and Ambuja Cement, respectively) (Jan. 4, 2020), available at http://archive.financialexpress.com/news/minority-shareholders-oppose-acc-royalty-hike/1076792.

40 Umakanth Varottil, *Evolution and Effectiveness of Independent Directors in Indian Corporate Governance*, 6(2) Hastings Business Law Journal 281 (2010).

41 Naazneen Karmali, *22 Year-Old Twins of India's Richest Man Mukesh Ambani Get Board Seats*, Forbes, 13 October 2014 (Jan. 4, 2020), available at http://www.forbes.com/sites/naazneenkarmali/2014/10/13/mukesh-ambanis-22-year-old-twins-get-board-seats/.

42 Manoj Pant & Manoranjan Pattanayak, *Insider Ownership and Firm Value: Evidence from Indian Corporate Sector*, 42(16) Economic & Political Weekly 1459 (2007).

43 Vrajlal K. Sapovadia & Kandarp Patel, *Is Blood Thicker Than Water? Appraising Adequacy of Indian Corporate Governance for Family Based Companies: A Case Study of Satyam Computers* (Jan. 4, 2020), available at http://ssrn.com/abstract=1347868.

44 Varottil 2009.

that the shareholding of Indian promoters and promoter groups is on average 55.53 percent.[45]

There have been several developments with respect to corporate governance in India and the first among them came through the Report of the Kumar Mangalam Birla Committee on Corporate Governance. The Securities Exchange Board of India (SEBI) appointed the Committee on Corporate Governance on 7 May 1999 under the Chairmanship of Shri Kumar Mangalam Birla, a member of the SEBI Board, to promote and raise the standards of corporate governance.[46] Given the prevailing conditions in the governance of Indian companies and the ensuing state of capital markets, the report was the first formal and comprehensive attempt to develop a Code of Corporate Governance. The sugestions put forth in the report included making amendments in the listing agreement executed by the stock exchanges with the companies apart from measures to improve the standards of corporate governance in listed companies in areas of continuous disclosure of material information (including financial and non-financial) and the manner and frequency of such disclosures. The suggestions also focused on defining the responsibilities of independent and outside directors and the safeguards to be adopted to prevent misuse of insider information and incidents of insider trading.

Subsequently, the Narayana Murthy Report,[47] also of the SEBI Committee on Corporate Governance, was released. This particular committee was constituted because it was the belief of the SEBI that efforts to improve corporate governance standards in India had to continue. The development of standards should complement market dynamics.[48] The primary issues discussed related to audit committees, audit reports, independent directors, related parties, risk management, directorships and director compensation, codes of conduct and financial disclosures. A few parameters including relative importance, fairness, accountability, transparency, ease of implementation, verifiability and enforceability were used to select the recommendations in the final report.

The adoption of Clause 49 of the Equity Listing Agreement on 23 August 2003 was a seminal event in Indian corporate governance. Clause 49 established a number of

---

45 Madhura Karnik, *Bull Run Opens Doors for Promoters to Raise Capital*, Livemint, 8 December 2014 (Jan. 4, 2020), available at http://www.livemint.com/Money/Xg1JjGlwJUbHaaDAuZ5nkN/Bull-run-opens-doors-for-promoters-to-raise-capital.html (stating that private promoters and the government own 51.5 percent of the total market cap of BSE-listed firms).

46 Shri Kumar Mangalam Birla et al., *Report of the Committee Appointed by the SEBI on Corporate Governance*, Securities and Exchange Board of India, 7 May 1999 (Jan. 4, 2020), available at http://www.sebi.gov.in/commreport/corpgov.html.

47 This committee was set up under the chairmanship of N.R. Narayana Murthy.

48 N.R. Narayana Murthy et al., *Report of the SEBI Committee on Corporate Governance*, Securities and Exchange Board of India, 3 February 2003 (Jan. 4, 2020), available at http://www.nfcg.in/UserFiles/narayanamurthy2003.pdf.

governance requirements for listed companies with a focus on the role and structure of corporate boards, internal controls and disclosure to shareholders.[49] The reforms introduced by Clause 49 closely aligned with international best practice at the time and set higher governance standards for listed companies than most other jurisdictions in Asia. The hallmark of Clause 49 was the introduction of independent directors in the Indian corporate governance system. Clause 49 includes a requirement that all listed companies have independent directors and sets forth some specific duties and obligations for independent directors. These reforms were phased in over several years and now apply to thousands of Indian listed companies. This was further modified[50] on 17 April 2014 after the new Companies Act 2013 was passed on 30 August 2013. The act provides for a major overhaul in the corporate governance norms for all companies.

The 1994 Company Law in China did little more than to restructure the organization and management of businesses, most of which remained under the control of the State. Private businesses remained as a useful supplement rather than a substitute for state-owned companies. On the other hand, India's concentrated ownership structure for the large majority of its companies remains in its families, rather than in the State.

2. An Analysis of Existing Corporate Governance Norms

2.1. China

The current system of corporate governance applicable to all listed companies in China dates from 2002. It follows a code-based approach, but one where the requirements are formally adopted when the company develops or revises its rules of corporate governance in the articles of association. The listed companies are required to follow not only the letter of the code but also the spirit while improving corporate governance.[51] The economic impact of legal procedures became apparent in the case of Chengdu Hongguang Industrial Co., Ltd,[52] where investors sued over

---

[49] Afra Afsharipour, *Directors as Trustees of the Nation? India's Corporate Governance and Corporate Social Responsibility Reform Efforts*, 34(4) Seattle University Law Review 995 (2011).

[50] Securities and Exchange Board of India, Circular on Corporate Governance in Listed Entities – Amendments to Clauses 35B and 49 of the Equity Listing Agreement, Circular No. CIR/CFD/POLICY CELL/2/2014 (Jan. 4, 2020), available at https://www.sebi.gov.in/legal/circulars/apr-2014/corporate-governance-in-listed-entities-amendments-to-clauses-35b-and-49-of-the-equity-listing-agreement_26674.html.

[51] Sean Liu, *Corporate Governance and Development: The Case of China*, 26(7) Managerial and Decision Economics 445 (2005).

[52] Naomi Li, *Civil Litigation Against China's Listed Firms: Much Ado About Nothing?*, Royal Institute of International Affairs, Asia Programme Working Paper No. 13 (February 2004) (Jan. 4, 2020), available at https://www.chathamhouse.org/sites/default/files/public/General/wpfeb04.pdf. This was the first civil compensation attempt on account of false statements which occurred on 4 December 1998 when a case regarding the directors of Hongguang Industries was filed at Shangai Pudong Xinqu

falsified listing details. The Shanghai court dismissed the case stating that the claimants had not established that losses were caused by fraudulent statements of the defendants.[53] The matter was referred to the CSRC. Even though securities law provides that advisors, such as issuers and underwriters, are liable to pay compensation for losses resulting from falsified accounts, there are no indicated methods of instigating such suits. Investors find it hard to take legal action, nor can they receive help from public agencies. The outcome of the Hongguang case led to considerable legal and business debate.[54]

The 2005 Company Law has considerably strengthened the position of the minority shareholders. Companies are now allowed to use cumulative voting,[55] if desired, thereby empowering minority shareholders to appoint directors and/or supervisors.[56] A stricter duty of care has been imposed on directors, supervisors and senior management.[57] Shareholders have the right to bring a derivative suit or direct suit against directors, supervisors and senior management.[58] The concept of 'piercing the corporate veil' has been introduced, enabling courts to look beyond the principle of limited liability.[59] Shareholders also have the right to check and make copies of the company's books of accounts[60] and meeting minutes, allowing share buybacks and granting shareholders the right to petition for liquidation of a company.[61]

Other issues for corporate governance relate to the directors and officers of Chinese listed companies. For example, most directors are inside or executive directors; few companies have many independent directors, leading to insider control. Although Chinese securities regulators attempted to overhaul insider-controlled boards by requiring every listed company to have independent directors forming

People's Court by an investor following a fine and administrative sanction given to the company by the CSRC (Jan. 4, 2020), available at http://www.chathamhouse.org/sites/files/chathamhouse/public/General/wpfeb04.pdf.

53 *Id.* The investor claimed that she had suffered losses by investing in Hongguans's shares on the basis of their false statements.

54 Tong Lu et al., *How Good Is Corporate Governance in China?*, 17(1) China & World Economy 83 (2007).

55 The term "cumulative voting" as mentioned refers to a system of voting by shareholders for the election of directors at a session of the shareholders assembly in which the shareholder can multiply his voting rights by the number of candidates and vote them all for one candidate for director or supervisor.

56 Company Law of the People's Republic of China, adopted at the 18th Meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China on 27 October 2005, effective on 1 January 2006, Art. 106.

57 *Id.* Art. 21 & Ch. VI.

58 *Id.* Art. 152. *See also* Hui Huang, *Shareholder Derivative Litigation in China: Empirical Findings and Comparative Analysis*, 27(4) Banking and Finance Law Review 619 (2012).

59 Company Law of the People's Republic of China, Art. 20.

60 *Id.* Art. 34.

61 *Id.* Art. 181.

at least a third of the board,[62] majority power remains extremely concentrated.[63] As a result, the ability of independent directors to influence the overall strategy of the company remains limited.

The Chinese system of governance is loosely based on German governance with a quasi two-tier structure of the board with a board of directors and a supervisory board. Although the 2006 Company Law has clarified the role of the supervisory board to a large extent, certain shortcomings still remain. In practice, the role of the supervisory board is restricted to rubber-stamping the decisions of the board of directors, which is the main decision-making authority. The duplication and overlapping of functions results in redundancy in the corporate governance structure. This increases adminitrative costs and dilutes the authority of the board of directors.[64]

Directors are crucial to the commercial performance of corporations and are held accountable for the conduct and activities of corporations. They have also been subject to increasing legal responsibilities.[65] The powers of managing corporations are vested in the board of directors. Since the power of management is conferred on the board, the members' meeting cannot direcly interfere with the management of the corporation. However, it may be indirectly influenced through the power to alter the constitutional documents of the company and the power to appoint or remove the directors. This arrangement allows the directors to assume a dominant role in the company and raises the issue of probable misuse of this power by the directors. This, in turn, underlines the need to enhance administrative oversight in the affairs of the company. This function is served by the non-executive and the independent directors that are in place to prevent the abuse of control over the management by the directors.[66]

In general, the fiduciary duties of directors consist of two threads, namely a duty of loyalty and a duty of care. However, in the earlier Chinese company law, 1993, only the concept of good faith could be located. A duty of care was absent.[67] The directors were only under an obligation to faithfully discharge their duties and work in the interest of the company and not be motivated by personal gain by misusing their

---

62 China Securities Regulatory Commission, Guidelines for Introducing Independent Directors to the Board of Directors of Listed Companies, Zhengjianfa [2001] No. 102 (Jan. 4, 2020), available at http://www.csrc.gov.cn/pub/csrc_en/newsfacts/release/200708/t20070810_69191.html.

63 Feinerman 2007.

64 IIF Equity Advisory Group, Corporate Governance in China – An Investor Perspective (March 2006).

65 Yuwa Wei, *Director's Duties Under Chinese Law: A Comparative Review*, 3(1) University of New England Law Journal 31 (2006).

66 *Id.*

67 *M 176, Documents and Studies on 19th c. Monetary History, When Orient and Occident Meet, Proceedings of the Round Table of the "Silver Monetary Depreciation and International Relations" Program (ANR DAMIN, LabEx TransferS), Osaka, April 4–6, 2014* (G. Depeyrot (ed.), Wetteren: Moneta, 2014) (Jan. 4, 2020), available at http://ssrn.com/abstract=2449299.

position. Any personal engagement or assisstance in the operations of a competing company, which might be detrimental to the interests of the company on the board of which they served, was prohibited. The new Companies Act 2005 introduced the concept of duty of care. The result is the express commitment to uphold duty of loyalty and care to the companies by the directors, supervisors and senior officers of Chinese companies.

Under Chinese law, a person shall not take the position of a director, a supervisor or any senior officer of a company if he has no or only limited civil capacity, if it is less than five years since the expiration of the term of enforcement of a criminal punishment that was imposed on him for corruption, bribery, conversion or misappropriation of property, or disruption of the order of the socialist market economy, or it is less than five years since the expiration of the term of enforcement of a punishment that deprived him of his political rights for a crime he had committed, if it is less than three years since the completion of the liquidation of a company or enterprise that became bankrupt and went into liquidation and for the bankruptcy of which he was held personally liable as a director of the board, factory director or manager of such company or enterprise.[68] Article 148[69] of the Company Law of the People's Republic of China 2005 provides that the directors shall abide by the laws, administrative regulations and the articles of association of the company and show their loyalty towards the company.

Under the provisions of Article 149 of the Company Law of the People's Republic of China 2005 directors are subject to a number of restrictions, such as misappropriation of funds or the deposit of funds of the company in bank accounts opened in their own names or in the names of others.[70] Lending funds and entering into contracts in violation of the articles or without the approval of shareholders are prohibited as well. Directors are not allowed to take advantage of their positions to obtain for their own benefit or the benefit of others any business opportunities that belong to the company or to engage in the same type of business as that of the company for their own account or for the account of others without approval of the shareholder meeting or the shareholder general meeting. They are also not allowed to disclose any secrets of the company without authorization. Additionally, if a director, a supervisor or a senior officer violates any provisions of the laws or administrative regulations or the articles of association of the company in the performance of his official duties, thus causing any losses to the company, he shall be liable for compensation for

---

68 Company Law of the People's Republic of China, Art. 147.

69 "The directors, supervisors and senior officers of a company shall abide by laws, administrative regulations and the articles of association of the company and owe duties of loyalty and diligence to the company. The directors, supervisors and senior officers shall not take advantage of their functions and powers to accept bribes or seek other illicit gains, nor shall they convert any property of the company."

70 Company Law of the People's Republic of China, Art. 149.

such losses.[71] If any director or senior officer is in violation of any provision of laws, administrative regulations or the articles of association of the company, thus causing any losses to the shareholders, the shareholders may initiate legal proceedings against such director or senior officer in the people's court.[72]

Another important distinguishing factor in the Chinese Company Law is that Chinese corporations embrace the mechanisms of both the supervisory board and the independent directors appointed to the board.[73] The practice of appointing independent directors to the boards of listed companies is prompted by the CSRC, which is the regulator of securities transactions and markets in China. The Guidelines for Introducing Independent Directors to the Board of Directors of Listed Companies were introduced by the CSRC in 2001 with the Code of Corporate Governance introduced in the following year. The board should have at least one-third independent directors as per the new Guidelines.[74] Training classes for independent directors were organized by the CSRC. An audit committee was also recommended.[75] The audit committee is required to (*a*) recommend the engagement or replacement of the company's external auditing institutions; (*b*) review the internal audit system and its execution; (*c*) oversee the interaction between the company's internal and external auditing institutions; (*d*) inspect the company's financial information and its disclosure; and (*e*) monitor the company's internal control system.[76] This marks the successful inclusion of independent directors in the listed companies by the amended Company Law.

A review of China's securities market shows that in December 2006 there were 1,461 companies listed in China.[77] There were over 65 million investor accounts (5 percent of the population), 118 securities firms and dozens of fund management firms in China as of mid-2003.[78] As for the regulatory system, the CSRC, established in 1992, oversees all the securities business activities in China (including futures). The original Securities Law, enacted in July 1999 and significantly amended in 2005 along with the revised Company Law, provides a legal framework for securities regulation. Legal reforms protecting shareholder rights through lawsuits, accounting reform and supervision of auditors have also been promoted by the CSRC. As noted

---

71 Company Law of the People's Republic of China, Art. 150.

72 *Id.* Art. 153.

73 Wei 2006.

74 Guidelines for Introducing Independent Directors, *supra* note 62, Art. I, para. 3.

75 China Securities Regulatory Commission, Code of Corporate Governance for Listed Companies in China, Zhengjianfa No. 1 of 2002, Art. 6, para. 52 (Jan. 4, 2020), available at http://www.csrc.gov.cn/pub/csrc_en/newsfacts/release/200708/t20070810_69223.html.

76 *Id.* Art. 6, para. 54.

77 Feinerman 2007.

78 Wei 2006.

above, one of the chief policies of the CSRC regulation was to increase the number of independent directors on company boards.

The similarity in the perception of problems, and the broad routes to tackling them, with the Western economies is a prominent aspect of corporate governance in China. The complicating factor, however, is that a great deal of political control by the Chinese Communist Party over the companies still remains under the facade of a capitalistic structure. The distinctive feature of the two-tier board system clearly exhibits borrowing from the corporate and legal life of countries like Germany.[79] When compared with the law in the USA and the UK, Chinese law has much room for development. Despite China's tradition of centralization and government regulation, the law hardly regulates executive compensation at all.[80] The Company Law treats it entirely as an internal corporate issue, only providing that compensation of directors and supervisors shall be decided by the shareholder meeting and that compensation of executives shall be decided by the board of directors.[81] After recent revisions, the law prohibits companies from offering loans directly or indirectly through subsidiaries to directors, supervisors and executives.[82] It also requires that companies disclose the compensation of directors, supervisors and executives regularly, similar to provisions of the U.S. Sarbanes-Oxley Act of 2002.[83] Yet, there have been no implementing rules promulgated by the State Council, the CSRC or other relevant government agencies.[84]

China's rapid economic progress would not have been possible without corresponding legal reforms. China's 2005 Company Law represents a major step towards achieving international standards of business organization and motivation. Although China's legal reforms can be further improved, in many respects what took mature capitalistic legal systems several centuries to develop has been accomplished by China in under two decades. China has had the advantage of being able to learn and borrow ideas from the experience of others overseas.[85]

More than a thousand state-owned enterprises (SOEs) were privatized through share-issuance privatization on two primary stock exchanges – the SHSE and the SZSE – during the 1990s by the Chinese government. This is a part of the central strategy of the Chinese government towards creating a "modern-enterprise system."[86]

---

79 Liu 2005.

80 Feinerman 2007.

81 Company Law of the People's Republic of China, Art. 38.

82 *Id.* Art. 117.

83 *Id.* Art. 118.

84 Feinerman 2007.

85 Ong & Baxter 1999.

86 Henk Berkman et al., *Agency Conflicts, Expropriation and Firm Value: Evidence from Securities-Market Regulation in China* (Jan. 4, 2020), available at http://ssrn.com/abstract=420763.

There are two types of blockholders in China. The State maintains control over the majority of the nation's listed firms and this is reflective of the "socialist Chinese market economy." The shares are held by the State in the form of *State* shares. The other type of blockholder is the domestic corporations and other non-individual legal persons that own the *Legal-Person* (LP) shares. This includes listed companies, non-bank financial institutions and state-controlled enterprises with at least one non-state owner. Since the State and LP shares are not publically tradeable they cannot be owned by foreign investors, but can only be transferred to domestic corporations with the prior approal of the CSRC. *Tradeable-A* shares, typically held by individuals and domestic corporations, are the only type of equity that can be traded on the stock market.[87]

The horizon of corporate governance has expanded from mitigating the agency problem between the directors and the minority shareholders to protecting the shareholders from the blockholder and their management team, i.e. the directors.[88] There was a major legal convergence that occurred in China when the CSRC introduced new regulations aimed at reducing expropriation from minority shareholders by the controlling blockholders. Three regulations were introduced in the second quarter of 2000 that were to some extent motivated by China's successful attempt to gain entrance into the World Trade Organisation. The first regulation significantly increased the rights of the minority shareholders at a firm's annual shareholder (general) meeting. The new regulation also prohibited shareholders involved in related-party trading (transactions) from voting on related-party trading (transactions). The second regulation prohibited the issuance of loan guarantees by a firm to its controlling shareholder, and the third regulation improved transparency and regulation of asset transfers to related parties.

2.2. India

India follows a corporate governance system that is a hybrid of the outsider-dominated, market-based systems of the United Kingdom and the United States and the insider model.[89] The outsider model displays dispersed share ownership with large institutional shareholdings.[90] The concept of separation of ownership and control ensures that the role of the directors in control of a company is placed higher than the individual opportunism of shareholders. This model is called the outsider model because shareholders typically have no interest in managing the company and retain no relationship with the company except for their financial investment.

---

87 Berkman et al., *supra* note 86.

88 Henk Berkman et al., *Political Connections and Minority Shareholder Protection: Evidence from Securities Market Regulation in China*, 45(6) Journal of Financial and Quantitative Analysis 1391 (2010).

89 Sarkar & Sarkar 2000.

90 Varottil 2009.

At the same time, the appointment or removal of directors proves to be difficult on an individual basis, due to the costs involved in coordination of large numbers of dispersed shareholders.

On the other hand, a close-knit group of shareholders wielding considerable voting rights in a general meeting of shareholders gives rise to the insider model. Such insiders would also have an increased long-term relationship with the company. With the remainder of the shareholding being diffused and held by institutions or individuals constituting the public, insiders naturally tend to have a controlling interest in the company. By virtue of being able to appoint and remove directors at will, they possess the ability to exercise dominant control over the company's affairs. As to the identity of the controlling shareholders, they tend to be mostly business family groups or the State.

A number of committees have been established over time to recommend measures to improve corporate governance, investor protection, independent audit, etc., in the country.[91] The recommendations of these committees and other stakeholders culminated in the enactment of the Companies Act 2013 – possibly the single most important development in India's history of corporate legislation, next only to the Companies Act 1956 which it replaces.

The Companies Act 2013 provides for a number of corporate governance reforms which were hitherto absent in the previous 1956 iteration.[92] A third of the board of listed companies must be independent directors if the chairman of the board is a non-executive member. In the event that the chairman is an executive member, half of the board is required to be independent.[93] Fresh out of the Satyam Computer Services accounting scandal,[94] the qualifications and liability of independent directors were revamped. Independent directors must possess integrity, relevant expertise and experience, and they must not be connected to the company or its associate or subsidiary companies as a past promoter, director, nor so too any of

---

91 Balasubramaniam, *supra* note 28.

92 Although most of these norms were previously present as part of the Bombay Stock Exch. Equity Listing Agreement.

93 Companies Act 2013, sec. 149.

94 In January 2009, Mr Ramalinga Raju, the promoter of Satyam Computer Services (Satyam), one of India's largest information technology companies, voluntarily confessed, in his resignation letter to the board of directors, to major financial wrong-doings committed by him over the years to inflate profits. This included, *inter alia*, showing inflated revenues, non-existent debtors and earnings from interest in the magnitude of Rs 7,000 crores (approximately US$1.4 billion). *See* fuBureau, *It Was Like Riding a Tiger, Not Knowing How to Get off Without Being Eaten*, The Financial Express, 9 January 2009 (Jan. 4, 2020), available at http://www.financialexpress.com/news/it-was-like-riding-a-tiger-not-knowing-how-to-get-off-without-being-eaten/407917; Mandar Nimkar, *How Much Is Satyam's Stock Actually Worth?*, The Economic Times, 7 January 2009 (Jan. 4, 2020), available at https://economictimes.indiatimes.com/tech/software/how-much-is-satyams-stock-actually-worth/articleshow/3948051.cms; Heather Timmon & Jeremy Kahn, *Indian Company in a Fight to Survive*, The New York Times, 8 January 2009 (Jan. 4, 2020), available at http://www.nytimes.com/2009/01/09/business/worldbusiness/09outsource.html.

their relatives.[95] Independent directors cannot have had a pecuniary relationship in the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the financial year of appointment. The Companies Act 2013 also provides for a code of conduct that independent directors are expected to adhere to.[96]

The Companies Act 2013 also provides for the creation of three board committees. The Audit Committee[97] must be composed of at least three financially educated directors out of which independent directors are in the majority. The terms of reference for the Audit Committee include the recommendation for appointment, remuneration and terms of appointment of the auditors of the company, review and monitoring of the auditors' independence and performance, and effectiveness of the audit process, examination of the financial statement and the auditors' report thereon, and scrutiny of inter-corporate loans and investments. Similar to the Audit Committee, the Nomination and Remuneration Committee[98] must also be composed of three or more non-executive directors of which the majority shall be independent directors. The duties of the Nomination and Remuneration Committee include identification and recommendation of appropriate senior management and directors to the board, and the committee must formulate a policy to provide for the appointment and remuneration of directors, key managerial personnel and other employees. A Stakeholder Grievance Committee must also be set up to resolve grievances of the security holders of the company. While the minimum strength for the committee is not provided for, the chairman must be a non-executive director.

Independent and objective boards committed to the welfare of the company and equitable treatment to all its shareholders is the cornerstone of good corporate governance. The 2013 initiatives have strengthened many existing regulatory requirements and introduced some new ones, too.[99] For the first time, the Companies Act 2013 enumerates the qualifying criteria both in affirmative and in negative terms. In affirmative terms, the person should, in the board's opinion, be one of integrity and possess relevant expertise and experience or should possess such other prescribed qualifications (in other words, should be a fit and proper person).[100]

In negative terms, a number of restrictions apply to the appointment of independent directors in India. The proposed independent director should not be a promoter of the company or its holding, subsidiary or associate company or related to promoters or directors of the company, its holding, subsidiary or associate

---

95 Companies Act 2013, sec. 149.

96 *Id.* sec. 149(8) & sch. IV.

97 *Id.* sec. 177.

98 *Id.* sec. 178.

99 Balasubramaniam, *supra* note 28.

100 Companies Act 2013, sec. 149(6).

company nor should he have any pecuniary relationship with the company, its holding or subsidiary or associate companies or their promoters or directors during the current or immediately preceding two financial years. There should not be (or have been) a pecuniary interest of his relatives amounting to 2 percent or more of the gross turnover or total income or 50 lakhs rupees (5 million rupees) or such higher amount as may be prescribed, whichever is lower, during the current or immediately preceding two years, or in whatever capacity in the holding company or its subsidary or associate companies, or directors. Neither should the proposed independent director hold 2 percent or more, together with his relatives, of the voting power in the company, nor should he have served as the chief executive officer or director of any not-for-profit organization that receives 25 percent or more of its receipts from the company, any of its promoters, directors, its holding, subsidiary or associate company or that holds 2 percent or more of the total voting powerr of the company.[101]

A director of a company shall act in accordance with the articles of the company. He shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole and in the best interest of the company, its employees, the shareholders, the community and for the protection of the environment.[102] A director of a company shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment; he shall not become involved in a situation in which he may have a direct or indirect interest that conflicts or possibly may conflict with the interests of the company; he shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, and if found guilty of such he shall be punished by the imposition of an amount equal to that gain.

Outside independent directors can attend to the corporate governance concern of controlled entities in their monitoring role. This is particulary important in jurisdictions like India where the minority stockholders have limited legal rights. Business decisions that wrongfully benefit the controlling stockholders at the expense of the minority shareholders can be impeded by the independent directors in controlled entities.[103] Where the directors have only limited power to decide issues without the consent of the controlling shareholders, independent directors can publicize or threaten to publicize majority shareholder abuses. This acts as an additional mechanism to protect the interests of the minority shareholders.

As a direct result of the *Satyam* case, provisions relating to auditor appointment and liability have been tightened as well. An individual auditor can be appointed for one term of five years and an audit firm for two terms of five years each.[104] In addition,

---

101 Balasubramaniam, *supra* note 28.

102 Companies Act 2013, sec. 166.

103 Afsharipour 2011.

104 Companies Act 2013, sec. 139.

the partner and team of an audit firm engaged in the audit of a company must be changed every year. A successive reappointment of the audit firm subsequent to the initial appointment requires a cooling-off period of five years, and the incoming and outgoing firms should not have common partners. Auditors are prohibited from providing non-audit services including accounting and book keeping services, internal audit, design and implementation of any financial information systems, actuarial services, investment advisory services, investment banking services, rendering of outsourced financial services or management services to companies for which they have been engaged as an auditor.[105] Auditors should not hold any interest in the company or its subsidiaries, be indebted to it, have any business interest with the company or have a relative who is a director of that company.[106]

Listed companies, companies with a paid-up share capital of 100 million rupees and companies with loans of more than 250 million rupees must appoint an internal auditor to evaluate the functions and activities of the company.[107] While the internal audit is required to be conducted under the aegis of the Audit Committee, internal auditors are separate from the statutory auditors mentioned above. Such internal auditors may be a chartered or a cost accountant or other professional appointed by the board, which may also engage an external agency.

The concept of the class action suit has been introduced in the aftermath of the Satyam corporate scandal.[108] While the law on class action suits is still in its infancy, the rationale given by the Ministry of Corporate Affairs for insertion of this provision was to see that "the shareholder feels like a king" in matters such as managerial remuneration.[109] Traditionally, there are four kinds of class action suits that can arise against a company, namely product liability or personal injury class actions, consumer class actions, employment class actions and securities class actions, but in India the right to file a class action suit under Section 245 of the Companies Act 2013 is only given to shareholders and depositors.[110] It is imperative that for a class action suit to arise there must be one or more legal or factual claims common to the entire class; the representative parties must adequately protect the interests of the class, the class must be so large as to make individual suits impractical; and

---

105 Companies Act 2013, sec. 144.

106 *Id.* sec. 141.

107 *Id.* sec. 138.

108 *Id.* sec. 245.

109 Class Action Suits to Ensure Shareholder Democracy, The Hindu, 8 November 2009 (Jan. 4, 2020), available at http://www.thehindu.com/todays-paper/tp-business/class-action-suits-to-ensure-shareholder-democracy/article134987.ece.

110 Minny Narang & Gunjan Jain, *Class Action Suits: A Measure of Progressive Activism in India*, 2(12) Paripex – Indian Journal Of Research 49 (2013) (Jan. 4, 2020), also available at http://theglobaljournals.com/paripex/file.php?val=December_2013_1388040512_75c39_16.pdf.

the claims or defenses must be typical of the plaintiffs or defendant. Grounds for filing a class action suit in India include an act which is *ultra vires* or a breach of the constitutional documents of the company, fraudulent, unlawful or wrongful act or omission or conduct by the directors, auditors or experts engaged by the company.[111] While the provisions relating to class action suits in India seem to have been inspired by the U.S. Federal Rules of Civil Procedure,[112] class actions in the United States have been around for a while and are more sophisticated. Certain aspects including an opting-out clause or an enabling provision for a lead plaintiff or even consumer class actions are missing in Indian class action provisions.

3. Convergence in the Positions of India and China

Adrian Cadbury, the former head of the Committee on the Financial Aspects of Corporate Governance in the United Kingdom, defined corporate governance as "the system by which companies are directed and controlled."[113] This definition, however, leaves unanswered the important question: For whose benefit should a company be run? There are two major schools of thought on this issue.[114] One, sometimes called "shareholder theory," asserts that the primary goal of corporate governance should be to protect investors against expropriation by management.[115] The other approach is often referred to as "stakeholder theory." It treats corporate governance in a broader context, and asserts that corporate governance should consider not only the investors' interests, but also the interests of other stakeholders such as employees, customers, suppliers and communities, which might be affected directly or indirectly by companies' behaviors.[116]

Because of the differences in the approaches of China and India to economic growth, differences in their approaches to corporate governance exist as well. In India, corporate governance reform was built on the existing framework which had been in place since 1956. It started with the private sector and was expanded to the public sector. In China, it worked the other way around, simply because initially there were few truly privatized enterprises. This difference in the starting point of corporate governance reforms would have had certain repercussions for how the

111 Companies Act 2013, sec. 245.

112 Fed. R. Civ. P. 23.

113 Cadbury 1992.

114 *See* G. Mitu Gulati et al., *Connected Contracts*, 47 UCLA Law Review 887 (2000) and Stephen M. Bainbridge, *The Politics of Corporate Governance: Roe's Strong Managers, Weak Owners*, 18(3) Harvard Journal of Law & Public Policy 671, 681–682 (1995).

115 Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52(2) Journal of Finance 737 (1997).

116 Gerard J. Charreaux & Philippe Desbrieres, *Corporate Governance: Stakeholder Value Versus Shareholder Value*, 5(2) Journal of Management & Governance 107 (2001).

reforms occurred and what shape they are likely to take in the future.[117] While the initial ownership structures in Chinese and Indian corporations are different in only that one is owned by the State and the other by the family, in more recent times the corporate rules that apply to these nations seem to have a number of common features as well.

Both countries provide for independent directors having similar requirements for qualifications as well as conduct. The Chinese Company Law 2005 does not have provisions relating to board committees. However, China follows the two-tier board system inherited from Germany, while India follows the common law approach of a single board. While both countries provide for an external audit of the books of accounts of companies, the Indian Companies Act 2013 delves into details such as auditor rotation, restricted mandates and liability in far more detail. Given that the Indian provisions relating to company auditors stem as a direct result from recent past experience, this seems to suggest that the development of corporate governance norms are indeed path-specific.

However, what is interesting to note is that there has been a convergence in terms of their corporate governance reforms which are based on Anglo-American models. Both countries face intense competition for capital as well as products from each other.[118] Referring to earlier sections of this paper, both countries have greater protection for minority shareholders, increased customization of company constitutional documents, requirements of an independent board, enhanced disclosure, more expectations from board committees and increased obligations on executive directors.

In both India and China the concept of independent directors is prevalent. This is again reiterated in the Code for Independent Directors in India which stipulates that independent directors shall safeguard the interests of all stakeholders and balance the conflicting interests of the stakeholders.[119] However, in China independent directors are sometimes described as non-executive directors or outside directors.[120] The CSRC, the regulatory body over securities transactions and securities markets, promotes the practice of appointing independent directors to listed companies' boards. The CSRC produced the Guidelines for Introducing Independent Directors to the Board of Directors of Listed Companies in 2001. In the following year, it promoted the Code of Corporate Governance for Listed Companies. Since 2003, according to the

---

117 Lucian A. Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52(1) Stanford Law Review 127 (1999).

118 Ian Coxhead & Sisira Jayasuriya, *The Rise of China and India and the Commodity Boom: Economic and Environmental Implications for Low-Income Countries* (2008) (Jan. 4, 2020), available at http://www.aae.wisc.edu/coxhead/papers/gdn/gdn-8.pdf. *See also* Tirupati N. Srinivasan, *China and India: Economic Performance, Competition and Cooperation: An Update*, 15(4) Journal of Asian Economics 613 (2004).

119 Balasubramaniam, *supra* note 28.

120 Wei 2006.

Guidelines and the Code, the boards of all listed companies should have at least one-third independent directors, and there are similar provisions[121] in India as well.

In China, the directors are prevented from being involved in transactions that result in conflicts of interest and engaging in business that competes with the company. The stipulation is merely that directors should not enter into a contract or have transactions with the company unless such transactions are permitted by the constitutional documents of the company or approved by the shareholder meeting.[122] Similar provisions can be found in India in the Companies Act 2013.[123] Chinese law does not address the issue of disclosure of interest by directors nor the issue of whether a director could be present and vote on the matter at the shareholder meeting if the director was also a shareholder.[124]

In both India and China the minority shareholders enjoy a moderate level of protection. This is mainly because in India the minority shareholders do not have much of a say, as they do not hold the sufficient number of shares in the company to be in a position to outvote or even veto the decisions in the sphere headed by the controlling shareholders.[125] The dominant shareholders often improve their position in the company by seeking control and voting rights in excess of the shares they hold. In other words, their control rights far exceed their economic interests in the company.[126] With respect to China, the State wants the enterprises it controls absolutely and owns partially to be run efficiently, but not solely for the purpose of shareholder wealth maximization. A necessary element of state control of an enterprise is the use of that control for purposes other than the maximization of wealth (as shareholder purposes are), such as the maintenance of urban employment levels, direct control over sensitive industries, effective price control in a given sector, politically motivated job placement or extraction of profits for politically privileged insiders.[127] But in using its control for these purposes, the State openly and not

---

121 Clause 49 of the listing agreement provided that the board of directors of the listed company must have a minimum number of independent directors. Where the chairman is an executive or a promoter or related to a promoter or a senior official, then at least one-half the board should comprise independent directors; in other cases, independent directors should constitute at least one-third of the board size. Bombay Stock Exch. Equity Listing Agreement, cl. 49(I)(A) (Jan. 4, 2020), available at https://www.bseindia.com/downloads1/ListingAgreement_30092014.pdf.

122 Wei 2006.

123 Companies Act 2013, sec. 166(4) (stating that a director of a company shall not become involved in a situation in which he may have a direct interest that conflicts or possibly may conflict with the interests of the company).

124 Wei 2006.

125 Varottil 2009.

126 *Id.*

127 Donald C. Clarke & Nicholas C. Howson, *Pathway to Minority Shareholder Protection: Derivative Actions in the People's Republic of China*, GW Law Faculty Publications & Other Works, Working Paper No. 1064 (August 2011) (Jan. 4, 2020), available at https://scholarship.law.gwu.edu/faculty_publications/1064.

necessarily fraudulently exploits minority shareholders who have no other way to benefit from their investment. As long as state policy requires the State to remain an active controlling investor in firms of which it is not the sole shareholder, meaningful legal protection for minority shareholders will mean either constraints on the state's ability to do precisely those things for which it has retained control, or else a de facto separate legal regime (at least as far as minority shareholder rights are concerned) for enterprises in which the State is the dominant shareholder.

4. The Case for Divergence

This paper notes in previous sections how India and China follow similar norms of corporate governance inspired by the Sarbanes-Oxley Act and the Cadbury Committee Report. However, in recent times there has been some resistance to this transplantation. The broad features of corporate governance norms that have been transplanted from other jurisdictions such as the USA and the UK follow the "outsider" model of corporate governance and hence those norms are not likely to be suitable for implementation in addressing governance problems in India and China, which both follow the "insider" model. It is amply clear from recent events involving the collapse of several leading financial institutions due to large-scale corporate governance failures, at least indirectly, that they have been the result of the failure of the efficacy of the U.S. and UK norms of corporate governance in India.[128]

This distinction between insider and outsider models of business stems from the existence or the lack of concentrated shareholding in companies. Berle and Means' seminal work of 1932 drew our attention to what was considered the modern structure of the corporation – that of widespread and dispersed shareholding and power concentrated in the hands of managers elected by these same shareholders. Coordination and other transaction costs between shareholders meant that managers, acting as agents, ought to be subject to a strict code of conduct, so as not to indulge in self-dealing opportunism. Thus, the importance and application of the agency problem as between shareholders and managers has been highlighted in prevalent literature.[129]

However, the phenomenon of widespread ownership seems to be restricted to a few countries. Except in economies with very good shareholder protection, relatively few of these firms are widely held, in contrast to Berle and Means's image

---

[128] Varottil 2009.

[129] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3(4) Journal of Financial Economics 305 (1976). *See also* Henry Hansmann & Reinier Kraakman, *Agency Problems and Legal Strategies* in *The Anatomy of Corporate Law: A Comparative and Functional Approach* 21 (R. Kraakman et al. (eds.), Oxford: Oxford University Press, 2004). *See also* Shleifer & Vishny 1997; Rafael La Porta et al., *Investor Protection and Corporate Governance*, 58(1-2) Journal of Financial Economics 3 (2000).

of ownership of the modern corporation.[130] Rather, these firms are typically controlled by families (as in the case in India) or the State (as in the case of China).[131] In contrast, firms in the USA are generally considered to have a widespread and dispersed shareholding.[132] Nevertheless, this phenomenon of widespread ownership of U.S. firms has been called into question.[133]

One of the hallmarks of corporate governance is the protection of the rights of shareholders against the opportunism of entities and individuals that are the "insiders" of the firm. The question then arises: Against whom are these rights to be upheld? In companies with widespread and dispersed shareholding, considerable power is vested in the managers. On the other hand, in companies with concentrated shareholding, power is vested in the majority shareholders. These majority shareholders, by virtue of their level of ownership in the firm, therefore control the board and its managers. The identity of the "insider" therefore changes between companies with dispersed and concentrated shareholding. This brings about the second agency problem, namely that between majority and minority shareholders.[134]

One of the goals of corporate governance norms in the USA and the UK has been to reduce agency costs between shareholders and managers, thus striving to resolve the agency problem. However, most corporate governance norms in the USA and the UK fail to make a distinction between minority shareholders who have little or no say in how the company is to be run and majority shareholders who not only control the board, but may also take up key managerial positions within the company. A case in point is that of independent directors. As a concept, independent directors bring a broader view to the company's activities and protect shareholder interests against members of the board itself, and take the lead in cases of potential conflicts of interest for members of the board.[135] Generally, independent directors are required not to have any material relationship with the company.[136]

However, in companies with concentrated shareholding it is possible for independent directors to lose some of their independence. Majority shareholders

---

130 *See generally* Adolf A. Berle & Gardiner C. Means, *The Modern Corporation & Private Property* (New Brunswick, N.J.: Transaction Publishers, 1991).

131 La Porta et al. 2000.

132 Berle & Means 1991.

133 Clifford G. Holderness, *The Myth of Diffuse Ownership in the United States*, 22(4) Review of Financial Studies 1377 (2009) (96 percent of U.S. firms have blockholders; these blockholders in the aggregate own an average 39 percent of the common stock. The ownership of U.S. firms is similar to and by some measures more concentrated than the ownership of firms in other countries).

134 Hansmann & Kraakman 2004.

135 Cadbury 1992. *See also* Confederation of Indian Industry, Desirable Corporate Governance: A Code (1998) (Jan. 4, 2020), available at http://www.nfcg.in/UserFiles/ciicode.pdf.

136 N.Y.S.E. Listed Company Manual, 303(A.02) (2013). *See also* Bombay Stock Exch. Equity Listing Agreement, cl. 49.

are virtually able to appoint and replace the entire board and, through this, influence management strategy and the operational affairs of the company. Thus, management, including independent directors, will likely owe its allegiance to the controlling shareholders.[137]

As recently as October 2016, an example of this influence that majority shareholders wield over the management of the company surfaced in respect of the Tata group of companies, one of India's largest family-run conglomerates. The Tata group comprises over 100 companies including 29 listed ones which account for 7.5 percent of the market capitalization of the Bombay Stock Exchange.[138] With more than US$100 billion in combined annual revenue, it also includes UK-based Jaguar Land Rover Automotive PLC and Tetley.[139] Companies of the Tata group are held directly or indirectly by Tata Sons, an unlisted company, which in turn is closely held by a number of family trusts, which are controlled by Ratan Tata to the extent of 65 percent of the shareholding of Tata Sons.[140]

In 2013, Ratan Tata stepped down as chairman of Tata Sons, making way for Cyrus Mistry. In an astonishing development a mere four years later Mistry was unceremoniously removed not just as chairman but from the board of a number of listed subsidiaries of the Tata group, on the directions of the Tata family trusts as the majority shareholders of Tata Sons. The reasons for this ouster included, at least on paper, the alleged incompetence on the part of Mistry.[141] However, there seems to be evidence otherwise, with the independent directors of one Tata subsidiary company expressing their confidence in Mistry.[142] Additionally, this move by the family trusts reveals a growing disagreement over the overall future strategy of the group between Mistry and Ratan Tata, who retains the controlling interest in the

---

137 Varottil 2009.

138 Raghuvir Srinivasan, *Mistry's Ouster, An Unseemly Affair*, The Hindu Business Line, 25 October 2016 (Jan. 4, 2020), available at http://www.thehindubusinessline.com/opinion/explaining-cyrus-mistrys-ouster-and-tata-groups-future/article9267887.ece.

139 Santanu Choudhury, *What Ratan Tata's Letter to Tata Group Employees Said About Cyrus Mistry's Departure*, The Wall Street Journal (India), 2 November 2016 (Jan. 4, 2020), available at http://blogs.wsj.com/indiarealtime/2016/11/02/what-ratan-tatas-letter-to-tata-group-employees-said-about-cyrus-mistrys-departure/.

140 M.K. Venu, *Were Cyrus Mistry's Powers Curtailed? Tatas Will Have to Answer Many Questions*, Business Standard, 29 October 2016 (Jan. 4, 2020), available at http://www.business-standard.com/article/companies/were-cyrus-mistry-s-powers-curtailed-tatas-will-have-to-answer-many-questions-116102600377_1.html.

141 Clash of The Tatas, The Economist, 19 November 2016 (Jan. 4, 2020), available at http://www.economist.com/news/business/21710304-indias-biggest-firm-adds-internal-strife-its-long-list-problems-clash-tatas.

142 The Indian Hotels Co. Ltd., Corporate Filing, 4 November 2016 (Jan. 4, 2020), available at https://www.bseindia.com/xml-data/corpfiling/CorpAttachment//2016/11/A5B5B9AB_E91E_471F_8ACD_FED5E7566EDA_182411.pdf.

family trusts and therefore Tata Sons and eventually the Tata group.[143] In a letter to the shareholders of a number of Tata group companies, Mistry highlighted a number of instances of the allegedly improper involvement of the majority shareholders of Tata Sons in the operations of not just the company but also its subsidiaries.[144]

While the legality of the removal of Mistry is presently a matter for the National Company Law Tribunal,[145] this incident underscores the failure of "inspired" corporate governance norms in India. While Tata Sons remains unlisted, some commentators have highlighted the greater governance issue, especially for a company that controls a large number of publically listed companies[146] which, therefore, are subject to public shareholder protection norms.

There are other forms of shareholder protection that have been inspired by the Cadbury Committee Report or Sarbanes-Oxley that suffer from the same predicament. While the Chinese Company Law 2005 does not have provisions relating to board committees,[147] the Indian Companies Act 2013 does. The provisions for board committees in both China and India require that such committees be constituted by a majority of independent directors and be chaired by independent directors.[148] The functioning of such board committees is dependent on independent directors.[149] If independent directors are not truly independent, it is possible for board committees to fail in carrying out their mandate. As the Tata-Mistry story so far has shown us, the reality is that independent directors continue to operate in the shadow of the promoters.[150]

---

143 Ratantrum, The Economist, 19 November 2016 (Jan. 4, 2020), available at http://www.economist.com/news/leaders/21710259-one-asias-most-important-firms-has-descended-chaos-its-patriarch-ratan-tata-largely.

144 BS Web Team, *Full Text of Cyrus Mistry's Letter on the Issue of Transparency at Tata Trusts*, Business Standard, 5 December 2016 (Jan. 4, 2020), available at http://www.business-standard.com/article/companies/full-text-of-cyrus-mistry-s-letter-on-the-issue-of-transparency-at-tata-trusts-116120501237_1.html.

145 ET Bureau, *Cyrus Mistry Takes Tata Group to Court, Moves Company Law Tribunal Claiming Oppression*, The Economic Times, 21 December 2016 (Jan. 4, 2020), available at http://economictimes.indiatimes.com/news/company/corporate-trends/cyrus-mistry-takes-tata-group-to-court-moves-company-law-tribunal-claiming-oppression/articleshow/56085155.cms.

146 Umakanth Varottil, *The Tata Sons Imbroglio: Whither Corporate Governance?*, IndiaCorpLaw blog, 27 October 2016 (Jan. 4, 2020), available at http://indiacorplaw.blogspot.in/2016/10/the-tata-sons-imbroglio-whither.html.

147 Provisions for board committees in Chinese companies are found in the Code of Corporate Governance for Listed Companies in China.

148 Code of Corporate Governance for Listed Companies in China, cl. 52; Companies Act 2013, secs. 177–178.

149 Cadbury 1992.

150 Umakanth Varottil, *The Tata Episode: Corporate Governance and the Continuing Influence of Promoters*, IndiaCorpLaw blog, 12 November 2016 (Jan. 4, 2020), available at http://indiacorplaw.blogspot.in/2016/11/corporate-governance-in-india-and.html.

To date, most of China's biggest corporations remain closely held in the hands of the State. Similarly, Indian companies remain closely held in the hands of promoters and their families. The classic agency problem of separation of ownership and control is commonly associated with dispersed ownership. However, the secondary agency problem – that between majority and minority shareholders – comes into stark focus in companies with concentrated ownership.

It can be argued, of course, that on the positive side the foremost benefit of concentrated ownership of companies is that such entrenched ownership and control will offer strategic stability and longer-term sustainability, especially in the case of family-controlled entities. Concentrated shareholding also offers the prospect of more efficient and cost-effective management, the fruits of which would largely benefit the bottom line. There would be greater and closer managerial surveillance to preempt leakages at operational levels. The entrepreneurial drive to grasp business opportunities as they arise and convert them into profits is rarely as effective in non-family managerial structures that usually tend to get bogged down in ritualistic bureaucracy. On the other hand, this brings about issues of higher decisional power in the hands of the majority shareholder. This may lead to an entrenchment situation, ending in undertaking actions aimed at expropriating wealth from the rest of the minority shareholders.

Therefore, it is evident that in companies having a concentrated shareholder there is little need for protecting that shareholder from the very board that it controls. Rather, it is the minority shareholder who has little or no say on the board or in the manner in which the company is run that requires protection from the majority shareholder. By transplanting provisions of corporate governance from the USA and the UK perhaps both China and India have striven to resolve problems that did not exist in the first place. It is of course true that mechanisms to address the second agency problem exist – primarily through free transferability of shares, anti-oppression and mismanagement rules and provisions for class action suits. However, both in China and in India neither of these mechanisms is considered to be the mainstay of corporate governance norms. Perhaps the need then is for emerging economies such as China and India to develop and implement corporate governance norms that are separate from those of more developed economies.

Conclusion

We see how China and India have both had very different backgrounds with regard to the regulation of businesses. We have also seen how both nations have had, and continue to have, differences in who owns and thereby controls companies – one being the State, the other the family. By all means, the two countries should have distinct models of corporate governance, given that their initial ownership structure and corporate regulation paths have been different.[151]

[151] Bebchuk & Roe 1999.

But that has not been the case. An overwhelming majority of provisions relating to corporate governance are common between both countries. These provisions are rooted in "outsider" models of business, and questions as to the efficacy of such provisions in countries demonstrating a typically "insider" model of business have been raised.[152] There is considerable evidence to show a growing concern that what may work for companies with dispersed shareholding may not similarly work for companies with a controlling shareholder.[153]

Through a comparative analysis of the (*a*) background of corporate law and jurisprudence, (*b*) shareholding patterns and (*c*) extant corporate governance principles of India and China, this paper demonstrates how emerging economies run the risk of mitigating problems that are less likely to exist rather than dealing with issues that are more likely to exist when directly transplanting corporate governance norms from advanced economies. The opportunism of managers vis-à-vis shareholders is the norm in more advanced economies from which such norms have been transplanted. However, the same issue is of little concern when the role and powers of such managers is subordinate to shareholders having a controlling interest. Instead, a new issue of the opportunism of control versus minority shareholders arises in emerging economies such as China and India. This inter-shareholder opportunism is unlikely to exist in the absence of a controlling shareholder. This paper posits that emerging economies such as China and India ought to develop and implement corporate governance norms that are separate from those of advanced economies to combat the unique issues arising out of shareholding patterns at home.

References

Afsharipour A. *Directors as Trustees of the Nation? India's Corporate Governance and Corporate Social Responsibility Reform Efforts*, 34(4) Seattle University Law Review 995 (2011).

Bainbridge S.M. *The Politics of Corporate Governance: Roe's Strong Managers, Weak Owners*, 18(3) Harvard Journal of Law & Public Policy 671 (1995). https://doi.org/10.2139/ssrn.275172

Bebchuk L.A. & Hamdani A. *The Elusive Quest for Global Governance Standards*, 157(5) University of Pennsylvania Law Review 1263 (2009).

Bebchuk L.A. & Roe M.J. *A Theory of Path Dependence in Corporate Ownership and Governance*, 52(1) Stanford Law Review 127 (1999). https://doi.org/10.2307/1229459

[152] Varottil 2009.

[153] Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157(5) University of Pennsylvania Law Review 1263 (2009).

Berkman H. et al. *Political Connections and Minority Shareholder Protection: Evidence from Securities Market Regulation in China*, 45(6) Journal of Financial and Quantitative Analysis 1391 (2010). https://doi.org/10.1017/s0022109010000608

Berle A.A. & Means G.C. *The Modern Corporation & Private Property* (New Brunswick, N.J.: Transaction Publishers, 1991). https://doi.org/10.4324/9781315133188

Bertrand M. et al. *Ferreting out Tunneling: An Application to Indian Business Groups*, 117(1) Quarterly Journal of Economics 121 (2002). https://doi.org/10.1162/003355302753399463

Charreaux G. & Desbrieres P. *Corporate Governance: Stakeholder Value Versus Shareholder Value*, 5(2) Journal of Management & Governance 107 (2001). https://doi.org/10.2139/ssrn.262902

Farrar J.H. *Developing Corporate Governance in Greater China*, 25(2) University of New South Wales Law Journal 462 (2002).

Feinerman J.V. *New Hope for Corporate Governance in China?*, The China Quarterly 590 (2007). https://doi.org/10.1017/s0305741007001592

Hansmann H. & Kraakman R. *Agency Problems and Legal Strategies* in *The Anatomy of Corporate Law: A Comparative and Functional Approach* 21 (R. Kraakman et al. (eds.), Oxford: Oxford University Press, 2004).

Howson N.C. *China's Company Law: One Step Forward, Two Steps Back? A Modest Complaint*, 11(1) Columbia Journal of Asian Law 127 (1997).

Huang H. *Shareholder Derivative Litigation in China: Empirical Findings and Comparative Analysis*, 27 Banking and Finance Law Review 619 (2012).

Jensen M.C. & Meckling W.H. *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3(4) Journal of Financial Economics 305 (1976). https://doi.org/10.1016/0304-405x(76)90026-x

Kirby W.C. *China Unincorporated: Company Law and Business Enterprise in Twentieth-Century China*, 54(1) Journal of Asian Studies 46 (1995). https://doi.org/10.2307/2058950

Lu T. et al. *How Good Is Corporate Governance in China?*, 17(1) China & World Economy 83 (2007). https://doi.org/10.1111/j.1749-124x.2009.01132.x

Mitu Gulati G. et al. *Connected Contracts*, 47 UCLA Law Review 887 (2000). https://doi.org/10.2139/ssrn.217590

Ong K.T.W. & Baxter C.R. *A Comparative Study of the Fundamental Elements of Chinese and English Company Law*, 48(1) International & Comparative Law Quarterly 88 (1999). https://doi.org/10.1017/s0020589300062898

Pant M. & Pattanayak M. *Insider Ownership and Firm Value: Evidence from Indian Corporate Sector*, 42(16) Economic & Political Weekly 1459 (2007).

Sarkar J. & Sarkar S. *Large Shareholder Activism in Corporate Governance in Developing Countries: Evidence from India*, 1(3) International Review of Finance 161 (2000). https://doi.org/10.1111/1468-2443.00010

Schipani C.A. & Liu J. *Corporate Governance in China: Then and Now*, Columbia Business Law Review 1 (2002). https://doi.org/10.2139/ssrn.315050

Seddighi H.R. & Nian W. *The Chinese Stock Exchange Market: Operations and Efficiency*, 14(11) Applied Financial Economics 785 (2004). https://doi.org/10.1080/0960310042000180826

Shleifer A. & Vishny R.W. *A Survey of Corporate Governance*, 52(2) Journal of Finance 737 (1997). https://doi.org/10.1111/j.1540-6261.1997.tb04820.x

Srinivasan T.M. *China and India: Economic Performance, Competition and Cooperation: An Update*, 15(4) Journal of Asian Economics 613 (2004). https://doi.org/10.1016/j.asieco.2004.05.011

Sun Q. et al. *How Does Government Ownership Affect Firm Performance? Evidence from China's Privatization Experience*, 29(1-2) Journal of Business Finance & Accounting 1 (2002). https://doi.org/10.1111/1468-5957.00422

Varottil U. *A Cautionary Tale of the Transplant Effect on Indian Corporate Governance*, 21(1) National Law School of India Review 1 (2009).

Wang J. *A Comparison of Shareholder Identity and Governance Mechanisms in the Monitoring of CEOs of Listed Companies in China*, 21(1) China Economic Review 24 (2010). https://doi.org/10.1016/j.chieco.2009.08.006

Information about the author

Arjya Majumdar (New Delhi, India) – Associate Professor, Jindal Global Law School, Director, Office of Academic Planning, Coordination and Interdisciplinarity, O.P. Jindal Global University (Sonipat, Narela Road, Haryana – 131001, NCR of Delhi, India; e-mail: abmajumdar@jgu.edu.in).

REGULATION OF MERGERS AND ACQUISITIONS IN TERMS OF THE SOUTH AFRICAN COMPANIES ACT 71 OF 2008: AN OVERVIEW

MADIMETJA PHAKENG,

The Cape Bar – Society of Advocates (Cape Town, South Africa)

https://doi.org/10.21684/2412-2343-2020-7-1- 91-118

The Companies Act 71 of 2008 (the 2008 Act) replaced the Companies Act No. 61 of 1973, effective 1 May 2011. The 2008 Act was aimed at keeping pace with developments in company law internationally. It is not intended to entirely replace the well-established principles and has largely retained the pre-existing South African company law. The mergers and acquisitions provisions are aimed at creating transparent, efficient, and simple procedures. Different types of mergers and acquisitions are clearly defined as "affected transactions" or "offers" in section 117. Section 118 provides for companies to which the provisions apply. The reasons for regulating these transactions and powers of the regulator – The Takeover Regulation Panel, have been reviewed, clarified, and improved. The previous section on disposal of all or greater part of assets or undertaking of a company has been re-written. The 2008 Act further introduces a new type of affected transaction in section 113, in the form of a "merger" or an "amalgamation." The 2008 Act has retained the scheme of arrangement in section 114, but has changed its format by removing compulsory court application and approval. The courts get involved under certain prescribed circumstances. The 2008 Act has enhanced shareholder protection for fundamental transactions in the form of section 164 – Appraisal Rights and section 115, dealing with shareholder approval of fundamental transactions. Some scholars and practitioners have criticised certain provisions. However, in general, the provisions have received favourable commentary. They regarded as progressive and comparable with others internationally.

Keywords: Companies Act 71 of 2008; affected transactions; offers; mergers; acquisitions; Takeover Panel Regulation; provisions, regulation; South Africa.

Recommended citation: Madimetja Phakeng, *Regulation of Mergers and Acquisitions in Terms of the South African Companies Act 71 of 2008: An Overview*, 7(1) BRICS Law Journal 91–118 (2020).

Table of Contents

Introduction

A number of years have passed since the South African merger and acquisitions (M&As) provisions in terms of the Companies Act 71 of 2008 (the 2008 Act) became effective on 1 May 2011. The 2008 Act made comprehensive changes to the South African company law. The Act repealed the Companies Act No. 63 of 1973 (the 1973 Act). Prior to promulgating the 2008 Act, the South African Department of Trade and Industry (DTI), published a policy document titled "South African Company Law for the 21st Century: Guidelines for Corporate Law Reform" (the DTI Guidelines). The 2008 Act is in line with the document and among others, seeks to make company law simple, flexible, transparent, predictable, and efficient. According to the Guidelines

> …should attempt, where practically possible, to balance the competing interests of economic actors and of society at large.[1]

[1] South African Department of Trade and Industry, South African Company Law for the 21st Century: Guidelines for Corporate Law Reform (May 2004), at 9 (Feb. 2, 2020), available at https://www.gov.za/sites/default/files/gcis_document/201409/26493gen1183a.pdf.

The DTI Guidelines indicated that the mergers and acquisitions provisions published under the 1973 Act are aligned with international practices.[2] But, the Guidelines also indicated that there is a need to review the enforcement powers that existed under the 1973 Act to ensure compliance.[3] The guideline also indicated that the rewrite is not aimed at "unreasonably jettisoning the body of jurisprudence built up over more than a century."[4] But the aim was to appropriately align company law to the legal, economic and social context of South Africa as a constitutional democracy and open economy.[5]

In its preamble, among others, the 2008 Act confirms the approach of the Guidelines by indicating that it seeks "to provide for equitable and efficient amalgamations, mergers and acquisitions of companies."[6] The aim of the DTI Guidelines is further carried through in section 7 indicating the intention of the legislature in enacting the 2008 Act. Among others, it provides that the purpose of the Act is to promote compliance with the Bill of Rights, as enshrined in the South African company law in the application of company law and to promote the development of the South African economy. A well-known scholar and legal practitioner, M.M. Katz, who also indicates that the 2008 Act is "a ground-breaking legislation which will have such an important impact on the commercial environment in South Africa," further confirms this approached in his article.[7] He further point out that

> The legislation is world-class and places South Africa at the forefront of corporate law reform.[8]

Another scholar indicates that

> The comparative analysis addresses protection of stakeholder rights; board duties, governance, and independence; appointment and removal of directors; director and management compensation; board supervision of management; and share-holder rights. Our analysis confirms that, in line with tested standards in other major economies and current international trends in corporate governance, the Companies Act sets out a modern, enabling model of regulation. In providing for flexibility and simplicity of company formation,

---

2 DTI Guidelines, at 42.

3 *Id.* at 3.

4 *Id.* at 8.

5 *Id.*

6 Preamble to the Companies Act 71 of 2008 as amended.

7 Michael M. Katz, *Governance Under the Companies Act 71 of 2008: Flexibility Is the Keyword*, Acta Juridica 248, 262 (2010) (dealing with Conclusion).

8 *Id.*

> transparency of governance, and effective exercise of shareholder rights, the Act creates a secure environment for entrepreneurship and investment. At the same time, it establishes standards of corporate responsibility distinctly appropriate to South Africa.[9]

Regulation of mergers and acquisitions is "a complex and controversial topic among policymakers, managers, investors and academics alike."[10] However, it also indicated that

> A well-regulated takeover market can create wealth for society by improving the allocation of productive resources. On the other hand, theoretical and empirical research agrees that an unregulated market for corporate control increases the cost of capital for firms by allowing inefficient transfers of control and thus fails to establish allocate efficiency.[11]

The 2008 Act borrowed extensively from corporate laws of other jurisdictions.[12] It has incorporated numerous elements of Australian, American and mainly United Kingdom laws, derived from the United Kingdom City Code on Takeovers and Mergers.[13] A quick overview of research articles suggests that there is generally dearth of research on regulation of mergers and acquisitions under the South African company laws. This article seeks to add to existing body of knowledge in this area of corporate law. It provides an overview of the regulation of the different types of mergers and acquisitions under the 2008 Act. The discussions include a brief overview of the provisions of the 1973 Act and those of the 2008 Act in respect of mergers and acquisitions. In this article, the terms "mergers" and "acquisitions," or in short, "M&As" – the practitioners' vernacular language,[14] are used for convenience interchangeably with the "affected transactions"[15] defined in the 2008 Act.

---

[9] John F. Olson, *South Africa Moves to a Global Model of Corporate Governance but with Important National Variations*, Acta Juridica 219, 219 (2010).

[10] Ying Wang & Henry Lahr, *Takeover Regulation to Protect Shareholders: Wealth Creation or Wealth Destruction?* (January 2015), at 2 (Feb. 2, 2020), available at https://pdfs.semanticscholar.org/f19f/93d3f97bb7581cb688efbf577820fba63d21.pdf.

[11] *Id.*

[12] Piet Delport, *Companies Act 71 of 2008 and the "Turquand" Rule*, 74 Journal of Contemporary Roman-Dutch Law 132 (2011) (Feb. 2, 2020), available at https://ssrn.com/abstract=2016801.

[13] Nigel Boardman, *A Critical Analysis of the New South African Takeover Laws as Proposed Under the Companies Act 71 of 2008*, Acta Juridica 306, 336 (2010).

[14] *See* Ezra Davids et al., *A Microscopic Analysis of the New Merger and Amalgamation Provision in the Companies Act 71 of 2008*, Acta Juridica 338 (2010).

[15] Section 117(1)(c) of the Act defines these transactions as follows:

> '"affected transaction' means–

1. The Regulatory Bodies Responsible to Regulate Mergers and Acquisitions

The 2008 Act creates, empowers and clarifies the role of the Takeover Regulation Panel (TRP),[16] a new body that replaced the Securities Regulation Panel (SRP).[17] The TRP performs the same functions as that of the SRP that existed under the 1973 Act. The powers and functions of the TRP have been strengthened, as will be indicated later in the article. Members of the TRP may not be more than 15 persons. Members of the TRP consists of the Competition Commissioner or a person designated by him or her, the Commissioner of the Companies Commission or a person designated by him or her, and 3 persons are designated by each exchange. The Minister of the Department of Trade and Industry (the Minister) appoints additional members based on their experience and knowledge of acquisitions and securities regulation.[18] The term of office of the Members is five years in the case of members appointed by the Minister,[19] while those appointed by the exchange, or in the case of the Companies Commissioner or their nominees and the Competition Commissioner or their nominees, hold office for 5 years, provided that they are still in the service of those institutions.[20] The TRP may also co-opt additional members for a specific purpose and for a limited period.[21] The Minister may designate a chairperson and deputy chairpersons of the TRP from among members of the TRP. Its Executive Director or the deputy Executive Director and other employees undertake the daily operations of the TRP.[22] The structure of the TRP and the process of appointment of TRP members differs from those that existed under the 1973 Act.

(i) a transaction or series of transactions amounting to the disposal of all or the greater part of the assets or undertaking of a regulated company, as contemplated in section 112, subject to section 118(3);

(ii) an amalgamation or merger, as contemplated in section 113, if it involves at least one regulated company, subject to section 118(3);

(iii) a scheme of arrangement between a regulated company and its shareholders, as contemplated in section 114, subject to section 118(3);

(iv) the acquisition of, or announced intention to acquire, a beneficial interest in any voting securities of a regulated company to the extent and in the circumstances contemplated in section 122(1);

(v) the announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by a person or persons acting in concert;

(vi) a mandatory offer contemplated in section 123; or

(vii) compulsory acquisition contemplated in section 124."

16 Sections 196 and 197 of the 2008 Act.

17 The Securities Regulation Panel was created by the section 440B of the Companies Act of 1973.

18 Section 197(1)(a)–(d) of the 2008 Act.

19 *Id.* sec. 197(4).

20 *Id*.

21 *Id.* sec. 197(2).

22 *Id.* sec. 200.

Under the 1973 Act, a number of institutions and organisations were entitled to nominate members of the SRP, who were then appointed to the SRP by the Minister.[23] In terms of the 2008 Act, the Minister decides who is appointed as a member of the TRP, except in the case of members who are appointed in their official capacity such as members appointed by the JSE Limited or other exchanges.[24]

Section 202(1) of the 2008 Act also creates a new body known, as the Takeover Special Committee is a committee of the TRP. The Takeover Special Committee (TSC) members consist of at least three persons.[25] The TSC is tasked under the Act to hear and decide referrals directly made to it by the Executive Director, deputy Executive Director or the TRP. The TSC may also review compliance notices issued by the Executive Director or deputy Executive Director of the TRP.[26] The members of the Takeover Special Committee are designated from time to time by the TRP from those members of the TRP who have been appointed by the Minister in terms of section 197(1)(d). The functions of the TSC are similar to those of the Appeal Committee of the SRP created under the SRP Code and the 1973 Act but with some difference.[27] The difference is that under the 1973 Act, the Appeal Committee was created in the SRP Code – a subordinate legislation being a regulation promulgated in terms of the 1973 Act, whereas the TSC is created in the Act.[28] The number of Appeal Committee in the SRP Code consisted of 5 members, and it may have included any member of the SRP, irrespective of the body or organisations that nominated the person.[29] However, in the case of the TSC only members appointed by the Minister in terms of section 197(1)(d) of the Act may be members of the TSC.[30] Another difference is that section 202(2) of the Act requires that the chairperson of the TSC be either an Attorney or an Advocate, whether practising or not. The SRP Code did not have such a requirement.

2. A Brief Overview of the Powers of the Takeover Regulation Panel

Section 201 of the Act sets four powers of the TRP.[31] The powers are to: (*a*) regulate affected transactions and offers to the extent provided for, and in accordance with, Parts B and C of Chapter 5 and the Takeover Regulations; (*b*) investigate complaints

23 Section 440B(3) of the 1973 Act.

24 Section 197(1)(d) of the 2008 Act.

25 *Id.* sec. 202(2).

26 *Id.* sec. 202(3).

27 *See* SRP Code in section 2(d).

28 Section 440C of the 1973 Act and the SRP Code in section 2(d).

29 *See* SRP Code in section A2(d).

30 Section 202(2)(b) of the 2008 Act.

31 *Id.* sec. 201.

with respect to affected transactions and offers in accordance with Part D of Chapter 7; (*c*) apply for a court order to wind up a company, in the manner contemplated in section 81(1)(f); and (*d*) consult with the Minister in respect of additions, deletions or amendments to the Takeover Regulations. The powers to apply for winding up a company in terms section 81(f) where the officers have committed fraud, an illegality or have failed to comply is new and did not exist under the 1973 Act, while the other three existed in one form or another.[32] The offending act must have been committed in the previous five years and the officers must have received an administrative fine or a conviction for the same conduct. It appears that this section is aimed at repeat offenders. The TRP has no authority to regulate affected transactions relating to fundamental transactions entered into by a company that is subject to a business rescue plan in terms of Chapter 6.[33]

3. A Brief Overview of the Reasons for Regulating Mergers and Acquisitions

Section 119 sets out the reasons for regulating mergers and acquisitions. It provides:

> 119. Panel regulation of affected transactions
>
> (1) The Panel must regulate any affected transaction or offer in accordance with this Part, Part C and the Takeover Regulations, but without regard to the commercial advantages or disadvantages of any transaction or proposed transaction, in order to–
>
> (a) ensure the integrity of the marketplace[34] and fairness to the holders of the securities of regulated companies;
>
> (b) ensure the provision of–
>
> (i) necessary information to holders of securities of regulated companies, to the extent required to facilitate the making of fair and informed decisions; and
>
> (ii) adequate time for regulated companies and holders of their securities to obtain and provide advice with respect to offers; and
>
> (c) prevent actions by a regulated company designed to impede, frustrate, or defeat an offer, or the making of fair and informed decisions by the holders of that company's securities.

---

32 *See* Chapter XVA of the 1973 Act.

33 Section 118(3) of the 2008 Act.

34 *See* DTI Guidelines, at 43. The Guidelines state that mergers and takeovers must ensure integrity of the market and also protect the interests of other stakeholders.

Section 119(1) encapsulates the general principles of regulation of M&As that existed under the SRP Code.[35] These principles have been reworded and subdivided into three subsections.[36] A quick overview of those general principles and section 119(1) indicates that the section forms the cornerstone of regulating M&As. The general principles originated from the United Kingdom Code on Takeovers and Mergers (the UK City Code) issued by the Panel on Takeover and Mergers in the United Kingdom.[37]

Section 119(1) also indicates that the TRP must not have regard to commercial advantages or disadvantages of mergers and acquisitions in its regulatory process. As if to emphasize this point, section 201(3) provides that the TRP must not express any view or opinion on commercial advantages or disadvantages on any transactions when exercising its powers and performing its functions. In this respect, the 2008 Act is similar to the 1973 Act, which provided for powers of the SRP. The SRP also, did not consider the advantages or disadvantages of mergers and acquisitions, when it regulated such transactions.[38] The UK City Code has similar restrictions and the UK Panel does not consider the commercial advantages or disadvantages of M&As.[39] According to this approach, it is the affected shareholders who should consider the commercial advantages or disadvantages of mergers and acquisitions.[40] The affected shareholders are in a better position to judge whether an affected transaction or offer has advantages or disadvantages based on their personal investment aims and decisions. Regulators are not able to judge or know the investment decisions of each individual shareholder, particularly where the shares of the company are widely held. Even in cases where the shareholding is not widely held, it is not appropriate for regulators to consider commercial advantages or disadvantages of M&As.

4. Companies That Are Subject to Mergers and Acquisitions Provisions

Regulated companies that undertake an affected transaction or offer, must comply with the takeover provisions unless exempted by the TRP.[41] The Act defines

35 *See* SRP Code in section C and General Principles of the Code.

36 Section 119(1)(a), (b) and (c) of the 2008 Act.

37 *See* SRP Code in section C, General Principles and also the introduction to the SRP Code.

38 Section 440C(2) of the 1973 Act.

39 *A Practitioner's Guide to the City Code on Takeovers and Mergers, 2006/2007* 1 (M. Button (ed.), London: City & Financial Publishing, 2006). *See also* Securities Regulation Code and the Rules of the Securities Regulation Panel (SRP Code), South African Government Gazette No. 12962, January 1991 in the introduction to the SRP Code.

40 *See* Button 2006, at 1.

41 Section 117(i) of the 2008 Act read with section 118 of the 2008 of the Act.

regulated companies as: for profit companies, that are public companies; state-owned companies unless exempted; and private companies, which had 10 percent or more of their issued securities transferred within a period of 24 months immediately prior to the date of a particular affected transaction, excluding transfers between or among related or inter-related persons, or a company whose Memorandum of Incorporation expressly provides that the company and its securities are subject to provisions of the Act in Part B, Part C of Chapter 5, and the Takeover Regulations in Chapter 5 of the Companies Regulations. The 1973 Act had similar provisions relating to state owned companies and public companies.[42] However, in respect of private companies, there is a significant difference between the 1973 Act and the 2008 Act. In terms of the 1973 Act and the SRP Code, private companies were subject to the M&A provisions only where the private company had more than 10 beneficial shareholders, and the transaction value was more than R5 million. In addition, the provisions were contained only in the SRP Code, a regulation, whereas in terms of the 2008 Act, the provisions are both in the Act and the Companies Regulations.[43]

There is criticism of the manner, which the takeover provisions apply to private companies as provided in section 118 of the Act. The provision makes the takeover provisions applicable to a wide range of private companies even where there is no risk of unfair or unequal treatment to shareholders and therefore no need to protect shareholders under such circumstances. The section unnecessarily burdens small private companies with compliance and associated costs. Unless exempted by the TRP, small companies will be forced to comply with M&A provisions. Exemptions require that companies must apply to the TRP and therefore, this results in addition of bureaucratic compliance and resultant costs to small businesses. It is indicated that the measurement of 10 percent transfer of shares in the regulated company in terms of section 118 is regarded as irrelevant.[44] The logical and commercial measure should be value and the number of shareholders to determine the type of companies that should be subject to the takeover provisions.[45] It is submitted that this requirement also appears to be contrary to one of the stated objectives of the DTI Guidelines aimed at reducing compliance costs.[46] It is further indicated that the benefits of transparency as weighed against the costs of compliance are disproportionate and at worst unnecessary.[47] The threshold set in the SRP Code should have been retained

---

42 Chapter XVA of the 1973 Act read with section A3 of the SRP Code.

43 Section A3 of the SRP Code.

44 *See* Harvey E. Wainer, *The New Companies Act: Peculiarities and Anomalies*, 126(4) South African Law Journal 806, 825 (2009).

45 *See Id.*

46 *See* DTI Guidelines, at 43.

47 Boardman 2010, at 318.

but with a higher threshold in number of shareholders and the value of transactions. This would allow oversight by regulators and also ensure that any possible prejudice to minority shareholders in private companies is limited. Such a threshold will also avoid the unintended consequences of adding a burden of compliance, and costs to all small private companies. It appears that the relevant authorities have considered the criticism made against this requirement. The Minister released the Companies Amendment Bill (the Bill), 2018 for public comments on 21 September 2018. The Bill proposes a number of amendments. It includes the much-criticised section 118(1)(c)(i) which creates the obligation for private companies to comply with the takeover provisions. It is proposed that private companies will become regulated companies if the private company is required by the Act or the regulations to have its annual financial statements audited every year.[48] If passed, the amendment will apply to those private companies that are also subject to the requirements of Chapter 3 of the Act, dealing with the extended accountability and transparency applicable to certain companies. The proposed amendment will ensure that only larger private companies are required to comply with the takeover provisions.

5. A Brief Overview of the Types of Mergers and Acquisitions Regulated

"Affected transactions" include both those transactions referred to as "fundamental transactions"[49] and "offers."[50] The heading in part A of Chapter 5 of the 2008 Act, sets out three fundamental transactions. The transactions have specific requirements, which will be discussed underneath. The 2008 Act does not specifically refer to the distinction between part A and Part B of Chapter 5. However, it is clear that it is possible that a company may enter into a fundamental transaction under Part A without triggering the authority of the TRP under Part B. This is so considering the wording of section 117, dealing with definitions applicable to Part B. Fundamental transactions are: firstly, the disposal of all or greater part of the assets or undertaking of a company in terms of section 112 of the Act. This section is substantially similar to section 228 of the 1973 Act. Section 112 includes a definition of what constitutes "all or the greater part of the assets or undertaking" being disposed. The 1973 Act did not have such a definition.[51] The definition will assist practitioners and companies

---

48 *See* Companies Amendment Bill, 2018, South African Government Gazette No. 41913, 21 September 2018 (Feb. 2, 2020), available at http://www.cipc.co.za/files/7715/4149/0472/Companies_Amendment_Bill_2018.pdf.

49 *See* Chapter 5, Part A headed "Approval of Fundamental Transactions" of the 2008 Act.

50 *See* section 117(1) definitions of "affected transactions" and "offers" of the 2008 Act.

51 Section 1 of the 2008 Act defines "All or the greater part of the assets or undertaking" as meaning more than 50 percent of the company's gross assets at fair market value, irrespective of its liabilities; or more than 50 percent of the company's value of its entire undertaking, at fair market value.

in interpretation of the section rather than leaving the interpretation to the courts. Another difference is that section 112 clarifies that the disposal of the assets or undertaking must be done at fair value. Despite criticism due to lack of guidance, it nevertheless a useful starting point.

Secondly, section 113 dealing with amalgamations or merger transactions is another type of fundamental transaction.[52] This is a new type of affected transactions that did not exist under the 1973 Act. The Act does not define the new terms individually but are defined jointly.[53] This suggests that there is no distinction between the two.[54] Davids, Norwitz and Yuill[55] in their article deal with these transactions in details and convincingly set out the merits of introduction of these types of transactions. It has been suggested that the new provision will facilitate the creation of business combinations.[56] According to Cassim[57] in a comprehensive analysis of the section, the introduction of the amalgamation and merger provisions is a significant liberalisation of policy by the legislature. Cassim and Yeats[58] indicate that the merger and amalgamation provision is one of the leading reforms introduced by the 2008 Act. A statutory merger in the true sense is a new invention under the 2008 Act.[59] The procedure to complete a merger or an amalgamation in terms of the Act is not a complicated process. It requires completion of a number of clearly set out steps. These include an agreement by the merging or amalgamating companies, voting by shareholders of the relevant companies based on full disclosures. The rights of the shareholders must be set out in the disclosure document including, and dissenting shareholder appraisal rights to have their shares bought at "fair value" in terms of section 164 of the Act. The courts play a limited role based on

---

52 Section 1 of the 2008 Act defines amalgamations or mergers as meaning a transaction, or series of transactions, pursuant to an agreement between two or more companies, resulting in–

(a) the formation of one or more new companies, which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement, and the dissolution of each of the amalgamating or merging companies; or

(b) the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the vesting in the surviving company or companies, together with such new company or companies, of all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement.

53 Definition in section 1 of the 2008 Act. *See also* Davids et al. 2010, at 341.

54 *Id.*

55 *See* in general Davids et al. 2010 and the discussions thereunder.

56 *Id.* and the discussions thereunder.

57 Maleka F. Cassim, *The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part 1)*, 20 South African Mercantile Law Journal 1, 1 (2008).

58 Maleka F. Cassim & Jacqueline Yeats, *Fundamental Transactions, Takeovers and Offers* in *Contemporary Company Law* 675 (F.H. Cassim et al. (eds.), 2nd ed., Claremont: Juta, 2012).

59 *See Id.* at 676.

specified circumstances.[60] The legislature is trying to balance the interests of the shareholders and economic growth by introducing the statutory merger to facilitate such transactions.[61]

The third affected transaction is the scheme of arrangement in terms of section 114 of the Act. The 2008 Act introduced significant changes to the procedure for implementing a scheme of arrangement. The new process is fundamentally different to the process under the 1973 Act. Under the 1973 Act, court involvement in a scheme of arrangement was a prerequisite. At least two court approvals were required before the companies undertaking a scheme of arrangement could implement the affected transaction.[62] Another difference is that section 114 of the 2008 Act specifically provides a number of transactions that can be implemented using a scheme of arrangement as opposed to the section 113 of the 1973 Act. The transactions listed include: division, consolidation, expropriation, exchange, and repurchase of securities. The legislature intended to make it clear that schemes of arrangement can be applied to different types company structure reorganisations and it is not limited to any type of transaction.[63] Similar to mergers or amalgamations, the role of the courts is limited to specified circumstances.[64]

The acquisition or intention to acquire beneficial voting securities in terms of section 122 is the fourth type of affected transaction. However, the inclusion of these transactions as affected transactions has not been generally accepted and has attracted numerous criticisms. A close consideration of the section shows a number of problems created by classifying the section as an affected transaction. The requirement under the definitions in section 117(1) is that acquisitions of, or announced intentions to acquire, beneficial interest in any voting securities of a regulated company amounting to 5 percent or any whole multiple of 5 percent of the securities of that class in terms of section 122 is an affected transaction. An analytical review of the section shows that such acquisitions require disclosure to companies and their shareholders. Therefore, it is inappropriate to classify such disclosures as affected transactions. Regarding these acquisitions as affected transactions is problematic, as they do not fit within clear categories of "affected transactions" or "offers" as defined in the Act, despite being defined as such. The legislature should have indicated that section 122 is a disclosure section and should not have formed part of affected transactions. However, the requirements of the section to disclose share dealings are in line with similar requirements in other countries. In those countries, such disclosures are reported and disclosed

---

60 Cassim & Yeats 2012, at 677.

61 Cassim, *The Introduction of the Statutory Merger in South African Corporate Law (Part 1)*, at 1.

62 *See* section 113 of the 1973 Act.

63 *See also* Cassim & Yeats 2012, at 726.

64 *Id.* at 729. *See also* Boardman 2010, at 315.

separately and are not regulated as a category of "affected transactions" or "offers."[65] The disclosure of such share dealings, assist management of companies and other shareholders to see if any shareholder is building up a stake which may be used later to implement a takeover offer.[66] According to some scholars, the inclusion of the disclosure requirements as an affected transaction can be interpreted to mean these transactions are "partial offers" or are "offers," as defined in the Act.[67] Such an interpretation may have unintended consequences. For example, an interpretation that an acquisition of 5 percent of the shares is an affected transaction in the form of a partial offer, may be interpreted that having acquired a portion of the shares, the acquirer is obliged to make a partial offer to other shareholders to acquire 5 percent of their shares to ensure equality of treatment and fairness to other shareholders.[68] Such an approach could lead to absurdities and is also that unworkable.[69]

The announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by a person or persons acting in concert is the fifth affected transaction. This requirement is similar to that found in the 1973 Act.[70] This type of affected transaction makes sense it allows persons who wish to acquire the entire issued share capital of a regulated company to do so within a regulated and controlled environment. This promotes disclosures and protection of shareholders.

The mandatory offer in section 123 of the Act is the sixth "affected transaction." This requirement is triggered by the acquisition of 35 percent or more of the voting securities of a regulated company under the circumstances specified in section 123 of the Act. The requirements for triggering the mandatory offer obligation are similar to those applied by the UK Panel in terms of the City Code,[71] although there are a number of differences. One of the differences is that the mandatory offer requirements of the UK City Code in Rule 9 is triggered at a threshold of acquisition of 30 percent or more of the voting rights compared to the 35 percent applicable in terms of the 2008 Act.[72]

---

65 In the United Kingdom, such disclosures are required both during an M&A transaction and even when there is not such a transaction. It has been submitted by Nigel Boardman that the United Kingdom disclosure requirements are much harsher. Further, in the same discussions, according to Boardman, Australian Takeover Panel may also regard failure to disclose in serious light.

66 Paul L. Davies, *Gower's Principles of Modern Company Law* 773 (6th ed., London: Sweet & Maxwell, 1997).

67 *See* Boardman 2010, at 329.

68 *See* section 125 of the 2008 Act. This section deals with partial offers and comparable offer. It states that parties making such an offer must acquire on *pro-rata* basis from each shareholder.

69 *See* Boardman 2010, at 329.

70 *See* Chapter XVA of the 1973 Act.

71 *See* rule 9 of the United Kingdom City Code 2016.

72 *See* rule 9 of the United Kingdom City Code 2016, and also the definitions in Chapter XVA of the 1973 Act and rule 8.1 of the SRP Code.

The mandatory offer requirements in section 123 of the 2008 Act, was previously in rule 8.1 of the SRP Code, and not in the 1973 Act.[73]

A compulsory acquisition of the remaining securities of a regulated company in terms of section 124 is defined as the seventh affected transaction. The transactions are commonly referred to in M&A parlance as "the squeeze out." The legislature in the heading to section 124 of the Act has also adopted this terminology. A "squeeze out" transaction may be implemented where the acquirer has managed to acquire 90 percent or more of the shares of the regulated company that were the subject of the offer. In terms of the section, the acquirer is entitled to acquire the shares of any shareholder who did not accept the offer. The terms and conditions of the squeeze out must be the same as those of the initial offer. Equality of treatment between the shareholders who accepted the earlier offer and those who are subjected to the squeeze out provision is required. Section 440K of the 1973 Act had similar requirements.

Section 48(8)(b), which is late addition to the Act in terms of the Companies Amendment Act, 2011 appears to add another "affected transaction" though not clearly. This is because section 48(8)(b) requires regulated companies that undertakes share repurchases to comply with the requirements of section 114 and 115 of the Act. Although section 48(8)(b) does not specifically refer to scheme of arrangement, section 114 is labelled "proposals for schemes of arrangement." Therefore, it argued that a section 48(8)(b) share repurchase must be undertaken in terms of a scheme of arrangement and it becomes an affected transaction. Section 115 in turn deals with procedural requirements to approve "fundamental transactions." A contrary assertion is that the section merely requires parties to make disclosures required by section 114, and must then comply with procedural requirements of section 115.[74] On this approach, a section 48(8)(b) share repurchase would not qualify as an affected transaction. According to some scholars and practitioners' section 48(8)(b) does not require share re-purchases to be implemented using a scheme of arrangement. Based on this view regulated companies may elect to use a scheme of arrangement to effect a re-purchase and where this is done, the transaction will amount to an affected transaction as defined in the Act.[75] The section has been criticised as unclear and its exact meaning even less clear.[76] Further is argued that the subsection create some uncertainties.[77] It appears that the criticism on this section has been taken to heart by the relevant authorities. The Companies Amendment Bill proposes changes to this section.[78]

---

73 *See* the definitions in Chapter XVA of the 1973 Act and rule 8.1 of the SRP Code.

74 *See* Johan Latsky, *The Fundamental Transactions Under the Companies Act: A Report Back From Practice After the First Few Years*, 25(2) Stellenbosch Law Review 361, 382 (2014).

75 *See* section 117 of the 2008 Act.

76 Piet Delport & Quintus Vorster, *Henochsberg on the Companies Act 71 of 2008. Vol. 1* 203 (Durban: LexisNexis, 2011).

77 *Id.*

78 *See* Companies Amendment Bill, 2018, *supra* note 48.

6. Specific Requirements for Fundamental Transactions

Affected transactions in the form of disposal of all or the greater part of the assets or undertaking of a regulated company in terms of section 112,[79] proposals for an amalgamation or a merger of regulated companies in terms of section 113 and schemes of arrangement involving a regulated company in terms of section 114 of the Act are referred to as "fundamental transactions" in terms of the Act.[80] The Act does not define the term "fundamental transaction."[81] The three types of transactions referred to above clearly contemplate substantial changes to the corporate substructure or essence of the business of the regulated company implementing such a transaction. Perhaps that this is the reason why the legislature did not define the term, "fundamental transaction." Any company that implement any of the listed transactions will result in a completely changed company.

Section 115 of the Act set out shareholder approval requirements that must be met before a fundamental transaction is implemented. Among others, these include disclosures certain disclosures, affording shareholders appraisal rights and shareholder approval before the transaction may be implemented.[82] However, if shareholders holding 15 percent of the votes and a meeting convened to vote on a fundamental transaction voted against it, court approval must be obtained before proceeding with the transaction. A company may also decide not to proceed with the transaction.[83] The 2008 Act also changed procedural requirements in respect of schemes of arrangements. The involvement of the court as a prerequisite for the scheme has been removed, and the requirement that a court must convene a scheme meeting of shareholders, followed by the court sanctioning the scheme, as was required in terms of section 311 of the 1973 Act has been abolished. In terms of section 114 of the Act, only shareholder approval will be required and court involvement will only apply in certain circumstances.[84] It is no longer mandatory as it was in terms of the 1973 Act. However, parties undertaking a scheme of arrangement must ensure compliance with a number of procedures including that an independent expert provides a fair and reasonable report to the shareholders.[85]

---

79 Section 1 of the 2008 Act defines "All or the greater part of the assets or undertaking" as meaning more than 50 percent of the company's gross assets at fair market value, irrespective of its liabilities; or more than 50 percent of the company's value of its entire undertaking, at fair market value.

80 *See* in Chapter 5 of the 2008 Act.

81 Cassim & Yeats 2012, at 674.

82 Section 115(2) of the 2008 Act.

83 *Id.* sec. 115(4)(b).

84 Section 115 of the 2008 Act makes provision for the court intervention where certain requirements have been met, such as where 15 percent of holders voted against the relevant resolution and sought court approval, or where the company applies to court for such approval.

85 Section 114(2) of the 2008 Act read with regulation 90, of the Companies Regulations 2011.

The company is also required to comply with other requirements such as shareholder approval in terms of section 115 of the Act. In addition, parties are obliged to inform shareholders of the provisions of section 115 and also of their entitlements to exercise appraisal rights in terms of section 164. It is submitted that the legislature have succeeded introducing a simplified procedure for the schemes of arrangement by removing the requirements of automatic court involvement.

In one of the example confirming that the legislature did not simply seek to change the well-established principles of South African company law is indicated in the case of *Ex parte Federale Nywerhede Bpk*.[86] This case, created one of the principle that there is no reason to give a narrow or limited meaning to an arrangement. As indicated in that case, safeguards in the form of disclosures have been required; there is a statutory majority and, in addition, court intervention in certain circumstances. This is in line with the principles set out in *Ex parte Federale Nywerhede Bpk*,[87] which indicate that by enacting provisions dealing with schemes of arrangement, the legislature seeks to ensure that companies can obtain shareholder approval in an efficient manner. The removal of automatic court involvement does not mean that shareholders have been left unprotected, as a new protective measure has been introduced in the form of appraisal rights in section 164 of the Act, in addition to shareholder approval in terms of section 115. In addition, shareholders will still have the right to ask the court to intervene provided certain requirements are met.[88] It appears that the legislature has achieved a balance of interests for the parties involved in this type of transactions by introducing simplicity while balancing that with additional protection for shareholders.[89]

In the case of an amalgamation or a merger certain formalities must also be completed and observed in terms of section 116 of the Act. According to the policy document of the DTI, this new type of affected transaction is aimed at introducing efficient M&As.[90] Cassim[91] indicates that the amalgamation or mergers in terms of this section is a modernised and progressive concept borrowed from the USA. It is submitted that such an introduction has been well received. It makes mergers and acquisition simple and efficient. It will also contribute to the facilitation of mergers and takeovers.[92]

---

86 *Ex parte Federale Nywerhede Bpk*, 1975(1) S.A. 826 W 264.

87 *Id.*

88 Section 115 of the 2008 Act.

89 *See* Latsky 2014, at 362.

90 DTI Guidelines, at 43.

91 Cassim & Yeats 2012, at 677.

92 Maleka F. Cassim, *The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part 2)*, 20 South African Mercantile Law Journal 147, 174 (2008).

All fundamental transactions are required to comply with certain requirements before they may be implemented. These requirements are similar but dependent on each type of M&A. However, the overriding requirement appears to be that all fundamental transactions must ensure that shareholders are aware of the protections offered to them in terms of sections 115 and 164 of the Act; that shareholders will have an opportunity to go to go to court provided certain safeguards have been observed, such as a requirement that 15 percent of the shareholders must have voted against the resolution. This ensures that a certain minimum objection level of members of the company at the shareholders meeting have raised their objections. Presumably to ensure that frivolous objections are avoided. In addition, all fundamental transactions are required to comply with the requirement for obtaining an independent adviser to advise the shareholders about the value of the shares they are selling, and in the case of the assets or undertaking of the company, the independent expert should provide a valuation of the undertaking or the assets being disposed of.[93] It is notable that the Act specifically requires that the independent expert report must include a copy of sections 115 and 164. Cassim and Yeats[94] indicate that presumably, this is to remind shareholders of their rights in terms of the Act. These requirements are additional to other disclosure requirements in terms of the regulations.[95] Cassim,[96] discussing the statutory merger in terms of section 113, of the Act indicates that section 164-appraisal remedy originated in the USA. It functions as a check in cases where directors make bad business judgments.[97] The appraisal remedy may also serve to strengthen the rights of shareholders, particularly where collateral or side-payments to certain shareholders shave been made. Side payments may have the effect of rendering shareholder approval ineffective as a protection where there has been inadequate disclosure.[98] Appraisal rights are aimed at assisting shareholders to exist the company whose risks may have changed and therefore do not wish to stay invested in the company. Appraisal rights create a market for mergers, and serve as a check on opportunism by the directors and controlling shareholders.[99] The appraisal remedy allows shareholders an opportunity to exit the investment for cash but not to defeat a merger or an acquisition. Cassim[100]

---

93 Section 114(2) of the 2008 Act read with regulation 90 of the Companies Regulations 2011.

94 Cassim & Yeats 2012, at 730.

95 Regulations 102 and 106 of the Companies Regulations 2011 contain detailed disclosure requirements and the timelines within which steps must be undertaken. The assumption is that timely disclosures will assist shareholders in making informed decisions.

96 *See* Cassim, *The Introduction of the Statutory Merger in South African Corporate Law (Part 2)*, at 157.

97 *See Id.* at 158.

98 *Id.*

99 *Id.*

100 Cassim, *The Introduction of the Statutory Merger in South African Corporate Law (Part 1)*, at 19.

points out that shareholders have no legal basis for preventing a merger, which has been approved by the requisite majority, save in certain prescribed circumstances.

The introduction of the appraisal right appears to have been welcomed by a number of commentators.[101] However, while the appraisal right has generally been welcomed, they have also been criticised on a number of aspects. Cassim[102] commenting on the right as contained in the then Companies Bill before the 2008 Act, notes that the efficacy of the right is to be questioned due to its procedural flaws. Appraisal right remedy has also been criticised as too complex, technical and rigid for shareholders. It is pointed out that it is associated with delays and prohibitive costs.[103] It is notable that the appraisal right as contained in the Companies Bill remained substantially the same as it is in section 164 of the Act. Therefore, the comments by Cassim[104] in the article published prior to the 2008 Act are still applicable. Davids, Norwitz and Yuill[105] share the view expressed by Cassim[106] that the appraisal remedy may be costly to shareholders. It is pointed out this may discourage small shareholders with limited funding to exercise this right. It must be noted this section is one of the longest sections with subsections running from subsection 1 to subsection 19. It is submitted that the section is complex and shareholders may find it difficult to exercise this right without requiring some expert advice. Cassim[107] noted that the appraisal right as a remedy has not been very successful in those countries, which have introduced it. It is indicated that companies tend to be wary of the rights. It appears that South Africa practitioners have sought to avoid the application of this right. In practice it appears that companies have introduced certain terms and conditions in merger documents which presumably are aimed at protecting the interests of the bidder and avoid paying a higher price where shareholders exercise this right. These terms include a suspensive condition in the mergers agreement that should a certain percentage, commonly 5 percent, of shareholders exercise their appraisal rights, and follow to the procedure to finality, the bidder reserves the right to terminate the M&A transaction.[108] In another transaction legal advisers were

---

101 *See* Cassim, *The Introduction of the Statutory Merger in South African Corporate Law (Part 2)* discussing how the appraisal remedy will be beneficial to shareholders and that it serves as check on possible abuse of powers by directors.

102 *Id.* at 176.

103 *See* the general discussions under appraisal rights in Cassim, *The Introduction of the Statutory Merger in South African Corporate Law (Part 2)*.

104 *See also* in Cassim & Yeats 2012, at 730.

105 Davids et al. 2010, at 366.

106 *See also* in general Cassim & Yeats 2012 discussing fundamental transactions and appraisal rights.

107 *Id.* at 798.

108 *See* Metorex Limited a circular to shareholder regarding a scheme of arrangement in terms of section 114(1)(c) of the Companies Act 2008 dated 17 June 2011. This is probably one of the first circulars issued in terms of the Companies Act 2008 which introduced this condition.

quoted as indicating that the appraisal right remedy causes uncertainty hence the attempt to neutralise it.[109] The debates on the legality or otherwise of these terms and conditions is beyond the scope of this review.

Davids, Norwitz and Yuill[110] hold that balances need to be struck between protection minority shareholders and the facilitation of economically advantageous transactions. Prudent regulation and risk taking should co-exist. Minority shareholders should not be allowed to hold transactions against the will of majority. It has also been indicated that minority protection is essential to encourage investment and also to preserve market integrity.[111] It will be interesting to see how the appraisal rights develop taking into consideration the observations and the criticism about the complexity of the procedure. Case law on the appraisal right is still developing. However, should the criticism be proven correct, then it may be necessary for the legislature simplify the appraisal rights procedure by an amendment to section 164 of the 2008 Act.

7. An Overview of Provisions Regulating the Conduct of Parties Involved in Mergers and Acquisitions

The 1973 Act did not specifically deal with the conduct of parties involved in mergers and acquisitions but such conduct was dealt with in the rules and regulations – the SRP Code.[112] The 2008 Act, however, specifically deals with such conduct in a number of sections. As part of its mandate, the TRP must ensure that the conduct of parties adhere to the provisions of section 119(2), when it regulates M&As.[113] The aim of section 119(2) is to ensure that the objects of section 119(1) as set

---

109 *See also* Ann Crotty, *CapeVin Offer Shows How to Neutralise Dissenters' Rights*, IOL, 17 April 2012 (Feb. 2, 2020), available at https://www.iol.co.za/business-report/economy/capevin-offer-shows-how-to-neutralise-dissenters-rights-1277283.

110 *See* Davids et al. 2010, at 338.

111 *See* Boardman 2010, at 311.

112 *See* the SRP Code published under the 1973 Act with comprehensive rules on acquisitions and mergers.

113 Section 119(2) of the 2008 Act provides that:

"subject to the provisions of subsection (6),

(a) that no person may enter into an affected transaction unless that person is ready, able and willing to implement that transaction;

(b) that all holders of–

(i) any particular class of voting securities of an offeree regulated company are afforded equivalent treatment; and

(ii) voting securities of an offeree regulated company are afforded equitable treatment, having regard to the circumstances;

(c) that no relevant information is withheld from the holders of relevant securities; and

(d) that all holders of relevant securities–

out above, are promoted when the TRP regulates M&As. The TRP may require certain disclosures; the filing of documents for approval; issue compliance certificates; receive complains; investigate and issue compliance notices in respect of M&As when undertaking its mandate.[114] Section 119(5) gives the TRP some powers to ensure compliance. In terms of the section, the TRP may prohibit and require any action by a person; or may order a person to divest of an acquired asset; or to account for any profits made. Section 121 also creates an obligation for parties entering into affected transactions to report such transactions, and such transactions must not be effected unless they have been approved by the TRP or have been exempted from approval by the TRP.[115] It appears that some provisions in the Act have been taken from the old SRP Code. Some of the wordings are similar almost word for word to those of the SRP Code.[116] The 2008 Act also creates prohibitions on actions that may frustrate or prevent merger or acquisition transactions,[117] unless shareholder approval, and the written approval of the TRP are obtained in terms of section 126(1). Collateral or favourable benefits to some shareholders to the exclusions of others during merger or acquisition transactions are also prohibited in terms of section 127(1). Parties may not enter into new transactions for a minimum period following the ending of an earlier transaction in terms of section 127(5) of the 2008 Act. The regulations also provide detailed actions which directors are required to perform during a merger or takeover to ensure that the interests of shareholders are protected and are discussed below.[118] These provisions are in line with the aim of the 2008 Act in respect of the M&As including to ensure that: parties who undertake mergers and acquisitions do not mislead market participants; assists in promoting equality of treatment of shareholders, and that parties to such transactions do not give preference to some shareholders. Further, the provisions assists in ensuring that there is sufficient details about M&As and that such information is provided timeously; they also seek to ensure that shareholders are denied a fair chance to consider the merits or demerits of an affected transaction or an offer. This could happen where there is insufficient information or where there are time constraints to consider the M&A transaction.[119] It is suggested that this is in line with the general rules of fairness and equity that requires that, in order to make informed decisions, shareholders need detailed information

(i) receive the same information from an offeror, potential offeror, or offeree regulated company during the course of an affected transaction, or when an affected transaction is contemplated; and

(ii) are provided sufficient information, and permitted sufficient time, to enable them to reach a properly informed decision."

114 Section 119(4) of the 2008 Act.

115 *Id.* sec. 121(b).

116 Rule 19 of the SRP Code.

117 This provision is similar to Rule 19 of the SRP Code published under the 1973 Act.

118 *See* Chapter 5 of the Companies Regulations 2011 for the detailed regulations.

119 Section 119(1) and section 119(2) of the 2008 Act.

that must be provided in good time. In this way, shareholders are able to consider the information and to seek independent advice should they choose to do so. The UK City Code has similar principles.[120] These principles also form a foundation of merger and acquisitions provisions of a number of countries.[121] The European Directive on Takeovers and Mergers has adopted similar principles, and it is indicated that the principles are modelled on the UK City Code.[122]

8. A Brief Overview of the Provisions for Enforcement and the Remedial Actions for Mergers and Acquisitions

In enforcing the 2008 Act, the court and the TRP must promote the spirit, purpose and objects"[123] of the Act and must also interpret the provisions in a manner that promotes the purpose and objectives set out in the Act where a provision may have more than one meaning. According to the DTI Guidelines, the enforcement mechanism in the 2008 Act was intended to avoid litigation during mergers and acquisitions.[124] The enforcement mechanisms are in Chapter 7 of the Act. They include: the TRP issuing a compliance notice to transgressors prior to approaching the courts, which is in line with the above intention. Unlike the 1973 Act,[125] the 2008 Act provides clearer measures for the TRP to enforce compliance with the mergers and acquisitions provisions. Section 440L of the 1973 Act, prohibited any person from concluding or proposing an affected transaction unless exempted in accordance with the Act. Section 121 of the 2008 Act is similarly structured. One of the criticisms of the enforcement measures under the 1973 Act was that they did not effectively deter transgressors and were defective.[126] In terms of section 440M of the 1973 Act, the SRP could approach the court for enforcement of the SRP Code. Further, in terms of section 440M(4) of the 1973 Act, any person who suffered damages could claim such damages from any person who caused such damages. However, these were regarded inadequate and hence the 2008 Act made significant changes.[127] Due to the concerns raised about the efficacy of the enforcement measures in the 1973 Act,

---

120 *See* General Principles of the UK City Code.

121 The principles are also followed in the European Union as required by the EU Takeover Directive. Some of the principles are also applied in Australia. *See* section 602 of the Australian Corporations Act 2001 dealing with the Eggleston Principles. Some of the principles are similar to the general principles in the UK City Code.

122 Harald Baum, *Takeover Law in the EU and Germany: Comparative Analysis of a Regulatory Model*, 3 University of Tokyo Journal of Law and Politics 60 (2006).

123 Section 158(b)(i) of the 2008 Act.

124 *See* DTI Guidelines, at 43.

125 The enforcement measures under the 1973 Act were contained in sections 440L and 440M.

126 *See* DTI Guidelines, at 46.

127 *See Id.* at 42.

the 2008 Act effected a number of changes and additional remedies. In terms of section 119(4) of the Act, the TRP may request filing of documents for approval; receive complaints; conduct investigations; and issue compliance notices in cases on non-compliance. In addition, section 119(5) provides that in order to ensure compliance, the TRP where required, may: prohibit or require any action by a person; or order a person to divest of an acquired asset; or account for profits. Section 440M of the 2008 Act had similar requirements, but the difference is that the TRP may also issue a compliance notice before approaching the courts.[128] Section 121 also specifically provides that parties must not enter into such transaction unless they do so in accordance with the general requirements of the Act and TRP regulations. The compliance notice is similar to the compliance rulings that may be issued by the United Kingdom Panel on Takeovers and Mergers in section 10(d) of the United Kingdom City Code.[129] The enforcement provisions of the 2008 Act are set out in Chapter 7, as read with the regulations in Chapter 7 of the Companies Regulations 2011 These provisions provide detailed steps and procedures in order to enforce compliance with the Act and the regulations. In terms of section 168, any person may lodge a complaint with the TRP. The TRP in its discretion, may refer the matter to the Companies Tribunal in cases where it believes that the matter falls within that body's powers;[130] may refer the matter to another entity for resolution;[131] may appoint an inspector or investigator to investigate the complaint.[132] On conclusion of the investigation, TRP may among others, excuse the person against whom a complaint has been raised;[133] refer the matter to the National Prosecuting Authority[134] or other authority when it believes that an offence has been committed;[135] issue a notice of non-referral to the complainant;[136] initiate legal proceedings in the name of the complainant in appropriate cases,[137] or issue a compliance notice.[138] The TRP may also publish the result on any investigation.[139] Where a matter has been referred by the TRP

---

128 Sections 119(5)(b) and 171 of the 2008 Act read with section 170 of the 2008 Act.

129 *See* United Kingdom City Code 2016.

130 Section 169 of the 2008 Act.

131 *Id.* secs. 156 and 169.

132 *Id.* sec. 209.

133 *Id.* sec. 170(1)(a).

134 *Id.* sec. 170(1)(f).

135 *Id.* sec. 170(1).

136 *Id.*

137 *Id.* secs. 157(2) and 170(1)(e).

138 *Id.* sec. 171(1).

139 *Id.* sec. 170(2).

to the Takeover Special Committee for its decision or hearing, the Takeover Special Committee may issue a compliance notice in terms of section 171. Such a compliance notice may require a person to restore the assets to a company or to any other person, or cease or correct or reverse any action that resulted in contravention of the Act. A person who has been issued with such a notice may object in terms of section 172 and follow a procedure set out therein, including making representations.[140] In terms of section 172(4), a decision by the Takeover Special Committee is binding subject to a right of review or appeal to a court.

The compliance notice issued by the TRP remains in force until it has been set aside by the Takeover Special Committee, if it was issued by the Executive Director, and in the case of a compliance notice issued by the Takeover Special Committee, until it has been set aside by a court.[141] The Executive Director may issue a compliance certificate once compliance has been achieved.[142] When a compliance notice is issued to a person, a copy of such a notice must also be sent to the licensing authority that granted the license authorising that person to conduct business.[143] It appears that this provision is intended to ensure that licensing authorities are aware of the conduct of licensees. This provision may deter would-be transgressors from contravening the Act as it may have a negative effect on the conditions of their license. In terms of section 171(7), failure to comply with a compliance notice issued may result in a person being fined up to 10 percent of annual turnover by a court on application by the TRP. Non-compliance may also be referred to the National Prosecuting Authority for prosecution as an offence. In addition, to offences which specifically relate to failure to comply with mergers and acquisitions provisions, a number of sections are aimed at ensuring that the TRP is able to perform its functions and investigate transgressions without being obstructed by other parties. Offences are created in terms of a number of sections to assist in compliance. These sections include; section 213 relating to breach of confidence, section 214 dealing with the making of false statements, reckless conduct and non-compliance, and section 215 relating to any actions intended to hinder the TRP in administering the Act. Commission of such offences may result in a prosecution and on conviction by a court; such a person may be imprisoned for a period of 12 months in respect of convictions for offences in terms of any other sections. However, the period of imprisonment for convictions for any offences in terms of sections 213 and 214 is 10 years or a fine or both. It is suggested that the legislature considers these offences to be serious; hence the penalties. However, a person may not be subject to both an administrative fine and an imprisonment.[144]

---

140 Sections 172(1) and 172(2) of the 2008 Act.

141 *Id.* sec. 171(5).

142 *Id.* sec. 171(6).

143 *Id.* sec. 171(3).

144 *Id.* sec. 171(7).

In terms of section 218 of the Act, a person may have a civil action against any person for loss or damage suffered, as a result of any contravention by such a person of any provision of the new Act. This section is similar to section 440M(4) of the 1973 Act, in terms of which persons who suffered damages could claim damages against the person who caused them such damages. The TRP may also apply to the court to declare a director to be a delinquent or under probation in certain circumstances,[145] for instance where the director has been acting as a director contrary to the provisions of section 69, due to the disqualifications in that section, or has abused his position as director.[146]

Finally, in order to assist and strengthen investigation into alleged non-compliance with the provisions of the new Act, section 159(4) offers whistle-blowers protection from any civil or criminal liability for disclosures made subject to certain safeguards.

In terms of section 119(6), the TRP may also wholly or partially exempt application of any affected transaction or offer from application of Part B, Part C of Chapter 5 of the Act and the Takeover Regulations where there is no reasonable potential for prejudicing the interests of any party to the transaction,[147] the cost of enforcing compliance will be disproportionate to the transaction[148] or where exemption is reasonable and justifiable in the circumstances, taking into consideration the principles and purposes of the TRP regulations.[149] This exemption is similar to that provided in terms of Rule 34 of the old SRP Code that was thought to provide broader grounds for exemption.[150] However, it appears that the ability of the TRP to grant exemptions in terms of this section is circumscribed due to the factors, which the TRP must consider in granting the exemption in the section. It has been suggested that section 119(6)(c) could be interpreted in such a way that it affords broad grounds for exemption, provided that the tests of reasonableness and justice can be met.[151] Finally, in terms section 6, the TRP may apply to a court to:

> declare any agreement, transaction, arrangement, resolution or any provision of a company's Memorandum of Incorporation or rules–

145 Section 162(3) of the 2008 Act.

146 *Id.* sec. 162(5).

147 *Id.* sec. 119(6)(a).

148 *Id.* sec. 119(6)(b).

149 *Id.* sec. 119(6)(c).

150 *See* rule 34 of the SRP Code, which provided in general terms that the Panel shall enjoy a general discretion to authorise, subject to such terms and conditions as it may prescribe, non-compliance with or departure from any requirement of the Code and to excuse or exonerate any party from failure to comply with any such requirement.

151 *See* section 119(6)(c) of the 2008 Act.

(a) to be primarily or substantially intended to defeat or reduce the effect of a prohibition or requirement established by or in terms of an unalterable provision of this Act; and

(b) void to the extent that it defeats or reduces the effect of a prohibition or requirement established by or in terms of an unalterable provision of this Act.

9. A Brief Overview of Some of the Disclosure Regulations for Mergers and Acquisitions

The Minister in consultation with the chairperson of the TRP may prescribe regulations in respect of affected transactions by notice in the Government Gazette.[152] This is similar to the 1973 Act where the SRP made rules and regulations that were then approved by the Minister and published in the Government Gazette.[153] The JSE Limited Listings requirements also deal with rules on M&As.[154] The promulgation of the 2008 Act resulted in the SRP Code being rewritten with a new name in the form of the Takeover Regulations instead of the SRP Code.[155] The TRP regulations in the main have incorporated most of the SRP Code provisions.[156] The TRP regulations also read more like formal regulations as compared to the SRP Code, which was drafted in a different style. The Takeover Regulations are found in Chapter 5 of the Companies Regulations 2011 (the Regulations). The regulations covers details on the practical procedures required to apply the 2008 Act, including general rules relating to negotiations,[157] announcements required,[158] duties and conduct of parties to affected transaction,[159] and procedures of the TRP.[160] The regulations also provides for the disclosures required during affected transactions and who is responsible for such disclosures. The regulations set out detailed requirements for disclosures in M&A documents to be considered by the shareholders. Some of the documents must be filed with the TRP and be approved by the TRP prior to being sent to shareholders.[161] The regulations among others provides for: time

152 Section 120 of the 2008 Act.

153 Section 440C of the 1973 Act.

154 Cassim & Yeats 2012, at 732.

155 Sections 120 and 223 of the 2008 Act.

156 *See* Chapter 5 of the Companies Regulations 2011 and the SRP Code published in terms of the 1973 Act.

157 *See* regulations 92 to 98 in the Companies Regulations 2011. *See also* Cassim & Yeats 2012, at 742.

158 *See* Takeover Regulations in part C of the Chapter 5 of the Companies Regulations 2011.

159 *See* Takeover Regulations in part D of the Chapter 5 of the Companies Regulations 2011.

160 *See* Takeover Regulations in part E of the Chapter 5 of the Companies Regulations 2011.

161 Regulation 117 of the Companies Regulations 2011.

period for publishing announcements about M&As and the relevant document; and how and when announcements and documents must be sent to shareholders. The regulations also set out which document must be available for shareholders to inspect during the course of an affected transaction or offer. The documents include annual financial statements, documents evidencing any valuations of property, and memoranda of incorporations.[162] It clear that practitioners structuring M&As and drafting the relevant documents under the 2008 Act need to be careful as failure to do so may result non-compliance with the M&A provisions. Under the 2008 Act, practitioners should consider the requirements of Act and those of the regulations. This is unlike the provisions of the 1973 Act where it was possible to comply with M&A requirements, by mainly referring to the SRP Code.[163] The 1973 Act in Chapter XVA merely provided a basis for regulating M&As. While the SRP Code provided comprehensive underlying principles of regulating M&As, it also had prohibitions, and the powers of the SRP in additions to those contained in the 1973 Act.[164]

Concluding Comments

Mergers and acquisitions raise numerous conflicts between different parties. Shareholders would prefer to sell their shares to the highest bidder, or may not prefer to sell at all, and yet may be forced to so; directors and management may feel threatened that their positions will no longer exist due to cost cutting from the new controller; Employees are also concerned about the possible downsizing and retrenchments. Therefore, it is not possible for legislation to completely cater for all these competing interests. However, a balancing of interests is required if the legislature is to achieve its stated objectives. Accordingly, from a merger and acquisition regulatory approach, TRP is required to implement the M&A provisions in line with the intention of the legislature to promote transparent, efficient and predictable company acquisitions and mergers as indicated in the preamble to the Act. The TRP is required to consider the objectives of the legislature when interpreting and applying the takeover provisions. The 2008 Act attempts to balance the conflicting interests of the various parties. A close scrutiny of the provisions shows that shareholder protection is provided in a number of ways. For example, minority shareholders are

---

162 Regulation 106 of the Companies Regulations 2011 requires certain documents to be available for inspection.

163 *See* the SRP Code. The SRP Code had detailed rules which contained all the general principles and the rule relating to prohibited conduct and disclosures. The fact that the 2008 Act separate obligations and detailed disclosures makes it imperative that both Chapter 5 of the 2008 Act and Chapter 5 of the Companies Regulations 2011 are consulted when undertaking M&As, whereas with the SRP Code practitioners could rely on for compliance the rules in the SRP Code with limited reference to Chapter XVA of the 1973 Act.

164 Chapter XVA of the 1973 Act and the SRP Code promulgated in terms of section 440C of the 1973 Act.

provided with protection by means of disclosures, appraisal rights and voting, among others. But, minority shareholders are also precluded from imposing their will on the majority.[165] For example, the will of the majority will be carried through when a fundamental transaction has been approved in accordance with the requirements of the Act.[166] Another example is that an acquirer may squeeze out the remaining minority shareholders where a majority of 90 percent have accepted its offer.[167] Finally, a dissenting shareholder may have no further rights once they send a demand to be paid a fair value for their shares in cases of appraisal rights.[168]

In promoting efficient regulation of M&As, the legislature preferred specialised regulatory body such as the TRP in continuing to regulate M&As. In line with the objectives of the legislature, the TRP can ensure a speedy and effective enforcement. Simple and efficient enforcement measures are required because in some cases, non-compliance may be so minor that there is no need to approach the courts. In that situation, it is preferable that an administrative tribunal such as the TRP and Takeover Special Committee intervene for quicker in speedy resolution. This also avoids clogging the general public court system with private minor shareholder issues. Specialised tribunals are appropriate to resolves such matters as they are better qualified to handle such matters. Shareholder approval of fundamental transactions, appraisal rights and the relevant disclosures are some of the important protection for shareholders in terms of the 2008 Act. Shareholders are also entitled to court review in certain circumstances. The legislature has in the most retained the provisions of the 1973 Act in respect of regulating mergers and acquisitions, while at the same time effecting some improvements and additions. The M&A provisions seem to be in line with what was intended in the DTI Guidelines despite some problematic interpretations. The recently published proposed amendments in the Companies Amendment Bill will go a long way in resolving some of the interpretation and application problems of the 2008 Act. However, some of the regulations and provisions of the Act need to be improved, others need an amendment, for better interpretation and application.[169] In general, the regulations have been well received and are workable.[170] Further, scholars and practitioners have welcomed the new M&As provisions, and regard the provisions as an improvement on those of the 1973 Act.

---

165 *See* Davids et al. 2010, at 337–338.

166 *See* section 115 of the 2008 Act, dealing with voting approvals for fundamental transaction.

167 *See* section 124 of the 2008 Act, dealing with expropriations and squeeze outs.

168 *See Id.* sec. 164(9).

169 *See* regulation 102 of the Companies Regulations 2011 dealing with timelines. It appears that the regulation may be in conflict with the JSE Listings requirements in certain respects. It would be preferred if the timelines could be aligned with those of the JSE Listings requirements for efficiency.

170 *See* Latsky 2014, at 362 & 384.

In promulgating the merger and acquisitions in the 2008 Act, the legislature sought to ensure that South African company law is updated and be aligned with developments internationally, and also, considers the South African changing business landscape as a developing economy.[171] Increasing globalisation may lead to more cross border mergers and acquisitions as companies seek new markets for their products and, investors seek better returns for their capital. The simplified, clearer and efficient merger and acquisition provisions may encourage increased mergers and takeovers activity due to inward investment into South Africa when investors and market participants gain confidence in the South African corporate law. Based on the analysis of the M&A provisions in the 2008 Act, it is concluded that the South African merger and acquisition provisions are compatible with the other takeover regimes in other countries, despite some deficiencies.

References

Baum H. *Takeover Law in the EU and Germany: Comparative Analysis of a Regulatory Model*, 3 University of Tokyo Journal of Law and Politics 60 (2006).

Boardman N. *A Critical Analysis of the New South African Takeover Laws as Proposed Under the Companies Act 71 of 2008*, Acta Juridica 306 (2010).

Cassim M.F. *The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part 2)*, 20 South African Mercantile Law Journal 147 (2008).

Wainer H.E. *The New Companies Act: Peculiarities and Anomalies*, 126(4) South African Law Journal 806 (2009).

Information about the author

Madimetja Phakeng (Cape Town, South Africa) – The Cape Bar – Society of Advocates (40 Queen Victoria St., Cape Town City Centre, Cape Town, 8000, South Africa; e-mail: madimetjaphakeng@yahoo.com).

[171] DTI Guidelines, at 4.

JUSTICE IN THE CONTEMPORARY WORLD

OLGA PANKOVA,

Kutafin Moscow State Law University (MSAL) (Moscow, Russia)

YURI MIGACHEV,

Kutafin Moscow State Law University (MSAL) (Moscow, Russia)

https://doi.org/10.21684/2412-2343-2020-7-1- 119-147

The article reveals the essential characteristics of justice as a specific type of state activity and identifies the main signs of justice that distinguish it from other types of state activity as well as from other types of judicial activity. The article also analyzes the categories of "justice" and "judicial power" and defines the essence of judicial control in the context of its relationship with justice. As a result of the study, the authors come to the conclusion that the most important and promising approach is to consider justice to be one of the characteristics organically inherent in the judiciary or as a related phenomenon. In this sense, justice is defined as state activity within the framework of which the judicial power is exercised. The judiciary is, accordingly, the essential expression of the functional purpose and competent certainty of justice. Turning to the issue of the signs of justice, the authors touch upon the problem of its wide and narrow understanding arising in connection with the increasing role of mediation, conciliation and arbitration as alternative forms of resolving legal conflicts, as well as in connection with vesting certain state bodies with jurisdictional powers. They come to the conclusion that, unlike in a number of foreign countries, justice in Russia can be administered only by state courts. The study of the subject area of justice related to the situation of legal conflict is also of considerable interest. In this context, the analysis of the concept of "legal conflict" and the proposed differentiation of such conflicts into types with the subsequent study of each of them is quite justified. Having studied justice as a category, which makes it possible to reveal the content and legal essence of this type of state activity, the authors define this concept in one universal definition.

Keywords: justice; judicial authority; legal conflict; fairness; jurisdiction; judicial control.

Recommended citation: Olga Pankova & Yuri Migachev, *Justice in the Contemporary World*, 7(1) BRICS Law Journal 119–147 (2020).

Table of Contents

Introduction

The main goal of legal and judicial reforms in Russia and abroad is to create an effective state. In such a state an important role is undoubtedly played by justice designed to ensure the sustainability of the judiciary and the adequate needs of society with a focus on the individual person, with his or her rights and freedoms, and democracy, the separation of powers and parliamentarism are recognized as basic political values.

Unfortunately, evaluating the results of the implementation of the constitutional ideas, principles and norms underpinning the contemporary model of justice in Russia, we have to state that only a virtual illusion of its effectiveness and full-fledged provision of human rights and freedoms has been formed so far. In fact, we are far from meeting the set goals – the gap between the ideal of justice and its practical implementation is very tangible. It seems that the more the judicial power and the judicial system are reformed, the more public complaints and societal distrust they cause. Numerous negative statements about justice in the mass media sometimes use the most unexpected combinations of the notion, such as "rusted justice" and "tariff for justice."

However, this situation is not unique to Russia. Some foreign countries are also concerned about the current state of justice.

For example, the United States recognizes the inability of its system of justice to preserve the social fabric that binds the nation together. The state has invested

enormous amounts of human and monetary capital in building the system of justice in the country. However, there is great doubt that this system can achieve the desired results, namely a reduced crime rate and an increased respect for the law.[1] As a result, every element of the U.S. justice system is questioned: from how it is organized to the techniques used to prevent crime, to the very philosophy upon which it is based.

Therefore, when considering the prospects for the development and further implementation of judicial reform by the Russian state, it is exceedingly important to explain the idea of the usefulness, reasonableness and practical importance of special scientific studies devoted to the analysis of theoretical problems of justice, as this is an essential generator of not only constitutional legal ideology and culture, but also individual, social, professional constitutional ideology. This subject matter has great research potential and allows moving closer to the ideal national model of "good justice" which will function in a constitutional mode ensuring real protection of the foundations of the constitutional system and human and civil rights and freedoms.

Moreover, the concept of "good justice" for citizens may differ from the concept of "good justice" for the judges themselves and for court staff. Thus, according to a survey conducted by Swiss researchers among judicial governors and judges of Switzerland, the indicators of "good justice" for judges are: (1) speed of justice; (2) focus on the interests of citizens; (3) openness; (4) independence from any external influence and political pressure; (5) transparency; (6) humanism; (7) proximity to people; and (8) individual approach.

For judicial governors, however, the criteria of humanity and humanism are not so significant. According to them, indicators of "good justice" are: (1) fairness; (2) accountability of justice to society; and (3) reliability.[2]

In any case, the model of "good justice" should reflect not only the legal and social reality, but also the historically established understanding of this legal phenomenon formed under the influence of objective factors of the national state and legal development, as well as traditions determining the mentality of the population of a country, their attitudes towards the law, the state and public institutions. At the same time, the principles of justice, based on three fundamental concepts, remain unchanged: do not offend anyone, give a person his due and do not take away from a person what belongs to him.[3]

However, coming to such a conclusion is not enough to form a correct understanding of justice. It is necessary to take into account that this concept is multidimensional and theoretically inexhaustible. The versatility of this legal category

---

1 Barbara Jordan, *Justice*, 5 Texas Journal of Women and the Law 175 (1996).

2 Yves Emery & Lorenzo Gennaro De Santis, *What Kind of Justice Today? Expectations of "Good Justice", Convergences and Divergences Between Managerial and Judicial Actors and How They Fit Within Management-Oriented Values*, 6(1) International Journal for Court Administration 63, 68–70 (2014).

3 Dorr Kuizema, *Justice*, 12 Central Law Journal 208 (2012).

is reflected in the various characteristics of justice. For example, there is conciliatory justice and restorative justice which, as is well known, go far beyond the bounds of judicial power and legal proceedings although they remain under the control of the court. Some concepts, having nothing to do with the implementation of state power, or rather its judicial branch, are sometimes associated with the definition of "justice." We can cite as an example preventative (preventive) justice carried out by a notary, or alternative justice carried out by arbitration courts.

However, the concept of "justice" in a strictly legal meaning is different – it is considered to be a legal phenomenon that is a complex system having specific goals and objectives, functions, forms of their implementation, structure and regulation that correspond to a certain stage of a society's development. And the more developed a society is, the more complicated the mechanism of the implementation of justice is, the more multidimensional this concept becomes. In this connection it seems natural that with the development of society and its state institutions there will appear a more complex judicial system, structure of the judiciary and procedural rules the courts are guided by. And the judiciary, consisting of people directly administering justice, will be different – it will be better.

1. Justice as a Multidimensional and Meaningful Category

As one eminent jurist put it, justice is the main interest of man on earth. In foreign legal doctrine justice is often defined as something incidental to other ends of our existence that implies justness, right and adjusted relations of man.[4]

In Russia, the formation of scientific views of justice in its modern sense was greatly influenced by the adoption in 1991 of the Concept of Judicial Reform designed to create a powerful and independent judiciary based on the constitutional principle of separation of powers, and then in 1993 by the Constitution of the Russian Federation which proclaimed the idea of forming a legal state and declared justice as one of the most important means of protecting the rights and freedoms of man and citizen. This gave rise to the fruitful theoretical work of representatives of legal science motivating them to define new approaches to the tasks and content of justice. In recent years, significant steps in this direction have been made both in terms of the general theory of law, and in terms of special legal sciences, first of all, constitutional law, criminal procedural law and civil procedural law.

Nevertheless, the general concept of justice is still debatable. Despite the active use of the term "justice" in Russian regulatory legal acts, there is no definition of the term in the acts. For example, Article 118 of the Constitution of the Russian Federation contains only one short formula:

> Justice in the Russian Federation shall be administered only by court.

[4] Dorr Kuizema, *Justice*, 12 Central Law Journal 208 (2012).

However, in order to understand the legal meaning of the term, it is necessary to analyze a whole series of constitutional norms that reinforce the basic principles of judicial organization and legal proceedings. It should be noted that this approach to the definition of justice is characteristic not only of the Constitution of Russia. It is found in the constitutions of many foreign states which neither mention nor regulate justice issues, but contain rules relating to the organization of the court system, the procedure for appointing or electing judges, legal proceedings and particular procedural rights of an individual. Thus, in the German Constitution of 1949 there is a special section called "Justice" (*Rechtsprechung*) (Sec. IX). However, the concept of justice itself is not defined and is not actually used there, and the focus is on the judiciary (*rechtsprechende*), which refers to the court system consisting of the Federal Constitutional Court, federal courts, land courts (Arts. 92–94) and specialized courts in the field of general, administrative, financial, labor and social justice (Art. 95). The section also deals with guarantees of impartial and proper administration of justice and mentions such of them as the independence of judges and their subordination only to the law (Art. 97). It also reveals the main elements of justice in the context of the principles of justice and the general concepts of the procedure. In particular, the articles of this section contain provisions on the prohibition of the death penalty (Art. 102), the inadmissibility of double punishment for the same act (Art. 103), the necessity of restricting freedom only on the basis of law and the maximum periods of pre-charge detention (Art. 104). The section proclaims the equality of all German residents before the law and provides their right to judicial protection, including against the arbitrary exercise of state authority, the right to be heard in court and the presumption of innocence.

Unlike the Constitution of Germany, the constitutions of many other European countries do not single out the issues of justice in a special section, rather they have a section on judicial authority. For example, Section VI of the Constitution of Spain of 1978[5] is called "Judicial Power" and is devoted to justice and judicial power. It stipulates that the people are the bearer of justice, and the judicial power is exercised on behalf of the King (part 1 of Art. 117). It also establishes that judges are independent, irremovable, accountable and subject only to the law (part 2 of Art. 117). The further depiction of the judiciary is given from the point of view of the descriptive characteristics of the main principles of the judiciary, the governing body of the judiciary (General Council of the Judiciary) and the order of its formation, the legal status of the Supreme Court as the highest court, the relationship of the prosecutor's office with the judicial authorities and the requirements with respect to the judges.

Section VIII "The Judicial Power" (*l'a utorité judiciaire*) of the Constitution of France of 1958 does not mention justice at all and the main focus is on state support of this activity, the judiciary, which is proclaimed as a guardian of personal freedom (Art. 66).

---

[5] Constitution of Spain (1978) (Jan. 16, 2019), available at http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf.

According to Article 64 of the French Constitution, the President of the Republic is the guarantor of the independence of the judiciary and heads the highest judicial authority (the Supreme Council of Magistracy), which includes the Minister of Justice (as his deputy) and nine members from among eminent scholars in the field of law (chosen by the President), one representative from the offices of the Senate and the National Assembly, as well as from the Council of State of France (Art. 65). In general, only three articles of the French Constitution are devoted to the judiciary.

Not much more attention is paid to these issues in the Norwegian Constitution of 1814.[6] Section D "On Judicial Power" (*dømmendemakt*) includes five articles. This section starts with a reference to a specialized judicial body called the State Court (Impeachment Court), which deals exclusively with cases initiated by the Odelsting (one of the departments of the legislative body Storting) against members of the State Council, the Supreme Court or the Storting for committing crimes during the performance of their official duties (Art. 86). Subsequent articles of this section define the basis of the legal status of the Supreme Court of Norway as the highest court. The most important provisions on justice in the context of legal proceedings are included in Section E "General Regulations" of the Constitution of Norway. The section contains the rule that no one can be convicted otherwise than by law or punished otherwise than by a court; torture during interrogation can never take place (para. 96).

As we see, in the Basic Laws of France and Norway there are actually no norms defining the general principles of legal proceedings, the structure and activities of courts, the legal status of judges and the relationship of the court and other state bodies.

In comparison with the constitutions of the states mentioned above, the Constitution of Turkey of 1982[7] differs positively owing to the fact that it contains the most informative Section 3 "Judicial Power" (*yargı*). Among the fundamental factors of justice it specifies the independence of the courts, the material security of judges, professionalism, trial publicity and the validity of court decisions. And yet the vast majority of the rules in this section are devoted to the judicial structure. It regulates in detail the status of the higher courts and, above all, the Constitutional Court, its structure, functions and powers (Arts. 146–153). As for the other issues of justice, in particular, the rules of the court activities and judicial proceedings, they are not reflected in the Turkish Constitution and are regulated by special laws.

The Constitution of China of 1982 is of particular interest from the point of view of the legal regulation of justice. China rejects the principle of separation of powers, and all the power in the state belongs to the parliament elected by the people on the basis of democratic principles. For all that, however, Article 126 of the Chinese Constitution stipulates that the people's courts shall administer justice independently, without

[6] Kongeriket Norges Grunnlov (Jan. 16, 2019), available at http://grunnloven.lovdata.no.

[7] Türkiye Cumhuriyeti Anayasası (Jan. 16, 2019), available at http://www.anayasa.gen.tr/1982ay.htm.

interference by administrative bodies, public organizations or individuals. This is the only article of the Constitution that mentions justice. In the other articles of the Constitution devoted to the structure and activities of the people's courts, nothing is said about justice or the judiciary, and these terms are not used. However, neither this nor any other section of the Chinese Constitution contains norms that would determine the procedural principles of justice. The only exception is the principle of open justice provided for in Article 125 of the Constitution.

The U.S. Constitution of 1787[8] demonstrates a different approach to the issues of justice. It does not have a special section on justice and/or the judiciary. However, it does have rules relating to the characteristics of justice. Thus, Section 2 of Article 3 of the Constitution defines the subject area of justice which includes all cases based on law and equity. The same article provides guarantees for the impartial and correct administration of justice including the irrevocability of judges and their material security. A significant part of the U.S. Constitution is devoted to the rules of the basic principles of legal proceedings, such as: (1) trial of all crimes by jury; (2) the possibility of jury trial in civil cases when the amount sought is greater than $20; (3) the inadmissibility of double punishment for the same offense; (4) the right not to testify against oneself; and (5) the inadmissibility of imprisonment without due process.

Thus, in the constitutions of countries both of the Romano-Germanic and of the Anglo-Saxon legal systems justice is viewed as something obvious and not entailing a separate constitutional regulation.

Nevertheless, the absence of a legislative definition of justice in the constitution and regulatory legal acts of Russia and other countries is compensated for by a huge amount of formulations of this concept in scientific studies.

At the same time, the main approaches to the concept of justice formed in Russian legal doctrine differ significantly from the understanding of this legal category in other countries. In foreign legal systems, the concept of "justice" is usually considered from two aspects: social and legal. It is believed that social justice refers to the distribution of benefits and burdens in society by social institutions. Legal justice, however, concern**s** the creation of legal norms and their enforcement through sanctions that include the compensation of injury or the imposition of punishment.[9] But in this latter sense justice is not seen as retribution for evil, nor as punishment, but as the subordination of the conduct of the individual or the practice of his life to the principles of law. For example, D. Kuizema notes that justice is something that is universally recognized and must be administered in the life circumstances in which a person has to live.[10] U.J. Pak also points out that from the perspective of the right, justice must be considered to be taking the correct action.

---

[8] Constitution of the United States (Jan. 16, 2019), available at http://constitutionus.com.

[9] Gray Cavender, *Justice, Sanctioning and the Justice Model*, 22(2) Criminology 203 (1984).

[10] Kuizema 2012.

Here, justice is accompanied by the duty to obey the general rules or procedures guiding our actions.[11]

It is emphasized that if justice is to be done among men, the right rules for just relations must be found and administered. Therefore, the concept of justice is most often associated with the concept of justness. These concepts are even considered to be identical. Moreover, we encounter the statement that justice is law and law is justice. In this sense, scholars associate the concepts of "law" and "justice" with the activities of the courts. For example, R. Pound in 1912 drew attention to the fact that courts and law exist to administer justice.[12] Obviously, in this case they are talking about legal justice.

At the same time, it is recognized that the term "justice" is associated not just with the law. It may also refer to various forms or manifestations of justice (for example, economic justice, moral justice, political justice, etc.). Thus, justice itself in the broad sense of the word can be thought of apart from the activities of courts.[13] Justice in its encompassing sense is sometimes also translated as "righteousness," while "law" frequently retains a more strictly legal or forensic sense.

Hence, in foreign legal doctrine the concept of justice is interpreted quite broadly and correlates with such concepts as law and justice but is not identified with court activities. Moreover, the activity approach to the characterization of justice is not used here at all. Therefore, there is a gap between the theory of justice and the judicial institution. This gap could be overcome by the concept of judicial justice that fits the judicial institution.

There is a different interpretation of the concept of justice in Russian jurisprudence. A review of the domestic legal literature of the last decade allows us to identify five main approaches to the concept of justice.

Firstly, justice is defined as one of the forms of public administration in its broad sense, which is "governance of a society carried out by the state as a whole through all three branches of government."

Secondly, from the standpoint of "legism," justice is viewed as an independent, objectively necessary type of state activity.

Thirdly, justice is analyzed in the context of judicial law which presupposes the integration of judicial activities regulated by criminal, civil and other branches of procedural law in one concept of "justice."

Fourthly, justice is studied in the context of its relationship with the judiciary.

And finally, justice is treated as one of the types of services provided by the state.

---

[11] Un Jong Pak, *Judicial Justice: From Procedural Justice to Communicative Justice*, 16(1) Journal of Korean Law 147, 150 (2016).

[12] Roscoe Pound, *Social Justice and Legal Justice*, 75(20) Central Law Journal 455 (1912).

[13] Lourens M. du Plessis, *Conceptualising "Law" and "Justice" (1): "Law", "Justice" and "Legal Justice" (Theoretical Reflections)*, 2 Stellenbosch Law Review 279 (1992).

Undoubtedly, each of these approaches brings a certain amount of clarity to the issue of the essence of justice and emphasizes certain aspects of this phenomenon. At the same time, the most important and promising approach is to consider justice to be one of the characteristics inherent in the judiciary or to be a related phenomenon.

Research on the judiciary within the framework of the theory of law, constitutional law, criminal procedural law and civil procedural law had a significant influence on the formation of scientific thought in this field in Russia. The range of opinions and definitions of justice in them is quite wide and diverse. Thus, recognizing justice and the judiciary as close but not identical concepts, many researchers assume that justice is a function of the judiciary, and the latter is based on the idea of resolving social contradictions and achieving social compromise based on law.

There is also an opinion that justice is a form of realization of the judicial power. In particular, according to one point of view, the only function of the judiciary as a branch of state power is judicial protection of the rights and freedoms of a person and a citizen, and justice is a form of realization of judicial authority.

Another point of view states that justice should be viewed rather not as a form, but as the legal content of the judiciary.

Some scholars believe that in its substantive purpose the judiciary is a specific form of state activity institutionalized as a justice system. Thus, the concepts of "justice" and "judicial authority" can be considered to be equivalent.

It is obvious that an adequate interpretation of justice in relation to the judiciary is hampered by an insufficient level of theoretical elaboration and the relative novelty of the very concept of "judicial authority," which first appeared only in the Declaration of 12 June 1990 "On State Sovereignty of the RSFSR," as well as by the lack of clarity as to what should be understood by its functions and forms of implementation.

Without going into a detailed study of this issue, we would like to cite a successful (in our opinion) definition of the functions of the judiciary formulated by S. Zagainova. She proposes to understand the main activities of judicial bodies as the functions of the judiciary:

> This is the range of activities, the duties that the state assigns to this power.[14]

Reasoning in this way, Zagainova argues for the viewpoint that justice is the main function of the judiciary, and she gives a thorough critical assessment of the position of those scholars who put judicial control beyond the bounds of justice, regarding it as an independent function of the judiciary. It is interesting to mention that Zagainova expresses the idea of justice as an external function of the judiciary together with its intra-system function – the administration of justice.

---

[14] *Загайнова С.К.* Судебные акты в механизме реализации судебной власти в гражданском и арбитражном процессе [Svetlana K. Zagainova, *Judicial Acts in the Mechanism of Implementation of Judicial Power in Civil and Arbitration Proceedings*] 34 (Moscow: Wolters Kluwer, 2008).

One may agree or disagree with the classification of the functions of the judiciary proposed in this research, but one thing, in our opinion, is indisputable: justice is its most important function, and through this function the judiciary implements its mission in society. Thus, the judicial power is exercised through justice and is the essential expression of its functional purpose and competent certainty.

As for one more issue, touched upon by Zagainova and connected with the relationship between justice and the other functions of the judiciary, as well as with considering judicial control to be one of them, the answer is not so obvious. In contemporary Russian legal doctrine two diametrically opposed approaches to this issue have been formed. Some scholars believe that the function of the administration of justice is "the dominant one, but not the only function of the judiciary," and put judicial control beyond the bounds of justice. Others believe that the judicial power is exercised only through the administration of justice and that all the activities of the court, carried out in accordance with the legal procedure established by law, are nothing more than justice which includes judicial control. However, all the authors who have studied both general theoretical and specific issues of regulation or practical implementation of judicial control unanimously distinguish the following three types: constitutional or judicial constitutional control; judicial control over the legality of actions (inaction) of public authorities exercised by courts of general jurisdiction and arbitration courts; and judicial control exercised at the pre-trial stages of criminal proceedings in the manner prescribed by the Code of Criminal Procedure of the Russian Federation, including cases of judicial authorization of preventive measures or other measures of criminal procedural coercion, as well as investigative actions restricting constitutional rights and freedoms of citizens. In addition, within the framework of the contemporary model of legal regulation, some authors single out preliminary judicial control exercised by courts of general jurisdiction in administrative proceedings in cases of judicial authorization of administrative measures aiming at the restriction of the rights, freedoms and legitimate interests of individuals.[15]

At the same time, the opinions of scholars differ when it comes to the essence of universally recognized types of judicial control in relation to justice. For example, some scholars, when speaking of the activities of the court in criminal proceedings, claim that if such an activity is connected with a dispute or a conflict, then it is a question of justice. But if there is no conflict, and there is only court activity to render the decisions of the investigating authorities or the prosecutor valid through delivering an appropriate court judgment, then this type of judicial activity does not apply to justice.

---

[15] *Зеленцов А.Б.* Судебное санкционирование как институт административно-процессуального права // Административное право и процесс. 2017. № 3. С. 57–63 [Alexander B. Zelentsov, *Judicial Authorization as an Institute of Administrative Procedure Law*, 3 Administrative Law and Procedure 57 (2017)].

One more viewpoint is also worth mentioning. Analyzing the problems of judicial control at the pre-trial stages of criminal proceedings, Zagainova considers it to be only an element of justice. This position is based on the fact that in this situation the judge does not resolve the case as a whole. There are other approaches to the point: some authors call judicial control a special kind of justice, others an integral part of justice, and a number of scholars consider it to be a form of justice or one of the tasks of justice.

Many administrative law scholars dealing with the issues of administrative justice adhere to the same position. In their research, judicial control exercised in the course of administrative proceedings of administrative cases is often defined as administrative justice,[16] which means that it is identified with it.

In modern Russian literature there is another proposition according to which justice is a function of the judiciary and judicial control is its authority, a type or a form of realization.

At the same time, it is obvious that separation of judicial control from justice and attributing it to an independent function of the judiciary or to a special form of its implementation is, in no way, justified. The artificial opposition of these legal phenomena is devoid of both theoretical and legal grounds. At the same time it would be incorrect to speak of the identity of these concepts, as well as to assert that judicial control is one of the tasks of justice or a form of its implementation, as some authors believe.

As we see it, justice absorbs judicial control, which is included in its content and is its particular manifestation. For example, constitutional control exercised by the Constitutional Court of the Russian Federation and constitutional (statutory) courts of the constituent entities of the Russian Federation, as well as judicial control over the legality of actions (inaction) and decisions of public authorities, exercised by courts of general jurisdiction and arbitration courts, are the contents of constitutional and administrative justice, respectively, which are implemented in the form of constitutional and administrative proceedings.

The same meaning inherent in the concept of "justice" in the context of its relationship with judicial control is applicable to criminal proceedings. Thus, we are convinced that the court, when considering cases related to the exercise of judicial control, implements exclusively the function of administering justice, but does not engage in any other procedural activity in which an independent function of the judiciary, distinct from justice, is manifested.

---

[16] *See Зеленцов А.Б.* Административное правосудие: проблема теоретического определения понятия // Вестник Российского университета дружбы народов. Серия: Юридические науки. 2002. № 2. С. 36–44 [Alexander B. Zelentsov, *Administrative Justice: the Problem of the Theoretical Definition of the Concept*, 2 Bulletin of the Peoples' Friendship University of Russia. Series: Legal Sciences 36 (2002)].

2. Essential Characteristics of Justice as a Type of State Activity

Analysis of the issue of the relationship of justice with the judiciary and judicial control highlights only a few facets of this legal phenomenon. Therefore, adherents of various scientific concepts gradually come to the idea of the need for a common understanding of justice, revealing it, on the one hand, as a function of the judiciary and, on the other hand, as a type of state activity in which the judicial power is actually implemented.

In general, the study of justice as a type of state activity has a solid tradition in domestic jurisprudence. This approach to the understanding of justice was formed in pre-revolutionary Russia and was most characteristic of the Soviet period. Nowadays, the definition of justice through the activities of the courts is also widespread in the legal literature. At the same time, we can clearly see two trends in the writings of modern scientists.

The first trend is widely represented in the textbooks on the structure and activities of law enforcement agencies and presumes that justice is understood as a type of law enforcement activity of the court in order to ensure legality. The second trend is to consider justice as a type of court enforcement.

It is necessary to emphasize that the discussion of this topic reflects the specifics of the Russian concept of justice. Foreign legal doctrine did not attempt to consider this concept from the perspective of court activities, nor did it raise the question of whether such activities are law enforcement. And this is not surprising. According to the general opinion of foreign scholars, the court is not a law enforcement body, and law enforcement is carried out by the police.

As for Russian researchers, the decision as to whether justice belongs to law enforcement activity depends on the meaning which certain authors put in the concept of its functions.

At present, it is firmly established that the functions of justice are derived from the functions of the state and law, and their content is based on the functions of law and is determined by the purpose (tasks) of the judiciary. The functions of justice are considered to be the main directions of its activity, a set of procedural and organizational duties to be performed by special subjects, carriers of the judiciary, to perform the tasks assigned to them and to achieve their goals.

Thus, the functions of justice do not coincide with its goals. The differences between them were very clearly showed by researcher A. Tsikhotsky who wrote that the goals of justice characterize the requirements for the court's activities, and the function is only its social role determined by the existence of law, legislation and the law enforcement function of the state.[17] In other words, the category "goal" answers

[17] *Цихоцкий А.В.* Теоретические проблемы эффективности правосудия по гражданским делам [Anatoly V. Tsikhotsky, *Theoretical Problems of the Effectiveness of Justice in Civil Cases*] 62 (Novosibirsk: Nauka, 1997).

the question of what the judicial activity is aimed at, and the category "function" the question of the extent to which it is carried out.

The ultimate goal of justice is quite broad – it is the protection of the rights and freedoms of a person and a citizen. This goal of justice corresponds to the human rights function of the state, which is traditionally distinguished together with its law enforcement function. Therefore, if we correlate the goal of justice with this function, we can conclude that justice performs a crucial function – human rights function – which is based on the law enforcement activity of the court aimed at protecting and restoring violated rights. And this is where justice differs from law enforcement, which is based on the protection of law and order.

Thus, the human rights activities of the court are not identical to the special law enforcement function, which is associated with the identification and elimination of offenses. Moreover, under the current regulation in Russia, the assignment of the court to law enforcement agencies does not comply with the law, by virtue of which these bodies are an integral part of the executive branch. That is why we cannot obviously recognize the definition of justice as a type of law enforcement activity of the state as an admissible one. The peculiarity of the activities carried out by the court is so great that it does not fit into the traditional concept of a law enforcement function, which the court performs only indirectly. A different approach would contradict the modern concept of the judiciary as a tool not only for punishing offenses, but also for protecting and restoring human rights, including those violated by the state itself, its bodies and officials.

The latter statement leads to the definition of justice as a variety of law enforcement activities of the court, as a result of which the conflict of certain legal relationships is resolved, which, in its turn, results in a regulatory impact on the existing legal order, protection or restoration of the right and, ultimately, implementation of constitutional provisions on human rights and freedoms.

Such a statement, as a matter of principle, is true. But it still needs one clarification. Justice, by its nature, is not just law enforcement, but jurisdictional activity. It should be mentioned that jurisdiction (from the Latin *jurisdictio* – legal proceedings, court hearing) is traditionally understood as the authority of judges and courts only, involving the trial and resolution of cases within their competence and the enforcement of decisions taken, since the literal translation of *jurisdictio* means "legal speaking," the act of "proclaiming the right by an authority empowered to judge." Therefore, throughout the world, jurisdiction is traditionally identified with the administration of justice. However, in modern domestic doctrine jurisdiction is interpreted more widely than justice and refers to any activity of the state and non-state bodies in the application of the law. In this respect, the idea expressed by one of the researchers is quite significant. Professor S. Alekseev claims that justice is the highest jurisdictional activity carried out by the courts, and they are the only authorities in the state empowered by law "to judge the law" in relation to a particular

legal matter, that is, to determine the legality or illegality of facts and make legally final decisions on them.[18] The statement of another Russian researcher, D. Tumanov, who called justice the king of law enforcement, is worth mentioning as well.[19]

Thus, speaking of this concept in its most general sense, we can note that justice is the law-enforcement, jurisdictional litigation activity of the court that restores and protects violated legal interests and rights. Is it possible, however, to consider that this definition reflects all the essential characteristics of justice? Obviously, it is not, because it does not disclose the scope and content of this concept.

As a matter of fact, we have already touched upon the issue of the content of justice when we talked about judicial control in the context of its relationship with justice and the judiciary.

This, however, does not cover the essence of the problem. As the analysis of the legal literature shows, the viewpoints of scientists are polarized. Some consider justice to be all the court activities carried out in accordance with the procedure established by law. Others believe that when considering certain categories of cases (for example, civil cases in summary proceedings, without a court hearing), the court exercises not justice, but a certain judicial function similar to notary activity, or a judicial management (administrative) function. It should still be recognized that nowadays more and more scientists exclude the possibility of attributing some court proceedings to the mechanism of administration of justice, and other court proceedings only to the ordinary procedural activities of the court, believing that it undermines the very essence of the judiciary.

This, in our opinion, is an answer to the first of the above questions – the question of the content of justice which, in its most general form, should be recognized as the consideration by the court of all cases requiring resolution on the basis of the criteria of legality and fairness.

The answer to the second question – regarding the scope of the concept of justice – is connected with the clarification of the issue of which kind of court activity constitutes justice itself, at what procedural moment it begins and when it ends.

Despite the fact that this issue has attracted the attention of many researchers for a long time, different authors have different views on it. In particular, a number of scholars continue to identify justice with the court activity on consideration and resolution of cases only in the first instance and believe that the function of justice is not carried out at subsequent stages of the proceedings. Some researchers believe that justice, in the proper sense of the word, covers a relatively narrow sphere of

---

[18] *Алексеев С.С.* Собрание сочинений в 10 томах. Т. 8: Учебники и учебные пособия [Sergey S. Alekseev, *Collection of Works in 10 Volumes. Vol. 8: Textbooks and Tutorials*] 223 (Moscow: Statut, 2010).

[19] *Туманов Д.А.* Еще раз о том, является ли судебный приказ актом правосудия, или Размышления о сущности правосудия // Законы России: опыт, анализ, практика. 2012. № 9. С. 16 [Dmitry A. Tumanov, *Once Again on Whether the Court Order Is an Act of Justice or Reflection on the Essence of Justice*, 6 Laws of Russia 13, 16 (2016)].

the exercise of the court power, and that it is adjudication in which this power is implemented; as for making so-called intermediate decisions, it does not match the functions of justice. There is also an opinion that justice covers the whole process of consideration of a case in court. In addition, some researchers believe that justice coincides with legal proceedings.

Logical analysis of the above ideas does not indicate their impeccability. In our opinion, it would be equally incorrect both to expand the scope of the concept of justice identifying it with legal proceedings and to restrict it only to making judicial decisions. Such definitions are unlikely to provide the necessary clarity.

We believe that nowadays there is hardly any need to prove that the concepts of "justice" and "judicial proceedings" are not equivalent. Justice is narrower than legal proceedings, because the latter includes – in addition to the activities of the court to resolve, for example, a criminal case – pre-trial proceedings, that is, the actions of the bodies of inquiry, preliminary investigation and prosecutors.

The exhaustive argument of this opinion was given by one of the researchers of this issue, A. Tsikhotsky, who devoted a number of provisions of his monograph to it. Analyzing the correlation of the above categories, he reasonably proceeded from the need to differentiate them according to the subject criterion, pointing out that the subject of justice is the court, but the subjects of the proceedings, in addition to the court, are other participants.[20] On this basis Tsikhotsky concluded that justice, being the supporting structure of legal proceedings, can be carried out only through the actions of the participants of the latter, although justice itself does not cover these actions.

Completely sharing the above position, we would like to emphasize that it, to a certain extent, determines the object of study. The study of the issues of legal proceedings will require an analysis of the actions of each of its participants, whereas the study of the issues of justice will make us focus on the activities of the court, touching upon the activities of the participants in the judicial proceedings only in terms of their impact on the administration of justice.

Objecting to the opinion of those scholars who identify justice with legal proceedings, we, nevertheless, cannot agree that the activities on the administration of justice are limited only to the delivery of judicial acts resolving the case on the merits. It seems that the most correct and precise definition of the scope of this concept was given by the Russian scholars who proposed to attribute to justice everything that is resolved and considered by the judicial authorities on the basis of the rules on jurisdiction established by law. The cited opinion is of fundamental importance because it provides a clear understanding of the fact that the judicial power is exercised only through the administration of justice, and, in this sense, the

---

[20] *Цихоцкий А.В.* Теоретические проблемы эффективности правосудия по гражданским делам: дис. … докт. юрид. наук [Anatoly V. Tsikhotsky, *Theoretical Problems of the Effectiveness of Justice in Civil Cases: Doctor in Law Dissertation*] 155 (Moscow, 2007).

court itself cannot do anything else. The other functions of the judiciary are auxiliary, and the judicial power is not directly implemented through them. In other words, the concept of justice should cover all judicial activity on the application of the norms of substantive and procedural law.

The concept of "administering justice" is, consequently, broader than the concept of "resolving a case on the merits." Some researchers pointed to this fact as far back as the 1960s, claiming that administering justice is a court activity which includes a whole range of legal procedures for the establishment and study of the actual circumstances of the case during the court trial, legal qualification of these circumstances and making legal conclusions arising from these procedures. This point of view seems very convincing and remains relevant today. At the same time, it is impossible to agree with this viewpoint, that only in the administrative hearing the court administers justice and that, in this connection, such actions of the judge as the termination of the proceedings at the stage of preparing the case for trial are not justice. However, as we see it, such activity of a judge is nothing else but justice. If a judge examines and evaluates, even preliminarily, the evidence, finds out and establishes the facts, applies the law and makes a binding decision, then, no matter at what stage of the proceedings all these legal actions are performed and expressed in judicial acts, the judge exercises specific elements of justice.

We can make a number of general conclusions based on the foregoing:

1. Justice is not identical with the judiciary. Justice, in terms of its purpose, is a state activity within the framework of which the judiciary is exercised. The judiciary is, accordingly, the essential expression of the functional purpose and competent certainty of justice.

2. The court, unlike other state bodies, is not an ordinary law enforcement body, but a special human rights body. The main function of justice, therefore, is the function of human rights protection.

3. Justice now covers a wide variety of legal conflicts that require resolution on the basis of such criteria as legality and fairness, and administrative offenses are among them. The basis of the control activities of the court in constitutional and criminal proceedings, as well as in proceedings arising from public relations, and in proceedings on administrative offenses, is also a legal conflict which requires attributing this activity of the court to justice.

The court, therefore, always acts as an organ of justice, regardless of the category of cases it resolves.

3. The Concept and Signs of Justice

Considering justice to be a category that allows revealing the scope, content and legal essence of this type of state activity, however, it is necessary to emphasize the objective complexity of defining this concept in one universal definition.

In this regard, it is advisable to use a different approach, focusing, first of all, on the signs of justice allowing to distinguish it, on the one hand, from other types of state activity and, on the other hand, from other activities of the court.

3.1. The Legal Content of the Feature "Administration of Justice Only by a Court"

Only a court can be a subject of justice in the Russian Federation, and not just any court, but only a state court (para. 1 of Art. 118 of the Constitution of the Russian Federation). This means that no other state bodies or non-state organizations have the right to administer justice. The judiciary has a monopoly on this type of activity. Thereby, a constitutional ban on any redistribution of the powers of the judiciary is established.

It should be noted that a similar approach is characteristic of the legislation of many foreign countries. For example, the Constitution of Spain of 1978, which was drafted in politically unstable conditions and was aimed to form an open and democratic regime, including the judicial system,[21] stipulates that the exercise of judicial power at all stages of the administration of justice falls exclusively within the competence of judges and the courts (part 3 of Art. 117). Moreover, by virtue of part 6 of Article 117 of the Constitution, the creation of emergency courts is prohibited.

A similar rule exists in the Constitution of Germany of 1949, which establishes that emergency courts are not allowed and no one can be removed from the jurisdiction of the lawful judge (Art. 101). The Constitution of Belgium of 1997[22] also stipulates no emergency commissions or courts can be established under any name (Art. 146).

However, in some foreign countries the administration of justice by quasi-judicial and other institutions that are not part of the judicial system of the country is permitted. Such rules exist, for example, in the constitutions of the Netherlands, Portugal and Ecuador.

Chapter VI "Administration of Justice" of the Constitution of the Netherlands of 1983[23] stipulates that the prerogative of resolving disputes arising on matters not regulated by civil law may be transferred, by an Act of Parliament, to quasi-judicial or other institutions that are not part of the judicial system. The procedure for the consideration of such cases and the execution of decisions made on such cases is established by the Act of Parliament (part 2 of Art. 112).

The Constitution of Ecuador of 2008[24] also stipulates that the authorities of indigenous peoples administer justice, applying their own rules and procedures to

---

21 Joaquín T. Villarroya, *Breve historia del constitucionalismo español* [*Brief History of Spanish Constitutionalism*] 45 (Madrid: Centro de Estudios Constitucionales, 1997).

22 Constitution de la Belgique (Jan. 16, 2019), available at http://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetFR.

23 Constitution of the Kingdom of the Netherlands (Jan. 16, 2019), available at https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008.

24 Constitución del Ecuador (Jan. 16, 2019), available at https://www.wipo.int/edocs/lexdocs/laws/es/ec/ec030es.pdf.

resolve conflicts in the community according to their own customs or customary law (Art. 191).

In general, many states in South Africa are characterized by the presence of so-called "autonomous justice systems" or "unofficial (informal) systems of justice." These systems of justice are often autonomous of the South African formal legal system in the sense that they are independent.[25] For example, in many urban African locations there are informal courts set up by Community Councilors and Ward Committees. They are a kind of appendages to the formal legal system in two ways. First, they are responsible for documenting new residents, issuing residence permits, making sure that rentals and utilities are fully paid up, and for sorting out housing and residential difficulties, including neighborhood disputes. An example of such an unofficial court is the *lekgotla*. If a sanction imposed by a *lekgotla* is not implemented by a wrongdoer, the authority of the Administration Board and the South African police can be invoked to enforce the sanction.

Second, these systems of justice are appendages to the formal legal system in the sense that their activities are limited by South African formal law. If their actions exceed these limits, they can be brought before Magistrates' Courts and fined for exceeding their authority.

There are other similar systems of justice in the townships, for example, *makgotla* (which is the plural form of *lekgotla*) dealing with tribal or "homeland" representatives. According to J. Hund, these courts have many non-legal functions.[26] They educate, acquaint people with the requirements of the formal legal system, integrate and organize public opinion, and so on. Hund points out that the courts often settle disputes by adjustment and development of indigenous law. With respect to the procedures followed, the essence of fairness, as it is construed by Western legal systems, is adhered to. For example, the *audi alteram partem* rule is scrupulously followed. Also, these courts do not adhere to a strict formalism in arriving at their decisions. These systems of justice are appendages to the formal legal system only in the sense that they operate on the basis of many South African formal legal definitions and use these to define urban rights and duties.

When speaking of Russian legislation, it is important to emphasize that, while allowing the administration of justice exclusively by the state court, it considers the administration of justice not to be merely a collegial activity of a special subject. The legislator rejected collegiality as an absolute principle of justice in favor of expanding the sole consideration of the case. As a result of this, justice is increasingly exercised by representatives of the state authorities – by the judges – individually, and that, in principle, corresponds to a new understanding of the organization of legal proceedings.

---

[25] John Hund, *Formal Justice and Township Justice*, 13(2) Philosophical Papers 50 (1984).

[26] *Id.* at 175.

3.2. Subject Area of Justice

The subject area of justice is characterized by the fact that, firstly, it is within the sphere of the application of the law, and, secondly, it is not limited to the specialized field of public relations and is related to the situation of legal conflict, which may be based on various categories of public relations. In fact, any conflict that has a legal nature may be within the area of justice. This characteristic of justice most clearly manifests itself in comparison with government administration, the hallmark of which is a clearly defined restriction of the sphere of public life to which the activities of its organs apply, including those that exercise jurisdictional powers and decide on the application of measures of administrative responsibility.

It is necessary to elaborate on the concept of legal conflict. Unfortunately, the concept of legal conflict, the theoretical foundations of which were laid in the domestic doctrine in the 1990s, has not yet received a final conceptualization. There are still various approaches to the definition of this concept in the scientific literature. However, all the existing interpretations in general agree on the idea that a legal conflict is always a certain confrontation of subjects of law in connection with the application, violation or interpretation of legal norms.

One of the most successful definitions of legal conflict was given by V. Kudryavtsev, who proposed to consider a legal conflict

> any conflict in which a dispute is somehow connected with the legal relations of the parties (their legally significant actions and conditions), and, therefore, the subjects, or the motivation of their behavior, or the object of the conflict have legal characteristics, and the conflict itself has legal consequences.[27]

A legal conflict, thus, may be based on a different understanding (interpretation), non-compliance with or violation of absolutely any rule of law: authorizing, binding or prohibiting.

The concept of "legal conflict," used to characterize the subject area of justice, must be distinguished from the categories of "legal dispute" and "offense," which are not always differentiated in modern legal literature. For example, some authors refer to relations arising from the fact of the offense as legal conflict or legal dispute, and these concepts are treated as equivalent. Other authors limit the understanding of the conflict in the legal sphere exclusively to offenses, or define the offense through the concept of "conflict," or consider the conflict to be an exclusively wrongful act. There is also an opinion that the offense is not a legal conflict, as it precedes the conflict.

In this context, the viewpoint of one of the leading experts in the field of legal conflicts A. Zelentsov is clear and convincing. He proved in detail the idea based

---

[27] Юридическая конфликтология [*Legal Conflictology*] 15 (V.N. Kudryavtsev (ed.), Moscow: Institute of the State and Law of the Russian Academy of Sciences, 1995).

on the fact that a legal dispute and an offense are independent forms of legal conflict. Legal conflict, according to Zelentsov, is a generic concept, the content of which includes both a dispute on law and an offense. He defines a dispute on law as a legal conflict, the subjects of which are the parties to the disputed substantive law relationship, and which arises as a result of non-compliance with the rules established by legal norms, violation of the subjective rights of one party by the other party and their lack of intent to restore the rights voluntarily.[28] According to the scientist, a dispute on the law differs from an offense by the presence of a special legal procedure for its resolution, and an offense differs from the dispute by its wrongfulness.

It is obvious that legal conflicts resolved by the court are diverse and inexhaustible. Therefore, any classification will inevitably be, to some extent, sketchy. All of them, however, can be conditionally combined into three groups: civil law conflicts, criminal law conflicts and administrative law conflicts. Moreover, in reality, such conflicts arise both in connection with a substantive law relationship and in connection with a procedural law relationship, the subdivision of which has the most general character. Thus, substantive conflicts include:

– offenses (criminal and administrative), in the resolution of which the court establishes the presence or absence of an unlawful act, the guilt of the person brought to justice or, on the contrary, the person's innocence, and determines the legal consequences for this person in the form of sentencing or exemption from liability;

– civil law or public law disputes, in the resolution of which the court recognizes or rejects the existence of certain legal relations between the parties, determining the legal consequences that should arise for the civil or administrative plaintiff and defendant; or establishes the presence or absence of a legally significant event or fact, thereby creating for a person, appealing to the court, the legally necessary prerequisites for the realization of that person's personal or property rights, or refusing to create such prerequisites due to the lack of proper grounds; or provides jurisdictional verification of regulatory legal acts of state authorities and other state bodies and organizations endowed with rule-making powers, or the legality of administrative decisions and actions (inaction) of administrative bodies; or carries out judicial authorization, making a decision on the use of coercion or on the performance of certain investigative or administrative actions.

Procedural conflicts arise when the conflicting interests of individual subjects of the proceedings collide. Such conflicts become legal conflicts due to the fact that there is an objective need for their procedural resolution. A typical example of such a conflict can be the verification of lower court decisions by a higher court and their subsequent cancellation or modification. This group of conflicts also includes all

---

[28] *Зеленцов А.Б.* Теоретические основы правового спора: дис. … докт. юрид. наук [Alexander B. Zelentsov, *Theoretical Foundations of a Legal Dispute: Doctor in Law Dissertation*] 52 (Moscow, 2005).

situations where an interim procedural decision, taken by a court on a certain case, can cause the violation of the constitutional rights and freedoms of participants of the process, creating an obstacle to further progress of the case. It is characteristic that in this instance only the will of the subject of the violated right brings the specific conflict into the sphere of justice, and the legislator establishes only the general right to appeal the decision. But, to tell the truth, there are situations when such decisions give rise to a conflict, the possibility and procedure for the resolution of which is not provided for by law. Such non-standard situations, in our opinion, should also be included within the scope of the subject area of justice because it is the court that is empowered to resolve all legal conflicts, and the court cannot refuse to ensure judicial protection even in circumstances where the legislator does not establish a procedure for the consideration of certain cases, for example, if there is a gap in procedural law.

The above views containing a description of the subject area of justice are sufficiently substantiated by legislation and allow us to conclude that justice covers all categories of cases arising from social contradictions and subject to judicial resolution.

3.3. The Arbitration Nature of Justice

Justice is arbitration in nature. Therefore, the court as a conflict-resolving intermediary must be neutral with respect to its parties. This feature is most pronounced in the special jurisdictional procedural activity of the court, the essence of which is that the court is not entitled to consider and resolve legal conflicts on its own initiative. It is especially important to emphasize this, taking into account the fact that, comparatively recently, the courts were entitled to initiate cases within their jurisdiction in the field of constitutional and criminal justice.

The boundaries of the activities of the court in each specific process are defined in a number of regulations that establish the principles of equality and competitiveness of the parties. These principles, which are so characteristic for the adjudication of private law disputes, have finally found application in the consideration of disputes arising from public law relations, criminal, administrative and tort cases.

Another aspect of the arbitration nature of justice lies in its situational character, which means that the court does not have any permanent continuous field of activity. This feature of justice is especially evident in comparison with the state administration, including that part of it which covers the jurisdictional activities of administrative bodies on the application of measures of administrative responsibility. When revealing the signs of state administration, a number of scholars indicate that it is carried out continuously, constantly and systematically,[29] whereas justice is exercised only on filing a procedural act to the judicial authority for the resolution of a legal conflict.

---

[29] *Бахрах Д.Н., Россинский Б.В., Старилов Ю.Н.* Административное право: учебник [Demyan N. Bakhrakh et al., *Administrative Law: Textbook*] 33 (Moscow: Norma, 2004).

3.4. Procedural Form of Administration of Justice

Justice is exercised in a special procedural form which determines the stages of legal proceedings, the sequence of procedural actions carried out within the stages and the procedural functions of the participants in the process. In general, these common features of procedural form are characteristic of all legal proceedings – constitutional, civil, criminal and administrative.

Nevertheless, in the light of the main trends in the reform of procedural legislation, the assertion retaining its relevance for a long period and stipulating that it is the procedural form of justice that distinguishes it from the activities of any other state bodies may be questioned.

Currently, it is impossible to overestimate the importance of this feature of justice, since in modern legal science the procedural form is identified not only with the activities of the courts but also with the activities of any state bodies, provided that it consists of a set of homogeneous procedures regulated by law and aimed at achieving a certain substantive result.

This conclusion corresponds to the main trends in the development of procedural legislation towards its proceduralization. The presence of procedural form, therefore, is an important but not the main sign of justice. We believe that the essence of justice cannot be limited only to procedural form. The presence of the procedural form allows classifying the court as a law enforcement body, but it does not distinguish one law enforcement body from another.

It is especially important to emphasize this, since the procedural form is a form of implementation not only of the court activity for the consideration and resolution of legal conflicts, but also of the jurisdictional activities of other state bodies which are not part of the system of judicial authority, but which use quasi-judicial procedures, that is, almost judicial procedures, maximally close to them.

Therefore, in order to determine the qualitative nature of jurisdictional bodies, it is necessary to identify, in particular, the distinctive features of each of the procedural forms.

3.5. Justice and Justness: Aspects of Interaction

Justice is exercised in such methods and ways that are designed to ensure that cases are considered by independent and impartial judges in accordance with established jurisdiction, as well as to ensure that fair and legitimate judgments are made. It is judges who occupy a central place in the judicial organization and have the greatest influence on other groups of subjects.[30] Considering in more detail the content of this aspect, one cannot ignore the issue of the relationship between justice and justness.

---

[30] Teresa A. Sullivan, *The Persistence of Local Legal Culture: Twenty Years of Experience from the Federal Bankruptcy Courts*, 17(3) Harvard Journal of Law & Public Policy 801 (1994).

Justness is a phenomenon of the social and moral sphere, inevitably peculiar to it and characterizing the attitude of a person to social values. It cannot be expressed through its one-dimensional description. This fact predetermines the existence in the domestic legal doctrine of a number of definitions claiming to provide an adequate interpretation of the essence and content of justness.

An understanding of what justness is depends on many factors: the current political situation, the political regime and social values, among others.[31]

Historical experience shows that different nations at different periods of their development had their own ideas of what is fair and what is not. Moreover, these ideas were not always the same.

Thus, in the period of primitive law (and later the first Roman laws), when justice was the means of preserving peace, everything that served to prevent private vengeance and private war was regarded as an instrument of justness.[32] The second stage in the development of the legal theory of justness dates back to the time of Plato and Aristotle, when it was understood as a means of harmonious maintenance of the existing social order. In the Middle Ages, a new concept of justness as a means of ensuring maximum individual self-assertion emerged. This conception was purely individualistic. It sought by means of law to prevent all interference with individual self-development and self-assertion so far as this may be done consistently with a reciprocal self-development and self-assertion on the part of others. It conceives that the function of the state and of the law is to make it possible for the individual to act. This concept culminated in the late 18th century and was reflected in the French Declaration of Human Rights and the U.S. Bill of Rights. As a result, justness came to be understood as a device for securing the maximum of individual self-assertion in 19th-century legal thought.

During the 19th century, the theme of justness dominated the works of H. Spencer, a prominent theorist of liberalism. Initially, his concept of justness was primarily regulatory in nature. He formulated the legal idea of justness in a well-known phrase:

> The liberty of each limited only by the like liberties of all.[33]

Hence the demand – to adopt a law on equal freedom and to recognize it as the law on which the right system of justness should be based.[34] In the 20th century, J. Rawls, the founder of the famous liberal theory of justness, continued to develop the ideas of

---

31 Louis E. Wolcher, *The Meaning of Justice in the World Today*, 67(4) National Lawyers Guild Review 228, 230–232 (2011).

32 Pound 1912.

33 Herbert Spencer, Stanford Encyclopedia of Philosophy (Jan. 16, 2019), available at http://plato.stanford.edu/entries/spencer/.

34 Jonathan H. Turner, *Herbert Spencer: A Renewed Appreciation* (Beverly Hills, CA: Sage Publications, 1985).

Spencer. He distinguished two main principles of justness: (1) everyone should have equal rights with respect to the most extensive scheme of equal fundamental freedoms compatible with similar schemes of freedoms for others; and (2) social and economic inequalities must be arranged in such a way that: (*a*) they can reasonably be expected to benefit all, and (*b*) access to positions and posts should be open to all.[35] In modern foreign doctrine it is considered that Rawls's concept of justness is the most promising one. It also emphasizes that justness has a formal nature. Formal justice presupposes the principle of the equality of the parties, as well as the elimination of unjustified inequality. What was considered true and fair in one case should be recognized similarly in all other cases. Only in this way can fair justice be ensured.

At the same time, some foreign scholars, such as C. Carr, believe that the notion of formal justness as a virtue embodying loyalty to government, obedience to the system, impartiality and so on, is only a philosophical illusion that disappears when one tries to understand this concept and get to its essence. Carr notes that philosophical and political sciences know little about justness, but, nevertheless, they continue to interpret it. From Carr's point of view, it is easier to understand what justness is if you start from its opposite concept – injustice.[36]

In Russian law, the concept of justness also causes ambiguous interpretation. Domestic lawyers define justness in the field of law as: a principle of legal liability, a principle of law, a practical criterion of law enforcement, a goal of the entire lawmaking and law enforcement process.

The concept of justness has been most thoroughly analyzed in a recent work by L. Voskobitova, who considers justness to be a qualitative characteristic of the mechanism of the implementation of judicial authority.[37] By fair trial she understands the observance of a set of procedural rules that are necessary for the protection of human rights in resolving a dispute about civil rights of a citizen or during the examination of the charges against the citizen, and which ensure due process in the consideration and resolution of criminal cases by the court, as well as in the exercise of judicial review.

In general, all Russian scholars link justice with justness. However, the question of the relationship between these legal categories is decided differently by different scientists. The study of the scientific literature makes it possible to distinguish three main approaches to the interpretation of this relationship.

The first approach identifies justice with justness. It is emphasized that justness in the field of justice is an integral part of social justice. It is the goal, principle driving force of court procedure. Many foreign researchers adhere to the same opinion. For

---

35 Sebastiano Maffettone, *Rawls: An Introduction* (Cambridge: Polity Press, 2010).

36 Craig L. Carr, *The Concept of Formal Justice*, 39(3) Philosophical Studies 211 (1981).

37 *Воскобитова Л.А.* Механизм реализации судебной власти посредством уголовного судопроизводства: автореф. дис. ... докт. юрид. наук [Lydia A Voskobitova, *The Mechanism for the Implementation of the Judiciary Through Criminal Proceedings: Doctor in Law Dissertation Abstract*] 15 (Moscow, 2004).

example, in foreign dictionaries, justice is quite often defined as the quality of being just, impartial or fair; as a principle or ideal that helps resolve matters rightly; as justness in the way that people are treated; as the establishment or determination of rights according to the rules of law or equity; or as the fair and proper application of laws in compliance with natural law, according to which everyone should be treated equally and impartially.[38]

At the same time, it would be possible to cite many examples where completely legitimate and well-founded judicial decisions are in contradiction with the requirements of morality which give us an idea of justice and injustice. In case of a contradiction between the norms of morality and law, the court, without any doubt, should give preference to the latter. Consistent implementation of the idea that justice is a synonym for justness can objectively lead to the opposition of law and morality and the resolution of cases on the basis of the requirements of morality, but contrary to the law, and ultimately to the identification of law not with law, but with justness.

In the course of this discussion the following statement is quite convincing: justice is primarily an activity and, therefore, it is not entirely logical to regard the activity itself as justness. Justness, after all, is an evaluative and, to some extent, an extra-legal category.

And finally, from the point of view of the etymology of the term, justice still means legal proceedings based not on justness, but on law.

The second approach treats justness as a constitutional or a constitutional–legal principle of the administration of justice. This approach, in principle, is correct if we consider justice to be a set of principles related to the implementation of fundamental human rights and freedoms at the present time. In this sense, justness acquires the value of a legal principle to the extent that it is embodied in the legal mode of regulation.

In international legal acts, justness is also considered to be one of the principles of justice. For example, in Recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties (adopted on 5 September 2001 at the 762nd meeting of the Ministers' Deputies) it is defined, in a broad sense, as a principle relating to the idea of justice. Recommendation REC(2001)9 also stipulates that the resolving of disputes should be done according to equitable principles and not just according to strict legal rules. However, in a narrower sense, justness is proposed to mean an amendment to written law, when the use of the latter will cause obviously disproportionate consequences. It is also stressed that the concept of justness can be used to fill gaps in the legislation and regulations in specific cases which they do not cover.[39]

---

[38] Merriam-Webster's Dictionary (Jan. 16, 2019), available at http://www.businessdictionary.com/definition/social-justice.html.

[39] Рекомендация Комитета Министров Совета Европы REC(2001)9 государствам-членам об альтернативах судебному разбирательству между административными органами и частными сторонами, принятые 5 сентября 2001 г. // Вопросы государственного и муниципального управления. 2008. № 3.

Representatives of the third approach call justness the goal of justice. According to them, this viewpoint is axiomatic and does not need to be proved.

At the same time, such a statement seems too categorical. It is obvious that the authors who propose to distinguish the concepts of justness and justice understood by citizens as the ultimate "consumers of judicial services" and by law enforcers are right. The value of justice for a citizen is expressed in the protection of the rights and freedoms guaranteed by the state. Therefore, in the public legal conscience justice is really associated with the category of justness. For the law enforcer, however, the terms "justice" and "justness" are not always identical; justness should be taken into account by the law, it is an element of the authority and legitimacy of the judicial power, and it is traditionally perceived as a principle of law.

Following this logic, we can consider justness to be the goal of justice only to the extent that it contributes to the most complete protection of the violated right. As one researcher, Professor D. Fursov of Russian State University of Justice, figuratively noted, the pursuit of the restoration of justness at every step of the court activity would be inappropriate, since it can distract from clarifying the merits of the case, and it is not objectively fundamental for its participants.[40]

Thus, justness and justice cannot be considered to be legal phenomena coinciding in whole or in part. Justness is, rather, an internal property of justice that contributes to its perception as a social and legal value. Justness is a direct reflection of people's actions towards each other.

The perception of justness prevailing in the practice of the European Court of Human Rights can be a valuable addition to what has already been said. The Court understands justness as the result of the implementation of standards of justice[41] and as a provision of procedural justness of all court procedures (the judgments of the European Court of Human Rights of 24 February 1997 in the case *De Haes and Gussels v. Belgium*; of 23 June 1993 in the case *Ruiz-Mateos v. Spain*; of 19 March 1997 in the case *Hornsby v. Greece*).[42]

C. 114 [Recommendation REC(2001)9 of the Committee of Ministers of the Council of Europe to member states on alternatives to litigation between administrative authorities and private parties adopted on 5 September 2001, 3 Issues of State and Municipal Government 106, 114 (2008)].

[40] *Фурсов Д.А.* Справедливость как фундаментальная ценность арбитражного и гражданского процесса // Российский ежегодник гражданского и арбитражного процесса. 2005. № 4. С. 58 [Dmitry A. Fursov, *Justice as Fundamental Value of Arbitration and Civil Proceedings*, 4 Russian Yearbook of Civil and Arbitration Proceedings 50, 58 (2005)].

[41] Mauro Cappelletti & Vincenzo Vigoriti, *Fundamental Guarantees of the Litigants in Civil Procedure: Italy* in *Fundamental Guarantees of the Parties in Civil Litigation: Studies in National, International and Comparative Law* 514 (M. Cappelletti & D. Tallon (eds.), New York: Oceana Publications, 1973).

[42] *See* Donna Gomien et al., *Law and Practice of the European Convention on Human Rights and the European Social Charter* 201 (Strasbourg: Council of Europe Publishing, 1998); Michele De Salvia, *La convenzione europea dei diritti dell'uomo* [*The European Convention on Human Rights*] 275 (Napoli: Editoriale scientifica, 2001).

3.6. Binding Force of Court Decisions

Justice is exercised within the framework of state power and ensures the universally binding force of judicial decisions, the execution of which involves the suppression of the will (freedom) or material deprivation of one of the parties by using, in some cases, the power and strength of the state.

The universality of the binding force of a judicial decision is one of its most important properties and is expressed in the following:

– the court decision, which resolved the issue of specific rights and duties, should be binding not only for the subjects of the substantive legal relationship in which such a decision was made, but also for all other persons who may be affected, in one or another way, by the court decision;

– no one has the right to challenge the legality of a court decision and to cast doubt on it, until it has been revised in accordance with the procedure established by law;

– non-judicial bodies with jurisdictional powers are not entitled to overrule court decisions; in addition, they cannot consider and resolve legal conflicts that have already been the subject of court consideration;

– legal facts and legal relations established by a court decision, which has entered into force, are binding on non-judicial bodies with jurisdictional powers and other courts that hear cases involving the same subjects.

The implementation of court decisions by measures of state coercion is very specific, since the court, applying punishment to the criminal or to the person in respect of whom the proceedings in the case of an administrative offense are being conducted, cannot implement, by its own means and resources, any of the coercive measures that it proclaims in its judicial acts. Nor can the court independently ensure the restoration of a right that it declares violated, including its compulsory protection. In both cases, the resources, efforts and actions of the executive branch (the institution of bailiffs, etc.) are necessary.

Thus, the court, on the one hand, is empowered to apply coercion ranging from the authoritative recognition of a legal fact or ascertaining the infringement of the right to the application of punishment. On the other hand, it has very limited possibilities of real impact on the offender or another person who has violated the law, since the fulfillment of the court order is primarily within the scope of the executive branch.

As a result of the above study of the concept and signs of justice, at least two important conclusions can be formulated.

1. Justice is a type of law enforcement jurisdictional activity which has a number of specific features distinguishing it from the law-enforcement activities of other public authorities and state bodies, as well as from other activities of the courts.

2. In modern conditions the concept of justice cannot be determined on the basis of its procedural peculiarities, since the procedures themselves have changed

significantly, and the presence of a procedural form no longer distinguishes the court from other law enforcement agencies.

Conclusion

The objective changes in the activities of the court that have taken place since the beginning of the modern judicial reform in Russia require a significant change in the understanding of justice. There is no doubt that the most important and promising approach is to consider justice to be one of the characteristics organically inherent in the judiciary or as a related phenomenon. In this sense, justice is defined as state activity, within the framework of which the judicial power is exercised. The judiciary is, accordingly, the essential expression of the functional purpose and competent certainty of justice.

At the same time, the clarification of the issue of the relationship between justice and the judiciary characterizes only a few facets of this legal phenomenon. Therefore, adherents of various scientific concepts gradually come to the idea of the need for a common understanding of justice and its features, revealing it, on the one hand, as a function of the judiciary and, on the other hand, as a type of state activity, within the framework of which judicial power is actually implemented.

In this regard, the main thing, as we see it, is the need for a clear understanding of what justice really is, as a type of state activity, and what characteristic features it possesses.

The use of the integrative analysis of the concept of "justice," as well as consideration of its axiological immanent essence, provide, in our opinion, sufficient grounds for defining this legal category as a special type of state activity carried out by courts and judges by consideration and resolution in a special procedural form of legal conflicts, assigned to their jurisdiction, and by making binding decisions, ensured by measures of state coercion, in order to restore and protect violated legal interests and rights.

References

Cappelletti M. & Vigoriti V. *Fundamental Guarantees of the Litigants in Civil Procedure: Italy* in *Fundamental Guarantees of the Parties in Civil Litigation: Studies in National, International and Comparative Law* 514 (M. Cappelletti & D. Tallon (eds.), New York: Oceana Publications, 1973).

Carr C.L. *The Concept of Formal Justice*, 39(3) Philosophical Studies 211 (1981). https://doi.org/10.1007/bf00354354

Cavender G. *Justice, Sanctioning and the Justice Model*, 22(2) Criminology 203 (1984). https://doi.org/10.1111/j.1745-9125.1984.tb00297.x

Emery Y. & Gennaro De Santis L. *What Kind of Justice Today? Expectations of "Good Justice", Convergences and Divergences Between Managerial and Judicial Actors and*

How They Fit Within Management-Oriented Values, 6(1) International Journal for Court Administration 63 (2014). https://doi.org/10.18352/ijca.118

Gomien D. et al. *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Strasbourg: Council of Europe Publishing, 1998).

Hund J. *Formal Justice and Township Justice*, 13(2) Philosophical Papers 50 (1984). https://doi.org/10.1080/05568648409506230

Jordan B. *Justice*, 5 Texas Journal of Women and the Law 175 (1996).

Maffettone S. *Rawls: An Introduction* (Cambridge: Polity Press, 2010).

Perlingeiro R. *Contemporary Challenges in Latin American Administrative Justice*, 3(2) BRICS Law Journal 21 (2016). https://doi.org/10.21684/2412-2343-2016-3-2-21-56

Pound R. *Social Justice and Legal Justice*, 75(20) Central Law Journal 455 (1912).

Sánchez R.J. *The Administrative Justice in Spain: Current Situation and Challenges*, 3(2) BRICS Law Journal 112 (2016). https://doi.org/10.21684/2412-2343-2016-3-2-112-123

Sullivan T.A. et al. *The Persistence of Local Legal Culture: Twenty Years of Experience from the Federal Bankruptcy Courts*, 17(3) Harvard Journal of Law & Public Policy 801 (1994).

Turner J.H. *Herbert Spencer: A Renewed Appreciation* (Beverly Hills, CA: Sage Publications, 1985).

Information about the authors

Olga Pankova (Moscow, Russia) – Associate Professor, Administrative Law and Process Department, Kutafin Moscow State Law University (MSAL) (9 Sadovaya-Kudrinskaya St., Moscow, 125993, Russia; e-mail: pancova_olga@list.ru).

Yuri Migachev (Moscow, Russia) – Professor, Administrative Law and Process Department, Kutafin Moscow State Law University (MSAL) (9 Sadovaya-Kudrinskaya St., Moscow, 125993, Russia; e-mail: Juri.migachev@yandex.ru).

COMMENTS

STRONG ECONOMIC DEVELOPMENT WITHOUT JUDICIAL INDEPENDENCE IN CHINA: A REVIEW

MOHAMMAD SAIFUL ISLAM,

International Islamic University Chittagong (Kumira, Bangladesh)

XU XIN,

School of Law, Beijing Institute of Technology (Beijing, China)

https://doi.org/10.21684/2412-2343-2020-7-1-148-177

Over the last four decades, China has sustained extraordinary economic development despite Western assertions of under-constructed economic markets and the lack of an independent adjudicative process. The purpose of this paper is to set out the context of China's judicial independence and high economic development scenario in the global economy. The paper aims to establish that vast economic expansion is possible without the conventional concept of an independent judiciary in which China provides an important example for the world. The study is mainly qualitative in nature and takes the analytical approach. The data and statistics have been collected from sources of the World Bank, IMF, WTO, UNCTAD, The World Factbook of the CIA, and the Chinese National Bureau of Statistics. The content analysis references the Chinese Constitution and judges law, reports of the Supreme People's Court, books, journal articles, newspaper articles, media reports, and internet documents. The findings of the study are that China preserves "adjudicative independence" as a unique feature instead of embracing the Western concept of judicial independence that promotes the confidence of investors to make more investments. Additionally, the initiatives of "Made in China" and "One Belt, One Road" attach new wings to China's emergence as the world's crucial economic power. The article concludes that China's experience provides a lesson for policymakers and economists of other developing or transitional countries struggling with weak legal and court systems, and emerging financial markets. The study strengthens the flourishing literature on the connection between judicial independence and economic development.

Keywords: economic development; adjudicative independence; judicial reform; financial reform; corruption.

Recommended citation: Mohammad Saiful Islam & Xu Xin, *Strong Economic Development Without Judicial Independence in China: A Review*, 7(1) BRICS Law Journal 128–177 (2020).

Introduction

As an obligatory branch of the state, the judiciary performs the core function of resolving disputes between parties. It explains and interprets the accurate meaning of the law, and it protects constitutionalism in respect of a matter relating to a written constitution through its exercise of the power of judicial review. Alexander Hamilton stated,

> No legislative act ... contrary to the constitution, can be valid.[1]

The interpretation of the law is a tricky business that belongs to the jurisdiction of the judicial authority. In other words, it has broad discretion to make law in the absence of vibrant indications of congressional legislation. Furthermore, the judiciary can play the healthy role of shaping a nondiscriminatory society through confirming fair justice, safeguarding citizens' rights, imposing a penalty on offenders, and ensuring the safety and security of innocent people from harm. The competent judiciary is a check on the corruption of the executive, bureaucrats, the judiciary itself, corporations, and is an institution whose actions are a crucial factor in maintaining economic growth and poverty reduction. Thus, the independence of the judiciary is essential if it is to perform all of its functions relating to the administration of justice properly. The concept of judicial independence, or the independent judiciary, was invented in Europe and underwent further development in the United States by the framers of the U.S. Constitution.[2] The U.S. concept is based on the political theory of separation of powers and checks and balances among the governmental organs so as to restrain them from oppressive abuses of their authority. The primary and core feature of an independent judiciary is the maintenance of the judiciary as a separate institution in which one arbitrator or judge can adjudicate disputes neutrally and impartially.[3]

---

1 Alexander Hamilton, *Federalist No. 78* in Alexander Hamilton et al., *The Federalist Papers* 235, 237 (New York: Palgrave Macmillan, 2009).

2 For a deeper understanding of the development of judicial independence as conceived in the United States, *see* Hamilton et al. 2009.

3 James L. Gibson, *"New-Style" Judicial Campaigns and the Legitimacy of State High Courts*, 71(4) Journal of Politics 1285 (2009).

The literature on development policy has established the impartial judicial system as a mode of economic development. The importance of an independent judiciary to enhance investment, protect rights, and strengthen democracy is emphasized by international institutions of development funding, including the World Bank, the International Monetary Fund (IMF), and the Inter-American Development Bank.[4] Feld and Voigt contend that the degree of judicial independence is associated with economic development.[5] The world's largest financial institution (the World Bank) promotes an independent judiciary as a means of gaining more economic growth and control of corruption.[6] The absence of well-functioning legal and court systems, and the existence of corruption, are limitations to economic growth and sustainability of development.[7] A well-performing and robust court system is linked with the faster growth of both small and large businesses in the economy.[8] One World Bank report stated that larger and more efficient firms found with better court systems that reduce the risk of firms show a willingness towards more investment.[9] Hence, an independent judiciary has a potentially crucial role in advancing a country's economic growth.

Yet, in China, economic development has occurred seemingly as a "miracle" and in spite of the conventional independent judiciary promoted with devotion by Western legal scholarship and economists. China is an extraordinary instance of an economy in respect of enhancing economic development within a short period of time that is already dignified as one of the fastest growing economies and which has attained the rank of the second largest economy in the world based on real gross domestic product (GDP). Many economists predict that China will be the largest economy within a few years, thus surpassing the U.S. economy. In fact, measured by purchasing power parity (PPP) China has already overtaken the U.S. economy and possesses the

---

4 Rebecca B. Chavez, *The Rule of Law and Courts in Democratizing Regimes* in *The Oxford Handbook of Law and Politics* 63 (K.E. Whittington et al. (eds.), New York: Oxford University Press, 2008).

5 Lars P. Feld & Stefan Voigt, *Making Judges Independent – Some Proposals Regarding the Judiciary*, Center for Economic Studies and Ifo Institute (CESifo), Working Paper No. 1260 (February 2004) (Dec. 20, 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=597721.

6 For more authorization *see*, among others, the report, The World Bank, Helping Countries Combat Corruption: The Role of the World Bank (1997) (Dec. 20, 2019), available at http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf; The World Bank, Building Institutions for Markets (2002) (Dec. 20, 2019), available at http://documents.worldbank.org/curated/en/850161468336075630/pdf/228250WDR00PUB0ons0for0markets02002.pdf; *World Development Report 2005: A Better Investment Climate for Everyone* (New York: The World Bank and Oxford University Press, 2004).

7 The World Bank, Initiatives in Justice Reform 1992–2012 (2012) (Dec. 20, 2019), available at http://documents.worldbank.org/curated/en/575811468175154113/pdf/707290WP0Full000Box370050B00PUBLIC0.pdf.

8 Roumeen Islam, *Institutional Reform and the Judiciary: Which Way Forward?*, World Bank Policy Research Working Paper 3134 (September 2003), at 7–8 (Dec. 20, 2019), available at http://documents.worldbank.org/curated/en/320271468779353185/pdf/WPS3134.pdf.

9 *World Development Report 2005*, *supra* note 6, at 86.

rank of the largest economy in the world. The World Bank has stated that China is "the fastest sustained expansion by a major economy in history."[10]

This study reveals the factors behind China's unprecedented economic growth despite the Western contention of its having weak legal institutions, a lack of judicial independence, and underdeveloped economic sectors.

1. Judicial Independence and China's Position

1.1. Conventional Concept of Judicial Independence

Judicial independence is one of the fundamental values and central principles of the administration of justice.[11] However, the concept of judicial independence[12] is a multifaceted idea,[13] and "one of the least understood concepts."[14] The delineation of judicial independence is hardly exactly the same everywhere since it is a matter of a mixture of many elements, such as the constitutional provision, legislative enactments, the selection method of judges through a merit basis, or open-ended executive selection within the socio-political culture. It differs from country to a country, dependent on the legal system, the governmental system, traditions and political estimations.[15] Conventionally, judicial independence refers to the freedom of judges to execute judicial functions without any explicit or implicit interference from the outside, chiefly from the executive branch of the government, and the independence that judges have from internal influences of senior colleagues. It requires that the judiciary should not be subject to regulation by the executive branch of government, and that judges should enjoy "protection from any threats,

---

[10] The World Bank, The World Bank in China: Overview (2019) (Dec. 20, 2019), available at https://www.worldbank.org/en/country/china/overview.

[11] Shimon Shetreet, *Creating a Culture of Judicial Independence: The Practical Challenge and the Conceptual and Constitutional Infrastructure* in *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* 15, 18 (S. Shetreet & C. Forsyth (eds.), Leiden: Martinus Nijhoff Publisher, 2012); Mohammad Saiful Islam, *Independent Judiciary: Nature and Facets from the International Context*, 6(2) International Journal of Ethics in Social Sciences 15, 17 (2018).

[12] For more on the fundamental concept and nature of an independent judiciary, *see* Saiful Islam 2018.

[13] Shimon Shetreet, *Judicial Independence and Accountability: Core Values in Liberal Democracies* in *Judiciaries in Comparative Perspective* 3 (H.P. Lee (ed.), New York: Cambridge University Press, 2011); *Judicial Independence: The Contemporary Debate* 6 (S. Shetreet & J. Deschênes (eds.), Dordrecht; Boston; Lancaster: Martinus Nijhoff Publishers, 1985); Zhao Yanrong, *The Way to Understand the Nature and Extent of Judicial Independence in China*, 6(01) Asian Journal of Law and Society 131 (2018) (Dec. 20, 2019), available at https://www.semanticscholar.org/paper/The-Way-to-Understand-the-Nature-and-Extent-of-in-Zhao/80d21d6658719c2ad1fa2bd91b1dd59fce608d92.

[14] Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44(4) American Journal of Comparative Law 605, 607 (1996).

[15] Lord Hailsham, *The Independence of the Judicial Process*, 13(1) Israel Law Review 1 (1978); Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13(4) International Review of Law Economics 349, 350 (1993).

interference, or manipulation which may either force them to unjustly favor the government or subject themselves to a penalty for not doing so."[16]

In other words, judicial independence denotes that judges are free from any influences in reaching a decision in the case before them, neither influences by the political branches of government nor influences by judicial colleagues, and that they are free from personal worry with regard to their performance of their official judicial obligations. It necessitates that

> a judge adjudicates without fear or favor, even in the face of a contrary view widely held by others, whether judicial colleagues, government, the public, the media, or interest groups.[17]

The ideal and most favorable concept of judicial independence brings to mind the U.S. practice of judicial independence. In the United States, the independence of the judiciary maintains both the independence of individual judges and the independence of the judiciary as an autonomous institution that is separate from the executive and legislative branches. It is based on the political theory of separation of powers and checks and balances among the governmental organs so as to restrain them from oppressive abuses of their authority. Hence, the conventional concept of judicial independence maintains two substantial elements: the independence of individual judges, or the adjudicative independence of individual judges, and the institutional independence of the judiciary.[18]

1.2. General Depiction of China's Judicial Independence

The president of the Supreme People's Court Zhou Qiang has stated that China would absolutely say no to the separation of powers, constitutional democracy, and judicial independence because he considers these are all Western ideals that are damaging to the Chinese Communist Party's (CCP) rule.[19] China's judiciary has consistently been depicted as not being independent,[20] as being entirely subservient

---

[16] Larkins 1996, at 608.

[17] Why Is Judicial Independence Important to You?, Canadian Judicial Council (May 2016) (Dec. 20, 2019), available at https://www.bccourts.ca/documents/Why_is_Judicial_Independence_Important_to_You.pdf.

[18] Shetreet 2011, at 15; Sarkar Ali Akkas, *Judicial Independence and Accountability: A Comparative Study of Contemporary Bangladesh Experience*, Doctor of Philosophy Thesis, Faculty of Law, University of Wollongong (2002), at 14 (Dec. 20, 2019), available at https://ro.uow.edu.au/theses/1856/; Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges* in *Judicial Independence: The Contemporary Debate* 590, 598 (S. Shetreet & J. Deschênes (eds.), Dordrecht; Boston; Lancaster: Martinus Nijhoff Publishers, 1985); John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72(2-3) Southern California Law Review 353, 355 (1999).

[19] Xin He, *The Politics of Courts in China*, 2(2) China Law and Society Review 129, 131 (2017).

[20] Veron Mei-Ying Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52(1) American Journal of Comparative Law 77 (2004); Pierre Landry, *The Institutional Diffusion of Courts in China: Evidence from Survey Data* in *Rule by Law: The Politics of Courts in Authoritarian Regimes* 207, 209 (T. Ginsburg & T. Moustafa (eds.), New York: Cambridge University Press, 2008).

to the government's rule by one party (the CCP) and without judicial independence and the separation of powers.[21] The root of this criticism is that the state appoints judges from among the members of the Party, who are checked by the Party's section in the judiciary, and who in practice must respond to administrative seniors within local governments.[22] Similarly, scholars claim that lawyers and social activists connected with judicial institutions are vetted continuously, and information streams are comprehensively controlled. Generally, the action by anyone of initiating a challenge against state actors or going to court to pursue a case remains a highly charged political matter.[23] All in all, there are intense debates and even completely opposite opinions, instead of consensus, regarding the nature and the extent of China's judicial independence among legal scholars inside and outside China, among Party executives, and even among the people.

1.3. Communal Insights and the Constitution of China

There are several approaches[24] to understanding the nature and the extent of judicial independence in China. Outside these doctrinal approaches, the communal insights towards China's judicial independence are: most of the existing literature perceives judicial independence in China "as stagnant,"[25] that it has little judicial independence,[26] that it does not exist or is vulnerable to influence from a diversity of sources,[27] that it is not fixed but changes on the basis of court discretion assigned to judges by the CCP.[28] Referring to judicial reform, a number of scholars have stated that "the judiciary has become more competent, authoritative, and independent."[29] Additionally, an opposite view asserts that China's judicial independence has been

---

21 Jerome A. Cohen, *The Chinese Communist Party and "Judicial Independence": 1949–1959*, 82(5) Harvard Law Review 967 (1969); Kenneth W. Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* 250 (Washington, D.C.: Brookings Institution Press, 2007).

22 Yi Zhao, *The Expansion of Judicial Power in China* (New Haven: Yale University Press, 2003).

23 Mary E. Gallagher, *Use the Law as Your Weapon! The Rule of Law and Labor Conflict in the PRC* in *Engaging the Law in China: State, Society, and Possibilities for Justice* 54 (N.J. Diamant et al. (eds.), Stanford: Stanford University Press, 2005).

24 Yanrong has identified three leading schools of thought to understand the nature and the extent of judicial independence in China: The International Best Practice School, China's Special Condition, and the Strategic Interaction School. *See* Yanrong 2018.

25 *Id.* at 1.

26 Xin He, *Ideology or Reality?: Limited Judicial Independence in Contemporary Rural China*, 6(3) Australian Journal of Asian Law 213 (2004).

27 William Fairbairn, *An Examination of Judicial Independence in China*, 23(4) Journal of Financial Crime 819 (2016).

28 Yanrong 2018.

29 Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions* in *Judicial Independence in China: Lessons for Global Rule of Law Promotion* 69, 87 (R. Peerenboom (ed.), New York: Cambridge University Press, 2009).

established more than China's necessity.[30] The Constitution and judges law of China mandate that the courts perform independent adjudication without any interference of any organization or individual. In 1954, the first Constitution specified,

> The people's courts adjudicate cases independently, only subject to the law.[31]

Later, in 1982, the Constitution of China stipulated,

> The people's courts exercise judicial power independently, in accordance with the provisions of law and not subject to interference by any administrative organ, public organization or individual.[32]

Judges law of the People's Republic of China states,

> Judges performing their duties in accordance with law are protected by law and are not to be interfered with by administrative organs, social organizations and individuals.[33]

On the basis of an analysis of Article 126 of the Constitution, some scholars mention that in China the court does enjoy judicial independence, albeit a tiny amount. The arguments on this position are that while Article 126 prohibits interference in court adjudication by public organizations, administrative organs, and individuals, it is not clear whether the CCP is included as an organization, and the article is silent about the People's Congress, and the procuracy.[34] From this position, it is implied that political influence from some other state organs over the adjudication process can occur.[35] By comparison of these two provisions (Article 78 of 1954 and Article 126 of 1982) of the Constitution, Chinese scholars conclude that the provision of 1954 was better in the logic that judges were only accountable to the law for its independent adjudication, and Article 126 worsens the matter rather than being a welcome development, and thus it should be revised.[36] Consequently, the "current

---

30 司法独立已经实现?! [Has Judicial Independence Been Established?!] (China: China law info, 2010).

31 Constitution of the People's Republic of China (1954), Sec. VI, Art. 78.

32 Constitution of the People's Republic of China (1982), Ch. III, Sec. 7, Art. 126.

33 Judges Law of the People's Republic of China, amended on 23 April 2019, effective on 1 October 2019, Ch. I: General Provision, Art. 7.

34 Lin Feng, *The Future of Judicial Independence in China*, Centre for Judicial Education and Research, City University of Hong Kong, Working Paper Series No. 2 (May 2016), at 5 (Dec. 20, 2019), available at https://www.cityu.edu.hk/cjer/lib/doc/paper/WK2_The_Future_of_Judicial_Independence_in_China.pdf; He, China Law and Society Review (2017), at 131.

35 Feng, *supra* note 34, at 5; He, *supra* note 34, at 131.

36 Tong Zhiwei, *Perfecting the Constitutional Provision on Independent Adjudication and Ancillary Reform*, 6 Jianghai Academic Journal 109 (2005).

Chinese laws demand only limited respect for the principle of judicial independence" for the reason that the law does not explicitly prohibit interventions "by the CCP, from the legislative organs, or from higher courts."[37]

1.4. Summary of Judicial Independence in China

In reality, in China's one-party political system and considering China's political estimations, the conventional theory of separation of power is impossible; therefore, it does not exist in China. The conventional concept of separation of powers provides checks and balances between the government branches that control abuses of authority; these are not maintained in China. In China, members of the National People's Congress (NPC) simultaneously possess seats in the Party and in the government, and the members of the NPC naturally include all of the high-ranking officials of the CCP. Also, the NPC supervises the actions of the government, the supreme procuratorate, the supreme court, and the central military commission. Hence, judicial independence in China offers adjudicative independence of individual judges, or an impartial adjudication, not institutional independence of the judiciary. The degree of adjudicative independence is developing and changeable by the extent of judicial discretion delegated by the CCP to judges. However, Larkins considers that,

> Judicial independence is not meaningful if the courts cannot exercise it to check the arbitrary or unjust exercise of power by political actors.[38]

The positive side of this matter is that the CCP has been putting into place a variety of judicial reforms over numerous rounds, with the purpose of confirming a more independent, strong, and efficient judiciary. However, scholars claim that all these reform initiatives have to be executed under the CCP's headship, and conventionally they do not permit any matters to undermine the Party's leadership position.[39]

2. Economic Growth Without Judicial Independence in China

In China, beginning in 1921, with the founding of the CCP, the law was used as a tool under Marxist-Leninist ideology to rebuild society, suppress class opponents, and administer Party policy.[40] At that time,

---

[37] Yuwen Li, *Judicial Independence in China: An Attainable Principle?* (The Hague: Eleven International Publishing, 2013).

[38] Larkins 1996, at 611.

[39] Peter C.H. Chan, *An Uphill Battle: How China's Obsession with Social Stability Is Blocking Judicial Reform*, 100(3) Judicature 14 (2016).

[40] Jianfu Chen, *Chinese Law: Towards an Understanding of Chinese Law, Its Nature, and Development* § 3, 34 (The Hague; Boston: Martinus Nijhoff Publishers, 1999).

> The courts were to serve as instruments for suppressing the enemies of the state rather than protecting individual rights.[41]

In the post-Mao era, the Chinese government took the rule of law to be a dominant component for its legitimation strategy.[42] As early as 1969, Jerome A. Cohen commented,

> [J]udicial independence can hardly be deemed irrelevant to [the] PRC's future development.[43]

Today, fifty years later, his prediction has been demonstrated to be accurate.[44] The reality is that for the world community China is perceived as a country without judicial independence and, most of the time, criticized for the factors that influence the process of decision making of judges, particularly the big role played by the government and the influence of the CCP on the judiciary.

2.1. China's Economic Scenario in Brief

Despite the hugh question regarding the deficiency of judicial independence in China, and regardless of its weak financial and legal systems, it is one of the fastest-growing economies.[45] China is the second-largest country in terms of its economy in the world, and it has shown comparable advancement in various other fields. Additionally, its economy is recognized as one of the most significant to the world economy.[46] According to the World Bank, from 1979 to 2018 China's real GDP grew at the rate of nearly 10% a year on average. The World Bank has described China as having "the fastest sustained expansion by a major economy in history."[47] The U.S. Congressional Research Service (CRS) has noted that China "ranks first in terms of economic size on PPP basis, value-added manufacturing, merchandise trade, and holder of foreign exchange reserves."[48] Over the past four decades, China has attained extraordinary economic development that has been described as a miracle. At the end

---

41 Yanrong 2018.

42 Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambrige and New York: Cambridge University Press, 2002).

43 Cohen 1969, at 1005.

44 Feng, *supra* note 34, at 1.

45 Franklin Allen et al., *Law, Finance, and Economic Growth in China*, 77(1) Journal of Financial Economics 57, 59 (2005).

46 Dam 2007, at 221, 233.

47 The World Bank in China: Overview, *supra* note 10.

48 Wayne M. Morrison, *China's Economic Rise: History, Trends, Challenges, Implications for the United States*, Congressional Research Service, CRS Report RL33534 (August 2014), at 1 (Dec. 20, 2019), available at https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2323&context=key_workplace.

of 2010, China became the second-biggest economy by overtaking Japan, and thus just behind the United States. At that time, Japan's economy was valued at US$5.474 trillion, and China's economy was nearly $5.8 trillion.[49] In 2018, China's GDP growth was 6.6% with nominal GDP of $13.608 trillion,[50] which is an increase of more than $2 trillion compared to 2017.[51] In 2019, China's economy is expected to grow 6.4% with a nominal GDP estimate exceeding $14.5 trillion. According to the World Economic Outlook (April 2019), China will reach $14.22 trillion. The GDP per capita also rose to $9,770 in 2018, almost ten times that of 2001 ($1,000), and which was only $205 in 1980.[52] According to the World Bank data, between 2017 and 2019 the world economy will increase by $6.5 trillion. While 17.9% of this estimated growth relates to the USA (GDP), China is predicted to contribute 35.2% – almost double that of the USA.[53]

China is the largest exporter and second largest importer in the world. In 2017, China's exports amounted to $2.41 trillion. During the five years from 2012 to 2017, China's exports grew at an annualized rate of 2.5% (from $2.12 trillion to $2.41 trillion). In 2017, China's imports amounted to $1.54 trillion. During the same five-year period China's imports grew at an annualized rate of 1.3% (from $1.42 trillion to $1.54 trillion). Moreover, China has been the largest global Foreign Direct Investment (FDI) recipient among developing countries. In 1991, China attracted $4.37 billion of FDI, and in 1993 FDI reached $27.52 billion. In 2003, China even surpassed the USA when it was ranked the number one FDI recipient among all economies.[54] In 2014, China again surpassed the USA when it was ranked the largest FDI recipient among all countries. In 2017 and 2018, China received $134 billion and $139 billion, respectively, as the second largest FDI recipient among all countries (Fig. 1).[55] James Zhan, director of the United Nations Conference on Trade and Development's (UNCTAD) Division on Investment and Enterprise, noted,

---

49 World Economic Outlook Report (2010).

50 World Bank national accounts data, and OECD National Accounts data files (2018).

51 This growth in GDP is the slowest pace since 1990. Economists had predicted similar results due to the ongoing U.S.-China trade war that depresses the country's exports.

52 World Bank national accounts data, and OECD National Accounts data files (2018). However, China News Agency stated on 21 January 2019 that China's GDP per capita almost exceeded $10,000 for the prior year. *See* China's GDP per capita to exceed $10,000, People's Daily Online, 23 January 2019 (Dec. 20, 2019), available at http://en.people.cn/n3/2019/0123/c90000-9540867.html.

53 Rob Smith, *The World's Biggest Economies in 2018*, The World Economic Forum, 18 April 2018 (Dec. 20, 2019), available at https://www.weforum.org/agenda/2018/04/the-worlds-biggest-economies-in-2018/.

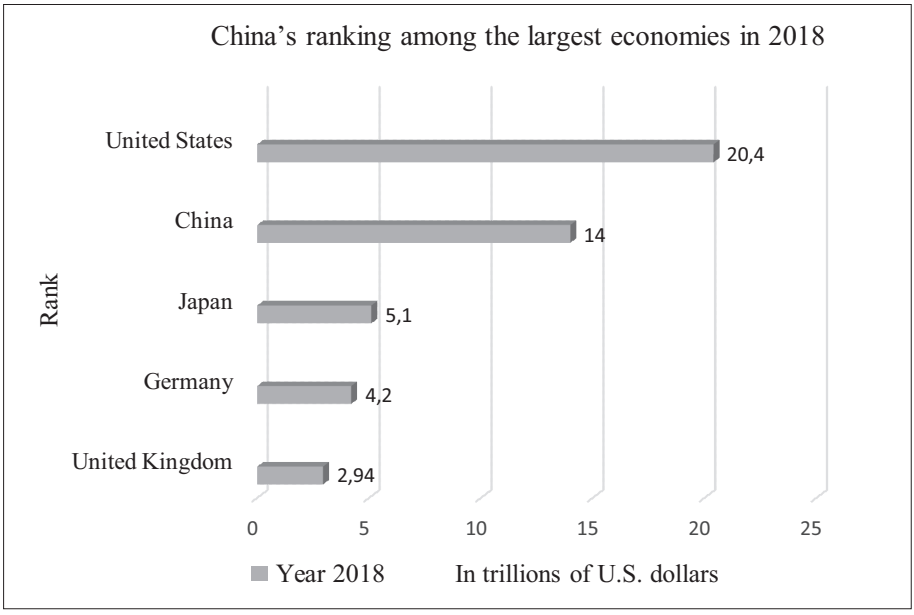
54 Li Yang, *China's Growth Miracle: Past, Present, and Future*, United Nations Research Institute for Social Development (2013), at 9 (Dec. 20, 2019), available at https://www.semanticscholar.org/paper/China-'-s-Growth-Miracle-%3A-Past-%2C-Present-%2C-and-Yang/9de08aecedc40d51843e67adda9d750c4a40cc54.

55 UNCTAD, World Investment Report 2019: Special Economic Zones (2019), at 4 (Dec. 20, 2019), available at https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2460.

> The investment flows to China continue to increase despite mounting trade tension, and increasing cost of production.

This statement was delivered at the time of publishing a report on investment trends monitored in October 2018 by UNCTAD.[56]

Figure 1: China's ranking among the largest economies in 2018



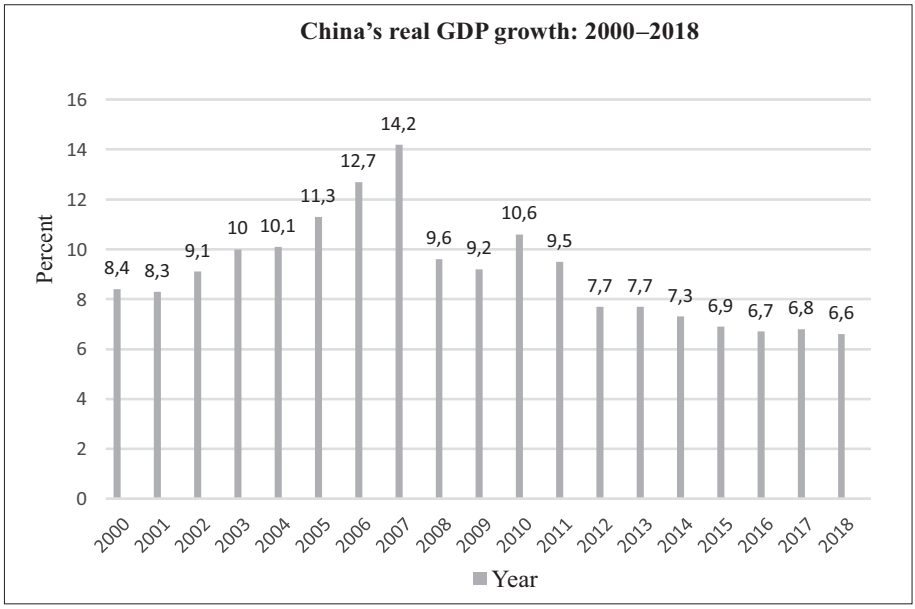
Data source: IMF

These are the world's five largest economies in 2018 based on data from the International Monetary Fund, 2018. In fact, measured by PPP, China is the largest economy in the world,[57] but when measured by the nominal GDP the United States is largest.

[56] China Becomes Largest Recipient of FDI in H1, Xinhuanet, 16 October 2018 (Dec. 20, 2019), available at http://www.xinhuanet.com/english/2018-10/16/c_137534827.htm.

[57] CIA, The World Factbook 2018 (2018) (Dec. 20, 2019), available at https://www.cia.gov/library/publications/download/download-2018/index.html.

Figure 2: China's real GDP growth: 2000–2018



Data source: IMF, and the Chinese National Bureau of Statistics

From 2000 to 2018, China's annual growth in real GDP averaged 9.08% (Fig. 2). From 2000 to 2007 GDP increased at the, remarkable, average annual rate of 10.51%. From 2008 to 2010 annual GDP growth averaged 9.8%. Though the rate of annual GDP growth fell for the subsequent six successive years, decreasing from 10.6% in 2010 to 6.7% in 2016, it increased to 6.8% in 2017.

Table 1: China's position as an exporter

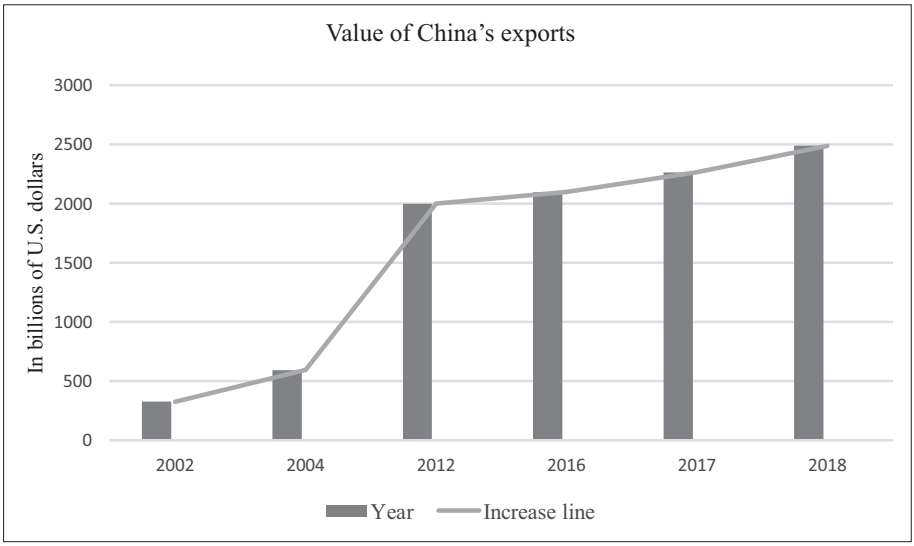
Rank	Country	Exports Value (2017)	Exports Value (2018)	Annual % change
1	***China***	$2.263 trillion	$2.487 trillion	10%
2	United States	$1.547 trillion	$1.664 trillion	8%
3	Germany	$1.448 trillion	$1.561 trillion	8%
4	Japan	$698 billion	$738 billion	6%
5	Netherlands	$652 billion	$723 billion	11%

Data source: World trade statistical review of the WTO, 2018 and 2019

In 2017, China's exports amounted to 12.8% of global exports. In 2018, they amounted to the same percentage. China's exports in 2018 registered an increase of

approximately 10% over 2017, and this resulted in China being the second highest in the given countries (the Netherlands had an increase of 11%) (Table 1).[58]

Figure 3: Value of China's exports



Data source: World trade statistical review of the WTO

The value of the goods exported by China has grown immensely over the years (Fig. 3). In 2002, the value of China's exports was about $327 billion. In 2004, the value of its exports was over 35% larger. In 2012, for the first time the value of China's exports exceeded $2 trillion. In 2016, China contributed 13.2% of total global exports. China's exports in 2017 were 8% larger than its exports in 2016.

Table 2: China's position as an importer

Rank	Country	Imports Value (2017)	Imports Value (2018)	Annual % change
1	United States	$2.410 trillion	$2.614 trillion	9%
2	***China***	$1.842 trillion	$2.136 trillion	16%
3	Germany	$1.167 trillion	$1.286 trillion	11%

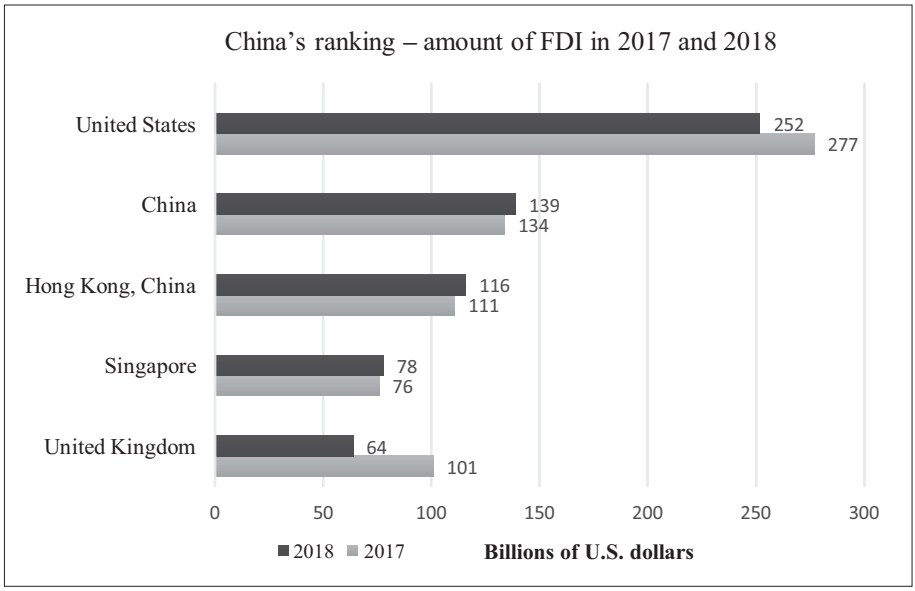
[58] WTO, World Trade Statistical Review 2018 (2018), at 124 (Dec. 20, 2019), available at https://www.wto.org/english/res_e/statis_e/wts2018_e/wts18_toc_e.htm; WTO, World Trade Statistical Review 2019 (2019), at 100 (Dec. 20, 2019), available at https://www.wto.org/english/res_e/statis_e/wts2019_e/wts19_toc_e.htm.

4	Japan	$672 billion	$749 billion	11%
5	United Kingdom	$644 billion	$674 billion	5%

Data source: World trade statistical review of the WTO, 2018 and 2019

In 2017, China's imports amounted to 10.2% of global imports, and in 2018 10.8%. China's imports increased by 16% from 2017 to 2018, which was the largest increase in the countries under review (Table 2).[59]

Figure 4: China's ranking – amount of FDI in 2017 and 2018

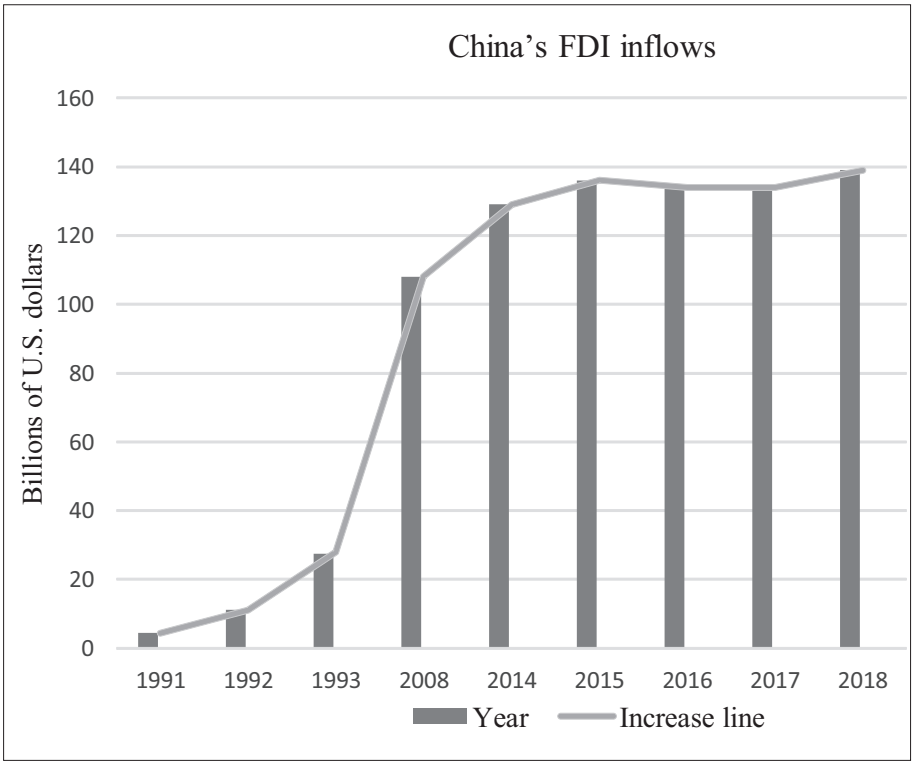


Data source: World Investment Report 2019 of UNCTAD

In 2017 and 2018, China remained the second largest FDI recipient among all economies. In 2018, China attracted a record $139 billion worth of FDI, which was an increase of 3% over 2017.

[59] World Trade Statistical Review 2018, *supra* note 58, at 124; World Trade Statistical Review 2019, *supra* note 58, at 100.

Figure 5: China's FDI inflows



Data source: World Investment Report of UNCTAD

In 1991, China's FDI was a dignified 1.15% of GDP; by 1993 it had risen to 6.25% of GDP. Every year thereafter saw a significant increase in this percentage. In 2015 and 2016, China was ranked as the third-largest recipient of FDI among all countries. And just one year earlier, in 2014, China attracted $129 billion of FDI and attained the ranking of the number one receiver among all economies by surpassing the United States ($107 billion) (Fig. 5).

China's economic miracle can be regarded as the most impressive, lasting, and complex in standings of institutional reforms and restraint conditions in the history of economic growth, which has been recognized by prestigious economists and organizations across the globe.[60] Some economic pundits envisage that before the end of this second decade of the century China's economy will exceed the size of the U.S. economy.[61] This, in fact, is the case, when measured on the basis of PPP, notwithstanding

[60] Yang, *supra* note 54, at 3.

[61] Allen et al. 2005, at 59.

the economic and trade actions (e.g. tariffs) imposed on China by the U.S. in recent years, to the detriment of China's economic growth (Table 3).[62]

Table 3: China's ranking on the basis of PPP

Rank	Country	GDP (PPP) in 2017	GDP (PPP) in 2018	Share %
1	***China***	$23.2 trillion	$25.3 trillion	18.7
2	United States	$19.4 trillion	$20.5 trillion	15.2
3	India	$9.4 trillion	$10.4 trillion	7.69
4	Japan	$5.4 trillion	$5.6 trillion	4.16
5	Germany	$4.1 trillion	$4.3 trillion	3.24

Data source: International Monetary Fund, World Economic Outlook (October 2018)

Economists, legal scholars, and international financial institutions agree that an independent judicial system is necessary to enhance and sustain economic development. In this study, the authors also take a similar standpoint. However, the level of judicial independence in China and its high economic growth clearly raise several questions as to the interested people in this fact. For example, How is China's speed of economic growth suitable to its degree of judicial independence? Does the simultaneity of great economic growth and little judicial independence indicate that an independent judiciary is not important to economic development in the end? A number of scholars have concluded that,

> China is an important counterexample to the findings in the law, institutions, finance, and growth literature: neither its legal nor financial system is well developed by existing standards, yet it has one of the fastest-growing economies.[63]

---

[62] The advent of China as a major and influential economic power in the world raised anxiety among many U.S. policymakers. Nevertheless, at present China is the largest merchandise trading partner of the United States, the biggest source of imports, and the third-largest U.S. export market. As stated by U.S. trade data, in 2017 the total commerce between the two countries produced an estimated $634 billion (which had been only $5 billion in 1980). U.S. policymakers claim that China exercises unfair trade practices that threaten "American jobs, wages, and living standards." *See* Morrison, *supra* note 48, at 1. Consequently, the USA has engaged in various efforts to slow Chinese growth and foster a trade-war environment.

[63] Allen et al. 2005, at 57.

3. Factors Behind Substantial Economic Development in China

This study identifies the following reasons for the enormous economic growth in China without the conventional concept of judicial independence.

3.1. Promoting the Rule of Law and Judicial Reforms

The early submission of the rule of law was advertised in its primary tradition of the political agenda as a shield for human rights, personal liberty, and individual dignity. In modern compliance, however, the oratory of the rule of law is very common in business communications, in the research and publications of the World Bank, the International Monetary Fund, the Asian Development Bank (ADB), in two-sided development support projects, and even in U.S.-China diplomatic dialogue.[64] The rhetoric is that the rule of law is an essential element in economic development, not only in socialist countries, but also in developing capitalistic countries as well.[65] China has promised to establish a "harmonious society of socialism" with features of the rule of law, justice, and fairness.[66] After the end of the Cultural Revolution (1966–1976), China put into effect wide-ranging institutional reforms to develop and facilitate economic advancement. At that time, the CCP placed expectations on the judiciary in ensuring the constancy of property and "profits in market-oriented societies."[67] The basis and background of the CCP's policy highlights that,

> The People's Republic of China governs the country according to law and makes it a socialist country under the rule of law.[68]

To fulfill these expectations and policies, in the 1980s China started judicial reforms with the vital objective of founding a state ruled according to the law.[69] In 1997, the CCP announced a ten-year goal for national social and economic development at the Fifteenth National Congress with a clear policy of "managing state affairs according to the law" and "building a socialist country ruled by law."[70]

---

64 John K.M. Ohnesorge, *The Rule of Law, Economic Development, and the Developmental States of Northeast Asia* in *Law Development in East and Southeast Asia* 70 (C. Antons (ed.), London: Routledge Curzon, 2003).

65 *World Bank Development Report 1996: From Plan to Market* (New York: Oxford University Press, 1996) (Dec. 20, 2019), also available at http://documents.worldbank.org/curated/en/917191468155732199/pdf/158920REPLACEMENT0WDR01996.pdf.

66 Mei Y. Gechlik, *Judicial Reform in China: Lessons from Shanghai*, 19(1) Columbia Journal of Asian Law 97, 98 (2005).

67 Yanrong 2018.

68 Constitution of the People's Republic of China (1982), Ch. 1, Art. 5.

69 Xin Chunying, *What Kind of Judicial Power Does China Need?*, 1(1) International Journal of Constitutional Law (2003).

70 Margaret Y.K. Woo, *Court Reform with Chinese Characteristics*, 27(1) Washington International Law Journal 241, 246 (2017).

In China, economic development policies are progressively placed into legal form; this is because market reforms are connected to the law and the courts; and because reform was required to build confidence in foreign traders and stakeholders. In the age of universal competition for investment, it is hard to find any state that is not involved in some agenda of judicial reform intended to make legal institutions more efficient, effective, and predictable.[71] Consequently, China adopted a number of reform initiatives in the legal arena, because legal and judicial reforms were desirable to facilitate economic reform that is required for healthy economic growth. China developed a system that offered foreign investors security and stability. China thus established an arbitration system for commercial disputes involving international parties to secure foreign investment which was constructed on international standards and norms and run by China's International Economic and Trade Arbitration Commission.[72] In 1994, The Chinese Arbitration Law was approved and circulated.

Prior to 2013 the CCP issued three "Five-year Reform Programs for the People's Courts" in 1999, 2005, and 2009.[73] The Supreme Peoples' Court (SPC) declared a five-year (1999–2003) reform strategy to shape a "fair, open, highly effective, honest, and well-functioning" judicial system.[74] This reform policy was designed with the aim of rebuilding judicial credibility, reconstruction of a professional judiciary, and improvement of the adjudication process. The measures included introducing single judge trial procedure for higher court efficiency, establishing enforcement offices at all levels of the courts, and requiring a law school degree for new judges. The second five-year court reform plan of 2004–2008 was issued in October 2005. This reform plan had the intended targets of ensuring judicial neutrality and fairness, improving judicial credibility, and promoting judicial transparency and professionalism. The concrete measures were: the principle of presumption of innocence recognized and applied in court hearings, and judicial review of administrative decisions. In 2006, around 17,018 administrative decisions were affirmed illegal or invalid. As a result of review, 34% of the decisions of (the various levels of) the government or its branches underwent changes, and the courts moved forward with only 18% of the total administrative decisions. An additional result was improved selection and promotional mechanisms for judges. In 2006, around 127 judges from the lower courts were promoted to sit as judges at higher courts, including as justices at the Supreme People's Court.[75]

---

71 Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics* in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, *supra* note 20, at 1, 9.

72 Woo 2017, at 243.

73 Supreme People's Court of the People's Republic of China, Whitepaper on Judicial Reform of Chinese Courts (2016) (Dec. 20, 2019), available at http://english.court.gov.cn/2016-03/03/content_23724636.htm.

74 Gechlik 2005, at 98.

75 Congressional-Executive Commission on China, Second Five-Year Reform Program for the People's Courts (2004–2008) (CECC Partial Translation) (2006) (Dec. 20, 2019), available at https://www.cecc.gov/resources/legal-provisions/second-five-year-reform-program-for-the-peoples-courts-2004-2008-cecc.

The third five-year court reform plan, promulgated in 2009, encompassed the period from 2009 to 2013. This reform plan was formulated to develop "working mechanisms, maintaining social fairness and justice," satisfying prospects of the ordinary people vis-à-vis the work of the judiciary.[76] The main tasks of judicial reform of the people's courts were: "reform and improve the operating mechanism for the judicial functions," "improve the criminal trial system," and "reform and improve the civil and administrative trial systems."[77] This reform phase granted mediation in a campaign promoted by the government to relieve pressure on the courts. Accordingly, in 2012 the civil procedure rules were also modified.[78] The Fourth Judicial Reform Plan as declared by the SPC covers the period from 2014 to 2019. One of the key aims of this reform policy is the accomplishment of the "Diversified Dispute Resolution Mechanism of reconciliation, mediation, arbitration, notarization, administrative ruling, administrative reconsideration and litigation."[79] The SPC has also tried to establish open and public trial so as to legitimize the work of the courts and transparency. According to the work report of the Supreme People's Court 2014, in 2013 the SPC published about 45,000 trial proceedings on public media including high-profile cases. Also, the SPC established a website to publish court judgment documents. Hitherto, about 3,900 SPC judgments and 1.65 million from local courts had been published.[80] Also, in 2018 China made several improvements in the judicial system: it launched the Shanghai Financial Court, which is China's first court specializing in the conduct of finance-related cases; and two new internet courts established in Beijing and Guangzhou. Among other actions, the SPC opened two international commercial courts in the cities of Shenzhen and Xi'an and "to promote transparency, over 2 million court trials have been live-streamed online on the SPC-run official website."[81] In summary, China's reforms on laws and the judiciary not just set the basis of expectations and representative goals, they also never ignore the fundamental national identity. Scholars contend that all laws and courts are

---

[76] Supreme People's Court of the People's Republic of China, Notice of the Supreme People's Court on Issuing the Third Five-Year Reform Outline for the People's Courts (2009–2013) (Dec. 20, 2019), available at http://www.lawinfochina.com/Law/Display.asp?Id=7380.

[77] *Id.*

[78] Woo 2017, at 253–254.

[79] Supreme People's Court of the People's Republic of China, Opinions of the Supreme People's Court on People's Courts Further Deepening the Reform of Diversified Dispute Resolution Mechanism (2016) (Dec. 20, 2019), available at http://en.pkulaw.cn/display.aspx?cgid=273230&lib=law; Woo 2017, at 254.

[80] Supreme People's Court of the People's Republic of China, Highlights of Work Report of China's Supreme People's Court (2014) (Dec. 20, 2019), available at http://english.court.gov.cn/2015-07/15/content_21289597.htm.

[81] Supreme People's Court of the People's Republic of China, Highlights of Supreme People's Court Work Report (2019) (Dec. 20, 2019), available at http://english.court.gov.cn/2019-03/12/content_37449108.htm; Highlights of China's Judicial Reform Progress in 2018, Xinhuanet, 15 January 2019 (Dec. 20, 2019), available at http://www.xinhuanet.com/english/2019-01/15/c_137745598.htm.

a reflection of "national goals and identity." Any proposed reforms that challenge Party goals and national identity fixed by the Party are predestined to fail.[82]

3.2. Gradual Economic Reforms

Dani Rodrik sketched an overall conclusion based on a study of the economic growth of some developing countries. He stated,

> The onset of economic growth does not require deep and extensive institutional reform

and

> Sustaining high growth in the face of adverse circumstances requires ever stronger institutions.[83]

The Chinese leadership understood the reality and necessity of strong institutions; therefore, they made numerous reforms in the institutional financial system to enhance and sustain economic expansion. China adopted several reform initiatives in economic aspects in order to enhance and sustain development. The early Chinese financial reform approaches included the dual-track, the township-village enterprises (TVEs), and fiscal federalism.[84] They introduced incentives in the market to expand production and to create new, strong firms, "but the new inputs and outputs would be traded in what was a market economy."[85] China launched market-oriented reforms in six very important fields: fiscal reforms; "reforms in [the] financial sector"; exchange rate reforms; a "market-based macro prudential system"; allowing private investment in "consumption goods markets, capital goods markets," and the financial sector; and renovating the government's functions, and promoting the reform of the legal system.[86] In 2003, the China Banking Regulatory Commission (CBRC) was established to take possession of the regulatory and supervisory responsibilities for the banking sector from the People's Bank of China (PBC).[87]

---

82 Woo 2017, at 242.

83 Dani Rodrik, *Introduction: What Do We Learn from Country Narratives?* in *In Search of Prosperity: Analytic Narratives on Economic Growth* 1, 15–16 (D. Rodrik (ed.), Princeton: Princeton University Press, 2003).

84 Jinglian Wu, *Understanding and Interpreting Chinese Economic Reform* (Mason, OH: Thomson/South-Western, 2005).

85 Dam 2007, at 271.

86 Yang, *supra* note 54, at 4.

87 China's Growth and Integration into the World Economy: Prospects and Challenges, International Monetary Fund, Occasional Paper 232 (2004), at 47 https://www.imf.org/external/pubs/ft/op/232/op232.pdf.

The gradual opening-up policy has played a crucial role in promoting and developing the private sector and has contributed to economic growth. Scholars remark that the private sector has increased much quicker than others despite comparatively poorer regular financing channels and legal protection, but effective, alternative-financing paths and corporate governance techniques exist to support the progression of the private sector.[88] China is making the transformation from tentative policy to deep and widespread institutional policy measures. Accordingly, China's entrance into the World Trade Organization (WTO) in 2001 can be seen as a milestone. This step was part of a trade reform policy. The trade reforms and accession into WTO have been essential in promoting China's economic expansion and supporting incorporation into the global trading system.

The slogan "Made in China 2025" stands as one more crucial item on the agenda to the new goal of economic growth through "innovation." In 2015, the Chinese government announced a plan identifying innovation as a top priority under its economic planning with the launch of a number of important initiatives. The goal of the "Made in China" plan is to modernize and upgrade China's ten key manufacturing sectors through widespread government assistance in order to make China a key global actor in these sectors.[89] In this regard, U.S. trade representative Robert Lighthizer designated the "Made in China 2025" inventiveness as "a very, very serious challenge, not just to us, but to Europe, Japan, and the global trading system."[90] The Belt and Road Initiative (BRI), also called "One Belt, One Road" (OBOR), is one more new effort by China to expand its economic growth and power globally. U.S. policymakers and analysts are cognizant of it and consider it to be another area of concern. They contend that China could make use of this initiative to boost its industries, expand new foreign markets, "influence other countries to adopt China's economic model; and expand China's 'soft power'" in the various countries that participate in the initiative.[91] The effectiveness of reforms in the economic and financial sectors are well recognized. One report prepared by the U.S. Congressional research service noted that before the commencement of economic reformations and trade liberalization,

> China maintained policies that kept the economy very poor, stagnant, centrally controlled, vastly inefficient, and relatively isolated from the global economy.

---

88 Allen et al. 2005, at 59.

89 Morrison, *supra* note 48.

90 *Id.*

91 *Id.* at 2.

Since adopting free-market reforms and opening up to foreign investment and trade, China has become one of the world's fastest-growing economies, with real annual GDP growing at the average annual rate of 9.5% through 2017.[92]

3.3. Maintaining Adjudicative Independence

The enforcement of substantive law is more important than its content, and the judiciary is a focal institution for substantive law's enforcement. The proper enforcement of law concerns an efficient judicial system, the quality of judges and the judiciary, and the judiciary's relation to the other branches of government. From the rule of law standpoint, both in implementing the law and in managing "the problem of the predatory state," the connection of the judiciary to other divisions of the government is essential.[93] Subsequently, judicial independence from the rest of the government branches is not only of fundamental significance but also a substance of outside assistance from international financial institutions, particularly in developing and third-world countries. However, the context of understanding and maintaining judicial independence is varied and based on a number of principles and standards. Impartial adjudication, independent adjudication or "adjudicative independence" is also generally agreed on a standard of judicial independence. Adjudicative independence as the perspective of judicial independence is mostly maintained in the courts of Great Britain and other European countries.[94]

China stands on adjudicative independence in the matter of maintaining judicial independence. The basis of adjudicative independence in China is Article 126 of the Constitution of China, which states,

> The people's courts exercise judicial power independently, following the provisions of law and not subject to interference by any administrative organ, public organization or individual.[95]

Some Chinese scholars refer precisely to the term "adjudicative independence," and demonstrate it as the unique feature of judicial independence in China.[96] For the moment, many international scholars contend adjudicative independence chiefly

---

92 Morrison, *supra* note 2.

93 Dam 2007, at 228.

94 Yanrong 2018.

95 Constitution of the People's Republic of China (1982), Art. 126.

96 Ming Zhao, 从历史的深处走来 – 漫议转型时期的当代中国政治与司法改革[*Coming from History – On Relationship of China' s Judicial System Reform and Political System Reform*], 3 政法论丛 [Journal of Political Science and Law] 3 (2008); Guangzhong Chen, *The Principle of Judicial Independence with Chinese Characteristics from the Perspective of Comparative Law*, 27(11) Chinese Prosecutor 1 (2013); Yanrong 2018.

by denoting it to judicial independence.[97] The ultimate factor to enhance economic development is an independent adjudication system, not the method of country regime, whether autocracy or authoritarian or democracy. China proves this position where Western scholars randomly claim that China lacks judicial independence. China does not bear the conventional concept of judicial independence, but emphasizes adjudicative independence and the rule of law.

3.4. Facilitating Trade and Investment

Long-term economic growth not only depends on foreign direct investment but also on the formation of new domestic enterprises backed by local savings.[98] Strong and worthy financial regulations concerning credit markets, shareholder rights, creditors rights, contract enforcement, and protection of property rights are vital to facilitate trade and investment. Making sound substantive law, providing a smooth and efficient procedure to run business, promoting infrastructure, protecting foreign investment, and securing minority investors are ways of advancing business and investment. China properly stimulates all factors to make it easy to do business in the country. According to the World Bank *Doing Business* rankings for 2019 (Table 4), China is 46th out of the 190 economies ranked. China is also among the top ten countries recognized for their improvement (over past performance), and the only economy so recognized in East Asia and the Pacific region. In this report, China's ranking in the factor "Starting a Business" is 28th.[99] The factor "Enforcing Contracts" measures the performance of the judiciary in the event of a contract lawsuit between the state and a private party, and between private parties. Adjudicative independence or independent judiciary is most essential for good performance of contract enforcement. The World Bank ranks China 6th in contract enforcement among the 190 countries. In China, land registration or the system of registering property is exceptionally strong, and procedures are also efficient.[100] In the same report, in the factor "Registering Property" China is ranked 27th.

Table 4: The World Bank Doing Business (WBDB) 2019 ranking of China in various factors relating to ease of doing business

Factors	WBDB 2019 Rank	WBDB 2019 Score	WBDB 2018 Score
Starting a Business	28	93.52	85.47

97 Peerenboom 2009.

98 Dam 2007, at 102.

99 A detailed description about China in the World Bank *Doing Business* can be found online (Dec. 20, 2019), available at https://www.doingbusiness.org/en/data/exploreeconomies/china.

100 Dam 2007, at 236.

Getting Electricity	14	92.01	65.71
Registering Property	27	80.80	74.99
Protecting Minority Investors	64	60.00	55.00
Paying Taxes	114	67.53	62.90
Enforcing Contracts	6	78.97	78.97
Resolving Insolvency	61	55.82	55.82

Source: World Bank *Doing Business* ranking report 2019

Overall, China's ranking (46th) is higher than the other countries in both the South Asian and the East Asian regions, although lower than the average of member countries of the Organisation for Economic Co-operation and Development (OECD). In fact, China is not a member of the OECD. Table 4 above shows that in 2019 in all factors, with the exception of "Enforcing Contracts" and "Resolving Insolvency," China scored higher than in 2018.

From the several World Bank *Doing Business* reports it is apparent that China's initiatives to facilitate business and trade are noteworthy. In the last decade, China has demonstrated remarkable reform agendas among numerous factors to promote trade. The reforms have taken place in respect of starting a business, dealing with construction permits, getting electricity, contract enforcement, registering property, protecting minority investors, paying taxes, cross-border trade, among others. The government carefully designs reform approaches aimed at developing the business regulatory environment to make it easier to do business. For instance, to attain that targeted objective, between January 2012 and December 2014 China exempted small and micro enterprises from paying various administrative fees to start a business so as to lower the expense of doing so. The reforms to enhance the efficiency of the business process cover introducing a single form to attain an organization code, tax registration, and business license. Also, the reforms launched an online company registration system and simplified social security registration in Beijing and Shanghai. In these two great cities, in order to start a new business, an entrepreneur obtains company registration and a business license within "five days" – and with no charges from the State Administration of Industry and Commerce (SAIC).[101]

The government has undertaken several initiatives that has meaningfully reduced the time needed to get an electricity connection for business. In the first half of

[101] The World Bank *Doing Business* 2019; China Economy Profile 2019 (Dec. 20, 2019), available at https://www.indexmundi.com/china/economy_profile.html.

2018, the government introduced a reform to the construction permit procedure. The reform covers "simplified documentation requirements, improved processing times, and expanded public access to information." To simplify cross-border trade, China applied "a national trade single window" connecting the tax and customs administrations, the Ministry of Commerce, port authorities, and other agencies engaged in import and export procedures.[102] Security of property rights facilitates trade and investment in the market; for this purpose, China strongly ensures adequate protection of property rights and punishment for violations of these rights. The government ensures that policies are credible and not harmful to capital expenditures and investment by enacting reliable regulations that signal stability and certainty to the market.

3.5. Crackdown Against Corruption

The presence of corruption in the public and private sectors is a substantial threat to high economic development, and even possibly a cause of poverty.[103] Corruption is perhaps the most significant factor hindering economic growth in a number of countries,[104] and the reason for loss of stockholder confidence.[105] The Chinese leadership has vowed to prevent corruption in all sectors to promote sound economic development. Accordingly, from 1998 to 2004, around 8,000 judges and other court personnel were penalized for violating procedures or laws. This amounts to approximately 2.7% of China's judicial staff.[106] In 2013, about 381 judges and court employees were denounced for misusing their power and violating laws and procedures, 101 of whom were prosecuted.[107] According to work report 2013 to 2017 of the Supreme People's Court, the Court punished 53 staff members for violating Party disciplinary rules and laws. Moreover, about 3,338 judicial members at local courts countrywide were denounced for misusing their authority, 531 of whom were prosecuted. In the same report, the SPC declared their stand on corruption with the language,

> The SPC would discipline judges and court staff more strictly and uphold a zero-tolerance policy on corruption.[108]

---

102 The World Bank *Doing Business* 2019, at 12.

103 Mohammad Saiful Islam, *Is the Independent Judiciary Important in Bangladesh? A Legal and Economic Study*, 5(3) International Journal of Law 38, 45 (2019).

104 Dam 2007, at 8.

105 Edgardo Buscaglia & Maria Dakolias, *An Analysis of the Causes of Corruption in the Judiciary*, 30 Law and Policy in International Business 95 (1999).

106 Gechlik 2005, at 129.

107 Highlights of Work Report of China's Supreme People's Court (2014), *supra* note 80.

108 Supreme People's Court of the People's Republic of China, Highlights of Supreme People's Court Work Report (2018).

In 2018, China undertook even more serious action against judicial corruption: around 1,064 court employees of Chinese courts at all levels were investigated and punished for abusing the judicial and enforcement authority. Also, about 369 court employees were investigated and punished for their "behaviors against the spirit of the eight-point regulation on improving Party and government conduct" mentioned in the SPC work report 2018.[109] The exact punishment for corruption among violators is unknown; maximum official document references to "violations of law and discipline" in the courts are set in the circumstance of corruption. This mention undoubtedly indicates that a great number of violators have been penalized for corruption.[110]

The Chinese government has embraced a robust position against corruption not only in judicial and administrative sectors, but also at all levels. The process of controlling (eliminating) corruption outside the judiciary is conducted and punished properly through judicial trial. In 2018, all levels of Chinese courts concluded 28,000 graft cases concerning bribery, embezzlement, and negligence of duty. These cases linked 33,000 people with 18 past officials at the provincial level and above. A total of 2,466 persons involved in bribery were sentenced in the heavy crackdown on such crime.[111] A recent momentous incident relating to the anti-corruption crackdown regarded the prosecution of Meng Hongwei, former Interpol chief and formerly one of six vice-ministers in China's Public Security Ministry, for allegedly taking bribes. The charges put forward regard abusing his position for private gain, mishandling state funds for his family's exorbitant lifestyle, and violating Party principles. According to the Central Commission for Discipline Inspection (CCDI), these charges amount to a "serious violation of law and discipline." Moreover, Lu Wei, China's former Chief of Internet Censorship, was penalized to fourteen years imprisonment for bribery in 2019.[112]

Conclusion

An impartial adjudication system is highly appraised as necessary in ensuring the rights of the public and private citizens, and in building a just society by eradicating unfairness and injustice. Today, it is also measured as a mode of attraction to foreign investment, to business, and to the sustainment of economic growth. The literature on development policy argues that a better quality judicial and legal system, and

---

109 Supreme People's Court of the People's Republic of China, Highlights of Supreme People's Court Work Report (2019).

110 Gechlik 2005, at 129.

111 Supreme People's Court of the People's Republic of China, Highlights of Supreme People's Court Work Report (2019).

112 Meng Hongwei: China to Prosecute Former Interpol Chief, BBC News, 27 March 2019 (Dec. 20, 2019), available at https://www.bbc.com/news/world-asia-china-47718827.

reforms in contract law and property rights protection, can generate economic growth in a country. Western jurists and political scientists claim that China operates by a one-party authoritarian regime, and that there is no independent and impartial judicial system. Yet, China is a unique example of the fastest economic development in the world.

In keeping with the above discussion, it is evident that an independent adjudication system to promote contract enforcement and attract international investment is feasible in a one-party regime. Despite huge Western blame vis-à-vis its weak and non-independent judicial system, China has achieved very impressive economic development. This is because, regardless of the enormous deficiencies of the legal system of China, the progressive movement is distinctive: the Party widely implements reform as a part of its public commitment to remodeling the legal system and building more independent legal and judicial institutions.[113] China has made market-oriented reforms in the legal system that have strengthened the effort to safeguard property rights, encourage trade, and attract investment.[114] Moreover, China facilitates trade and doing business through the enactment of new regulations, and the amendment of already existing regulations, that make it easier to do business in the country. And while China does not maintain the conventional concept of judicial independence, it does assert a new and unique concept of an independent judicial system which is termed "adjudicative independence" or "independent and impartial adjudication."

China's experience may be regarded as the instructions for other developing and third-world countries with a weak legal system and emerging financial markets.

References

Allen F. et al. *Law, Finance, and Economic Growth in China*, 77(1) Journal of Financial Economics 57 (2005). https://doi.org/10.1016/j.jfineco.2004.06.010

Buscaglia E. & Dakolias M. *An Analysis of the Causes of Corruption in the Judiciary*, 30 Law and Policy in International Business 95 (1999).

Chan P.C.H. *An Uphill Battle: How China's Obsession with Social Stability Is Blocking Judicial Reform*, 100(3) Judicature 14 (2016).

Chavez R.B. *The Rule of Law and Courts in Democratizing Regimes* in *The Oxford Handbook of Law and Politics* 63 (K.E. Whittington et al. (eds.), New York: Oxford University Press, 2008). https://doi.org/10.1093/oxfordhb/9780199208425.003.0005

Chen G. *The Principle of Judicial Independence with Chinese Characteristics from the Perspective of Comparative Law*, 27(11) Chinese Prosecutor 1 (2013).

Chen J. *Chinese Law: Towards an Understanding of Chinese Law, Its Nature, and Development* (The Hague; Boston: Martinus Nijhoff Publishers, 1999).

[113] Peerenboom 2002.

[114] *Id.*

Chunying X. *What Kind of Judicial Power Does China Need?*, 1(1) International Journal of Constitutional Law 58 (2003). https://doi.org/10.1093/icon/1.1.58

Cohen J.A. *The Chinese Communist Party and "Judicial Independence": 1949–1959*, 82(5) Harvard Law Review 967 (1969). https://doi.org/10.2307/1339545

Dam K.W. *The Law-Growth Nexus: The Rule of Law and Economic Development* (Washington, D.C.: Brookings Institution Press, 2007).

Fairbairn W. *An Examination of Judicial Independence in China*, 23(4) Journal of Financial Crime 819 (2016). https://doi.org/10.1108/jfc-12-2015-0068

Ferejohn J. *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72(2-3) Southern California Law Review 353 (1999).

Gallagher M.E. *Use the Law as Your Weapon! The Rule of Law and Labor Conflict in the PRC* in *Engaging the Law in China: State, Society, and Possibilities for Justice* 54 (N.J. Diamant et al. (eds.), Stanford: Stanford University Press, 2005).

Gechlik M.Y. *Judicial Reform in China: Lessons from Shanghai*, 19(1) Columbia Journal of Asian Law 97 (2005).

Gibson J.L. *"New-Style" Judicial Campaigns and the Legitimacy of State High Courts*, 71(4) Journal of Politics 1285 (2009). https://doi.org/10.1017/s0022381609990211

Hailsham L. *The Independence of the Judicial Process*, 13(1) Israel Law Review 1 (1978). https://doi.org/10.1017/s0021223700006087

Hamilton A. *Federalist No. 78* in Hamilton A. et al. *The Federalist Papers* 235 (New York: Palgrave Macmillan, 2009). https://doi.org/10.1057/9780230102019_47

He X. *Ideology or Reality?: Limited Judicial Independence in Contemporary Rural China*, 6(3) Australian Journal of Asian Law 213 (2004).

He X. *The Politics of Courts in China*, 2(2) China Law and Society Review 129 (2017). https://doi.org/10.1163/25427466-0020001

Hung V.M.-Y. *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52(1) American Journal of Comparative Law 77 (2004). https://doi.org/10.2307/4144447

Islam M.S. *Independent Judiciary: Nature and Facets from the International Context*, 6(2) International Journal of Ethics in Social Sciences 15 (2018).

Islam M.S. *Is the Independent Judiciary Important in Bangladesh? A Legal and Economic Study*, 5(3) International Journal of Law 38 (2019).

Judicial Independence: The Contemporary Debate (S. Shetreet & J. Deschênes (eds.), Dordrecht; Boston; Lancaster: Martinus Nijhoff Publishers, 1985).

Landry P. *The Institutional Diffusion of Courts in China: Evidence from Survey Data* in *Rule by Law: The Politics of Courts in Authoritarian Regimes* 207 (T. Ginsburg & T. Moustafa (eds.), New York: Cambridge University Press, 2008). https://doi.org/10.1017/cbo9780511814822.009

Larkins C.M. *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44(4) American Journal of Comparative Law 605 (1996). https://doi.org/10.2307/840623

Li Y. *Judicial Independence in China: An Attainable Principle?* (The Hague: Eleven International Publishing, 2013).

Moustafa T. & Ginsburg T. *Introduction: The Functions of Courts in Authoritarian Politics* in *Rule by Law: The Politics of Courts in Authoritarian Regimes* 1 (T. Ginsburg & T. Moustafa (eds.), New York: Cambridge University Press, 2008). https://doi.org/10.1017/cbo9780511814822.001

Ohnesorge J.K.M. *The Rule of Law, Economic Development, and the Developmental States of Northeast Asia* in *Law Development in East and Southeast Asia* 70 (C. Antons (ed.), London: Routledge Curzon, 2003). https://doi.org/10.2139/ssrn.3480823

Peerenboom R. *China's Long March Toward Rule of Law* (Cambrige and New York: Cambridge University Press, 2002). https://doi.org/10.1017/cbo9780511493737

Peerenboom R. *Judicial Independence in China: Common Myths and Unfounded Assumptions* in *Judicial Independence in China: Lessons for Global Rule of Law Promotion* 69 (R. Peerenboom (ed.), New York: Cambridge University Press, 2009). https://doi.org/10.1017/cbo9780511809484.005

Rodrik D. *Introduction: What Do We Learn from Country Narratives?* in *In Search of Prosperity: Analytic Narratives on Economic Growth* 1 (D. Rodrik (ed.), Princeton: Princeton University Press, 2003). https://doi.org/10.1515/9781400845897-003

Salzberger E.M. *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13(4) International Review of Law Economics 349 (1993). https://doi.org/10.1016/0144-8188(93)90029-5

Shetreet S. *Creating a Culture of Judicial Independence: The Practical Challenge and the Conceptual and Constitutional Infrastructure* in *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* 15 (S. Shetreet & C. Forsyth (eds.), Leiden: Martinus Nijhoff Publisher, 2012). https://doi.org/10.1163/ej.9789004188334.i-639.17

Shetreet S. *Judicial Independence and Accountability: Core Values in Liberal Democracies* in *Judiciaries in Comparative Perspective* 3 (H.P. Lee (ed.), New York: Cambridge University Press, 2011). https://doi.org/10.1017/cbo9780511996399.003

Shetreet S. *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges* in *Judicial Independence: The Contemporary Debate* 590 (S. Shetreet & J. Deschênes (eds.), Dordrecht; Boston; Lancaster: Martinus Nijhoff Publishers, 1985).

Woo M.Y.K. *Court Reform with Chinese Characteristics*, 27(1) Washington International Law Journal 241 (2017).

World Development Report 2005: A Better Investment Climate for Everyone (New York: The World Bank and Oxford University Press, 2004). https://doi.org/10.1596/0-8213-5682-8

Wu J. *Understanding and Interpreting Chinese Economic Reform* (Mason, OH: Thomson/South-Western, 2005).

Yanrong Z. *The Way to Understand the Nature and Extent of Judicial Independence in China*, 6(01) Asian Journal of Law and Society 131 (2018). https://doi.org/10.1017/als.2018.27

Zhao M. 从历史的深处走来 – 漫议转型时期的当代中国政治与司法改革[*Coming from History – On Relationship of China' s Judicial System Reform and Political System Reform*], 3 政法论丛 [Journal of Political Science and Law] 3 (2008).

Zhao Y. *The Expansion of Judicial Power in China* (New Haven: Yale University Press, 2003).

Zhiwei T. *Perfecting the Constitutional Provision on Independent Adjudication and Ancillary Reform*, 6 Jianghai Academic Journal 109 (2005).

Information about the authors

Mohammad Saiful Islam (Kumira, Bangladesh) – Assistant Professor, Department of Law, International Islamic University Chittagong (Kumira, 4318, Bangladesh; e-mail: saiful@law.iiuc.ac.bd).

Xu Xin (Beijing, China) – Professor, School of Law, Beijing Institute of Technology (5 Zhongguancun St., Haidian, Beijing, 100811, China; e-mail: xuxin.net@163.com).

BRICS Law Journal

Volume VII (2020) Issue 1

Оформление и компьютерная верстка:
ИП Резниченко А.С.

Подписано в печать 10.03.2020. Формат 70x100 $^{1}/_{16}$. Объем 11,125 п.л.
Цена свободная.
Заказ №

Наш адрес:
ООО «Издательство «Деловой стиль»
1119602, г. Москва,
ул. Тропарёвская, владение 4, этаж 2, комн. 802.
www.ds-publishing.ru