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BRICS LAW JOURNAL (BRICS LJ)

An independent, professional peer-reviewed academic legal journal.

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

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NON-STANDARD EMPLOYMENT IN THE BRICS COUNTRIES

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Non-standardization of employment has become the main trend of the labour markets in the globalized economy. Attempting to enhance the flexibility of employment relations the legislators in BRICS countries are also the part of this trend. The forms of the non-standard employment are numerous, the present paper concentrates upon the following ones: temporary employment, part-time and multi-party employment relationship. The authors review the experience of four BRICS countries in regulating non-standard forms of

employment and determine what were the specific reasons for adopting them in Russia, China, Brazil, and South Africa. The national parts are introduced by the consideration of the international standards of protection of employees working under non-standard contracts. It is argued that even though these four states did not ratify the ILO Convention No. 181 Private Employment Agencies Convention (1997) and only Russia ratified ILO Part-Time Work Convention (No. 175), the ILO approach has influenced the development of national regulations. Though the equal treatment of all workers is lacking in many aspects of employment relations. In the national parts the authors trace the changes in employment law which reflect the pursuit of flexibilization of the labour market and, as in Brazil, the need to formalize employment relations.

Keywords: non-standard employment; part-time work; temporary agency work; short-term employment; formalization of employment; BRICS.

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Introduction

It has been generally accepted that globalization and the reinforced competition are the key reasons for the constant rise of non-standard forms of employment.[1] Both developing and developed countries[2] demonstrate the significant growth of such

[1] Olusegun Oladeinde, *Global Capitalism and the Rise of Non-Standard Employment: Challenges to Industrial Relations* in *The Global Labour Market: From Globalization to Flexicurity* 53 (R. Blanpain (ed.), Austin: Wolters Kluwer Law & Business; Alphen aan de Rijn: Kluwer Law International, 2008); *Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects* 2 (Geneva: International Labour Office, 2016) (Aug. 15, 2020), also available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf.

[2] *See, e.g.*, Katherine V.W. Stone, *The Decline in the Standard Employment Contract: Evidence from Ten Advanced Industrial Countries*, UCLA School of Law, Law and Economics Research Paper No. 12-19 (2013) (Aug. 15, 2020), available at https://ssrn.com/abstract=2181082.

contracts. In some countries the spread of non-standard forms is so significant that it becomes worth questioning which employment has become a "standard."[3]

To determine the notion of the non-standard employment we should start with the understanding of the standard form. Throughout the 20th century the standard was perceived as work under a permanent employment contract for a full-time job. Industrialization needed workers for the whole day and the main concern of both national and international labour law was to impose limits to working time. The struggle for the better working conditions lead to the establishment by the end of World War II of a set of rights and guarantees which should be provided to the worker.[4] From the end of the 80s of the 20th century a number of political, economic and technological factors brought changes to the labour market and the rise of non-standard employment. As such we can mention the defeat of communism in Western Europe and the collapse of the Soviet Union, the general weakening of trade unions, globalization and the mobility of business, the development of technologies and a number of world economic crises which lead to unemployment growth.

Non-standard employment in this context meant an opportunity to provide work without the provision of the whole set of right and guarantees elaborated by labour law and to have a more flexible human resources management.

The forms of the non-standard employment differ. The International Labour Organization (ILO) in its report divided them into temporary employment, part-time and on-call work and multi-party employment relationship.[5] It also pointed disguised employment/dependent self-employment as a non-standard form, however, it is outside the scope of employment contract.

In the present paper we will research the experience of four BRICS countries in regulating non-standard forms of employment and will try to determine what were the reasons for introducing of the new types of employment in Russia, China, Brazil, and South Africa.

In the first part of the paper we will consider the international standards of protection of employees working under non-standard contracts. The following four parts will be dedicated to the national experience of regulation. Each national part will include the definition of standard employment and the analysis of the reasons for the emergence of non-standard forms of employment. We will consider the legal regulations, the relevant case law and statistics.

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[3] In Bangladesh and India according to the ILO nearly two-thirds of wage employment is casual. *See Non-Standard Employment Around the World*, *supra* note 1.

[4] *See, e.g.*, Bob Hepple, *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* 285 (London: Mansell, 1986).

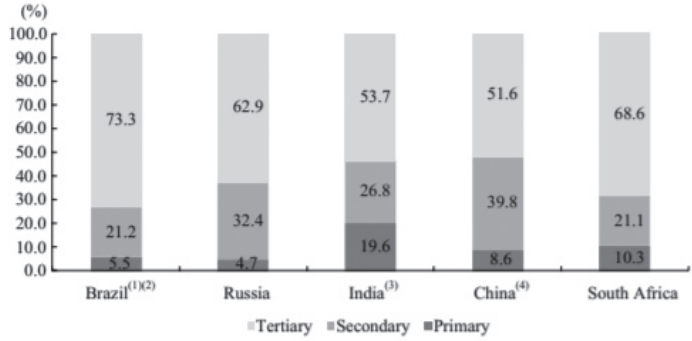
[5] *Non-Standard Employment Around the World*, *supra* note 1, at 21.

1. Non-Standard Employment and International Labour Standards

There is no official classification at the international level of standard and non-standard from of employment. As we mentioned above ILO in its research pointed such non-standard forms as temporary employment, part-time and on-call work and multi-party employment relationship.[6] The fluctuation from traditional two-subject employment relation for full time and indefinite term are the main features of these types of employment.

ILO noted that in general the expansion of the services sectors, particularly retail trade and hotels and tourism, is associated with greater use of part-time employment arrangements and fixed-term contracts. The rise of tertiary sector in BRICS economics is clearly demonstrated in the graphic below, which represents the share of GDP in different sectors in 2016.[7]

Graph 4.3 Share of GDP in Different Sectors, 2016



The BRICS Joint Statistical Publication 2017 also revealed that the percent of tertiary sector in all the countries is steadily rising since 2007. It is not surprising that in the same time we can clearly see the rise of non-standard forms of employment in all the 4 countries (*see* figure below).[8]

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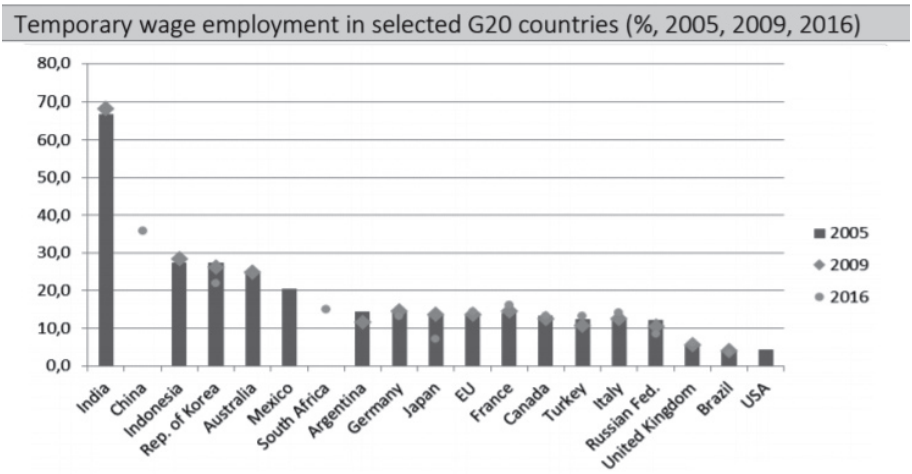
6 *Non-Standard Employment Around the World*, *supra* note 1, at 21.

7 BRICS Joint Statistical Publication 2017 (Aug. 15, 2020), available at https://www.gks.ru/free_doc/doc_2017/JSP-2017.pdf.

8 ILO, Informality and Non-Standard Forms of Employment (2018) (Aug. 15, 2020), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_646040.pdf.



In the recent Declaration of the 11th BRICS Summit adopted on 14 November 2019, where the presidents underline that "labour markets need to become more adaptable and inclusive."[9] We suppose that both words "adaptable" and "inclusive" have relevance to non-standard forms of employment, because at the one hand, the emergence and the rise of these forms are the signs of the adaptation of the state policy for the need of business. On the other hand, the diversification of employment contracts makes it easier to provide jobs for some more vulnerable groups of workers as people with family responsibilities, disabled people or migrant workers. In addition, non-standard forms of employment can provide flexibility to both enterprises and workers, especially when part-time work is chosen voluntarily. However, there should be limits for the "adaptability" of labour markets and labour regulations. These limits are established in the international labour law and will be considered below.

The International Covenant on Economic, Social and Cultural Rights is the only relevant international instrument ratified by all the BRICS members. It provides the right to just and favorable conditions of work (Art. 7), prohibition of discrimination (Art. 2), the freedom of association and the right to strike (Art. 8). Article 7 established the key rights which should be guaranteed at work, such as fair wages and equal remuneration, safe and healthy working conditions, rest and leisure. The Committee on economic, social and cultural rights has underlined in its General Comment No. 23 that the national policy should cover all branches of economic activity, including the formal and informal sectors, and all categories of workers, including non-standard workers. Therefore, the rights set in Article 8 of the ECESCR should be equally guaranteed to workers both in standard and non-standard employment.

[9] BRICS Brasilia Declaration, Declaration of the 11th BRICS Summit, 14 November 2019 (Aug. 15, 2020), available at http://en.kremlin.ru/supplement/5458.

The same idea may be traced in the ILO Recommendation No. 198. Though the document is aimed at establishing clear criteria of employment relations it also provides a recommendation for the states to ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties, so that employed workers have the protection they are due.

In order to determine what is meant by the "due protection" rule we should first of all refer to the ILO fundamental principles. It is evident that all workers, both standard and non-standard, should be protected from forced labour, from discrimination and work, from child labour and should enjoy the freedom of association.[10] All the eight fundamental conventions do not provide any distinction in regulation of non-standard work. Brazil has ratified 7 out of 8 conventions (except for No. 87), Russia and South Africa has ratified all, China did not ratify conventions on forced labour and on freedom of association and the right to bargain collectively.[11] Thus having ratified these conventions Russia, South Africa and Brazil at least took an obligation to ensure the freedom of association for non-standards employees and their protection from discrimination. Another source of understanding the scope of "due protection" for non-standards workers are the special ILO Convention – Convention No. 181 Private Employment Agencies Convention (1997) and Part-Time Work Convention No. 175 (1994). Though Russia is the only BRICS country which ratified at least the latter convention, the brief review of the relevant standards is an important part of our paper. These conventions, in our view, provide a certain benchmark, the standards which will be used for the analysis of the national approaches to non-standard employment.

The ILO Part-Time Work Convention (No. 175) was adopted in 1994. At the time of writing it was ratified only by 18 out of 187 ILO members. Scholars note that in spite of the low level of ratifications it has influenced, directly or indirectly, the development of national or regional laws, regulations, and policies on the topic.[12] The confirmation of this argument we will see below considering the national regulations of part time work.

The acknowledgment of the states' obligation to ensure that part-time workers receive the same protection as that accorded to comparable full-time workers is the main achievement of the convention. Article 4 provides that the same treatment should be guaranteed in respect of the right to organize, the right to bargain collectively and the right to act as workers' representatives, to occupational safety

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[10] The ILO Declaration on Fundamental Principles and Rights at Work (1998) (Aug. 15, 2020), available at https://www.ilo.org/declaration/lang--en/index.htm.

[11] Ratifications of Fundamental Conventions by Country, ILO (Aug. 15, 2020), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0::NO::P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F.

[12] Işik Urla Zeytinoğlu, *International Policymaking: The ILO Standards on Changing Work Relationships* in *Changing Work Relationships in Industrialized Economies* 219, 225 (I.U. Zeytinoğlu (ed.), Amsterdam: John Benjamins, 1999).

and health and to protection from discrimination in employment. ILO though left the flexibility clause in Article 3, providing that the states may, after consulting the representative organizations of employers and workers concerned, exclude wholly or partly from its scope particular categories of workers or of establishments when its application to them would raise particular problems of a substantial nature. However even the inclusion of this flexibility clause did not convince the majority of ILO Member States to ratify the instrument.

Another convention on non-standard employment – about regulation of private employment agency work – has a very interesting history. Initially the aspirations of the ILO Member States were directed towards the prohibition of Fee-Charging Employment Agencies. It was reflected in the first convention dedicated to this topic – ILO Convention No. 34, adopted in 1936. It had only 11 ratifications and prohibited the fee-charging employment agencies which act as an intermediary for the purpose of procuring employment for a worker or supplying a worker for an employer with a view to deriving either directly or indirectly any pecuniary or other material advantage from either employer or worker.

The revised convention on Fee-Charging Employment Agencies was adopted after World War II in 1949. It is structured in a way to make the countries choose either they abolish such agencies (part II) or they create conditions for thorough supervision of their activities (part III). This convention had 42 ratifications. The last convention on Private Employment Agencies (PAA) was adopted in 1997 (No. 181). Up to date it was ratified by 32 countries, though none of the BRICS members ratify it.

This revised edition for the first time specifies the type of the employment agency which is created for employing workers with a view to making them available to a third party which assigns their tasks and supervises the execution of these tasks. The revision was necessary in the opinion of the ILO Conference as this type of the employment agencies has become widespread in the world and the rights of workers should have been protected against the abuses.

The key points of this convention are the following:

– necessity to take into account the opinion of social partners while determining the legal status of private employment agencies (Art. 3);

– need to ensure that private employment agencies treat workers without discrimination (Art. 5);

– emphasis on granting collective rights to PAA's employees (Arts. 11, 4);

– rule on free services for employees (possible exceptions, Art. 7).

A number of important issues were left behind by the drafters: the convention does not deal with ensuring the equality of PAA's workers with the rights of the third party's workers at least as far as remuneration is concerned, it does not deal with the responsibilities of the third party, to whom the workers were provided, and does not provide the obligations of the third party in respect of provided workers.

As we will see below the regulation of private agency work in some BRICS states goes far beyond the ILO standards.

2. BRICS Countries' Regulations Relating to Non-Standard Employment

2.1. Brazil

For the determining the non-standard forms of employment in Brazil we suppose it necessary to start with the notion of standard employment. According to Article 2º of the Labour Law Consolidation, an employer (the company, individual or collective), assuming the risks of the economic activity, admits, hires and directs the employees rendering service, and an employee is an individual who provides services of a non-contingent nature under the employer's dependence and with a salary (Art. 3).

In this scenario, a typical employment contract, that means, full-time employment without contract term limitation, will be registered by the employer in employee Work and Social Security Card (CTPS) allowing only the worker to do the job, providing his service, performing it in person prohibiting replacing him by another person, since it's a (i) personal contract with (ii) habitually, since the work performed must be provided continuously and permanently, which does not constitute an occasional job, as in the case of freelancers, (iii) legal subordination, which consist in the provision of the service by the worker under the direction and management of the employer, which determines the dynamics of the work execution and (iv) onerosity that consists in the payment received by the employee arising from the work performed because of the contract agreed between the parties.

An employee in a typical employment contract will have the guarantee of a minimum wage of R$1.045,00 effective on 1 February 2020, that is equivalent to U$ 250,0 for a maximum weekly schedule of 44 (forty-four) hours, annual paid vacation of 30 (thirty) days with a $^{1}/_{3}$ (one third) bonus on the payment, that can be divided in 03 (three periods) over the year, being one period longer than 14 days and the other two periods with a minimum of five days each. The employee vacation cannot begin on the two days preceding a holiday or on weekly rest days. The worker also has the rights of a 13th-month salary, one day off per week, preferably on Sundays, Length of Service Guarantee Fund (FGTS)[13] with an additional fine if dismissed without cause and the right of unemployment insurance (established originally in 1986). Workers still have the right to a night shift after 10 pm of at least 25% of the hourly wages and a hazardous, unhealthy and painful premium. Maternity leave of 120 (one hundred and twenty) days and paternity leave of 5 (five) days are also granted by law.

On 11 November 2019, the Brazilian government launched Green and Yellow Employment Contracts via Provisional Measure No. 905/2019 effectiveness for 60 (sixty) days with one extendable period of more 60 (sixty) days with the objective of generate

[13] Accordingly to Sychenko *et al.* in the FGTS system, employers are required to deposit in a bank account managed by a Federal Government Institution an amount of 8% (eight percent) of an employee's monthly compensation, owning each employee private access to the account. Elena Sychenko et al., *Dismissal Protection in the BRICS Countries in Light of ILO Convention No. 158*, 6(4) BRICS Law Journal 34, 42 (2019).

a favourable environment for the reactivation of the Brazilian labour market and the creation of job vacancies for young people between 18 (eighteen) and 29 (twenty-nine) years old, without previous job registration[14] in CTPS. Its continued effectiveness is conditioned on its conversion into law by the Legislative Branch.

Green and Yellow Employment Contracts apply to new hiring of employees limited up to 20% (twenty) of the organization's employees, not replacements, with a maximum salary of 1.5 minimum wage in a contract with a 24 (twenty-four) months duration determined that can be converted in a regular contract after the term. In this type of contract still is necessary a personal contract with habitually, legal subordination and onerosity (a salary payment), but some labour rights are attenuated such the FGTS penalty that is reduced from 40% (forty) to 20% (twenty), and without the 10% of social contribution, also the monthly FGTS employers payment is reduced from 8% (eight) to 2% (two).

In the case of exposure of the worker due to hazardous work, the company will pay 5% of the base salary and not 30%, as stated by law in other types of contracts.

The company that contracts by Green and Yellow Employment Contracts are exempt from the payment of some social taxes that can reduce the tax burden around 28% (twenty-eight).

Data regarding if Green and Yellow Employment Contracts reduced unemployment between young workers until now are not available since it was enforced in last November, but Brazilian formal labour market, that is, employees with job registration on CTPS shrank between 2014 and the first half of 2019 from 45% to 40.4% while in the same period the share of those working in the informal sector went from 37.4% to 40.9% of the total of Brazilian workforce[15] (IBGE/PNAD, 2019).

The Brazilian labour legislation needed to be updated in many aspects, which has been occurring since 2017, mainly due to the economic crisis that the country suffered between 2014 and 2017, with a sharp recession in the years 2015 and 2016, which generated a current liability of 12.1% of the unemployed workforce.

The solution found so far by the Brazilian government has been the creation of new forms of employment contracts, aiming to give greater dynamism to the economy, reducing the costs of Brazilian labour by changing rights, with a speech from the currently President of the Republic in December 2018, that Brazilian workers must choose between a little fewer rights and more jobs or all rights and no jobs.

The tax reform, the readjustment of the national infrastructure and the revision of Brazilian state structural, which are essential to make the country more competitive, remain projects in progress at the national congress. What is perceived so far is

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[14] Accordingly to Article 1 of Provisional Measure No. 905/2019 for characterization as first job, the following employment relationships will not be considered: I – minor apprentice; II – experience contract; III – intermittent work.

[15] Other 12.1% are unemployed and 6.6% low-spirited workers, which means that they are unemployed and lost their faith in finding a job.

a great incentive to increase pejotization and the growth of informality, especially in the face of work through passenger transport or delivery applications, in which workers are considered as self-employed and it has no labour rights. "Pejotization" has been used by jurisprudence to refer to the contracting of personal services, exercised by individuals, in a subordinate, non-eventual and costly manner, carried out by means of a legal entity constituted especially for this purpose, in an attempt to disguise any relationships.

In general, non-standard employment contracts may be classified into a fixed-term employment contract, temporary contracts, daily employment, part-time work, intermittent employment contract.

As per the Labour Law Consolidation, fixed-term employment agreements are only allowed for up to 2 (two) years or an initial 45 (forty-five) days extend once for equal period, totalizing 90 (ninety) days for probation employment period (trial experience).

In the case of early termination of a contract for a fixed term without dismissal cause, the employer is obligated to pay half of the salary due for the remaining period to the employee and the employee will have the right to access the unemployment insurance and receive the additional FGTS fine.

A fixed-term employment contract that, tacitly or expressly, is extended more than 2 (two) years will, or in the case of trial experience more than 90 (ninety) days, be converted into a standard employment contract.

In fixed-term contracts, employees maintain all obligations and rights that are fixed in standard employment contracts, with the exception, in case of regular termination, of the additional fine of 40% (forty percent)[16] of the balances of individual accounts in his FGTS during the time of his employment relations with the company and the access to the unemployment insurance.

Temporary agency work is regulated by Law 6,019/74, with legislative modifications by Law 13,429/17 and originally predicted that temporary work is provided by a natural person to a company when the business activities have a temporary extraordinary increase in services or the temporary nature of the service justifies a pre-established term.

With the amendments made by Law 13,429/17, the criteria for hiring temporary workers changed with the substitution of "extraordinary increase in services" by "complementary demand for services." By this last expression, it is understood that it comes from factors (i) unpredictable, which means business situations that cannot be known in advance and (ii) predictable, business situations, which are likely to be anticipated within the exercise company's economic activity such season events (Christmas, New Year's Eve, Valentine's Day, Carnival, etc.) or maternity leave.

[16] This fine can be reduced to 20% upon agreement between employer and employee in dismissal without cause.

Temporary workers may be hired for up to 180 (one hundred and eighty) days, which can be postponed by 90 (ninety) days[17] if the maintenance of the conditions that gave rise to it has been proven. After the maximum period of 270 (two hundred and seventy) days, whether consecutive or not (180 days + 90 days), the temporary worker may only be placed at the disposal of the same borrower, in a new temporary contract, after 90 (ninety) days of the end of the previous contract.

These workers cannot be contracted to replace workers on strike, and they will be employed by an agency (manpower company) that is authorized by the Ministry of Labour to render this type of service. When temporary employees perform services on the contracting company, it's his responsibility to ensure the health and occupational safety conditions and to provide the same meals and medical facilities that are granted to the contracting company's own employees.

The agency is responsible for paying salaries to the temporary workers, with subsidiary responsibility for the contracting company. Temporary workers are entitled to receive the same wages and other contractual rights granted to the employees of the contracting company in standard employment contracts. At the end of the temporary contract or in case of early termination without cause, the additional fine of 40% (forty percent)[18] of the balances of individual accounts in his FGTS during the time of his employment relations, it's not due, and the employee will not have access to the unemployment insurance.

In daily employment, workers do not have an employment contract, except if they perform their services more than 2 (two) days per week for the same contractor. Without an employment contract they are not entitled to received paid annual leave, 13th-month salary, one day off per week, Length of Service Guarantee Fund (FGTS) and other rights fixed in the Labour Law Consolidation, but their contractor must observe the maximum hours limit per day that daily employee can work and the meal break.[19]

On 13 July 2017, Brazilian Congress approved the Labour Modernization reform (Law 13467/17) which changed more than 100 articles of the Labour Law Consolidation (CLT) and created the intermittent contract of employment amending the rules of the part-time employment contract.

In the intermittent employment contracts, workers will be able to alternate between periods of work and inactivity, which means that individuals are engaged under an employment relationship to render services under a non-continuous basis. The employee will have alternate periods of inactivity, when the employee may provide services to third parties, and work that may be determined by months, days or hours, regardless, with some exceptions, of the activities of the employer or the employee.

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17 Before the amendments, the temporary work would be provided for a maximum period of 3 months, which could only be extended to the maximum period of 9 months upon specific authorization from the Ministry of Labour.

18 This fine can be reduced to 20% upon agreement between employer and employee in dismissal without cause.

19 One hour of duration in general that can be reduced to 30 (thirty) minutes upon agreement.

The worker must be called for duty with at least 3 (three) days in advance and will have 1 (one) business day to respond. If the employee does not answer or refuses the call, the refusal does not amount to the violation of subordination.

Under this arrangement the employer will be required to pay, at the end of each period of work: (i) pending hourly salary that can't be lower than the minimum hourly wage or than the hourly salary of other employees in the same position of the same company (ii) proportional vacation and additional $^{1}/_{3}$ payments; (iii) proportional 13th salary; (iv) paid weekly rest; and (v) FGTS. Employers are required to collect employment charges and social security contributions on the amounts paid to intermittent employees monthly. If the intermittent contract is terminated by agreement the worker cannot receive payments for the Unemployment Insurance Program.

Since the approval of the Labour Modernization reform (Law 13467/17) until November 2019, 1.124 million formal jobs were created, being 11.8% of these jobs intermittent contracts.

Under part-time employment contracts, employers can hire workers under a part-time regime if the employee works for up to 30 (thirty) hours per week, without the option of overtime or 26 (twenty-six) hours or fewer hours per week, with the possibility of up to 6 (six) overtime hours per week with an additional of 50% (fifty) wage hourly payment. Hour's payments in part-time work contracts cannot be lower than the minimum hourly wage or the hourly salary of other employees in the same position of the same company.

Vacation period for part-time workers is 30 (thirty) days and one-third of that time can be converted into money.

Although the ILO Recommendations and non-ratified ILO Conventions have no binding character, they are intended to be widely applied and contain symbolic and political commitments made by Member States, such Brazil, aimed to make a transition from the informal to the formal economy, removing legal and practical barriers to the exercise of essential labour rights. However, the solutions adopted by Brazil are currently on a collision course not only with the provisions of ILO Recommendation No. 198 but also with the ICESCR, as far as the right for just and favourable conditions of work for all is concerned. We suppose that the right course should be in finding the balance between labour rights and formal employment creation, maintaining a minimum social security net protection for all workers.

2.2. Russia

The Law of the Russian Federation "On Employment of the Population in the Russian Federation" defines employment as the activities of citizens related to the satisfaction of personal and social needs, which are not contradicting the legislation of the Russian Federation and usually bringing them earnings.[20] These activities are

[20] Закон Российской Федерации от 19 апреля 1991 г. № 1032-1 «О занятости населения в Российской Федерации» // Бюллетень нормативных актов РСФСР. 1992. № 1. С. 4–18 [Law of the Russian

not divided into standard or non-standard employment. Nevertheless, statistics are kept on certain forms of non-standard and informal employment.[21]

The understanding of standard and non-standard employment is closely linked to the features of typical and non-typical labour relations.

Article 20 of the Labour Code of the Russian Federation defines that an employee is an individual entering labour relations with an employer, while an employer is an individual, or a legal entity (organisation) entering labour relations with an employee.[22] Special importance is attached to the fact that there is an labour relationship.

The definition of labour relations is contained in Article 15 of the Labour Code of the Russian Federation.

Labour relations shall be the relations based:

– on an agreement between an employee and an employer;

– on the personal performance by the employee of a work function for payment (work in a position in accordance with the staff schedule, profession, specialty, specifying the qualification; specific type of work assigned to the employee);

– under the management and control of the employer;

– on the employee's compliance with the internal working regulations;

– with the employer providing the working conditions stipulated by the labour law, collective contract, agreements, employment contract.

This definition and the conclusion of the Supreme Court of the Russian Federation allow highlighting the signs of typical labour relations:

– the employee and the employer have agreed on the use of labour;

– the relations are stable;

– the employee gets paid. This payment is provided periodically and is the employee's sole and/or main source of income;

– the labour is considered to be dependent. The employee performs duties in the interests, under the employer's control and management. The employee follows the internal working regulations and the work schedule of the employer;

– the employee is included in the employer's organizational structure;

– the employer provides working conditions and tools, materials and mechanisms for work;

– the employee gets the guarantees in accordance with labour law.[23]

Federation No. 1032-1 of 19 April 1991. On Employment of the Population in the Russian Federation, Bulletin of Normative Acts of the RSFSR, 1992, No. 1, p. 4].

21 Федеральная служба государственной статистики Российской Федерации [Federal State Statistics Service of the Russian Federation] (Aug. 15, 2020), available at https://rosstat.gov.ru/labour_market_employment_salaries.

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

23 Постановление Пленума Верховного Суда Российской Федерации от 29 мая 2018 г. № 15 «О применении судами законодательства, регулирующего труд работников, работающих у работодателей –

The absence of any classic signs of labour relations[24] make it possible to characterise it as non-typical. Thus, that the employment will be considered as non-standard.[25]

Non-typical labour relations include the labour relations under a fix-term employment contract, temporary employment, distant (remote) work, part-time work and work through Private Employment Agencies under the contract for the provision of an employee.

Labour relations must be formalised by employment contract. Persons who work without employment contract or under a civil contract are not protected under labour law unless they can prove that their work corresponds to the features of subordinate labour.

Article 56 of the Labour Code of the Russian Federation gives the concept of an employment contract and highlights the signs of labour relations.

The employment contract shall be an agreement between the employer and the employee in accordance with which the employer shall undertake to provide the job to the employee with the work function agreed upon, to ensure the working conditions as stipulated by Labour Code, laws and other normative legal acts, the collective contract, agreement, the local normative acts containing the labour law norms and this agreement, to pay wages to the employee timely and in full, while the employee shall undertake to perform the certain work function determined by such agreement under the management and control of the employer, comply with the internal working regulations in the organisation.

The work under an employment contract entitles to basic labour guarantees:

– of the provision of work that is conditional on the employment contract. If the employer is unable to provide work, he/she must pay for downtime;

– of the working time no more than 40 hours a week;

– of their right to work in conditions that meet workplace safety requirements;

– of the timely and complete payment of wages in accordance with his/her qualification, the job complexity, the quantity and quality of the work performed not less than the minimum wage established at the national level;

– of the rest in the form of weekly rest days, paid public holidays, paid annual leave of at least 28 calendar days;

физических лиц и у работодателей – субъектов малого предпринимательства, которые отнесены к микропредприятиям» // Бюллетень Верховного Суда РФ. 2018. № 7 [Plenary Ruling of the Supreme Court of the Russian Federation No. 15 of 29 May 2018. On Selected Issues of the Application by Courts of Legislation Regulating the Labour of Employees Working for Employers – Individuals and Employers – Small Businesses That Are Classified as Microenterprises, Bulletin of the Supreme Court of the Russian Federation, 2018, No. 7].

[24] L. Tal is the founder of the study of classical features of the labour contract and labour relations. *Таль Л.С.* Трудовой договор: цивилистическое исследование [Lev S. Tal, *Employment Contract: Civil Law Study*] 632 (Yaroslavl: Printing House of the Provincial Government, 1913).

[25] *Лушникова М.В., Лушников А.М.* Очерки теории трудового права [Marina V. Lushnikova & Anatoly M. Lushnikov, *Essays on the Theory of Labour Law*] 940 (Saint Petersburg: Iuridicheskii tsentr Press, 2006).

– of the right of forming and joining to trade unions for the protection of their labour rights, freedom and legitimate interests;

– of the participation in the management of the organization in the forms prescribed by the Labour Code and the collective agreement;

– of the collective bargaining, concluding collective contracts and agreements, obtaining additional guarantees provided for in the collective agreement and contract;

– of the protection of their labour rights, freedom and legitimate interests by all means not prohibited by law;

– of the resolution of individual and collective labour disputes, including the right to strike;

– of the compensation for harm caused to the employee's life or health while performing his job duties;

– of the compulsory social insurance. Only persons working under an employment contract are entitled to sickness or quarantine benefits.

Labour legislation of the Russian Federation regulates the rule of recognition of relations under a civil law contract as labour relations. However, this requires the establishment by a Court, State Labour Inspectorate or employer of features of labour relations.[26]

According to the Labour Code of the Russian Federation an employment contract concluded for an indefinite term is a general rule.

In 2008, the Government of the Russian Federation accepted the Concept of long-term social and economic development of the Russian Federation for the period up to 2020. This Concept assumes that a new wave of technological changes will enhance the role of innovations in socio-economic development and will result in creating a new technological base of economic systems, based on using the latest developments in biotechnology, information technology and nanotechnology. This will require high professional and territorial labour mobility. A flexible and well-functioning labour market is an essential component of an innovative economy.[27]

Transformation processes taking place in Russia's economy, intensive development of information and communication technologies, the use of robotics, and the increase of population's education level have led to changes in production

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[26] *Зайцева Л.В., Курсова О.А.* Отказ в признании трудовых отношений: о некоторых недостатках в конструкции юридической фикции // Журнал российского права. 2016. № 3(231). С. 80–87 [Larisa V. Zaytseva & Oksana A. Kursova, *Private Employment Agencies and Contingent Labor in the Russian Federation: Comparative Law Research*, 3(231) Journal of Russian Law 87 (2016)].

[27] Распоряжение Правительства Российской Федерации от 17 ноября 2008 г. № 1662-р «О Концепции долгосрочного социально-экономического развития Российской Федерации на период до 2020 года» // Собрание законодательства РФ. 2008. № 47. Ст. 5489 [Order of the Government of the Russian Federation No. 1662-r of 17 November 2008. On the Concept of Long-Term Socio-Economic Development of the Russian Federation for the Period up to 2020, Legislation Bulletin of the Russian Federation, 2008, No. 47, Art. 5489].

and labour organisation. The new labour market needs influence labour relations development, making them more flexible to reduce employer's production costs and to retain qualified staff. A ratio between typical and atypical labour relations is rapidly changing in favour of the latter by increasing the volume of non-standard employment in the Russian Federation.

The sociological research shows that there is a significant increase in non-standard forms of employment in the Russian labour market: the number of part-time employees increases to 100,000 people per year, on average, and remote employees by 200–300,000 people per year. Moreover, some of them work without official employment papers. Non-standard forms of employment have a steady upward trend.[28]

As we have mentioned before the contract concluded for an indefinite term is a general rule. Therefore, we can refer to the fix term contract as to the first form of a non-standard employment. Such agreements might be made only if there are reasons for that (these reasons are to the large extent listed in Article 59 of the Labour Code). The duration cannot be more than five years. If the term of employment contract was omitted and the employee proceeds with the work – such contract shall be deemed to be transformed to indefinite term.

The fix term employment contract shall be concluded in the cases when the labour relations cannot be established for an indefinite term taking into consideration the nature of the impending job or conditions of its performance, unless otherwise set by Labour Code or other Federal Laws:

– with persons entering a job in an organisation established for a certain period of time or to perform a certain job;

– for the duration of an absent employee's duties, who, according to labour law, retains his place of work;

– for the duration of temporary (up to two months) work;

– to perform seasonal work, when due to natural conditions work can only be performed during a certain period (season);

– with persons assigned to work abroad;

– with persons entering a job in an organization established for a certain period of time or to perform a certain job;

– with persons who are accepted to perform certain work in cases where its completion cannot be determined by a specific date. The Constitutional Court of the Russian Federation in the Resolution of 19 May 2020 No. 25-P "In the Case of Checking the Constitutionality of the Eighth Paragraph of the First Part of Article 59 of the Labour Code of the Russian Federation in Connection with the Complaint of a Citizen I.A. Sysoev" determined the inadmissibility of multiple conclusion of fix term

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[28] *Мусаев Б.А.* Нестандартные формы в современной структуре занятости // Экономика труда. 2017. Т. 4. № 4. С. 413–422 [Batal A. Musaev, *Non-Standard Forms in the Modern Structure of Employment*, 4(4) Labour Economics 412 (2017)].

employment contract to perform work in the same position (profession, specialty).[29] This underscores the importance of constitutional review of employment law;

– for jobs directly connected with practical training and professional training of the employee;[30]

– in other cases stipulated by federal laws.

The fix term employment contract can be concluded by agreement between an employee and an employer also on the grounds provided for in part two of Article 59 of the Labour Code of the Russian Federation:

– with persons enrolling in small business organisations with the staff numbering up to 35 persons (up to 20 persons in the trading and consumer services organisations as well as working for individual employers);

– with old-age pensioners as well as with the persons to whom temporary work is only allowed due to their health in accordance with a medical opinion;

– with persons enrolling in the organisations located in the Polar North areas or in the localities equated with them, if in case of relocating;

– for performing urgent work on preventing accidents, incidents, catastrophes, epidemics, epizootics as well as for liquidating consequences of the abovementioned and other emergency situations;

– with creative personnel in mass media, movie industry, theatre, theatrical and concert organizations, circuses, and with other persons participating in creation and/or performance of art works, professional sportspeople in accordance with the lists of professions approved by the Russian Federation Government with account for the opinion of the Russian tripartite commission for regulating socio-labour relations;

– with researchers, teachers and lecturers, with other personnel concluding employment contracts for a definite term as a result of the competition held in the manner set by the law or another normative legal act of a state authority or a local self-government body;

– with heads, deputy heads and chief accountants of organisation;

– with persons working for the organisation part-time;

– with crews of ships and riverboats;[31]

– in other cases stipulated by federal laws.

Working under a term employment contract does not affect the scope of rights and guarantees of employees.

At the same time, the employees who concluded an employment contract for the period of two months are granted leaves of absence or compensation payments

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[29] Постановление Конституционного Суда Российской Федерации от 19 мая 2020 г. № 25-П // Собрание законодательства РФ. 2020. № 21. Ст. 3375 [Ruling of the Constitutional Court of the Russian Federation No. 25 of 19 May 2020, Legislation Bulletin of the Russian Federation, 2020, No. 21, Art. 3375].

[30] Art. 59.1 of the Labour Code of the Russian Federation.

[31] *Id.*

in the amount of two workdays per month. These employees are not paid any dismissal payments unless federal laws, collective or individual contracts stipulate other procedures.[32]

Chapter 12 of the Labour Code of the Russian Federation regulates specifics in the regulation of certain categories of employees and of certain job-positions. These rules partially limit the application of general rules or provide additional rules for certain categories of employees.

Work at home and distant work have a significant amount of labour regulation features. These labour relations are also considered as non-typical, and employment is non-standard.[33]

A distinctive feature of distant work is that an employee using public information and telecommunications-networks, including the Internet. A distant employee may set the working and rest hours regime independently unless otherwise provided by the employment contract.[34]

If workers perform duties at home without using information and telecommunication networks, they are called home workers. Chapter 49 of the Russian Labour Code regulates this work.[35]

The advantage of the distant work and home work is that the worker has the flexibility to regulate working hours, to save travel time and to reduce transport costs. The employer gets an opportunity not only to save on the organisations of the workplace and rental of office space, utilities, but also to increase the intensity and efficiency of work and, as a result, increase productivity. But the Russian Labour Code does not regulate online and offline working time. It increases the intensity of work and blurs the boundaries between working time and time of rest of distant employees.

Another non-typical form of employment is the work for the private employment agencies (literary translation would be "work under the agreement on the provision of labour concluded with the private employment agency"). This form is actively applied in IT technologies, support of accounting programmes, consulting, legal and security services and in other areas where it is economically viable.

Article 56.1 of the Labour Code of the Russian Federation prohibits borrowed labour.

The provision of a worker is allowed only under the rules of Chapter 53.1 of the Russian Labour Code and the Law of the Russian Federation "On Employment of the Population in the Russian Federation":

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[32] Art. 59.1 of the Labour Code of the Russian Federation.

[33] *Лютов Н.Л.* Дистанционный труд: опыт Европейского Союза и проблемы правового регулирования в России // Lex Russica. 2018. № 10(143). С. 30–39 [Nikita L. Lyutov, *Remote Work: The Experience of the European Union and the Problematic Aspects of Its Legal Status in Russia*, 10(143) Lex Russica 30 (2018)].

[34] Ch. 49.1 of the Labour Code of the Russian Federation.

[35] *Id.* Ch. 49.

– the employer (hereinafter – sending party) sends its employees temporarily, with their consent, to a natural person or legal entity (hereinafter – receiving party) that is not the employer of these employees;

– the employee (hereinafter – provided employee) performs his or her work for the benefit, management and control of the receiving party.

Activities on providing of employees shall be entitled to exercise:

– Private Employment Agencies;

– other legal entities.

Private Employment Agencies are legal entities that are registered in the Russian Federation and are accredited to perform this type of activity.[36]

The number of employees engaged under the contract for the provision of labour to employees must not exceed 10 percent of the number of employees of the receiving party. Employees can only be engaged in temporary work for a period of no more than nine months.[37]

The Labour Code specifies the list of entities that can be a receiving party and the purpose of sending employees. A Private Employment Agencies may only temporarily send its employees:

– to an individual entrepreneur or a legal entity for temporary performance of duties of temporarily absent employees;

– to an individual entrepreneur or a legal entity to carry out work related to a knowingly temporary (i.e. up to nine months) expansion of production or scope of services;

– to a natural person who is not an individual entrepreneur, for the purpose of personal service, assistance in running a household.

Private Employment Agencies have the right to conclude employment contracts with certain categories of persons for the purpose of their temporary employment, to send them to the receiving party and in other cases. These cases include the grounds for concluding a term employment contract in accordance with Article 59 of the Russian Labour Code or other Federal Laws of the Russian Federation.

The aims and grounds for the temporary provision of workers have been expanded for certain categories of persons in need of enhanced social protection. These persons include:

– full-time students;

– single parents and parents of large families raising children under 18 years old;

– persons released from establishments executing a punishment in the form of imprisonment.

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[36] *Зайцева Л.В., Чукреев А.А.* Частные агентства занятости и заемный труд в России: сравнительно-правовое исследование // Вестник Пермского университета. Юридические науки. 2017. Вып. 1(35). С. 94 [Larisa V. Zaitseva & Andrey A. Chukreev, *Private Employment Agencies and Contingent Labour in the Russian Federation: Comparative Law Research*, 1(35) Perm University Herald. Juridical Sciences 84, 94 (2017)].

[37] Art. 18.1 of the Law of the Russian Federation "On Employment of the Population in the Russian Federation."

The provided employee is in an employment relationship with a Private Employment Agency. The labour relations between an employee and a Private Employment Agency do not terminate. Labour relations between the provided employee and the receiving party do not arise. Private Employment Agency and the provided employee enter into an additional agreement to the employment contract, which specifies information about the receiving party as well as the number and term of the agreement on the provision of work to employees.

The agreement may provide that:

– the receiving party has the right to demand from the provided employee that he or she performs his or her work duties, that he or she treats the property of the receiving party and the property of the receiving party's employees with care, and that he or she observes the internal labour regulations of the receiving party. Also, it can suspend an employee from work or keep him/her away from work, for example, for the appearance of an employee in the condition of alcoholic, narcotic or other toxic intoxication at his/her workplace. The receiving party is required to notify the employer of these cases immediately;

– the receiving party is obliged to provide the provided employee with the equipment, tools, technical documentation and other means necessary for the performance of his or her work duties, the household needs of the sent worker related to the performance of his or her work duties, and compensation for work in harmful and/or dangerous working conditions.

Terms of payment for the provided employee must be no worse than those of the receiving party workers performing the same work functions and having the same qualifications.

A Private Employment Agency is obliged to monitor the compliance of the receiving party's actual use of the labour functions of the provided employee with the labour functions defined in their employment contracts, as well as the receiving party's compliance with labour law standards. The receiving party may not prevent a Private Employment Agency from exercising the said control.

Other legal entities, including foreign legal entities and their affiliated person (except for individuals) may carry out activities to provide employees only under conditions and in accordance with the procedure established by Federal law. For example, in cases when employees are temporarily assigned to a legal entity that is affiliated with the sending party, as well as to a legal entity that is a party to a shareholder agreement with the sending party.[38]

The Law of the Russian Federation "On Employment of the Population in the Russian Federation" prohibits sending employees to work for a receiving party under a contract on the provision of labour to employees for purposes:

– of replacement of employees participating in the strike of the receiving party;

[38] Art. 341.2 of the Labour Code of the Russian Federation.

– performance of work in the case of downtime (that is a temporary suspension of work by a receiving party), bankruptcy proceedings by the receiving party, part-time work by the receiving party in order to preserve jobs in the event of the threat of mass dismissals of receiving party workers;

– performance of works at facilities classified as dangerous production facilities of I and II hazard classes;

– performing work at workplaces where working conditions are classified as harmful working conditions of 3 or 4 degrees or dangerous working conditions, as well as in other cases stipulated by the Law of the Russian Federation "On Employment of the Population in the Russian Federation."[39]

The collective agreement of the receiving party does not apply to the provided workers, because they are not its employees.

In conclusion, it should be noted that the flexible labour market and the mobility of labour resources make it possible to respond promptly to economic challenges, which is a crucial component of the country's economy. Employers use flexible forms of employment as a factor to optimize production costs and increase productivity, as well as a way to keep staff in crisis conditions. According to the research centre of portal Superjob.ru, 21% of companies that have transferred employees to remote work during quarantine on Covid-19, after the completion of the regime of self-insulation will leave some staff to work from home.[40] Large Russian companies have introduced a four-day working week to reduce personnel costs and retain staff;[41] many companies have reduced the number and staff of employees, which led to an increase in the number of unemployed.

Non-standard forms of employment give employees more flexibility in their time management. However, distant workers, outworkers and workers sent by Private Employment Agencies to other employers are not usually unionized. In organisations where distant and homeworkers mainly work, as well as in private employment agencies, collective agreements are usually not concluded due to the absence of a trade union. Consequently, the potential of social partnership is not realized, although employees are not deprived of this opportunity.

The purpose of the state employment policy in these conditions is to create legal, economic and organisational conditions ensuring the development of a flexible,

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[39] Art. 18.1 of the Law of the Russian Federation "On Employment of the Population in the Russian Federation."

[40] Каждая пятая компания, где сейчас действует удаленка, продлит ее и после окончания карантина // Исследовательский центр портала Superjob.ru. 22 мая 2020 г. [Every Fifth Company Where the Remote Control Is Currently Operating Will Extend It After the End of Quarantine, Research Center of the Portal Superjob.ru, 22 May 2020] (Aug. 15, 2020), available at https://www.superjob.ru/research/articles/112374/kazhdaya-pyataya-kompaniya/.

[41] Российские компании начали переходить на четырехдневную рабочую неделю // Новости Mail.ru. 8 апреля 2020 г. [Russian Companies Began to Move to a Four-Day Work Week, News Mail.ru, 8 April 2020] (Aug. 15, 2020), available at https://news.mail.ru/economics/41289027/?frommail=1.

efficient labour market. It will make it possible to overcome the structural mismatch between labour supply and demand, reduce the proportion of illegal employment and increase labour motivation and labour mobility.

2.3. China

China not only has to deal with common global issues such as the sharing economy, algorithmic recruitment and crowdsourcing, but also has to examine the problems in the labour field caused by China's own special national conditions.[42] As an ILO member country, China has recognized and ratified more than 20 international labour conventions, and some of the conventions that have not been ratified by China and the proposals that do not require ratification are also used for reference in China's labour legislation.[43] Similar to Brazil, in China, international labour conventions and recommendations do not necessarily have legal force, and only the legislative organs or relevant administrative organs can convert their contents into laws and administrative regulations.

Due to its own unique historical reasons, China has different labour legislations in the Mainland, Hong Kong, Macau and Taiwan. Its legal tradition includes both the continental legal system and the Anglo-American legal system, forming a "one country, two jurisdictions" pattern, leading to major differences in employment relationship determination standards and employment contract rules. They apply their respective laws and regulations.[44] This paper will take Mainland China as the main model to explore the reasons for the emergence of non-standard employment contract in China and whether labour legislation meets international standards.

China's labour law do not distinguish between standard employment and non-standard employment. In practice, the focus of disputes concerning the protection of the rights and interests of workers in informal employment usually starts with the

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[42] For example, some state-owned enterprises have redundant staff and lack of front-line personnel due to legal restrictions on dismissal and total labour requirements. That is, strict restrictions on the dismissal system have led to the excessive number of non-main business employees (such as logistic service personnel) in some state-owned enterprises, especially industrial enterprises, and it is difficult to withdraw from their jobs. However, the state has a requirement for the total amount of employees of state-owned enterprises, therefore, under the situation of "wide in and strict out," the front-line production of enterprises under the condition of lack of employees (first-line employment often requires young employees) cannot introduce labourers through the typical employment, resulting in some state-owned enterprises only through labour outsourcing to meet the needs of enterprises.

[43] For example, the prohibition of forced labour, the opposition to employment discrimination, improves the social insurance system, establishes working hours and rest and vacation systems. In addition, China voted in favor of Recommendation No. 198 at the 95th International Labour Conference, which also shows that China is also facing the legislative perfection of labour relations definition standards and the existence of hidden employment relationships in society.

[44] In addition, there are a large number of local administrative regulations in China, and these local administrative regulations are different, resulting in different local judicial practice calibers, which is inconvenient to analyze in detail in this paper.

identification of employment relations. However, labour legislation does not define what is the employment relation. Although it was defined in the Public Consultation Draft of the Employment contract Law[45], unfortunately, this clause was not adopted in the end. The Notice on Matters Related to the Establishment of Employment relations (the Ministry of Labour and Social Security issued [2005] No. 12) stipulates three requirements for the determination of employment relations: firstly, the subject qualifications, which meet the requirements of employers and labourers in laws and regulations; secondly, the personal dependency, including the application of rules and regulations, control and management, and remunerated labour; thirdly, economic dependency, labour is an integral part of the employer's business.

The qualification of the employer as the subject is not only qualified as the subject, but also requires it to be listed in the legislation and does not exclude the application. The Labour Law, the Employment Contract Law, the Regulations on the Implementation of the Employment Contract Law, the Explanation of Several Provisions of the Labour Law of the People's Republic of China (Labour Office [1994] No. 289) and the Opinions on Some Issues concerning the Implementation of the Labour Law of the People's Republic of China (Labour Department [1995] No. 309) summarizes enterprises, individual economic organizations, private non-enterprise units, domestic institutions, institutions and social groups, as well as cooperative organizations such as accounting firms and lawyers firms and the foundation, are employers, but also completely excluding the type of natural person employer.[46] The Taiwan Labour Standards Law stipulates that employers include persons in charge of business operations,[47] but it cannot be applied in the mainland China. This leads to the fact that when the employer is unqualified or not the above-mentioned subject, it is difficult to determine the employment relationship involving the contract[48] and the employment relationship caused by the attachment,[49] even if the parties meet some elements of the standard employment.

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[45] The employing unit recruits labourers as its members, and the rights and obligations arising from the labourers providing paid labour under the management of the employing unit.

[46] Art. 2 of the Labour Law, Art. 3 of the Labour Contract Law, Art. 2 of the Explanation of the Several Provisions of the Labour Contract Law, Art. 1 of the Opinions on Several Issues concerning the Implementation of the Labour Law.

[47] According to paragraph 2 of Article 2 of the Taiwan Labour Standards Law, an employer refers to a business owner who hires labour, a person in charge of business operation or the representative of the employer as the person handling the labour affairs of the employer. There are three types of employers: (1) Business owners; (2) The person in charge of business operation; (3) A person who handles labour affairs on behalf of the business owner. *The Interpretation of Labour Standards Law: Review and Prospect for 20 Years of Practice* 28 (Taiwan Labour Law Society (ed.), Shanghai: New Xue Lin Publishing Co., Ltd., 2009).

[48] *Zhengning County Heng'an Construction Co., Ltd. v. Jiao Xiaoli*: the appeal case of confirm labour relationship dispute 472 (Qingzhongmin Zhongzi 2014); *Lu Junjie, Qing'an v. State-owned Forest Farm Administration*: Shuguang Forest Farm Labour dispute, Civil Disputes Civil Judgment, 866 (Hei12 Minzhong 2019).

[49] *Wang Qinghong, Linyi v. New Era Motor Vehicle Driving Training Co., Ltd.*: confirm the labour relationship dispute, Civil Disputes Civil Judgment (2019), 9982 Lu 13 (Min Zhong 2019); *Yulin City Yiliang Shiming Auto Repair Factory v. Huang Zhenzhong*: Labour Dispute Retrial Case 15 (Gui Min Zai 2017).

In China, "worker" has different meanings in different fields. If there is no definition, it is impossible to determine in what context labourers are equivalent to employees. Labour legislation restricts labourers by means of reverse exclusion. First, they are required to meet the conditions of age,[50] health status,[51] and occupational qualifications,[52] etc., at the same time, excluding the rural labourers (except for township and village enterprise workers, farmers who urban work or do business), family nanny, active duty soldier.

In summary, China's labour legislation only sets the criteria for identifying the standard employment, and the judgment of employment relations mainly adopts the subjective judgment model.[53] The judging criterion of subjective elements and subordinate attributes is not the judging criterion to distinguish between standard employment and non-standard employment, but the criterion to identify employment relations. Whether it is standard employment and non-standard employment, the existence of employment relations is the prerequisite for the application of labour legislation and the protection of employees by labour laws. However, due to the uncertainty of the concept, this kind of subject factor standard cannot guarantee the labour rights of some employees.[54]

At the same time, the Labour Law and the Employment contract Law divide the employment contract into the fixed-term employment contract, the non-fixed-term employment contract, the employment contract with a deadline to complete certain tasks.[55] According to the international standards, the non-fixed-term employment

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50 Should reach the legal minimum age for employment (age 16).

51 Law of the People's Republic of China on Promotion of Employment restricts employment in legal industries (Art. 30).

52 The Labour Law and the Vocation Education Law of the People's Republic of China all require labourers to meet the conditions required for some vocational jobs.

53 Feng Yanjun & Zhang Yinghui, *Reflection and Reconstruction of the Judgment Standard of "Labour Relations,"* 6 Contemporary Law Review 92 (2011).

54 Taking the subject qualifications of university student as an example, there are differences in judicial decisions. In the cases of Wang Article 15 of the Labour Law and Article 2 of the Regulations on the Prohibition of the Use of Child Labour require labourer Guobing V. Love to Rent Suzhou Property Services Co., Ltd. (Civil Judgment in the Second Instance of Labour Disputes 1368 (Su05 Min Zhong 2018)), *Jingshan Yanyang Cultural Media Co., Ltd. v. Fang Yu* confirms the labour relationship dispute 00102 E (Jingshan Minyi Chu Zi 2014), there is a labour relationship between the university student and the employer, and the main reason for the judgment is that the university student is for get a job purpose. In the cases of *Xue Ying v. Nanjing Sanle Electronic Information Industry Group Co., Ltd.*, Labour Contract Dispute Appeal Case 627 (Ning Min Zhong Zi 2014), *Xu Yunxin v. Chinese People's Revolutionary Military Museum*, Labour Dispute, Appeal Case 59942 (Yi Zhong MinChuzi 2014), there is no labour relationship between the two parties, and the main reason for the judgment is that the student does not have the subject qualifications for the labour relations.

55 The Hong Kong Employment Ordinance divides labour contracts into continuous and discontinuous contracts. The Law No. 7/2008 of the Macao Labour Relations Law divides labour contracts into contracts with a fixed or uncertain period and contracts with no period. The Taiwan Labour Standards Law divides labour contracts into fixed-term labour contracts and non-fixed-term labour contracts.

contract is the standard employment, the other two types of employment contract are the non- standard employment. However, apart from the difference in contract term, these three types of employment contracts in mainland China have no difference in the protection of employees' labour rights, especially in aspects of wages, working hours, rest and vacation, dismissal protection and social insurance.

It is worth mentioning that, due to the different economic development conditions in various regions of China, the minimum wage standards are also different. So the employees of the above three types of employment contracts have different minimum wages according to their regions; some provinces even divide cities and counties into different files, and the minimum wage standards for each file are also different, as shown in the following table. There was no minimum wage system in Hong Kong China before 2011, the Minimum Wage Ordinance came into force on 1 May 2011, and the hourly wage system was adopted. Since 2011, the legal minimum wage level has been adjusted every two years, increased from $34.5 per hour to $37.5 per hour, as of 1 May 2019.[56]

Monthly Minimum Wage Standards in Beijing, Shanghai, Fujian and Xinjiang (as of June 2019)[57]						
Unit: yuan ¥						
Province	Implementation Date	Monthly Minimum Wage Standard				
		First Level	Second Level	Third Level	Forth Level	Fifth Level
Beijing	1 September 2019	$2120.00				
Shanghai	1 April 2019	$2480.00				
Fujian	1 July 2017	$1700.00	$1650.00	$1500.00	$1380.00	$1280.00
Xinjiang	1 January 2018	$1820.00	$1620.00	$1540.00	$1460.00	

Like other countries, the development of tertiary industry in the era of industry 3.0 and 4.0 in China has triggered the development of non-standard employment (flexible labour). According to the China Labour Statistics Yearbook 2019, China's tertiary industry accounted for 22.3% in 1979 to 52.2% in 2018,[58] except for 2004, 2005 and 2006 which were slightly lower than the previous years, the proportion of the

[56] The Government of the Hong Kong Special Administrative Region of the People's Republic of China, the Labour Department (Aug. 15, 2020), available at https://www.labour.gov.hk/tc/news/mwo.htm.

[57] Ministry of Human Resources and Social Security of the People's Republic of China (Aug. 15, 2020), available at https://www.mohrss.gov.cn/SYrlzyhshbzb/laodongguanxi_/fwyd/202002/t20200210_359176.html.

[58] The National Bureau of Statistics of China, China Labour Statistics Yearbook (2019) (Aug. 15, 2020), available at http://www.stats.gov.cn/tjsj/ndsj/2019/indexch.htm.

tertiary industry in the total GDP has increased year by year, until 2015, it accounted for more than half of the total GDP. Meanwhile, the proportion of employed person in the tertiary industry also increased from 12.6% in 1979 to 46.3% in 2018.[59] Such changes in the industrial structure have led to the flexibility of labour, the diversity of employment relations and the individuality of employment contracts, and have also confirmed that the development of labour legislation and the industrial revolution are concomitant. The development of non-standard employment forms in China also has its own special reasons. The development of non-standard employment forms in China also has its own special reasons.

The relevant regulations issued in the 1980s[60] have laid the foundation for the status of the fixed-term employment contract in China as equivalent to the standard employment contract. In 2002, the State Council of China issued the Notice on Further Improving the Re-employment of Laid-off and Unemployed Persons (Zhong Fa [2002] No. 12), which proposed to encourage laid-off and unemployed persons to obtain employment through various forms such as part-time, temporary, seasonal, flexible work. The Information Office of the State Council issued the White Paper on China's Employment Status and Policies in April 2004 stated that: "Develop flexible and diverse forms of employment and increase employment channels." At the same time, the government has formulated relevant policies on medical insurance wage payment and other aspects, which provided soil for the development of non-standard employment forms in China. In recent years, China's economy has entered a new normal, the downward pressure on the economy is obvious, a structural imbalance between supply and demand. For these reasons, Opinions of the State Council on Promoting the Accelerated Development of the Service Outsourcing Industry in January 2015, indicating that the service outsourcing industry will become a national strategy and the service outsourcing has become the new normal. The Recommendation for the 13th Five-Year Plan for Economic and Social Development of the Central Committee of the Communist Party of China on 29 October 2015, clearly stated that during the "13th Five-Year Plan" period, the government should be "to improve the quality of labour force, the labour participation rate and the labour productivity, to increase the flexibility of the labour market, to promote the free flow of labour among regions, industries and enterprises." China began to vigorously carry

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59 The National Bureau of Statistics of China, China Labour Statistics Yearbook (2019) (Aug. 15, 2020), available at http://www.stats.gov.cn/tjsj/ndsj/2019/indexch.htm.

60 The labour legislation concerning labour relations during this period includes: the Provisional Regulations on the Recruitment of Workers in State-Owned Enterprises, the Provisional Regulations on Institution of Labour Contract System in State-Owned Enterprises, the Interim Provisions on the Dismissal of Staff and Workers in Violation of Discipline in State-Owned Enterprises, the Provisional Regulations on the Management of Temporary Workers in Enterprises Owned by the Whole People (Nationally Owned Enterprises), the Provisional Regulations on the Management of Labour in Private Enterprises, etc. These regulations have made major reforms to China's traditional fixed-work system, but they were repealed in 2001.

out supply-side structural reform, and put forward the "five priority tasks,"[61] hoping to create more effective supply and promoting high-quality economic growth; "reducing costs" has become one of the important tasks of supply-side reform. Since then, the Politburo of the CPC Central Committee made it clear that the focus of reducing costs is to increase the flexibility of the labour market, curb asset bubbles and reduce the macro tax burden. The increased flexibility of the labour market is regarded by employers as an important means of "reducing costs."[62]

The in distinguishability among the above three of contracts in terms of applicable targets, labour standards and dismissal protection, as well as the strict regulations of labour dispatch, which not only reflects the legislative principle that China's labour legislation favours the tilt protection of labours, but also increases the employers 'resentment of the above three of contracts. At the 2016 NPC and CPPCC sessions, some representatives and economists from the business community said that the Employment contract Law should be amended, because it has the disadvantages of restricting flexible employment, overprotecting labourers, ossifying labour market, increasing enterprise labour costs[63] and hindering economic development. On the other hand, the scholars, government workers and labourers who hold a position to protect labour rights argue that the cost of enterprises is not just the labour costs, but the tax costs (the main costs).Therefore, under the circumstances that the country has successively introduced a large number of tax cost reduction policies, it is impossible to relax the regulation of the labour market, out of the needs to protect the labour side that maintains a weak position. In addition, both the Communiqué of the Fifth Plenary of the 18th Central Committee of the Communist Party of China and the Government Work Report (2016) mentioned "strengthening support for flexible employment and new forms of employment." Opinions of the State Council on Effectively Ensuring Employment and Entrepreneurship at Current and Future Periods (No. 28 [2017] of the State Council) is even more clear that "support the development of emerging business types; improve employment, social security and other systems adapting to the characteristics of new employment types; explore the mode of payment out of unemployment and work-related injury insurance to flexibly employed personnel." Based on this, with the support of national policies,

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61 "Cutting overcapacity, de-stocking, de-leveraging, reducing costs and improving weak links."

62 Tian Ye & Liu Xia, *Balancing Flexibility and Security of Employment in a Flexible Age-Focusing on Debate over Labour Contract Law*, 19(2) Journal of Tianjin University (Social Sciences) 139 (2017); Zhang Ran & Cao Huaqing, *Supply Side Structural Reforms Need Flexicurity Employment Policies*, 3(30) Economy and Management 64 (2016); Tian Silu, *Evolutionary Course and Legal Response to Atypical Developing Trend of Labour Relationship,* 6 Law Science 138 (2017); Ban Xiaohui, *Shared Development, Supply-Side Reform and Social Issues: Summary of High-End Forum on Shared Development and Social Legal Construction*, 6 Journal of Sichuan University (Philosophy and Social Science Edition 2016).

63 Research Group of China Academy of Labour and Social Security, *Research on Labour Market Flexibility and Legal Regulation: Research from the Evaluation of the Implementation Effect of the Labour Contract Law*, 3 China Labour 34 (2018).

a large number of employers have begun to adopt new, more flexible, atypical forms of employment in order to avoid labour legislation.

As mentioned earlier, the difference in employees' legal labour rights is extremely small among the fixed-term employment contracts, the employment contracts that set the completion of specific tasks as the term to end contracts and the indefinite employment contract. However, based on a 2010 study by the China Urban Workforce Survey (CULS), we found that, among the employment contract types signed by labourers between the ages of 16 and 60 in the five cities of Shanghai, Wuhan, Shenyang, Fuzhou and Xi'an, the proportion of signing employment contracts without a fixed term is 19.93% – in respect of migrant workers and 44.58% – urban local labourers, while the proportion of signing fixed-term employment contracts (less than 3 years) is 19.93%-migrant workers and 53.48% – urban local labourers. By 2016, the term of the fixed-term employment contracts signed by migrant workers is mainly "three years or more," accounting for 65%, and the urban local labour reached 71%.[64] From the above data, it can be seen that the signing rate of the fix-term employment contracts is much higher than that of non-fixed term employment contracts in China. It can be seen that, unlike western developed countries, China's mainstream employment contract type is not fixed-term employment contracts but a fix-term employment contract.

Although both forms of labour employment are subject to strict employment and labour protection, the short-term nature of the fixed-term employment contract makes it difficult for labourers to achieve long-term stable employment expectations. In order to prevent the "40, 50 phenomenon,"[65] Article 14[66] of the Employment contract Law stipulates the conditions for the conversion of the fixed-term employment contracts to non-fixed term employment contracts, in order to realize the labourers' right to employment safety. However, the provisions of "worked for 10 years consecutively" and "two fixed-term employment contracts have been concluded consecutively" are considered by employers to face "easy in, hard out," and the provisions will bring adverse effects to the employers. For this reason, after the promulgation of the Employment

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64 王美艳.《劳动合同法》的实施:问题和对策建议[J].贵州财经学院学报 [Meiyan Wang, *The Implementation of China's Labour Contract Law: Problems and Policy Suggestions*, 1 Journal of Guizhou University of Finance and Economics 23 (2013)].

65 The "40, 50 phenomenon" in the labour market refers to employers' unwillingness to recruit 40- and 50-year-old labourers. Employers believe that the golden age of labourers is before 40 and 50, so they are reluctant to hire again after using up the golden age of workers. Some employers even specify that labourers must no older than 45 years when recruiting.

66 Article 14 of the Labour Contract Law provides four situations: the employee has already worked for the employer for 10 full years consecutively; when the employer initially adopts the labour contract system or when a state-owned enterprise re-concludes the labour contract due to restructuring, the employee has already worked for this employer for 10 full years consecutively and he attains to the age which is less than 10 years up to the statutory retirement age; the labour contract is to be renewed after two fixed-term labour contracts have been concluded consecutively; the employer fails to sign a written labour contract with an employee after the lapse of one full year from the date when the employee begins to work.

contract Law, large-scale layoffs began in companies such as South Korea's LG Electronics, Wal-Mart Global Procurement Center China, Spreadtrum Communications' Shanghai headquarters, and some employers began to use the form of labour dispatch to reuse workers that have worked for themselves for nearly a decade, in order to evade employers' labour law obligations. This provision also makes the employer choose to sign a fixed-term employment contract with employees for less than ten years, or not to renew a second employment contract or enter into a third employment contract with the same employee, taking a negative attitude towards the long-term employment of labour. In summary, the purpose of legislation is clear and beneficial to labour, but there are many obstacles to the realization of its value.

The Employment contract Law stipulates that labour dispatch as a special form of employment in section 2 of Chapter V, it stipulates the conditions for the establishment of labour dispatching units, the content of labour dispatch agreements, the obligations of dispatching units and accepting units and so on, hoping to standardize the development of labour dispatch and prevent the continued expansion of labour dispatch form of employment in China. However, due to the ambiguity of the regulations, the labour dispatch is out of control to a certain extent.[67] For example, Article 66 of the Employment contract Law (2008) stipulates that worker dispatch services shall normally be used for temporary, auxiliary, or substituting positions; Article 57 stipulates that a worker dispatch service provider shall be established according to the Company Law and have a registered capital of not less than RMB 500,000 Yuan. Due to the ambiguity of the definition of the three positions and the low cost of the design of labour dispatch companies, the number of labour dispatch companies and labour dispatch workers in China began to increase year by year in 2008. According to the *Report on the Current Situation Analysis and Investment Prospect Evaluation of China's Labour Dispatch Industry in 2019–2025* (released by Zhiyan Consulting Co., Ltd.), the number of labour dispatching companies increased from 10,000 in 2009 to 35,000 in 2017, and the number of labour dispatched workers increased from 27 million in 2009 to 36 million in 2017, as shown in the table below.

Trend of the Number of Labour Dispatch Companies and Workers in China from 2009 to 2017[68]

Year	Number of companies (ten thousand units)	Number of workers (ten thousand units)
2009	1	2,700
2010	1.2	3,100

[67] Xie Decheng, *The Ambiguity of China's Labour Dispatch Law and Its Improvement*, 8 Law Science 121 (2011).

[68] Analysis on the number of workers and market size in China's labour dispatch industry in 2017 (Aug. 15, 2020), available at http://www.chyxx.com/industry/201904/726793.html.

2011	1.5	3,700
2012	1.8	4,000
2013	2.2	4,500
2014	2.5	4,200
2015	2.8	3,800
2016	3	3,500
2017	3.5	3,600

The number of dispatched labour was the highest in 2013, and then began to decline. This is influenced by the amendment of the Employment contract Law in 2012. The Employment contract Law (2012 Amendment) and the Interim Provisions on Labour Dispatch issued in 2014 stipulate that the labour dispatch is a supplementary form which can only be implemented in temporary, auxiliary or substitutable positions; the number of dispatched workers employed shall not exceed 10% of the total number of its workers. In addition, the registered capital of the labour dispatching unit has also risen to 2 million Yuan, and the administrative license has been set up.

The Interim Provisions on Labour Dispatch and the Employment contract Law clearly stipulate that the term for the employment contract between a worker dispatch service provider and the workers to be dispatched must not be less than two years.[69] During the time period when there is no work for the workers. During the time period when there is no work for the workers, the worker dispatch service provider shall compensate the workers on monthly basis at the minimum wage prescribed by the people's government of the place where the worker dispatch service provider is located; to pay social insurance premiums, provide labour protection and safety and health conditions for the dispatched employees; employers also have to pay overtime salary, bonuses, non-discriminatory and job-related benefits, implement a normal wage adjustment mechanism. Labour dispatched workers enjoy the same basic labour rights as the standard employment workers, such as the right to equal pay for equal work, dismissal protection, to organize and join trade unions etc. In addition, if the accepting unit causes damage to the dispatched worker, the labour dispatching unit shall bear joint and several liability for compensation.

[69] Taking Shenzhen as an example, in the second half of 2015, the labour contract signing rate of labour dispatched employees was as high as 100%, and the labour contract term of 2 years and the labour contract term of more than 2 years and less than 5 years accounted for about 90%, which becoming the mainstream of the labour contract term of the labour dispatch; at the same time, 8580 persons of them signed labour contract with no fixed term, which was a year-on-year growth of 10.9%. Lisa Wu, *A Study of Labour Dispatch in Shenzhen in 2015: Annual Report on Shenzhen's Labour Relationship*, Social Sciences Academic Press (China) 112 (2016).

Even though the stricter labour dispatch employment system is stipulated, due to the ambiguity of the legislative regulations, a large number of labour dispute cases have been generated during the application of the law, including: the definition of "auxiliary positions" the confirmation of legal liability under invalid labour dispatch agreements the conversion of direct employment,[70] the recognition of "equal pay for equal work," the payment of economic compensation, etc. In the database of Peking University Magic Weapon,[71] a total of 63,525 judgment documents on labour disputes and personnel disputes for labour dispatch, and the cases were mostly considered from 2014 to 2019. Among them, there were 4789 cases of equal pay for equal work (564 cases in Jiangsu Province and 434 cases in Henan Province); 2,381 cases of second instance, and an increase of nearly 450 cases in 2015 compared with 2014; 1098 cases of auxiliary positions, mostly in Liaoning, Jiangsu and Shanghai; 353 cases of the liability under invalid labour dispatch contracts, including 128 cases in 2016 alone. It can be seen that labour disputes have not been reduced due to the amendment of the law, and there are still cases where the rights and interests of dispatched workers are violated.

China adopts the time-defining method for part-time employment, using weekly working hours as the standard. Since the legislation adopts a "general" or "average" number of daily working hours, that is, the maximum length of working time is not 4 hours per day, then the part exceeding 24 hours per week should be overtime or should be considered as a conversion condition for full-time employment? The Labour Law and the Employment contract Law do not stipulate this, and the relevant laws and regulations in various regions have different opinions. For example, Beijing Municipality[72] stipulates that: the workers who work for more than 4 hours a day in the same employer entity shall be regarded as full-time employees. Under Regulations of Jiangsu Province on Employment Contract, overtime is not applicable to part-time employment unless the agreement between the employer and the employee.

According to the legislation, the wages of part-time employees are not lower than the minimum hourly wage standards stipulated by the government of the employer's location, rather than adopting the principle of "equal pay for equal work" as in the case of labour dispatch. Therefore, the wages of the part-time employees with the same type of job, job position, etc., and the standard employment employees may differ greatly. In addition, the legislation also does not make

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70 *See* Art. 17 of the Taiwan Fundamental Labour Law (2012 Amendment).

71 This database is one of the earlier case databases in China, but also other case databases, such as China Judgment Online and the official websites of local courts. But these databases do not fully collect all the judgments in China, even in the mainland China. Although the collection is not complete, it is already a comprehensive database of cases in mainland China, so the data of this database is selected as the statistical basis.

72 Circular of Beijing Municipality on Several Issues concerning the Administration of Non-Full-Time Employment.

clear which labour standard laws the part-time employees can enjoy, such as the right to rest on statutory holidays, paid annual leave, social insurance and so on. Neither the Employment contract Law nor the Regulation on Paid Annual Leave for Employees stipulates whether part-time employees can enjoy paid annual leave. In the local regulations, there are two ways, one is to make it clear that the part-time employees do not enjoy paid annual leave, and the other is to be agreed between the employer and the employee.[73] Regarding the issue of arranging employees to work on statutory holidays, most regions have not made regulations.[74] Whether the part-time employees participate in social insurance or what kind of social insurance they can take is mainly based on the Opinions on Several Issues concerning the Non-Full-Time Employment issued by the Ministry of Labour and Social Security in 2001: besides industrial injury insurance, labourers can choose to participate in urban employee insurance or resident insurance. The urban employee insurance includes many types of insurance, and employers pay; the urban and rural resident insurance includes pension insurance and medical insurance, and the part-time employees pay. The two insurance models have significant differences in payment costs and insurance treatment. The part-time employees do not enjoy the same rights as dispatched labourers in terms of dismissal protection. According to the legislation, both parties can terminate the contract at any time without employers being subject to time procedures and financial compensation payment obligations.

Concluding the present review of the Chinese regulation of non-standard employment we should note that in recent years, China has made stable employment and employment expansion the common priority for economic and social development. The government has placed employment policies at the macro-policy level and adopted more flexible employment methods to provide more jobs. This has also led to the rapid development and growth of non-standard employment forms and employers. However, the new forms of non-standard employment do not match the current labour legislation completely. As a country with statutory laws, the revision of the law requires a certain period of time and procedure, which also leads to the lag of labour legislation. Lagging labour legislation and weakened subordination are not conducive to the protection of employees' labour rights and interests under the new employment forms.

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[73] Art. 12 of the Several Opinions of Zhejiang Province on Implementation of the System of Paid Annual Leave for Employees of Enterprises. Guiding Opinions of Shanghai Municipality on Several Issues concerning the Labour and Personnel Dispute (I): In principle, the paid annual leave system is not applicable to the part-time employment workers, the retirees employed by employing unit, non-standard employment labour organizations and their personnel, but if the two parties agree otherwise, the agreement shall prevail.

[74] Implementation Opinions of Hunan Province on Strengthening the Management of the Part-Time Employment stipulates that the wage is not less than three times of the local minimum hourly wage standard. Several Provisions of Shenzhen Municipality on the Non-Full-Time Employment stipulates that wage is not less than 300% of the employees' own standard wage. Notice by the Ministry of Labour and Social Security on Issuing the Opinions on Several Issues concerning the Non-Full-Time Employment stipulates that the wage is not less than 300% of the employees' own hourly wage.

Although China has not ratified the Convention No. 175 and No. 181, but actively endorsed the Employment Relations Recommendation and regulated some forms of non-standard employment in domestic legislation. China also actively promotes the application of international labour standards in the domestic. There are achievements and shortcomings, but efforts are still being made to explore the balance between the regulation and autonomy of the open labour market.

2.4. South Africa

After the first democratic elections in South Africa in 1994, the country experienced a flurry of new legislation. The most important employment laws are: Constitution of the Republic of South Africa,[75] Labour Relations Act,[76] Basic Conditions of Employment Act,[77] Employment Equity Act,[78] Skills Development Act,[79] Unemployment Insurance Act[80] and acts like the Occupational Health and Safety Act and Compensation for Occupational Injuries and Diseases were amended.

The Constitution of South Africa provides for a special place of International Law, International Agreements and Foreign Law. Section 139(b) and (c) of the Constitution states that our Courts must consider International Law when they interpret our Bill of Rights. Section 231(2) states that International Agreements binds South Africa, section 231(4) states that International Agreements become law in South Africa when it is enacted into our national legislation.[81]

The most important employment law in South Africa is the Labour Relations Act (LRA), 66 of 1995. Section 1(a) and 1(d) of the LRA states that one of the purposes of the LRA is to give effect to the obligations incurred by South Africa as a member of the ILO and to fundamental labour rights as stated in section 23 of our Constitution.

Two court judgments stressed the importance of international law and ILO conventions: in *National Union of Metal Workers of South Africa and Others v. Bader Bop (Pty) Ltd. and Another* the CC said that the rights of minority trade unions to strike are based on the principles established in ILO conventions 87 and 98.[82] In *Parry v. Astral Operations Ltd.* the Labour Court (LC) stated that labour rights have been elevated to constitutional rights, and these rights are protected by and strengthened

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75 Constitution of the Republic of South Africa (Act No. 108 of 1996).

76 Labour Relations Act (Act No. 66 of 1995).

77 Basic Conditions of Employment Act (Act No. 75 of 1997).

78 Employment Equity Act (Act No. 55 of 1998).

79 Skills Development Act (Act No. 97 of 1998).

80 Unemployment Insurance Act (Act No. 63 of 2001).

81 In this regard special attention must be given to the conventions and recommendations of the ILO.

82 Judgment of the Constitutional Court of South Africa in *National Union of Metal Workers of South Africa and Others v. Bader Bop (Pty) Ltd. and Another* [2003] 2 B.L.L.R. 103 (CC).

through public policy and collective bargaining but within the limits allowed by the Constitution.[83]

A standard employment relationship entails that the employment is full-time and the employee has one employer that the employee works on the employer's premises, that the employment is ongoing and that an employment contract is in place.[84] South Africa's labour legislation does not draw any distinction between full-time employees, part-time employees, casual workers, foreign workers, level of seniority, male/female, etc.; once it is established that a person is an employee, that person is entitled to all protections in terms of all labour legislation; access to labour dispute bodies is the same for all employees; the definition of an employee in section 200A of the LRA and the Code of Good Practices ensures equal protection for vulnerable employees; the CCMA and our Labour Courts will assume that a person is an employee, the onus will be on the employer to proof otherwise; Labour legislation in SA does not make provision for training in International Labour Standards, however section 231(4) of Constitution states that it must be taken into consideration and is Law in SA.[85]

Only individuals who are employees can make use of the statutory dispute resolution mechanisms by referring disputes to the Labour Courts or the Commission for Conciliation, Mediation and Arbitration (CCMA). The fundamental labour rights contained in our Constitution and other Labour laws are only applicable to employees.[86] One would assume that foreign nationals that work in South Africa without a valid work permit will not be considered to be an employee in terms of labour legislation, the same would apply to sex workers or workers performing illegal work. Our courts have provided clarity in this regard with two very interesting judgments.

In *Discovery Health Ltd. v. Commission for Conciliation, Mediation and Arbitration and Others*, the applicant, Discovery Health, terminated the services of an employee without following any normal procedures after it was discovered that the employee was working without a valid work permit. The employee obtained an arbitration award in his favour for an unfair dismissal at the CCMA. The employer took the matter on review in the Labour Court claiming that as the employee was an illegal worker without the necessary work permit, they were not obliged to follow the standard dismissal procedures and were also not allowed to employ the employee. The Labour Court disagreed with the arguments of the applicant and stated that the LRA states that all employees are entitled not to be unfairly dismissed and the Constitution stated that everyone is entitled to fair labour practices. No distinction is drawn between different categories of employees. The moment the employee was employed

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83 Judgment of the Labour Court of South Africa in *Parry v. Astral Operations Ltd.* [2005] 10 B.L.L.R. 989 (LC).

84 Anthea van der Burg, *Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw* (Stellenbosch: Centre for Rural Legal Studies, 2008).

85 Shalina S. Naidoo, *A Critical Analysis of Temporary Employment Services in Terms of Current Legislation*, unpublished LLM thesis, University of KwaZulu-Natal (Pietermaritzburg, 2016).

86 *See* sec. 23 of Constitution of the Republic of South Africa.

a contract of employment was established which can only be terminated by following due process. Any person employed is entitled to fair labour practices.[87]

In May 2010 a Cape Town based sex worker, Kylie, who had been dismissed from a brothel for not performing her duties properly, won her case in the Labour Appeal Court (LAC). The LAC ruled that just because someone worked in an illegal profession, this does not mean that they have no rights under the LRA.[88] Interesting that the LAC could not order re-instatement as the worked performed by Kylie was illegal, she was entitled to compensation for an unfair dismissal. These two cases clearly illustrate that vulnerable employees are open to all different forms of exploitation and our courts have provided protection for them in terms of our Constitution and LRA.

The protection of employees against unfair labour practices is crucial for job security.[89] Many employers and businesses often argue that people in their "service" are not employees but independent contractors to avoid their obligations in terms of labour legislation. Different tests have been developed over the years to determine the actual employment status of individuals.[90]

The control test: The employer has control over the result of the employee's work and how it is done whereas an independent contractor will determine the what, when and how of his own work. This test has been rejected as the employer can no longer supervise and manage the entire spectrum of jobs in the ever-changing world of work. The organisation test: Does the individual form an integral part of the organisation? This has also been rejected by our courts as being too vague. The dominant impression test: Here the courts will weigh up various factors that point towards a contract of employment, which include factors like; only works for one entity, must provide work personally cannot delegate duties, who determines the working hours and who provides the tools to perform duties.

The South African legislation has enshrined a comprehensive definition of who is an employee.[91] The definition of an employee in both the LRA and the Basic Conditions of Employment Act (BCEA) are verbatim the same and can be summarised as follows:

If any one or more of the following factors are present, irrespective of the wording in the contract of an employment, that person will be an employee:[92] The manner in which the person works is subject to the control or direction of another person;

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87 Judgment of the Labour Court of South Africa in *Discovery Health Ltd. v. Commission for Conciliation, Mediation and Arbitration and Others*, [2008] 7 B.L.L.R. 633 (LC).

88 *Kylie v. Commission for Conciliation, Mediation and Arbitration and Others*, 2010 (10) B.C.L.R. 1029 (LAC).

89 Kola O. Odeku, *Labour Broking in South Africa: Issues, Challenges and Prospects*, 43(1) Journal of Social Sciences 19, 20 (2015).

90 *Labour Relations in South Africa* 14–15 (R. Venter & A. Levy (eds.), 5th ed., Oxford: Oxford University Press, 2015).

91 In this regard *see* sec. 213 of the LRA, sec. 83A of the BCEA and also sec. 200A of the LRA.

92 Sec. 200A of the LRA and sec. 83A of the BCEA.

the person's hours of work are subject to the control or direction of another person; In the case of a person who works for an organisation, the person forms part of that organisation; the person has worked for that other person for an average of at least 40 hours per month over the last three months; the person is economically dependent on the other person for whom he or she works or renders services; the person is provided with the tools of the trade or work equipment by the other person; the person only works for or renders services to one person.

The rise in casualization in South Africa is a result of employers attempts to avoid a standard employment relationship and the obligations incorporated into this relationship.[93] Business owners in South Africa have increasingly sought to "externalise" the traditional full-time, permanent, employer-employee relationship into a triangular labour broker connection.[94] The law provided mainly for the standard employment relationship without taking into account agency employees or some other non-standard employees. In most cases these employees were prejudiced as they did not have access to the right not to be unfairly dismissed or to be protected against unfair labour practices. Agency work or part – time work in South Africa falls under Temporary Employment Services (TES) and is regulated by the LRA. There has always been disputes regarding the TES employees; are they employed by the TES or by the client of TES and for how long can a person be employed on part-time basis. To understand the scenario in South Africa it is important to briefly provide a background of labour brokers/Temporary Employment Services.[95]

Almost 1.5 million people are employed via Labour Brokers/Temporary Employment Services (TES) in SA. TES employees are often paid less than the employees of the receiving company and their employment benefits are not the same. In general TES employees are open to abuse and have limited protection, the TES employees are in fact now vulnerable employees.

The trade union movement in South Africa have asked for a total ban of TES and have argued that all employees that are placed by a TES on the premises of a client are in fact employees of the client. The legislature has opted not to ban TES's but rather control and regulate them. In *Assign Services (Pty) Ltd. v. National Union of Metalworkers of South Africa and Others* the Constitutional Court have ruled that after three months of service the TES employees can no longer be considered as temporary placements and in fact becomes employees of the client.[96]

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93 Odeku 2015.

94 Stefan van Eck, *Temporary Employment Services (Labour Brokers) in South Africa and Namibia*, 13(2) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 107 (2010).

95 Paul A. Smit, Examples given to students during a lecture on 5 June 2019 regarding the amendments of the Labour Relations Act at North West University (Potchefstroom, South Africa, 2019).

96 *Assign Services (Pty) Ltd. v. National Union of Metalworkers of South Africa and Others*, [2018] Z.A.C.C. 22. The CC also stated that after three months of service the TES employees are not only employees of the client but become permanent employees of the client and are entitled to the same benefits as other employees. Provision has however been made for exceptions.

As we have stated before, the standard employment relationship is supposed to be full-time, with one employer, when the employee works on the employer's premises and an employment contract is concluded.[97] The addition of agency work/part time work in the triangular relationship does not equate to a standard employment relationship. The rights afforded to the standard employees were not available to the non-standard employees such as; the right not to be unfairly dismissed or not to be subjected to unfair labour practice;[98] the onus of the employer to prove that the dismissal was fair once the dismissal is established by an employee;[99] and the remedies (an order to the employer to re-instate the employee, to re-employ the employee or to pay compensation) available upon the establishment of an unfair dismissal or unfair labour practice.

It is important to note that South African High Court underlined in *Grobler v. Naspers Bpk* that the courts have a duty to protect and promote the dignity, rights and security of all in the workplace not only a select few.[100]

South African Labour legislation has taken cognisance of ILO Recommendation 198 to provide protection for non-standard employment and it is to a large extent in line with Article 7 of the ICESCR. The most important sections of ILO Recommendation 198 are sections 4–8. All these elements are reflected in the labour legislation.

Conclusion

Scholars once noted that BRICS members, unlike many countries in the developing world, have the expertise, and the political and economic capacity, to determine the orientation of their labour laws.[101] The review of the national regulations of non-standard employment in four BRICS countries demonstrates that these regulations are only partly in line with the international standards, the equal treatment of all workers is lacking in many aspects of employment relations. The general world trend in increasing the role of non-standard employment is relevant for all the countries considered in this paper.

The reasons for such a trend are mainly of two types: constructive[102] (for example, permitting to hire temporary agency workers for short term jobs and limiting the overall percent of such workers which permits enterprise to have the needed flexibility) and lobbied by business overall decrease of employment protection aimed

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97 Van der Burg 2008.

98 Sec. 185 of the LRA. The meaning of "dismissal" and "unfair labour practices" is set out in sec. 186 of the LRA.

99 Sec. 192 of the LRA.

100 *Grobler v. Naspers Bpk* (2004) 25 I.L.J. 439 (C).

101 Sean Cooney et al., *Building BRICS of Success?* in *Comparative Labour Law* 440 (M.W. Finkin & G. Mundlak (eds.), Cheltenham: Edward Elgar Publishing, 2015).

102 *See Non-Standard Employment Around the World*, *supra* note 1.

at reducing costs (for example, the exclusion of certain types of workers from the scope of protection in certain aspects, as in case of the part-time employees in China who do not enjoy the same rights as other workers in terms of dismissal protection). Or "pejotization" used in a forced way when contracting personal services, exercised by individuals, to disguise employment relations and lower costs in Brazil.

These two reasons of the "non-standardization" of the labour market are intertwined and the second one is often disguised to take the form of constructive appeal to the legislator and to convince the public opinion. The Doing Business Report[103] published in 2020, citing the then chief economist of the World Bank, Simeon Djankov and Rita Ramalho, point that flexible labour regulation provides workers with the opportunity to choose their jobs and working hours more freely, which in turn increases labour force participation.[104] This is a spread and dangerous assertion. In 2015 prof. Simon Deakin warned labour lawyers to be prepared "to question conventional wisdom on the supposed negative impact of worker protective norms and to query claims made over the desuetude of its core institutions, in particular the standard employment relationship."[105]

Indeed, even if the standard employment relationship, taking into account the rise of other forms of employment, has become a rather obsolete concept, protective norms and ensuring decent work for all are as actual as ever. Fundamental labour rights of all employees in all forms of employment should not be sacrificed following the rhetoric of jobs creation, formalization of labour market and of enhancing business management flexibility. We suppose that the constitutional review of employment law might be a way to delimit the boundaries for flexibility to safeguard the fundamental rights constraint upon it. The judgments of the South African and Russian Constitutional court referred to in this paper are the illustrations of this argument.

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TELEWORK IN BRICS: LEGAL, GENDER AND CULTURAL ASPECTS

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With the rapid development of digital technologies and globalization, telework is becoming increasingly common. For the BRICS countries, the formation of a modern legal regulation model for telework is of great importance. In drafting legislation, it is essential to take into account economic and cultural factors, as well as the need to ensure gender equality. This article presents an analysis of current trends in telework development in the BRICS countries. Its findings reveal various reasons for a growing need to regulate telework. For Brazil, the issue of ecology plays an important role; for China and India, the possibility of integration into the world economy; in Russia, the focus is still on the procedural issues concerning the conclusion and termination of employment contracts; in South Africa, the issue of ensuring not only gender equality, but also racial equality is acute. The analysis gives the authors grounds to conclude that the BRICS countries are still lagging behind the United States and the European Union in the area of telework labor law, despite its widespread prevalence. The BRICS countries do not yet produce the necessary statistics on the prevalence of telework. Issues relating to BRICS's deepening integration require the development of common approaches to regulating the work of teleworkers. The harmonization of legislation between Russia and China is of particular importance due to the territorial factor.

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Introduction

The first scientific publications related to the organization of telework date back to the late 20th century, when Jack Nills singled out this new form of labor. The term "telework" or "teleworking" refers to a work flexibility arrangement under which an employee performs the duties and responsibilities of his or her position, and other authorized activities, from an approved worksite other than the location from which the employee would otherwise work.[1] Currently, more than 88% of multinational, Forbes-listed companies provide part-time or full-time telework opportunities. The involvement of national labor markets in teleworking is determined by many factors including public policy, legislative regulation, digital literacy, cultural traditions and gender.

The purpose of this study is to compare the legal, gender and cultural aspects of telework in the BRICS countries.

For each BRICS country, we present the data characterizing the level of economic development, population size and peculiarities of territorial development. This information is necessary for a better understanding of labor market trends. Then, we investigate the legal framework of telework. In addition, we try to analyze the gender and cultural factors affecting telework development. As the most important cultural factors, we evaluate overall literacy rates as well as the level of English language proficiency.

When studying telework on an international scale, it seems necessary to distinguish two forms depending on the participants' composition. Under the first form, both the employee and the employer are residents of the same state. In this case, they are subject only to the national legislation. This form of telework is proposed to be called "national telework." In the second case, the employee and the employer are in different countries. This form in this study will be called "international telework." The analysis of the telework vacancy market suggests that the largest telework employers are American companies. These companies offer telework in many countries of the

[1] Telework Enhancement Act (2010) (Sep. 3, 2020), available at https://www.govinfo.gov/content/pkg/PLAW-111publ292/pdf/PLAW-111publ292.pdf.

world. The situation described shows that in the case of international telework, in addition to the national regulation, the rules used in the employer's country are important. Therefore, it seems important for us to highlight the U.S. experience in regulating telework briefly.

The demand for a detailed regulation of the teleworkers labor was realized in the United States much earlier than in the Russian Federation – in the 1990s on the background of the rapidly developing information technologies. Currently, U.S. legislation is aimed at encouraging the introduction of flexible working arrangements. According to the Telework Report, which is submitted annually to the U.S. Congress, the share of teleworkers in U.S. federal agencies amounts to about 20% of the workforce.[2]

In the United States, telework is considered the optimal form of employment in the following cases:

– pregnancy, childbirth, breastfeeding;

– if family members need to be cared for (children, older persons, seriously ill persons);

– child adoption.

The active legislation development is now reflected in the Telework Enhancement Act (2010). This law is addressed to U.S. federal executive agencies. The main reason for its adoption was the awareness of the advantages that telework provides for both employees and employers. The U.S. law establishes equal scope of rights, guarantees and obligations for teleworkers and non-teleworkers. The 2014 Presidential Memorandum states,

> The federal government's policy is to promote a culture in which managers and employees understand the flexible working arrangements programs available to them. In today's environment, the State must identify and remove any administrative barriers that prevent the use of flexible working arrangements.[3]

Every federal agency in the United States is required to:

– develop a policy whereby workers can telework;

– notify all employees of the agency of their right to telework.

U.S. federal workers have the right to ask an employer to switch to flexible working arrangements. The employer is obliged to examine the request and respond within twenty days. If a refusal is received, the employee has the right to appeal against

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[2] Status of Telework in the Federal Government (Sep. 3, 2020), available at https://www.telework.gov/reports-studies/reports-to-congress/annual-reports/.

[3] Presidential Memorandum – Enhancing Workplace Flexibilities and Work-Life Program (Sep. 3, 2020), available at https://obamawhitehouse.archives.gov/the-press-office/2014/06/23/presidential-memorandum-enhancing-workplace-flexibilities-and-work-life-.

it. The right to telework is not absolute. First, each agency determines a list of jobs where telework is not provided due to the need for the presence of employees. Restrictions can also be imposed based on security requirements. Second, staff members who have disciplinary sanctions for absence from the workplace of more than five calendar days per year cannot be transferred to telework. Third, transfer to telework is prohibited for those employees who have been prosecuted for watching, downloading or sharing pornography in the workplace.

Much attention in the United States is paid to the policy of training teleworkers. The exemption from training is possible only if the employee has sufficient experience and the necessary competences. In order to organize work with teleworkers, the position of Telework Managing Officer has been introduced in each agency. The Telework Managing Officer refers to senior managers and reports directly to the head of the federal agency.

Telework management is based on resource support, which includes:

– written policy;

– control system;

– training system;

– information resources, including cybersecurity;

– resources for telework workplace equipment.

The Personnel Department is obliged to develop a written manual for teleworkers, which should reflect the peculiarities of remuneration and leave, admission to work, dismissal, evaluation of productivity, security, and the procedure for dealing with documents and their storage. All information for teleworkers should be available on a specially created website.

In the United States, much attention is paid to the system of accounting and control in the sphere of telework. Annually, each federal agency submits a report that includes the following indicators:

– the proportion of jobs that can be transferred to telework and the potential number of teleworkers;

– actual number of teleworkers by age and gender;

– management goals in the field of telework and percentage of their achievement;

– teleworkers survey data.

If the total number of teleworkers has changed by more than 10% compared to the previous year, the federal agency should describe the reasons for the positive or negative change. The report should explain what measures are being taken to identify and remove barriers to the wider use of telework. Based on the results of the reports, submitted by each agency, a general report is formed, which is sent annually to the U.S. Congress. This report provides information on all federal executive agencies and summarizes best practices.

The data analysis from the annual telework reports to the U.S. Congress provides important information to assess the effectiveness of government telework policies.

It should be noted that the in the United States all cases of telework are taken into account, even if carried out during the year only occasionally. In 2018, just 25% of teleworkers carried out their activities without visiting the office; 41% teleworked for more than 3 days in a two-week period; 34% did so from 1 to 2 days in a two-week period; and 13% performed their telework duties not more than once a month.[4] The report to the Congress noted that the issue of assessing the frequency of telework has traditionally been difficult to measure due to the lack of uniform approaches to calculating teleworkers' working time.

American employers use the following methods of evaluation:

– based on timesheets;
– based on the analysis of the employment contract terms;
– based on automated systems for recording performed work;
– based on sociological surveys.

The U.S. telework accounting system is constantly being improved. Thus, since 2012 all state authorities have been obliged to provide monthly personnel reports, which include indicators of teleworking. We can see that the United States has a sufficient regulatory framework in the field of telework. The U.S. experience is used by us as a starting point for assessing telework in the BRICS countries.

1. Telework in the Russian Federation

The Russian Federation is the largest BRICS state by territory, but the country ranks 4th in population, after China, India and Brazil. The number of residents in the Russian Federation in 2018 amounted to 146.5 million people.[5] By 2030, the projected population will decrease to 138 million. The projected life expectancy will be 66 years. The literacy rate of adults in the Russian Federation is approaching 100%. The official language is Russian. By the level of English language proficiency, Russia ranks only 38th in the world.[6] English proficiency is thus rated low.

The Russian Federation is characterized by a significant differentiation of territorial development. The most developed areas are the largest megalopolises of Moscow and St. Petersburg, which are characterized by a developed labor market and high pay levels. At the opposite pole are towns, where the number of inhabitants is rapidly decreasing. Such significant territorial differences increase the urgency of creating teleworkers. Telework can be considered to be a way to support smaller towns, rural areas and develop local labor markets.

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[4] Status of Telework in the Federal Government, Report to Congress Fiscal Year 2018 (Sep. 3, 2020), available at https://www.telework.gov/.

[5] Statistical data (population, GDP, literacy rates, etc.) are derived from UNCTAD databases (Sep. 3, 2020), available at https://unctad.org/statistics.

[6] English language proficiency rankings are derived from the EF English Proficiency Index (EF EPI) 2020 (Sep. 3, 2020), available at http://www.ef.com.

Prior to the entry into force of amendments to the Labor Code of the Russian Federation in 2013, telework was often considered to be a form of home-based work;[7] however, at present telework is referred to as an independent form of employment.[8] As advantages of this employment form for employers, Russian economists point out cost savings and the possibility to attract labor from other regions and states. For employees, telework offers advantages in the form of flexible working hours, a reduction in commuting time, and the possibility to plan and perform labor functions independently.

At present, the telework regulation is specified in Chapter 49.1 of the Labor Code, which was introduced by Federal Law of 5 April 2013 No. 60-FZ. This chapter contains five articles and regulates the:

– concept of telework;

– peculiarities of the conclusion and modification of the telework contract terms and document exchange procedures;

– peculiarities of teleworkers' labor organization and protection;

– peculiarities of teleworkers' work and recreation modes;

– peculiarities of telework contract termination.

According to Chapter 49.1 of the Labor Code, telework has two essential characteristics. Firstly, it is performed by the worker outside the stationary workplace. Russian legislation distinguishes telework and home-based work. A teleworker does not necessarily have to work from home, their activities may also be of a travelling nature. Secondly, telework is carried out using information and communication technologies. It should be noted that Russian legislation, unlike U.S. and EU legislation, does not provide for the possibility of part-time telework. In fact, however, many workers (e.g. teachers) are partly involved in teleworking.[9] It seems that one of the directions of improving the Russian legislation may be the introduction of the concept of full and part-time telework.

A significant part of the norms in Chapter 49.1 of the Labor Code specify procedures relating to electronic document flow. The parties to the employment contract may exchange not only paper documents but also electronic documents. The enhanced encrypted and certified digital signature (EDS) is required to give them legal effect. In practice, many Russian companies ignore these requirements, and

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[7] *Томашевский К.Л.* Компьютерное надомничество (телеработа) как одна из гибких форм занятости в XXI веке // Трудовое право в России и за рубежом. 2011. № 3. Vol. 32–36 [Kirill L. Tomashevsky, *Computer Home-Based Work (Telework) as One of the Flexible Forms of Employment in the 21st Century*, 3 Labor Law in Russia and Abroad 32 (2011)].

[8] *Воробьёва О., Лазарева И.* Особенности правового регулирования труда дистанционных работников // Балтийский гуманитарный журнал. 2018. Т. 7. № 2(23). Vol. 379–380 [Olga Vorobyeva & Irina Lazareva, *Features of Legal Regulation of Labor of Remote Workers*, 2(23) Baltic Humanitarian Journal 379 (2018)].

[9] *Лютов Н.Л.* Дистанционный труд: опыт Европейского Союза и проблемы правового регулирования в России // Lex Russica. 2018. № 10(143). С. 30–39 [Nikita L. Lyutov, *Remote Work: The Experience of the European Union and the Problematic Aspects of Its Legal Status in Russia*, 10(143) Lex Russica 30 (2018)].

most workers do not have the necessary software and technical capability to use EDS. In addition, despite the conclusion of an electronic employment contract, the legislation establishes a requirement for the existence of the paper-based contract. It seems to us that in the conditions of the digital economy it is necessary to modernize the Labor Code norms and introduce paperless personnel document circulation.

It should be noted that in the legal literature at the time of its introduction Chapter 49.1 of the Labor Code was assessed quite optimistically. The several years that have passed since the amendments were introduced show that telework still remains in the 'grey sector' of the economy, and the current legislation has a large number of problematic and controversial points. Comparing the norms of Russian and American legislation, it can be concluded that compensation for the employee's expenses is the employer's right rather than a duty. As a rule, the employer does not include the compensation norms in employment contracts. Consequently, Russian teleworkers have a much lower level of rights protection. Russian legislation lags behind American legislation in regulating telework organizational issues, and it is true that in Russia the role of trade unions is significantly reduced in telework.[10]

In accordance with Article 312.4 of the Labor Code of the Russian Federation, the teleworker's work and recreation mode is established at their own discretion. The practice of applying the legislation poses many unanswered questions for the employee and employer, including those regarding compliance with the norms of the Labor Code for the working time duration, payment for overtime work, and night and holiday pay. So far, the current legislation does not address these questions. An example may illustrate this point. An employee appealed to the State Labor Inspectorate of the Rostov region in light of the following.. In accordance with his official duties, he was required to review online conferences within two days of their having taken place. One such online conference took place on a Saturday morning, and a review was done at the weekend and presented on Monday. The question posed here was: Is the employee eligible for an increased payment because he worked on Sunday?

The State Inspectorate reply stated that,

> The employer does not have the need to maintain time records and fill in the time sheet for a teleworker. In the case, when a teleworker independently determines the work and recreation mode, there is no need for increased remuneration for the work performed during night, weekends, public holidays and overtime.[11]

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[10] *Нуштайкина К.В.* Реализация права работников на социальное партнерство в условиях дистанционного труда // Вестник Пермского университета. Юридические науки. 2013. Вып. 3(21). С. 152–156 [Ksenia V. Nushtaikina, *Realization of the Right of Workers for Social Partnership in the Conditions of Remote Work*, 3(21) Perm University Herald. Juridical Sciences 152 (2013)].

[11] Ответы на вопросы Государственной инспекции труда по Ростовской области [Answers to Questions of the State Labor Inspectorate in the Rostov Region] (Sep. 3, 2020), available at https://git61.rostrud.ru/.

The example presented shows that such an interpretation of the situation as a whole is valid from the point of view of the current legislation. However, from the employee's point of view, the use of telework leads to a significant reduction in the level of social protection.

There are difficulties in interpreting and applying labor laws when dismissing teleworkers. Part 1 of Article 312.5 of the Labor Code provides for the possibility of dismissal of a teleworker on the grounds provided for in the employment contract. This ground discriminates against teleworkers compared to most other categories of workers for whom there is no such ground for termination of the employment contract. There is no objective reason to identify such a basis for differentiating the work of teleworkers.[12] Additionally, judicial practice has already accumulated a rather large number of disputes related to the peculiarities of teleworker dismissal because of absenteeism. Difficulties generally arise as to how to prove the presence or absence of a staff member in the workplace.

In general, Russian legislation regulates teleworking in a fragmented manner. The focus is made on procedural issues of the employment contract. Russian telework legislation is gender-neutral. A serious problem is the lack of telework-related statistics. The experience of introducing telework in state and local self-government authorities has not been developed in the Russian Federation yet. Russian labor law provides teleworkers with fewer guarantees than non-teleworkers. The Russian market is mainly dominated by national employers. Insufficient proficiency in English as well as digital skills are constraints in telework development.

2. Telework in China

Since December 2014, China's economy has been ranked number one worldwide in terms of GDP. The PRC is the world's leader in the production of most industrial products, including computers and telecommunications equipment. In 2018, the population of China exceeded 1.5 billion. By 2030, Chinas projected population will be 1.4 billion, so China is expected to lose the leadership in population size to India. The male adult literacy rate is 98.17%, and the female literacy rate is 94.48%. There are about 300 languages and dialects in China. The standard state language of the PRC is officially spoken only on the mainland. The Tibetan language has official status in the Tibetan Autonomous Region, and the Mongolian language in the territories of Inner Mongolia. Spoken languages in the Republic belong to at least nine families. In terms of English language proficiency, China ranks 36th in the world. English proficiency is rated low. China's territorial development is heterogeneous. The eastern regions, as well as the areas along the sea coast, are considerably more developed. Guangdong Province has the lead in mainland China in the production of electronic, textile, food and pharmaceutical products and household appliances.

[12] Lyutov 2018.

The share of women in the Chinese labor market is high at over 40%. Women's ability to work is seen as an important indicator of independence and gender equality. Most women work full-time because Chinese law does not provide any benefits for working mothers. The rapid economic development of the past two decades has led to the integration of rural women into the labor market.

The spread of telework in China is linked to the country's desire to improve its competitiveness in the global markets. Overpopulation and environmental pollution also increase the PRC's interest in developing teleworking. The active introduction of telework in China dates back to the early 2000s. According to one survey, the level of ICT-use by the Chinese was quite high at the time: 83% of companies used e-mail, and more than 85% of respondents had their own website.[13]

A few examples of successful experience in telework projects can be given. In hosting the 2008 Olympic Games, the Beijing Municipal Government asked state-owned enterprises to make the most of the opportunities of telework to reduce traffic congestion in the city. In 2010, in order to reduce emissions of harmful substances, the China National Development and Reform Commission (NRDC) selected Hubei Province to implement a pilot telework program. In addition, the Shanghai Government published ICT policy options for smart cities the same year. One of the program directions was to promote and support telework. Finally, the experience of Alibaba, which gave employees the opportunity to work from home, is the most indicative among commercial enterprises. Furthermore, a number of Chinese companies practice part-time telework when employees are allowed to reduce commuting in case of abnormal climatic conditions or epidemics.

The legal regulation of labor relations is regulated by the Labor Act (1994), the Employment Contract Act (2008) and the Employment Promotion Act (2007). The Employment Contract Act regulates part-time employment. It is this model that is most often used in telework. Remuneration for workers' labor in this case is paid on an hourly basis. Working hours do not exceed four hours per day, and weekly working hours do not exceed twenty-four hours. In part-time employment, the parties may conclude an agreement orally. A part-time employee may enter into an employment contract with one or more employers, but subsequently concluded employment contracts should not affect the performance of previously concluded employment contracts. In part-time employment, each side (employer and employee) may at any time notify the other side of the termination of the employment relationship. Upon termination of the employment relationship, the employer does not pay the employee severance pay. The hourly wage for part-time employment may not be less than the minimum hourly wage established by the government at the employer's location. The maximum frequency of calculation and payment of remuneration for

[13] Nicholas Bloom et al., *Does Working from Home Work? Evidence from a Chinese Experiment*, 130(1) Quarterly Journal of Economics 165 (2014).

part-time employment may not exceed fifteen days. Thus, part-time work is the main option for the registration of a teleworker. An employee may enter into several such contracts. A part-time employment contract significantly reduces the guarantees for workers, but allows for more flexible working arrangements.

Leading Chinese companies provide teleworkers with the same level of guarantees as non-teleworkers. This applies to wages, social insurance and benefits. Researchers note that in some cases the level of legal guarantees for teleworkers may even be higher. This is due, first, to sectoral peculiarities – the level of wages and guarantees in the telecommunications sector is higher than in agriculture. Second, as we noted earlier, international corporations often provide their teleworkers with a higher level of guarantees based on their experience and the higher requirements of U.S. and EU legislation.

Researchers note that the organization of telework in China should be based not solely on state regulation. The formation of an effective telework model should take into account cultural traditions. Long, Kuang & Buzzanell indicate the need to cultivate *guanxi*.[14] The *guanxi* effect is based on trust. *Guanxi* extends to different spheres of life of every Chinese person, but has a special force in the business world. Establishing strong ties is a tradition in Chinese society, and these ties can remain strong throughout a person's life. Telework, unlike traditional forms of employment, creates the problem of employee isolation. The problem of worker isolation has long been the focus of attention of Western researchers.[15] For China, due to cultural traditions, it matters much more. Surveys of teleworkers in China show that in addition to pay, working hours and cost compensation, it is important for them to establish common goals and develop common values with the employer. While non-teleworkers can cultivate *guanxi* in daily interactions at work, teleworkers face isolation due to the lack of workplace and interaction with colleagues. It is essential for Chinese workers to receive the approval of their boss and colleagues. This example shows that the legal regulation of telework should take into account the peculiarities of national culture and traditions.

Public opinion is another obstacle to the spread of telework in China. Due to culture and traditions, most Chinese believe that traditional office work is the only legitimate form of work in modern Chinese business conditions. The society treats telework with mistrust. It should be noted that this situation was also common in Western countries at the early stages of telework distribution. It was perceived as something not serious and even fraudulent. The gradual increase in the number of teleworkers, and the development of legislation, has led to the perception of telework as an effective form

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[14] Ziyu Long et al., *Buzzanell Legitimizing and Elevating Telework*, 27(3) Journal of Business and Technical Communication 243 (2013).

[15] Arora Shikha, *Does Workplace Isolation Matter? Examining the Impact of Workplace Isolation on Telecommuter Work Engagement* (Melbourne, FL: Florida Institute of Technology, 2012).

of employment in Western countries. In developing countries, including China, such a position is being formulated with a considerable delay.

When studying the experience of organizing telework in China, it is important to note that many Chinese workers assess the advantages of telework in a different way compared to representatives of Western countries. Thus, European and American workers see the advantage of telework in reducing commuting time. Chinese workers note in their interviews that they spend the saved time on establishing deeper and more trustworthy relationships with customers. Telework is viewed by the Chinese through the lens of work ethic.

China's experience shows that the development of telework is largely determined by cultural factors. With a large population and deep integration into the global economy, China could become the largest market with millions of teleworkers. At the state level, China is aware of the importance of telework to mitigate environmental problems. China is Russia's largest economic partner and close neighbor. Within the framework of BRICS, it is necessary to look for opportunities to develop telework in order to strengthen Russian-Chinese relations.

3. Telework in India

India ranks second in BRICS in terms of population – India's population exceeded 1.38 billion in 2018. By 2030, India's projected population will exceed 1.5 billion. The adult male literacy rate is 80.95%, and the female literacy rate is 62.84%. More than 200 million people are illiterate in India, which exceeds the entire population of Russia. India has many megalopolises with more than 10 million inhabitants. The most populous include Mumbai, Delhi, Bangalore, Calcutta and Hadarabad. India is characterized by significant differences in territorial development. Major cities develop as modern megalopolises, while most of the population continues to reside in the provinces. Most of the population is employed in agriculture. The state languages are English and Hindi. Due to ethnic diversity, there are more than 2,000 dialects in India. India ranks 27th in the world in terms of English proficiency, which varies significantly. There are virtually no language barriers among the educated part of the society, while the people of the countryside mostly speak one of the many dialects.

India represents the most promising market for telework job openings in BRICS. A particularly large number of job openings are placed by U.S. employers. A number of factors account for the main reasons why the United States is active in India's labor market. First, India, on a par with China, is one of the largest labor markets. Second, as already alluded to, highly skilled workers do not face a language barrier, which facilitates their integration into international corporations. Third, the active development of the telecommunications sector in India and public investment in the development of information technologies provide a large number of qualified and trained information technology (IT) specialists. Low pay explains the high demand for Indian programmers among American companies.

Bangalore's experience is the most successful in terms of developing telework. The scientific literature even formulated the concept "Bangalore Phenomenon." The city of Bangalore is often referred to as the Indian Silicon Valley. The economic breakthrough in Bangalore was made possible by the fact that in 1991 Manmohan Singh, the Finance Minister of India, gradually began to open the Indian economy to foreign investment.

In the late 1990s, due to "the Year 2000 problem" (aka Y2K bug), thousands of programmers were needed across the globe to reconfigure computer systems. India was able to provide sufficient numbers of qualified specialists to software manufacturers (mainly from the United States). India reached a new level as a host country of outsourcing, allowing a large number of Indians to join the single global market for goods and services.

Infosys Technologies is among the most famous and successful IT companies in India. The company is headquartered in Bangalore. In 1999, it became the first Indian firm to launch an IPO in the United States. The Bangalore Phenomenon can be an example for all of the BRICS countries. The key factors of Bangalore's success in developing telework are attributed to the combination of legal, geographic and infrastructure factors. Investors from other countries are attracted by the presence of highly qualified specialists, a favorable tax regime, as well as a special culture similar to the culture of Silicon Valley in the United States. Educational institutions have played a significant role in Bangalore's success as a telework center in India. Historically, Bangalore has been home to the best universities that focus on UK standards and training experience. Effective training for teleworkers includes both technical skills and soft skills. Among the soft skills required by teleworkers, Indian researchers consider the skills of planning and independent work organization. Government efforts are now focused on replicating Bangalore's success in other major Indian cities, such as Calcutta and Mumbai.

Telework is actively introduced in the field of information technologies and communications, in the media, book publishing, education, trade and even medicine. It is necessary to emphasize once again the fact that the main employers offering telework in India are companies from the United States and the European Union. The huge difference in wages allows international companies to achieve substantial savings. For example, India has created many jobs in telemedicine and medical data processing.[16]

While in the United States the annual income of a specialist who processes medical data is more than $25,000 a year, in India the salary does not exceed $1,500 a year. The shift of jobs from developed countries to India is also due to the fact that the population in developed countries is gradually ageing. At the same time,

[16] Ernesto Noronha & Premilla D'Cruz, *The Dynamics of Teleworking: Case Studies of Women Medical Transcriptionists from Bangalore, India*, 12(2) Gender, Technology and Development 157 (2008).

India's job market is dominated by young specialists, who can master new digital skills much easier. The high share of young people in the labor market determines India's attractiveness to foreign employers. According to Swasti Mitter, the creation of telework in India reduces staff costs five to ten times.[17]

The main obstacle to the development of telework in India is the high poverty rate. Many towns and rural areas in India still lack stable electricity supply. One of the most important state initiatives was the creation of telecenters – office buildings with all of the necessary equipment in which points of collective access to the Internet were created. This has led to significant progress in the field of information technology.

Significant shortcomings in the legal regulation of telework in India are observed regarding the protection of teleworkers' rights and their workplace safety. As noted earlier, this situation is also common in the Russian Federation. Indian lawyers insist on ensuring equal rights of teleworkers and non-teleworkers in the field of health care, regular medical examinations, eyesight checkups and workplace safety.

In considering the gender dimension of telework development, a high level of gender inequality must be taken into account. As noted earlier, almost 40% of women in India are illiterate, and unable to use electronic means of communication. They do not have the skills that would allow them to be involved in telework. In addition, the spread of telework is prevented by a large number of children in the family, overpopulation and lack of necessary infrastructure. As Swasti Mitter notes, telework is available mainly to educated women from well-off families.[18] The level of gender inequality in telework in India remains high. Surveys of Indian women show that remote work is not always seen as an advantage. Even mothers with disabled children point out that the main disadvantage of telework is isolation, lack of communication and lack of support from the society.

Women's involvement in telework varies significantly across industries. Thus, among programmers, the proportion of women does not exceed 20%. At the same time, international airlines, using telework in back-offices and call-centers, mainly assign such work to women. A number of initiatives have been taken to reduce gender inequality in India. For example, SNDT Women's University and the National Center for Software Technology have been conducting a special course on improving computer literacy of women since 2000. Special attention is paid to the training of rural women. As measures to reduce gender inequality, it is proposed to provide women with preferential educational loans and subsidies for the purchase of computer equipment and software.

Thus, India has successful experience in creating telework in the IT sector. The Bangalore Phenomenon is of interest to all of the BRICS countries. India is a country

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[17] Swasti Mitter, *Teleworking and Teletrade in India: Combining Diverse Perspectives and Visions*, 35(26) Economic and Political Weekly 2241 (2000).

[18] *Id.*

that is characterized by a high level of gender inequality. Telework is mainly targeted at highly skilled workers. Indian workers' competitive advantage is fluency in English. The largest employers creating tele-jobs are U.S. and EU residents. The influence of cultural factors and traditions results in the heterogeneous spread of telework in India in both in sectoral and in territorial terms.

4. Telework in Brazil

Brazil ranks 3rd in BRICS in terms of population. The number of Brazil's residents in 2018 amounted to 215 million people. By 2030, Brazil's projected population will rise to 225 million. Life expectancy is 72 years. That is higher than the average world life expectancy, which is around 71 years. The literacy rates for both men and women are around 92%. The state language is Portuguese. The level of English proficiency is low – the country ranks only 41st in the world, the worst result for any BRICS country.

Brazil has a relatively high level of urbanization. According to the Brazilian Institute of Geography and Statistics (BIGS), eight out of ten Brazilians live in cities. The largest cities are Sro Paulo, Rio de Janeiro, Brasilia, Belo Orizonti, El Salvador and Fortaleza. From a territorial point of view, Brazil has an important distinctive feature: the great Amazon River. The Amazon region is sparsely populated and difficult terrain. The most developed industry is concentrated in the south and south-east of the Brazil. The northeast is the country's poorest region.

Over the past twenty years, Brazil has created a large number of teleworkers. The country has started to generate statistical information on the spread of telework, among other methods, through conducting surveys of employers. According to IBGE, using information collected in the last census of 2010, approximately 23% of Brazilians (about 20 million people) have experience in home-based work, including telework via the Internet.[19] A study conducted by Brazil's Ministry for Home Affairs with institutional support from SOBRATT (Brazilian Society of Challenges of Telework in Brazil) found that of the 325 companies surveyed, 68% used telework in one form or another. Some companies provided part-time telework to their workers, about 40% organized home-based jobs for employees. However, only 60% of those companies that actually used telework enshrined this activity formally in their local corporate agreements The remaining 40% used telework without amending contracts and local corporate agreements. Interestingly, tele-jobs are created not only in the commercial sector, but also in the sphere of public administration.

The legislative regulation of telework in Brazil has undergone a significant change over the past few years. In 2011, the Consolidation of Labor Laws (CLT) introduced Article 11, which enshrined equality of rights for teleworkers and non-teleworkers.

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[19] IBGE: Censo Demogr6fico (Sep. 3, 2020), available at http://www.ibge.gov.br/home/estatistica/populacao/censo2010/default.shtm.

However, in 2017, the CLT amended Article 62. According to this amendment, teleworkers are not subject to time control regulations. In actual fact, this resulted in teleworkers' losing their right to overtime pay. The severity of the issue of overtime accounting and payment is evidenced by the research conducted by Brazilian economists. In Boonen's survey, 97% of teleworkers work more than the standard eight hours a day, compared to 57% for non-teleworkers. The same survey indicates that 49% of teleworkers work more than thirteen hours a day.[20] For non-teleworkers, such a situation does not arise due to direct prohibition and strict fines.

Studies also point to such issues as transferring costs from an employee to an employer. Brazilian employers do not seek to pay the costs of a teleworker for communications, Internet access service, purchases of equipment and electricity utility costs.[21] In 2017, legislation included the norm that the procedure for reimbursement of a teleworker's costs relating to communications and workplace equipment is determined by an individual employment contract. The employer is also obliged to conduct health and safety briefings. However, it is not clear how the employer will monitor the implementation of these instructions. On the basis of a comparative legal analysis, we can conclude that the norms of Russian and Brazilian legislation in the field of telework regulation are significantly similar. Despite the sufficient prevalence of telework, researchers note most issues are poorly studied, including the protection of labor rights and gender equality.

5. Telework in South Africa

South Africa is the smallest BRICS country by population. In 2018, the number of residents amounted to 57 million people. South Africa is one of the most nationally diverse countries in Africa and has the largest proportion of white population on the continent. One of the most pressing demographic problems in the country is the reduction of the white population due to emigration. Life expectancy at birth (for both sexes) in South Africa is 49.3 years. This is the lowest figure for any of the BRICS countries. By 2030, the projected population of South Africa will exceed 64 million. The male adult literacy rate is 95.51%, and the female literacy rate is 93.13%. There are eleven official languages, including English, under the Constitution of South Africa. English language proficiency is the highest in BRICS, and the country ranks 8th worldwide.

South Africa is characterized by a high stratification of the population. About 15% of the population live in the best conditions, while about 50% (mostly black) are very poor. Not all residents have access to electricity and clean water, and poor sanitation in many settlements contributes to the spread of various diseases. About

[20] Eduardo Boonen, *As vбrias faces do teletrabalho*, 2/3E G Econ e Gestro 106 (2002).

[21] Isabel Costa, *Teletrabalho: subjugaзгo e construзгo de subjetividades*, 41(1) Rev Adm Pъblica 105 (2007).

17 million people live below the poverty line, and about 11 million of them live in rural areas. The national unemployment rate is about 40%.

South African researchers note that telework is not sufficiently developed yet.[22] As in all of the BRICS countries, there is a lack of statistical information available. A characteristic feature of South Africa is persistent gender and racial inequality. Racial differences are still widespread, while 82% of white South Africans have a phone in their home, only 18% of black South Africans have a phone connection in their homes.[23]

The question of how to ensure equal access to telework for rural women is particularly acute. Women's low income, due to the lack of access to education, formal employment, social security and public employment programs, has marginalized women in South Africa.

The African Information Society-Gender Working Group (AIS-GWG) has identified a range of issues that need to be addressed in order to reduce gender and racial inequalities in the use of IT technologies. The most important regulatory documents are the White Paper on Telecommunications and the Telecommunications Act of 1996. The White Paper on Telecommunications states:

> Besides referring to those who were disadvantaged by the apartheid system in the past, the term "disadvantaged" also applies to those South Africans who have been historically disadvantaged through discrimination on the grounds of gender and/or disability. In the context of telecommunications, the severe disadvantage experienced by the members of rural communities under apartheid should receive special attention.[24]

One mechanism for developing telework, as well as ensuring equal access to information technologies in South Africa, is the establishment of telecenters by the Universal Service Agency. The evaluation of the effectiveness of this initiative receives conflicting assessments. According to the developers, telecenters should allow residents of rural areas and remote areas of South Africa to do telework. The program has received significant budgetary funding. However, a study by Aki Stavru and Peter Benjamin shows that many of the created telecenters do not function.[25] The

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22 Nicholas Baard & Adйle Thomas, *Teleworking in South Africa: Employee Benefits and Challenges*, 8(1) SA Journal of Human Resource Management 298 (2010).

23 Alison Gillwald et al., *Gender Assessment of ICT Access and Usage in Africa*, Volume One 2010 Policy Paper 5 (Sep. 3, 2020), available at https://www.ictworks.org/sites/default/files/uploaded_pics/2009/Gender_Paper_Sept_2010.pdf.

24 National Integrated ICT Policy White Paper (Sep. 3, 2020), available at https://www.dtps.gov.za/images/phocagallery/Popular_Topic_Pictures/National_Integrated_ICT_Policy_White.pdf.

25 Peter Benjamin et al., *Telecentre 2000: Synthesis Report* (Johannesburg: DRA-Development and LINK Centre, 2000).

main reasons for the low efficiency of telecenters consists in the lack of professional training, and residents' low digital literacy.

Under licensing requirements, each company is required to contribute 1% of the pay fund to the Human Resource Development Fund. The Employment Equity Act requires that on the national scale companies seek gender and racial equality. Both of these pieces of legislation demonstrate the strength of trade unions. However, they are often criticized for creating an unfriendly environment for investors and unnecessary regulatory barriers.

Despite the fact that South Africa is creating tele-jobs for women, gender inequality remains acute. This is reflected in the fact that even if equal access to job-openings is ensured, in the field of telework women occupy mainly low-paying positions without career prospects. As has been noted by Alison Gillwald:

> If 1000 women are employed in a company of 2000 and all are domestic workers or secretaries, this is unlikely to be a contributing factor to gender equity.[26]

Another problem is that in South Africa residents speak not only English, but also many dialects. Accordingly, proficiency in English often acts as a necessary requirement when providing telework. Sara Macharia points out:

> The relevance of the information being disseminated [on the Internet] ... may be readily accessible but sometimes the materials being transmitted may appear too technical, too difficult to understand or having no bearing to the African situation, therefore causing users in the region to ignore such material.[27]

This problem is common in the BRICS countries. The telework phenomenon consists in the fact that the generated jobs are designed mainly for educated and skilled professionals. This fact can only increase inequality. The solution to inequality is to improve overall education, digital literacy and knowledge of English as a universal language in business communications.

The analysis of scientific publications identified an interesting area which is currently being studied mainly by researchers from South Africa. This is related to the BYOD concept. The concept of "bring your own device" (BYOD) describes a situation where employees use their own equipment (computers, laptops, mobile phones,

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[26] Gillwald et al., *supra* note 23.

[27] Sara Macharia, Presentation to the Expert Group Meeting, WomenWatch Global Information through Computer Networking Technology in the follow-up to the Fourth World Conference on Women, 26–28 June 1996, NYC U.N. Division for the Advancement of Women, UNIFEM & INSTRAW (mimeo).

tablets, office equipment, etc.)[28] instead of stationary workplaces and equipment provided by the employer. By using the employee's equipment, the employer's costs are significantly reduced. It decreases costs for office rental, for purchases of equipment, electricity usage and communications services. As we have repeatedly stressed in previous studies, there is actually a transfer of costs to the employee.[29] At the same time, such policies lead to increased threats in the field of computer security, protection of intellectual rights and personal data, health and safety issues. South Africa is particularly interested in BYOD due to the high growth rate in the introduction of mobile devices in business practices. Against the explosive increase in the use of workers' mobile devices, most employers in South Africa do not have a clear idea of how to develop BYOD policies and minimize emerging risks.

The European Union Network and Information Security Agency (ENISA) guide to BYOD risk management focuses on owners rather than devices. The United States National Institute of Standards and Technology (NIST) (2016) published the 'User's Guide to Telework and Bringing Your Own Device Security' which presents specific recommendations to address security concerns relating to BYOD. Accordingly, securing a device used for BYOD includes:

– using special programs (antivirus software, personal firewalls, filtering spam and web content, as well as blocking pop-ups);

– limiting PC use by having a separate user account for each person;

– ensuring that updates are regularly applied to the operating system and core applications;

– switching off unnecessary network features on PCs and secure configuration of wireless networks;

– configuring core applications to filter content and stop other activities that may be malicious;

– installing and using only well-known and reliable software;

– configuring remote access software based on the organization's requirements and recommendations;

– maintaining PC security on a continuous basis, for example by changing passwords regularly and checking software health periodically.

This makes it possible to conclude that South Africa's experience is of great value to all of the BRICS countries. South Africa's historical experience relates to the recognition of gender and racial inequality and active policies to remedy this

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[28] Ivan Veljkovic & Adheesh Budree, *Development of Bring-Your-Own-Device Risk Management Model: Case Study From a South African Organisation*, 22(1) Electronic Journal of Information Systems Evaluation 1 (2019).

[29] *Чудиновских М.В.* Регулирование дистанционного труда в странах Евразийского экономического союза // Евразийская адвокатура. 2018. № 4(35). Vol. 109–111 [Marina V. Chudinovskikh, *Regulation of Distance Work in the Eurasian Economic Union*, 4(35) Eurasion Advocacy 109 (2018)].

serious matter. In other BRICS countries, inequality issues also occur, but they are not recognized so openly. The absence of public initiatives for equality in telework can lead to "digital inequality." South Africa's experience shows that the construction of telecenters does not solve the problem of generating telework for the poorest people in rural areas. Increasing the availability of mobile computer equipment and its use in telework forms the need to conceptualize the BYOD issue.

Conclusion

The study concludes that the BRICS countries are still in the early stages of establishing an integrated legal regulation of telework. Telework itself is developing very rapidly, and residents of the BRICS countries receive employment opportunities in international companies. Telework regulation should not be limited to labor law. The issue of equality of access to telework job openings, regardless of sex, race, nationality or place of residence, is of great importance. Telework can contribute to a more uniform development of rural and remote areas.

Based on the findings of the study, we propose a set of measures to improve state policy in the field of telework, including its legal regulation.

1. Currently, the BRICS countries lack up-to-date statistical information on the spread of telework.[30] It seems necessary to collect telework statistics, including sex-disaggregated data. Such information should serve as a basis for developing telework policies. This information should be published and made available to the public. It is necessary to maintain records of employers providing telework opportunities. The experience in such accounting already exists in the United States and the EU countries.

2. Teleworkers should be informed about the peculiarities of the telework legal regulation, their rights and duties. In the developed countries, state telework portals that provide information about legislative acts, methodological recommendations for employees and employers, materials of scientific research and surveys are being set up.

3. The protection of teleworkers' rights should be facilitated by the establishment of trade unions. In view of the territorial separation of teleworkers, it may be necessary to change the legal and regulatory framework for joining a trade union and conducting collective negotiations.

4. The peculiar feature of telework consists in the use of tele-workplaces. Teleworkers should be compensated for the costs incurred in the performance of their

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[30] Natalia Tonkikh et al., *Assessment of Female Telework Scope in the Conditions of Digital Economy*, Proceedings of the 1st International Scientific Conference "Modern Management Trends and the Digital Economy: From Regional Development to Global Economic Growth" (MTDE 2019) (Sep. 3, 2020), available at https://www.atlantis-press.com/proceedings/mtde-19/125908810.

job functions, namely equipment, communications, electricity utility costs, office supplies and other work-related expenses.

5. The legislation of the BRICS countries has little regulation of issues related to teleworkers' health and safety protection. Teleworkers may be open to certain harmful factors. Teleworkers should be subject to the basic regulations, rules and instructions adopted in the field of occupational health and safety. To the extent possible, these guidelines should be translated into languages spoken by teleworkers. It should be the responsibility of employers to inform teleworkers of all the hazards associated with their work and the precautions to be taken, and to train them properly if necessary. The teleworkers' duties should include the implementation of prescribed safety and health measures, the adoption of reasonable precautions with regard to their own safety and health, as well as the safety and health of others, including family members.

6. The issue of teleworkers' recreation mode requires further study. The studies conducted in many countries indicate that teleworkers experience a significant excess of working time. The increase in teleworkers' working time may be determined by the difference in time zones, as well as by the need to respond promptly to tasks of employers or clients. The time limit for a teleworker to perform a task should not deprive him or her of the possibility to have a daily or weekly holiday comparable to that enjoyed by other workers.

7. Teleworkers should enjoy the same protection as other workers with regard to termination of employment. At present, however, some legislation in force, for example in the Russian Federation, allows for the possibility of termination of an employment contract with a teleworker "on the grounds provided for in the employment contract." In fact, teleworkers are becoming more vulnerable in this regard than non-teleworkers.

8. At the level of each of the BRICS states, it is necessary to develop a state program for telework development. The program should include issues of informing the society about the opportunities, advantages and peculiarities of telework. Gender equality requires the development of digital literacy programs. This is particularly relevant for rural areas. Active inclusion in the world's labor market requires proficiency in foreign languages, especially English. Government programs may include training courses, including those delivered on the basis of distance-learning technologies. The creation of conditions for telework development can be facilitated by the provision of concessional loans or subsidies for socially vulnerable segments of the population for the purchase of computer equipment, phones and software.

9. Telework requires creating a special corporate culture and availability of soft skills. It is reasonable to deliver cultural courses at BRICS educational institutions. Such experience can be useful for international teams and implementation of joint projects.

10. In order to manage telework and protect it against cyber threats, employers should develop local corporate agreements, including those within the framework of the BYOD concept. A clear BYOD policy is an important step toward managing privacy and security in organizations. Employees using BYOD must follow appropriate procedures when accessing and using information resources. The developed information security policy should be enshrined in local corporate agreements, and teleworkers should be trained. From the perspective of Russian labor law, employers are currently obliged to train employees in the field of labor protection. With the development of telework, it is possible to predict the need to establish norms for compliance with information security not at the level of an employment contract with an employee, as now enshrined in Article 312.3 of the Labor Code of the Russian Federation, but in a local normative act.

Thus, the BRICS countries are still in search of an optimal model for regulating telework. The creation of optimal legal conditions can contribute to deeper integration of the countries, and intensification of their joint economic and scientific projects.

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FROM RESERVE CURRENCIES TO RESERVES OF CRITICAL GOODS: DESIGNING A NEW BRICS INTERNATIONAL CURRENCY

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Currently, there is a need for reform of global monetary circulation and credit, which in a sense has stalled. The key is to restore the connection between monetary circulation and real production. In the first part of this study, I provide a brief analysis of the catastrophic consequences that the current design of reserve currencies has led to for the world economy. At the same time, the transition from the dollar to other reserve currencies operating on the same principles, the ethos of which is now being actively promoted in the West, will not improve the situation. In the second part, I demonstrate the efforts being made to de-dollarize settlements by both the BRICS, the EU, and the EAEU countries. The third part shows the successful historical experience of the transferable ruble as an international currency that functioned in 1960–1980 on non-discriminatory principles within the Council for Mutual Economic Assistance (CMEA). In the fourth part, the international currencies already functioning in the world are described, as well as some existing proposals for the introduction of new international currencies. I argue that reliable physical access to reserves in basic food and medicines in controlled warehouses is becoming a matter of great importance. The transition is necessary from the ideology of reserve currencies to the ideology of reserves of critical goods. Such an incentive of a new BRICS currency on the demand side will be food and healthcare security. On the supply side, for all states that have established a currency, there should be a clear vision of how they can develop their exports using this currency. In order to secure currency, such goods must be pledged to international BRICS warehouses that correspond to the main export directions of the project countries and/or are critical for their import. These are basic foods such as grains, then medicines, fuel and energy resources, and metals.

Keywords: global food security; global health care; currency zone; BRICS; international currency; international reserve warehouses; export promotion.

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Introduction

Any crisis situation not only hurts, but also opens a window of opportunity. This fully applies to the coronavirus pandemic. The United States and the European Union responded to the virus with another large-scale emission of the dollar and the euro, respectively. To a certain extent, both American and European authorities resemble some medieval doctors who tried to cure all diseases with bloodletting, cauterization and leeches. Only the place of the indicated medieval methods of "treatment" is occupied by a decrease in the discount rate, which almost can't be reduced any more, as well as unlimited monetary emission. Such mechanisms are inherently vicious, as they are based on a mechanistic concept of money circulation as a "plant," with production problems that can be solved by tightening one or another nut or releasing steam.

But money circulation is not a factory, it always avenges, however, with a lag in time, for government interventions that cause significant imbalances in the money supply and the commodity stock. Both the United States and EU Member States expect at least a 10% drop in bloated artificial GDP by the end of 2020. And the matter is not only due to the coronavirus; such a fall would have happened without it. Only a little later in 2021–2022 since the fundamental cause of the fall is not coronavirus, but objective accumulated imbalances in the global economy, which has led to its structural rather than cyclical crisis.

As the economy becomes more complex, at each next step in the division of labor, profit falls, and the increase in the cost of new infrastructure becomes greater than the profit that it generates. At the macro level, the total expenditures of the economy become more than the profit that it generates. Temporarily, the Western world "borrowed and used" its future incomes, but this cannot be done further. The

inability at the level of the world economy to further expand the total production and final consumption of households or even maintain it at the current level is due to the fact that all objective methods for this have been exhausted. Namely, it is impossible a) to expand the geography of the market, since it is already global, b) to increase labor productivity by further deepening the division of labor due to the technical parameters of current production technologies, c) to refinance private debt by lowering the key rate, because it is already almost zero, and households have already been overloaned. Since the current structure of the labor division system, primarily financial, is built for global markets, while demand falls it will become unprofitable. In fact, this has already happened, most of the international financial institutions and states live only on the basis of emission replenishment. This means that the collapse of the world into several new technological zones, which, most likely, will be created by issuing new regional currencies – currency zones, will be economically beneficial.[1]

When banks initiate credit expansion, that is, increase the money supply in the form of new loans, provided without the support of new voluntary savings, processes in the economy spontaneously start, which ultimately lead to crisis and recession. So if there is credit expansion, then it is impossible to avoid economic crises and recessions. Thus, economic crisis is inevitable, despite any attempt to delay it by injecting new, ever-increasing doses of credit expansion. A recession starts when credit expansion slows down or stops, as a result of which investment projects launched if flawed are liquidated, the production structure narrows, and the number of its stages decreases. At the same time, the demand for labor and other primary means of production, applied at the most distant stages from consumption and no longer generating profit, disappears. Economic recovery develops when economic agents in general, and consumers in particular, decide to reduce their consumption and increase their savings in order to repay the loans and deal with the new stage of economic uncertainty and recession. However, in practice, new credit expansion interferes with the natural process of economic recovery, causing new rounds of crisis.[2]

To a certain extent, inflation in the United States has so far been restrained by the fact that other states are depositing U.S. dollars in national reserves, that is, the dollar is the reserve currency. Indeed, the issue of reserve currency is a type of "export" of inflation from the issuing country to those countries that agree to accept the currency into their reserves.[3] It is likely that the euro authorities are also hoping to shift the

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1 *Хазин М.Л.* Воспоминания о будущем. *И*деи современной экономики [Mikhail L. Khazin, *Memories of the Future. Ideas of the Modern Economy*] (St. Petersburg: RIPOL Classic Sfera, 2019).

2 Jesъs Huerta de Soto, *Money, Bank Credit, and Economic Cycles* (Auburn, AL: Ludwig von Mises Institute, 2012).

3 Murray Rothbard, *History of Money and Banking in the United States* (Auburn, AL: Ludwig von Mises Institute, 2002).

inflationary burden of the euro emission to other countries outside the Eurozone, hoping that the latter, under the slogans of "de-dollarization of settlements," will put freshly printed Euros in their reserves.

If unprecedented monetary measures are now in place, then in the future, governments and central banks will no longer have any effective recipes to counter the inevitable crisis. Solving the tactical tasks associated with the problems arising from the coronavirus will not allow reduction of the risks of excessive of interdependence of developed and developing economies this year and will only aggravate the problem of global inequality and enormous debt. And then any new "black swan" will become a real trigger of global crisis.[4]

The markets are no longer able to survive without almost daily help from the central banks. In fact, the interbank "market" no longer exists, since operations on it would be impossible without the constant support of central banks. Therefore, we have returned globally to the Soviet administrative system of financing. The financial activities are increasingly detached from the "real" economy, becoming less and less legitimate. Every step taken by central banks to stabilize their situation in the end only adds to anxiety and distrust.[5]

We see the expansion of global debt (both government, corporate and consumer) much faster than real GDP growth; decrease in investment activity in the real sector of the economy while expanding financial bubbles; the release of colossal volumes of derivatives; trade wars as a response to imbalances and negative balances in foreign trade; the impossibility of accumulated debt repayment without new central banks lending at almost zero rate, which is impossible to do to infinity; the prospective depreciation of assets when deflating a credit bubble (delevarage). Structural changes in the world economy are needed. Such as the formation of several monetary centers comparable in volume – financial and economic poles, on which would be the base for the whole structure of the world economy, a multi-currency structure of world reserves and mutual settlements in trade between countries.[6]

However, in a morally normal economy, the right to make a profit is nothing but a reward for taking risks. If all risks are transferred to the counterparty, then there

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[4] *Лосев А.В.* Коронавирус vs экономика: бегство от риска или разворот к мировому кризису // Клуб «Валдай». 26 февраля 2020 г. [Alexander V. Losev, *Coronavirus vs Economics: Risk Exodus or Reversal to the Global Crisis*, Valdai Club, 26 February 2020] (Aug. 2, 2020), available at https://ru.valdaiclub.com/a/highlights/koronavirus-vs-ekonomika-begstvo-ot-riska/?sphrase_id=69423.

[5] *Сапир Ж.* Ждать ли нового финансового кризиса? // Клуб «Валдай». 21 октября 2019 г. [Jacques Sapir, *Should We Expect a New Financial Crisis?*, Valdai Club, 21 October 2019] (Aug. 2, 2020), available at https://ru.valdaiclub.com/a/highlights/zhdat-li-novogo-finansovogo-krizisa/.

[6] *Лосев А.В.* Что будет с экономикой, когда лопнет глобальный пузырь на рынке кредитования? // Клуб «Валдай». 14 ноября 2019 г. [Alexander V. Losev, *What Will Happen to the Economy When the Global Bubble in the Credit Market Bursts?*, Valdai Club, 14 November 2019] (Aug. 2, 2020), available at https://ru.valdaiclub.com/a/highlights/chto-budet-s-ekonomikoy/?fbclid=IwAR3QVrUDY5pIZ9rHRV8eXVGD4sId5FV22WVN2uwBFB-EjAj33962yQsieyo.

are no moral grounds for making a profit. This is conceptually well developed by the ideologists of traditional Islamic finance.[7]

1. Traditional Ideas for Reserve Currencies

The need to expand the list of reserve currencies available in the global economy is now recognized.[8] The process of regionalization instead of globalization, changes in the global economy and the emergence of new technologies will create in the near future a diversified "multipolar" system based on several world currencies.[9]

But it is unclear why, then, we need large national reserves in any foreign currencies? Criticizing the United States, other countries did not offer any real alternative reserve currency, which would be free from the shortcomings of U.S. dollars. After all, one can't seriously consider such an alternative as bitcoin and other "cryptocurrencies," the rate of which goes up and down all the time, and no one guarantees the safety of investments in such.

Although some central banks, in particular the Swedish, Dutch and French, as well as large private companies like Facebook plan to issue cryptocurrencies,[10] this could be a marketing gimmick. It does not matter whether any currency is formally titled as "crypto" or not, the specific assets backing it are important.

Currently there is a lot of talk about alternative reserve currencies, however, it usually just proposals to replacing the dollar with the Euro or Chinese Yuan. However, this is just a variation of a concept already expressed in the past[11] to replace the dollar with an only formally different international currency.

According to Carney, who until recently served as the Governor of the Bank of England:

> the dollar's position as the world's reserve currency must end, and that some form of global digital currency – similar to Facebook Inc.'s proposed

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7 Muhammad Taqi Usmani, *An Introduction to Islamic Finance* (Karachi: Idaratul Ma'arif, 1998).

8 *Лисоволик Я.Д.* БРИКС: путь к новой системе глобального управления // Клуб «Валдай». 28 февраля 2020 г. [Yaroslav D. Lisovolik, *BRICS: The Path to a New Global Governance System*, Valdai Club, 28 February 2020] (Aug. 2, 2020), available at https://ru.valdaiclub.com/a/highlights/briks-put-globalnoe-upravlenie/?sphrase_id=69438.

9 *Лосев А.В.* Гегемония доллара и перспективы евроизации // Клуб «Валдай». 17 декабря 2018 г. [Alexander V. Losev, *The Hegemony of the Dollar and the Prospects for Euroization*, Valdai Club, 17 December 2018] (Aug. 2, 2020), available at https://ru.valdaiclub.com/a/highlights/dollar-i-evro/.

10 *Ковачич Л.* Криптоюань вместо долларов. Как Китай строит международную финансовую систему будущего // Московский Центр Карнеги. 18 ноября 2019 г. [Leonid Kovachich, *Cryptoyuan Instead of Dollars. How China Is Building the Future International Financial System*, Carnegie Moscow Center, 18 November 2019] (Aug. 2, 2020), available at https://carnegie.ru/commentary/80364.

11 James Rickards, *The Death of Money: The Coming Collapse of the International Monetary System* (New York: Penguin Books, 2014).

> Libra – would be a better option. That would be preferable to allowing the dollar's reserve status to be replaced by another national currency such as China's renminbi. In the longer term, we need to change the game … When change comes, it shouldn't be to swap one currency hegemon for another. It may be that a new "Synthetic Hegemonic Currency" would be best provided by the public sector, through a network of central bank digital currencies. Even a passing acquaintance with monetary history suggests that this center won't hold … Let's end the malign neglect of the international monetary and financial system and build a system worthy of the diverse, multipolar global economy that is emerging.[12]

However, it is impossible to believe that China and Russia will support such a plan. Simply because it is economically disadvantageous for them. It is unclear in terms of motivation the creation of a common currency with the UK and the USA which for decades, first the UK, then the USA, continuously abused the status of the world reserve currency. In practice, it could be more advisable to give the latter the opportunity to bear the burden of the consequences of their financial policies themselves, fencing off from their currency zone. Even if to imagine the creation of a common currency with the U.S. and Great Britain and developing economies' participation, how will it be decided concerning the appropriateness of the issue and its distribution?

As Shenaev rightly notes,

> any single national currency, no matter what the economic and political power of the state it relies on, can't become full-fledged world money. The issue of the dollar is mainly determined by the needs of the U.S. economy, and the flow of dollars in international monetary circulation is caused by the U.S. balance of payments, not the real needs of international settlements.[13]

The issue of the euro in this aspect is fundamentally no better.

2. Dedollarization as an Anti-Sanction Path

More countries are becoming aware of the need to diversify their payment instruments since they are also vulnerable to American sanctions. External incentives for third countries to fight their dependence on the U.S. dollar includes U.S. trade wars, tangible risks of sanctions against major Chinese players, "secondary" sanctions against

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[12] Brian Swint, *Carney Urges Libra-Like Reserve Currency to End Dollar Dominance*, Bloomberg, 23 August 2019 (Aug. 2, 2020), available at https://www.bloomberg.com/news/articles/2019-08-23/carney-urges-libra-like-reserve-currency-to-end-dollar-dominance.

[13] *Шенаев В.Н.* Мировые деньги: история и перспективы. Мировая валютная система и проблема конвертируемости рубля [Vladimir N. Shenaev, *World Money: History and Perspective. The World Monetary System and the Problem of the Ruble Convertibility*] (Moscow: Mezhdunarodnye otnosheniia, 2006).

European businesses etc. With regard to payment options, the main instruments of diversification are national currencies and currency swaps linked to them, and regional payment systems, the development of which was announced in the EAEU and BRICS. Still, the systemic obstacle to complete rejection of the U.S. dollar is that it is very difficult to find a replacement for its savings function, as opposed to the payment one.[14]

In December 2018, the European Commission presented a plan to strengthen the international status of the Euro and published a report on the international role of the Euro in the energy sector as well as recommendations to EU countries on expanding the use of the euro in energy trade, strengthening the role of the euro in the financial sector. In 27 August 2019, French President E. Macron stated that:

> Our companies, even when we decide to protect them and take them forward, are dependent on the dollar. I am not saying that we need to fight the dollar, but we need to build real economic and financial sovereignty of the euro. And we have moved too slowly in this area as well. And what we need to build on is a strengthening, a greater integration of the Euro Area, a greater integration of financial markets of the Euro Area and stakeholders, and a capacity to build everything that truly establishes financial and monetary sovereignty. We are not there yet. And it is essential.[15]

However, from the view outside the EU, the transition to settlements with the Eurozone countries to Euro and national currency does not lead to a significant intensification of mutual economic cooperation and increase in trade, since this depends on broader political and economic reasons. At the same time, this approach contributes to a limited revival of trade and investment interaction, since it eliminates those risks of blocking mutual trade that are associated with the use of the American currency.[16] A certain replacement of dollars by the euro in foreign trade can strengthen relations with European countries in certain sectors where export to European markets is significant, but does not provide a significant strategic advantage outside them, since it can't counterbalance transatlantic business ties.[17]

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[14] Anastasia Likhacheva, *Challenges and Opportunities for Russia's Strategy*, 3 Russia in Global Affairs 109 (2019) (Aug. 2, 2020), also available at https://eng.globalaffairs.ru/articles/unilateral-sanctions-in-a-multipolar-world/?fbclid=IwAR1bExLv8q3bQpr_-mFV9guQ1XyEguxTVnkG9hbbWKWhyFmcyljTTgFB6KU.

[15] Emmanuel Macron, *Ambassadors' Conference – Speech by M. Emmanuel Macron, President of the Republic*, Paris, 27 August 2019 (Aug. 2, 2020), available at https://lv.ambafrance.org/Ambassadors-conference-Speech-by-M-Emmanuel-Macron-President-of-the-Republic.

[16] *Бажан А.И.* Россия и ЕС готовы перейти на расчеты в евро. Почему это хорошая новость? // Клуб «Валдай». 17 июля 2019 г. [Anatoliy I. Bazhan, *Russia and the EU Are Ready to Switch to Settlements in Euros. Why Is This Good News?*, Valdai Club, 17 July 2019] (Aug. 2, 2020), available at https://ru.valdaiclub.com/a/highlights/rossiya-es-evro/.

[17] *Яннинг Й.* Зависимость Европы: почему отказ от доллара невозможен? // Клуб «Валдай». 18 декабря 2018 г. [Josef Janning, *Dependence of Europe: Why Is the Rejection of the Dollar Impossible?*, Valdai Club, 18 December 2018] (Aug. 2, 2020), available at https://ru.valdaiclub.com/a/highlights/zavisimost-evropy/.

In October 2019, Russia and Turkey reached an agreement on settlements in the national currencies, Turkish Liras and Russian Rubles. At the end of 2018, the share of trade settlements with Turkey in rubles and lira already amounted to 22%, but in dollars 65% of bilateral trade was still carried out as well as 13% in Euros.[18] Payments between Russia and China are already almost half de-dollarized, and there is a significant progress underway in the de-dollarization of Russian-Indian settlements. However, the process is slowed down due to the global historical role of the U.S. dollar as the most liquid currency with a highly developed system of correspondent accounts, while technically almost everywhere in the world, the conversion from one national currency to another, as a rule, goes through the dollar "leg." That is, banks have to go through the dollar link to get a different currency. For example, if India pays Russia for deliveries in Russian rubles, Indian banks servicing these transactions must first receive these rubles. They can technically do this only through the U.S. dollar.[19]

Also, the problem of settlements in Yuan is its limited convertibility. Although in 2016, the IMF included Yuan on the currency list on the basis of SDRs, Beijing has not completely lifted restrictions on the movement via capital account. Therefore, when exporting goods to China with Yuan settlements, there is a risk of a long wait for administrative permission to withdraw revenue from China, and not always at a favorable exchange rate. Beijing is not yet willing to open a full capital account flow due to the massive outflow of capital amid a slowdown in the economy, a trade war with the United States and the flight of families of corrupt officials. The Chinese do not want to open personal 'windows', fearing that those who want to withdraw money to the world market in transit via these windows will rush into them.[20]

BRICS countries have begun to create the unified payment system BRICS Pay as a part of the development of a common platform for retail payments and transfers in the participating countries. Thus, Brazil, Russia, India, China and South Africa will be able to switch to the use of national currencies as a means of circulation and payment for external settlements, so a serious step will be taken towards de-dollarization. U.S. protectionism and Trump's trade wars push regional powers to form financial and economic ties with neighbors and partners outside the "dollar zone."[21]

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[18] *Агеева О., Ткачев И.* Лира сыграет в унисон с рублем // РБК. 8 октября 2019 г. [Olga Ageeva & Ivan Tkachev, *Lira Will Play in Unison with the Ruble*, RBC, 8 October 2019] (Aug. 2, 2020), available at https://www.rbc.ru/newspaper/2019/10/09/5d9c7b539a7947b0de346b49.

[19] *Ткачев И., Фейнберг А.* В Минфине сообщили о сложностях отказа от доллара в торговле // РБК. 31 июля 2019 г. [Ivan Tkachev & Anton Feinberg, *The Ministry of Finance Reported on the Difficulties of Abandoning the Dollar in Trade*, RBC, 31 July 2019] (Aug. 2, 2020), available at https://www.rbc.ru/finances/31/07/2019/5d4036239a7947155b5c1db8.

[20] *Габуев А.* Заколоченное валютное окно // Коммерсантъ. 2 августа 2019 г. [Alexander Gabuev, *Boarded up Currency Window*, Kommersant, 2 August 2019] (Aug. 2, 2020), available at https://www.kommersant.ru/doc/4047919.

[21] *Лосев А.В.* BRICS Pay – единая платежная система стран BRICS // Клуб «Валдай». 5 марта 2019 г. [Alexander V. Losev, *BRICS Pay – a Single Payment System of the BRICS Countries*, Valdai Club, 5 March 2019] (Aug. 2, 2020), available at https://ru.valdaiclub.com/a/highlights/brics-pay/.

At the forum of the BRICS Business Council in Brazil in November 2019, the problems of creating the unified payment system BRICS Pay, a single cryptocurrency and an international arbitration court within the framework of BRICS were discussed.[22] Payment systems and arbitration (although their creation, of course, requires time and certain technological efforts) is just a technical part of the currency circulation. Compared with the technical parameters of the payment system, it is much more important what currency the specified payment system will work with, that is, what are the characteristics of this currency? Let's draw a clear analogy: logistics is very important, as is fair justice. But even if you have established good logistics for the supply of cheese to consumers and have very good courts presiding over the jurisdictions, then this will not help you if your cheese is of poor quality.

3. Transferable Ruble and the Council for Mutual Economic Assistance (CMEA)

Although the Soviet Union took part in drafting the Bretton Woods agreement, it then refused to sign it on the grounds that the accession of the USSR would result in its subordination to the United States. Several years later, when developing the GATT, the rules on monetary circulation were excluded from there. Moreover, although initially the rules on fair competition in international trade were to become the basis of the GATT (the ITO Charter agreed in Havana in March 1948), subsequently the United States torpedoed them.

The alternative plan developed in 1951 by the Soviet authorities was motivated by the goals of establishing "equal Asian-Pacific and international trade, eliminating economic discrimination, and the decisive role of individual currencies (the British pound and U.S. dollar) in interstate and regional trade." From 3 to 12 April, 1952, an international economic conference was held in Moscow, where it was proposed to create a common market for goods, services and investments that is not tied to the dollar. Discussed were such topics as customs and price privileges for developing countries or their specific goods, mutual favored nation treatments in trade, loans, investment, scientific and technical cooperation; the harmonization of policies in international economic organizations and in the global market; the possibility of barter (including the repayment of debts), mutually agreed prices and the non-requirement of U.S. dollar settlements. It discussed also a question of creating an interstate settlement currency with a mandatory gold content.[23] After that, on 23 February – 4 March 1953, the U.N. Economic Commission for Asia and the Far East (ECAFE) held a conference

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[22] *Гальчева А.* В БРИКС предложили создать единую валюту для криптоальянса // РБК. 14 ноября 2019 г. [Anna Galcheva, *In BRICS Proposed Creating a Single Currency for Crypto Alliance*, RBC, 14 November 2019] (Aug. 2, 2020), available at https://www.rbc.ru/economics/14/11/2019/5dcd27a49a794738b8c6fdd8.

[23] Международное экономическое совещание в Москве, 3–12 апреля 1952 г. [*International Economic Conference in Moscow, 3–12 April 1952*] (Moscow: International Trade Promotion Committee, 1952).

in Manila on the initiative of the USSR, supported by China, Mongolia, India, Iran, Indonesia, Burma, and North Vietnam. The USSR proposed introducing a system of interstate settlements in national currencies and removing restrictions on mutual trade, that is, moving towards a free trade regime in Asia and the Pacific. Although in the end such a project could not be realized on a global scale for political reasons, a great part of it was subsequently successfully implemented in CMEA.

The emergence of a collective currency under the CMEA was preceded by bilateral currency clearings, which provided for settlements between the two states by offsetting counterclaims and obligations with the balance being cleared by commodity supplies. If it was not enough, the difference theoretically could be covered by gold or freely convertible currencies. The system was focused on bilateral economic ties. However, this method of settlement was not effective enough because it limited the expansion of multilateral trade cooperation between countries. Bilateral clearing demonstrated serious disadvantages of this form of settlement such as the commodities turnover being limited by the potential of a less industrially developed country, the surplus could only be used to pay for commodity "additional deliveries," and its use to pay for goods from third countries was impossible.[24] The introduction of the CMEA transferable ruble and, accordingly, the multilateral clearing system made it possible to overcome these shortcomings.[25]

In fact, bilateral clearing (or settlements in national currencies) is an instrument of the 1930s and 1940s. But already in the 1950s, many countries began to move to the creation of multilateral clearing. In Western Europe, it was the European Payment Union (EPU) consisting of 17 countries, which was created in 1950 and existed until 1958. A supranational currency appeared within the ENP called "Epunit" which was equal to one U.S. dollar or 0.888671 grams of gold. The EPU was created as a regional organization of Western European countries. Unlike the IMF, quotas in the ENP were not paid and served to regulate the balances of countries participating in multilateral clearing. Within them, the share of gold payments and the share of loans that countries with active balance of payments provided to debtors were determined. The ENP was replaced by the European Monetary Agreement (EMA), which also provided for clearing settlements between the participating countries. But if all the requirements and obligations of the participating countries were cleared through the EPU, then only a part of the mutual settlements were cleared

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[24] *Беляев М.* СЭВ: переводной рубль – виртуальный, но эффективный // Яндекс Дзен. 28 марта 2019 г. [Mikhail Belyaev, *CMEA: Transferable Ruble – Virtual, but Effective*, Yandex Zen, 28 March 2019] (Aug. 2, 2020), available at https://zen.yandex.ru/media/id/59b92ed777d0e6b8fac17f65/sev-perevodnyi-rubl--virtualnyi-no-effektivnyi-5c9cb7d253b66100b374b7d7.

[25] *Мазанов Г.Г.* Международные расчеты стран – членов СЭВ [Gennady G. Mazanov, *International Settlements of the CMEA Member Countries*] (Moscow: Finansy, 1970); *see also Гершанович Е.А.* Конвертируемость российского рубля: историко-экономический экскурс (1897–1991 гг.) // Экономический журнал. 2008. № 3(13). С. 141–157 [Elena A. Gershanovich, *Convertibility of the Russian Ruble: Historical and Economic Outline (1897–1991)*, 3(13) Economic Journal 141 (2006)].

according to the EMA, moreover, it steadily decreased due to the lifting of currency restrictions by most countries of Western Europe. The end of the EPU gave rise to a sharp dollarization of the European economy.[26]

In Eastern Europe, in 1949, a gradual transformation of bilateral clearings with the participation of the USSR into multilateral clearings began. So, in 1949–1951 a large number of trilateral clearing with the participation of the USSR appeared. One of the modifications of such clearing was the transfer of the balance from the account from one bilateral clearing to the account of another bilateral clearing on the basis of a tripartite agreement between the USSR and two other countries. Then agreements began to appear that initially envisaged the organization of trilateral clearing settlements. In various combinations, the USSR concluded such agreements with Poland, Czechoslovakia, Bulgaria, and Finland. Finally, in 1957, an agreement was signed in Warsaw on the organization of multilateral currency clearing. Settlements were entrusted to the Clearing House, in which the authorized banks of the participating countries opened their clearing accounts. As part of the clearing settlements of the USSR with other socialist countries, the Clearing Ruble was used, which acted as both the settlement currency and the regional currency. Clearing rubles were non-cash money, they were not used for internal settlements of the countries participating in the system.[27]

It is asserted in the Western literature that the main problem with a multilateral system of payments in transferable rubles was that

> the creditor countries cannot automatically make use of their assets in transferable rubles to purchase goods and services on the possibility of additional imports of goods, and respectively, the automatic growth of multilateral balancing of accounts in trade between the socialist countries.

The accumulation of assets in transferable rubles was an inevitable aspect of the development of credit cooperation. Countries participating in credit relations were interested not merely in increasing their trade, but also in increasing the mutual exchange of goods in short supply as well as that of high-performance products. Consequently, in credit relations, effectiveness depends first and foremost on their capacity to stimulate progressive structural changes in international trade.[28]

The socialist countries also tried to organize their trade with Western countries in national currencies, but unsuccessfully. During the 1970s bilateral currency clearing

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[26] *Катасонов В.Ю.* Клиринг // Завтра. 1 июня 2015 г. [Valentin Yu. Katasonov, *Clearing*, Zavtra, 1 June 2015] (Aug. 2, 2020), available at http://zavtra.ru/blogs/esche-raz-o-valyutnoj-monopolii.

[27] *Id.*

[28] Gansho Ganshev & Michel Vale, *The Economic Effectiveness of Loans and Credits from the International Bank for Economic Cooperation in Transferable Rubles*, 22(1) Soviet and Eastern European Foreign Trade 51 (1986).

in business with advanced capitalist countries and developing countries of the Third World was supplanted by a system of payment in convertible currencies. This eliminated the drawbacks of bilateral clearing: a reduction in turnover down to the potential of the weak partner, distortion of the parameters for calculating the effectiveness of foreign trade in view of the different price levels in clearing contracts, the lack of stimulus for boosting production quality, the rigidity arising from the fact that participation in clearing is beneficial to the partners only on the basis of the assurance of receiving the goods stipulated in the contract, and the need to adapt the export supply to each individual country effecting payment in the clearing system.[29]

So, CMEA – the Council for Mutual Economic Assistance, created in 1949, since 1960 began transformation to a fully-fledged regional international economic organization. In October 1963, the International Bank for Economic Cooperation (IBEC) was established as a part of the CMEA in order to promote the development of foreign trade of member countries and the implementation of multilateral settlements in new supranational currency. In 1964 IBEC began issuing transferable rubles. The introduction of the transferable ruble did not imply a liquidation of national currencies. In 1970 the CMEA member countries also established the International Investment Bank (IIB) to provide long-term and medium-term loans for the implementation of large international projects.[30]

In accordance with the Agreement on Multilateral Settlements in Transferable Rubles and the Organization of the International Bank for Economic Cooperation of 22 October 1963 and its Charter, IBEC not only made international transfers, but also provided loans, including for national balance of payments clearing. As a general rule, loans were interest-bearing, and sometimes interest-free loans were allowed within strict limits. The agreement was signed by the USSR, Bulgaria, Hungary, East Germany, Mongolia, Poland, Romania, and Czechoslovakia. These same countries signed the Agreement establishing the IIB on 10 July 1970. Later Vietnam and Cuba joined both IBEC and IIB. The transferable ruble had an official gold content of 0.987412 grams of pure gold in the 1980s. It ensured the dedollarization of economic ties between 10 countries. Also, it was partially used in the mutual settlements of the CMEA countries with the associated members (observers) of CMEA such as Yugoslavia, Finland, Mexico, Angola, Iraq, Nicaragua, North Korea, Laos, Ethiopia and Mozambique.[31]

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[29] Andrzej Biec et al., *Improving the Function of the Transferable Ruble as International Currency (Part 1)*, 16(2) Soviet and Eastern European Foreign Trade 26 (1980).

[30] *Катасонов В.Ю.* К 70-летию Совета экономической взаимопомощи // Фонд стратегической культуры. 5 сентября 2019 г. [Valentin Yu. Katasonov, *To the 70th Anniversary of the Council for Mutual Economic Assistance*, Strategic Culture Foundation, 5 September 2019] (Aug. 2, 2020), available at https://www.fondsk.ru/news/2019/09/05/k-70-letiu-soveta-ekonomicheskoj-vzaimopomoschi-48938.html?fbclid=IwAR0J5TzNHtB-HcfCvDh3a02L9xfYebqNK0CKMrru5Rox6NwOg_g2N3-CFM8.

[31] *Войтенко И.* Нужен ли СНГ переводной рубль? // Столетие. 17 марта 2015 г. [Igor Voitenko, *Does the CIS Need a Transferable Ruble?*, Stoletie, 17 March 2015] (Aug. 2, 2020), available at http://www.stoletie.ru/fakty_i_kommentarii/nuzhen_li_sng_perevodnoj_rubl_259.htm?utm_source=politobzor.net.

Funds in transferable rubles could be used for settlements, interstate loans, and they could be made as an equity contribution to the international economic organizations of the CMEA countries. On the technical side, the essence of the system of transferable rubles was that each participating country had to ensure, within a certain period, the equality of commodity supplies, as well as the balance payments with all members of the Agreement of 22 October 1963, not with each country separately. Settlements were carried out in transferable rubles through IBEC. The methodology for calculating the rate of the transferable ruble was based on correlating the purchasing power of the Russian Ruble and the U.S. Dollar by comparing the weighted average contract prices in trade between the CMEA countries (in transferable rubles) and world market prices in U.S. dollars. The comparison was carried out according to the structure of trade between CMEA member countries.[32]

The transferable ruble was the international, collective currency of the CMEA Member States. No country had the right to independently issue this currency, it was put into circulation by IBEC. States received collective currency as a result of the actual deliveries of goods and services. If the country did not have money at any time to pay for the goods it purchased, it could receive it on credit from IBEC, and subsequently also from IIB. Loans were provided in accordance with agreed plans and supply contracts. It was assumed that such a procedure for issuing and lending in collective currency would ensure the equal rights of all countries in its formation and use, and prevent the unregulated redistribution of national income in the unilateral interests of a state contrary to the wishes of other countries.[33] This was provided by the system when the decisions of the Council of Banks had to be adopted by all Member States unanimously, and each country was guaranteed a seat in the executive boards of banks.

The main task of the IIB was to provide long-term and medium-term loans for activities related to the international labour division, such as construction of facilities that are of mutual interest for the further development of member countries. The IIB resources made it possible to build and reconstruct many enterprises of the basic industries such as metallurgy, mechanical engineering, and electrical engineering. With the help of the bank, joint infrastructure projects were implemented such as gas pipelines, and automobile and railway lines.[34]

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[32] *Мальцев А.А. и др.* Государственное регулирование внешнеэкономической деятельности в Российской Федерации: 1992–2012 гг. Т. 1 [Andrey A. Maltsev et al., *Government Regulation of the International Economic Activity in the Russian Federation in 1992–2012. Vol. 1*] 73 (Yekaterinburg: Publishing House of Ural Economic University, 2012).

[33] *Кирсанов Р.Г.* Деятельность Международного инвестиционного банка в 1970–1995 годах // Вестник КРАГСиУ. Теория и практика управления. 2015. № 14(19). С. 18–21 [Roman G. Kirsanov, *Activities of the International Investment Bank in 1970–1995*, 14(19) Bulletin of Komi Republican Academy of State Service and Administration. Management Theory and Practice 18 (2015)].

[34] Belyaev, *supra* note 24.

After the establishment of the IIB, IBEC granted other types of credits in transferable rubles for settlement in discrete payments, and for a fixed period payment. The first type of credit was for covering short-term (up to one year) needs for borrowed funds deriving from imbalances in commodity flows between different countries owing to the influence of seasonal and other factors. Fixed time credits were provided to square long-term (up to three years) gaps in trade balances.[35]

The transferable ruble became the first world collective currency, an international settlement and payment instrument of the contract type when gold lost its status as the "world money." It had an independent exchange rate and contributed to the growth of mutual commodity exchange in the period from 1964 to 1991.[36] For 1981–1984 the balance of current settlements of the CMEA countries has changed from minus $3.5 billion to plus $6.4 billion. Due to the distribution of the IIB's current profit, all its shareholder countries are fully compensated for their initial contributions to the authorized capital[37]. According to some estimates, in 1985–1990 more than 5% of all world trade was served by transferable rubles.[38]

4. Modern International Currencies

What scenario is most likely to change the global reserve system? It was suggested that this would be a multi-currency reserve system, including several global reserve currencies and several local reserve currencies on the periphery of the global economy.[39]

Today, the world's collective international, currencies are: the Euro for 19 EU countries (also Andorra, Monaco, San Marino, Vatican City and Montenegro use the Euro as their official currency); CFA Franc for 14 countries (technically West African CFA Franc, which will be replaced by new currency called Eco, for eight countries and Central African CFA Franc for six countries); East Caribbean Dollar (for eight countries); CFP Franc (for three French overseas collectivities). Also the SUCRE project which has been unsuccessful.

Special mention should be made of SDRs – Special Drawing Rights – a non-cash currency issued by the IMF in order to ensure international liquidity and which is

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35 Ganshev & Vale 1986.

36 Gershanovich 2006.

37 Kirsanov 2015.

38 *Борисов С.М.* Рубль – валюта России [Stanislav M. Borisov, *Ruble Is the Currency of Russia*] (Moscow: Konsaltbankir, 2004); *see also Катасонов В.Ю.* «Переводной рубль» как уникальный проект переводной валюты // Институт высокого коммунитаризма. 28 ноября 2013 г. [Valentin Yu. Katasonov, *Transferable Ruble as a Unique Project of the Transferable Currency*, Institute for High Communitarianism, 28 November 2013] (Aug. 2, 2020), available at https://communitarian.ru/publikacii/sng/perevodnoy_rubl_kak_unikalnyy_proekt_regionalnoy_valyuty_28112013/.

39 *Миркин Я.М.* Мировая валюта: что в резерве? // Прямые инвестиции. 2010. № 4(96). С. 28–31 [Yakov M. Mirkin, *World Currency: What Is in the Reserve?*, 4(96) Direct Investments 28 (2010)].

a means of mutual settlement between IMF Member States. This is a collective currency, the rate of which is calculated as the weighted average rate of a number of world currencies. SDRs are not used in private circulation. Banks may accept deposits in SDRs. However, physically their acceptance and issue are carried out in other currencies. SDRs, not being domestic money, do not participate in the formation of commodity prices, their potential "purchasing power" depends on the power of the basket of currencies which compose SDRs.[40]

There are numerous supporters of a single currency for the Eurasian Economic Union (EAEU). The motivation of dozens of such authors for the last 15 years is quite similar, therefore, and I restrict myself to providing only one typical following relevant example. Thus, it is argued that the objective need for the introduction of a single currency is to create conditions for the further integration of the member countries of the EAEU on the basis of increasing the certainty of economic ties between the individual economic entities of these countries. Under the current conditions of fluctuation of national currencies relative to each other, uncertainty arises regarding the profitability of future trade relations between economic entities located in different countries of the Union. Such uncertainty increases the degree of entrepreneurial risk and hinders the process of investing in the expansion and development of production. A higher risk also requires the use of a higher discount rate for the net cash flow generated by the business sector, which leads to a lower market capitalization. As a transition period to the single currency zone, a temporary currency zone is proposed. It means first flexible, and then tight binding of national currencies to each other in order to assess the degree of economic integration of the economies of countries and assess the macroeconomic risks of such integration. In other words, to establish whether the economies of these countries are able to maintain stable economic relations among themselves without adjusting them using the exchange rate? To switch to a single currency, countries must meet a number of macroeconomic criteria like the Maastricht ones.[41]

Historically, in the framework of the Eurasian Economic Community (EAEU predecessor), in 2005 a single currency was declared as a future aim of the Union.[42] Indeed, in international trade in general and in the EAEU in particular, there is an element of uncertainty associated with currency fluctuations. However, to maintain this risk at a reasonable acceptable level, it is not necessary to completely switch to a common currency. It is also obvious that within the framework of the economic

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[40] *Сухарев А.Н.* Единые валюты в современном мире и перспективы создания единой валюты в ЕврАзЭс // Финансы и кредит. 2014. № 17(593). С. 2–10 [Alexander N. Sukharev, *Common Currencies in the Modern World and Prospects for Creating a Single Currency in the EEC*, 17(593) Finance and Credit 2 (2014)].

[41] *Id.*

[42] The Concept of Cooperation of the Member States of the Eurasian Economic Community in the Monetary Sphere, approved by the Decision of the EEC Interstate Council of 22 June 2005 No. 220.

integration of the EAEU, the unified financial space will be built in completely different ways, depending on whether it is based on a single currency or not.

The new Concept for the formation of the EAEU Common Financial Market (October 2019) proposed to create a supranational financial regulator, as well as the creation of a common payment space, but on the principles of "national security, independence and equality of national payment systems."

I would like to note that a lot of supporters of all economic integration projects, are actually federalists. They constantly demand more and more integration, empowerment of supranational authorities with greater powers, and can't stop in time. This applies equally to scholars and experts specializing in the EU, the EAEU, etc. However, economic integration can be successfully developed without a single currency. In the EU, the existence of a single currency led to the fact that Greece, Spain, and Italy fell into credit bondage.

The design of the Eurozone provides sales of German industry products within the zone without counter export flows to Germany. This leads to an artificial slowdown in the development of a number of lots of Eurozone Member States, a constant increase in their debt before Germany, and thus an increase in imbalances within the Eurozone[43]. Now Italy and Spain demand the issue of Eurobonds, that is, they are trying to shift the responsibility for their debts to all EU countries. At the same time, the Czech Republic and especially Poland, due to the continued possibility of devaluation of the national currency, did not fall into credit bondage. I can't imagine their entry into the Eurozone in the foreseeable future. Sweden feels economically beautiful, having kept the crown. And the special topic that Eurozone enthusiasts do not like to talk about: the entry of many countries into the Eurozone has led to a significant increase in domestic prices for consumer goods.

There is nothing bad in economic integration while maintaining national currencies. Aggressive pushing of a complete transition to a single currency will cause nothing but irritation and undermining to normal progressive economic integration. Even Belarus, which is more integrated with Russia than other EAEU countries, is shying away from a Russian Ruble as a single currency. Partial use of common currency only for some international settlements seems to be much more promising.

Conclusion

Currently, there is a general need for reform of global monetary circulation and credit, which has stalled. The key is to restore the connection between monetary circulation and real production. In the modern world, in which borders can be closed at any moment, and funds in accounts can be blocked, it is not so important to

[43] Thilo Sarrazin, *Europe Does Not Need the Euro* (Мьnchen: DVA, 2012).

have reserves in accounts in foreign currencies. Reliable access to reserves in basic foodstuffs and medicines in controlled warehouses is much more important.

The problem of settlements in national currencies, which was already clear at the end of the 1940s, is that such settlements are effective only if mutual commodity deliveries are approximately equal. Since this rarely happens in practice, the might of the more economically strong side can manifest dictatorial qualities if it can impose its currency on the other side as the main means of settlement. The foreign currency quickly begins to accumulate excessively, which it does not need in such quantity.

The new BRICS international currency will be useful for purposes other than forcing all the EAEU members to be into a single currency zone. The CMEA experience shows that even with an international currency, it is not necessary to transfer to a single currency all domestic payments and even all international payments originating from the respective countries.

Historically, de facto not exchanging transferable rubles for gold, the CMEA did not offer an alternative in the form of another attractive commodity to back the issue, in fact, considering the transferable ruble as a fiat, non-fiduciary currency. One can't repeat this mistake of the CMEA. Therefore on the demand side there should be understandable incentives of a non-monetary nature in comparison with alternative currencies for investment in it. Such an incentive will be food and drug security. A transition is needed from the ideology of reserve currencies to the ideology of reserves of critical goods. For all states that have established a currency, there should be a clear vision of how they can develop their exports with this currency. Also the currency must not be used for "twisting the arms the nations." Thus, access to currency should not be based on demanding of the implementation of a particular domestic policy or the transfer of a significant amount of sovereign authority to supranational bodies. This means that the currency should be absolutely politically neutral. Its circulation should not be associated with the nomination of any macroeconomic and, moreover, political requirements.

The issue, which will be jointly carried out by the governments of the BRICS countries, must be fully secured by a pool of liquid commodities in permanent international reserve warehouses under the control of the issuing governments. Not to get bogged down in endless disputes about the fair value of services, stocks, bonds, intangible assets, and inflated intellectual property – these cannot serve as security for new money. As for any great market success, what is being offered to investors should fundamentally differ in its main parameters from what is already on the market. If you offer unsecured (fiat) money that is issued and traded similarly to dollars, Euro, Yuan, etc., but just under a different name, then why should someone trust it? More broadly, as there is a constant tightening of regulation around the world, the chance of the governments issuing currency is to offer investors a real liberal alternative, while guaranteeing them protection from the authorities of their own and third unfriendly countries.

Although metal gold should be included in the backing currency, it is not possible to return to the classic gold or bimetallic standard, since the prices of gold and other banking metals are highly volatile. To demonopolize gold pricing, which is now controlled largely by several Western financial institutions, it would be necessary to concentrate such large volumes of physical gold that it could hardly be done in the short term.

At the same time it is impossible to very strongly manipulate the price of a diversified basket of goods. In order to back the new currency, such commodities must be pledged to international BRICS reserve warehouses that correspond in the main to their export directions and/or are critical for their import. These are food products, medicines, fuel and metals. Such a scheme will simultaneously allow normalizing world pricing for these goods. Currency (in fact, BRICS commodity warehouse certificates) can be exchanged in warehouses for a previously fixed pool of these goods at the first request by the banknote owner. Information on currency transactions should not be automatically transmitted to the authorities of third countries. Currency circulation disputes must be resolved by independent international arbitration.

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FORMAL DEBT-RELIEF, RESCUE AND LIQUIDATION OPTIONS FOR EXTERNAL COMPANIES IN SOUTH AFRICA

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This article discusses how foreign companies doing business in South Africa during periods of financial distress and registered locally as external companies are, as a recent High Court decision confirms, denied the formal debt-relief measures of business rescue and therefore a compromise with creditors because of being excluded by the definition of "company" in the Companies Act 71 of 2008. Nor, for the same reason, may these companies, if solvent, rely on the current liquidation procedures. But they may possibly use the procedure preserved in the otherwise repealed Companies Act 61 of 1973 for liquidation as far as the transitional arrangements in the Companies Act 71 of 2008 allow. The purposive solution suggested in this article for the interplay between the two Acts may need legislative attention. This article surveys other possibilities relevant to these companies such as informal voluntary arrangements, applications for winding-up, ordinary debt collection, and perhaps compulsory sequestration applications. Finally, it raises the policy issue for the legislature to consider why these companies should be denied business rescue and/or a compromise with their creditors when these formal debt-relief measures might help them survive their financial stress and emerge stronger, to the advantage of themselves, their creditors, their stakeholders and communities, and the entire nation. It is submitted that these issues could and should be considered as part of the current law reform process of South African insolvency law.

Keywords: external companies; formal debt-relief policy; business rescue; compromise with creditors.

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Introduction

Cross-border trade and business typify contemporary economies. Companies expand their reach by establishing a presence in foreign states, investing in property and creating places of business elsewhere while maintaining their main place of business and/or headquarters commonly in the state of their original incorporation. These companies contribute in various ways to the local economy of the states in which they establish a presence. Unfortunately, a further reality of business is the risk of financial distress and failure, whether at home or abroad, as happened in a recent case in the Gauteng North Division of the High Court of South Africa: *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others* ("*CMC(SA)*").[1] In its judgment the court held that the business rescue procedure in Chapter 6 of the Companies Act 71 of 2008 ("the 2008 Act") does not apply to a foreign company conducting business in South Africa where it has also been recognised and registered as an external company. Based on this interpretation, it is clear that the compromise with creditors provided for by section 155 of the 2008 Act will also not apply to external companies, and it may even cast doubt on the application of local liquidation procedures in relation to external companies. The judgment turns on interpreting the relevant provisions of the South African legislation on companies,[2] which are discussed in this article. Within this context a need to liquidate such external branch may also arise, either because of its insolvency or because it wants to terminate its presence locally, and the question is then whether South African law enables such a process.

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1 *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, 2020 (2) S.A. 109 (GP). *See, in general*, Eric Levenstein & Roxanne Webster, *Are South African Rescue Proceedings Applicable to South African Registered External Companies?*, 2020 INSOL Small Practice Newsletter (forthcoming, on file with the author); Siviwe Mcetywa & Timothy Baker, *No Business Rescue Option for Financially Distressed Foreign and External Companies*, Cliffe Dekker Hofmeyr, 8 April 2020 (Sep. 7, 2020), available at https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/dispute-resolution-alert-8-april-no-business-rescue-option-for-financially-distressed-foreign-and-external-companies.html; Tessa Brewis & Elnalene Cornelius, *More Foreign Investment and Economic Growth – Less Red Tape*, 20(2) Without Prejudice M&A Feature 14 (2020).

2 The Companies Act 71 of 2008 repealed the previous Companies Act 61 of 1973 ("the 1973 Act") on 1 May 2011 except for Chapter 14, which deals with the liquidation of companies (*see* Item 9 of Schedule 5 to the Companies Act 71 of 2008).

1. Background

1.1. The Choice of Methods of Conducting Business in South Africa

Foreign companies wishing to conduct business in South African can choose a variety of vehicles to do so. They may for instance incorporate a company under South African law; they may obtain shares in a South African company; or, as in the *CMC(SA)* case, they may establish a place of business in South Africa and register a branch office as an external company in terms of South African company law. Section 13(5) of the 2008 Act also allows a foreign company to transfer its registration in order to be recognised in terms of the 2008 Act as though it had originally been incorporated and registered in South Africa. (In the case under discussion, CMC(SA) concluded construction contracts, one of them worth about €255 million, that would contribute to the South African economy and create jobs.) In this article, the term "foreign company" means a company incorporated elsewhere, and the term "external company" means a foreign company that has established a branch in South Africa and meets the definition of an "external company" in South African company laws.

1.2. The Registration Requirements for the External Company

Section 23 of the 2008 Act requires a foreign company not only to register with the Companies and Intellectual Property Commission ("CIPC") within 20 days after beginning to do business in South Africa but also to indicate its registered address. For failing to register, this company may be issued with a compliance notice by the CIPC that may lead to its being prevented from continuing with its business should it fail to heed the notice.[3]

This company does not acquire legal personality or become a body corporate merely by this registration, because its status in this regard is determined in its country of incorporation and according to the principles of private international law and such registration is intended to be of a procedural rather than a substantive nature.[4] Its registered address is the place where it can be found and served with court processes:[5] its registered office is thus its domicilium.[6]

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[3] Sec. 23(6) of the Companies Act 71 of 2008.

[4] Piet Delport et al., *Commentary on the Companies Act of 2008* 107 (electronic version, Durban: LexisNexis, 2019) (Sep. 7, 2020), available at https://www.mylexisnexis.co.za/Index.aspx, state: "Generally speaking, bodies corporate are recognised throughout the commercial world. In South Africa, in terms of s 14, a company becomes a body corporate when it is registered with the Commission. Such a company does not necessarily have a corporate existence in every foreign country, although by the generally established principles of international private law a body corporate duly created in one country is usually recognised as a body corporate by other countries."

[5] *Id.* at 109, with reference to *Basfour 3752 (Pty) Ltd. v. KVL Developments* [2015] Z.A.K.Z.P.H.C. 29, 2015 J.D.R. 1061 (KZP), para. 11.

[6] Delport et al. 2019, at 109.

It must be noted that the 2008 Act contains a number of definitions relating to "foreign companies" and "external companies." Section 1 of the Act defines a "foreign company" as "an entity incorporated outside the Republic, irrespective of whether it is – (a) a profit, or non-profit, entity; or (b) carrying on business or non-profit activities, as the case may be, within the Republic." A "juristic person" is defined to include a foreign company and a trust (irrespective of whether or not the trust was established within or outside South Africa), and an external company means a foreign company that is "carrying on business, or non-profit activities, as the case may be, within the Republic, subject to section 23(2)." It must be noted that an external company must register its office in terms of section 23 of the 2008 Act. But despite such registration, the external company is not deemed to be formally incorporated in South Africa and remains incorporated elsewhere, that is, at the jurisdiction where the foreign company has been incorporated. In this sense neither the foreign company nor its South African branch, the external company, falls within the definition of "company" as defined in the 2008 Act. As stated above and in practical terms when the external company is registered, the CIPC must in terms of section 23(5) of the 2008 Act assign a unique registration number to such external company that has registered and must maintain a register of external companies.

1.3. The Company Under Principles of Private International Law: The Single Entity Approach

Under private international law, a company properly established or incorporated in terms of the laws of a state as a distinct body corporate or juristic person is usually acknowledged as one. Companies operating within different states or jurisdictions are one and the same body corporate: this is known as the single entity approach.[7] But when the company operates across borders, the local laws of the foreign state in which it operates determine whether it is recognised and how far and on what conditions it is acknowledged and allowed to operate within that jurisdiction.

Local laws may nevertheless treat the external company *for certain purposes* as if it is an independent entity without granting it a substantive status as such. It is to be noted that the external company may sue or be sued in South Africa although it may be said that the litigation will then be deemed to be litigation by or against the foreign company itself. In practice and if this company fails to meet a local judgment debt, it will normally be sued at its registered local address, and execution will first be levied against

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[7] *Wiseman v. Ace Table Soccer (Pty) Ltd.*, 1991 (4) S.A. 171 (W), at 173E; Christopher Forsyth, *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the Supreme Court* 182 footnote 280 (3rd ed., Cape Town: Juta, 1996), and *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* 210 footnote 304 (5th ed., Cape Town: Juta, 2012); and Alastair Smith & André Boraine, *The Grab Rule Foils the Foreign Liquidator in His Own Jurisdiction*, 14(3) South African Mercantile Law Journal 566, 570 (2002) (where the authors also point out that this approach to companies in international law is tempered by the application of territoriality and by the relevant definitions in local laws). *See also* Delport et al. 2019, at 108.

its local assets before alternatives such as approaching the jurisdiction where the foreign company is situated with a view to applying for recognition and enforcement of the South African court order, or perhaps a local liquidation court order, will be considered. The Registrar of Deeds will also register immovable property against the name of the external company registered at the CIPC, and the local allocated registered number will be used to identify it as such.[8] It is evidently to the benefit of South African creditors to be able first to attempt to obtain satisfaction of their debts locally before embarking on cross-border recognition and/or enforcement. The foreign law will nevertheless determine to what extent the South African creditors will be assisted in their quest to get the South African court order recognised and enforced should it become necessary for them to approach the home jurisdiction of the foreign company. It must also be remembered that all actions by or against the external company in South Africa remain actions by or against the foreign company in principle, because despite such exceptions it remains one and the same entity. But some liquidation procedures will also apply in relation to the external company as if it is a separate entity.[9] In the case of liquidation, the South African liquidation order will most probably not be deemed to be a liquidation order of the foreign company as such because it is mainly intended to deal with the South African-based assets and liabilities.

1.4. The Choice of Proceeding Against the Company in South Africa or at Home

It is important to note that these companies conducting business in South Africa may also be recognised as external companies by the current company laws, even if they do not yet have a registered office here.[10] Included in this consideration is the question how far the local law of the state – in this instance, South Africa – in which the foreign company operates will allow the external company to use debt-relief measures available by local rescue and insolvency laws to assist the local operations of the foreign company if it suffers financial distress.

In this respect and on the basis of the single entity principle,[11] that as the local branch remains part of the company incorporated elsewhere – thus one and the same company – the debt should therefore rather be dealt with in the forum where this foreign company was incorporated. This would be where the registered office, headquarters, or main place of business is, for instance, situated: in other words, the centre of its main

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8 *See* para. 4.9.7 of the Chief Registrar's Circular No. 28 of 2013 *read with* sec. 23(5) of the Companies Act 71 of 2008.

9 *See also* Delport et al. 2019, at 115, *referring to* rule 4(1)(a)(v) of the Uniform Rules of Court and rule 9(3)(e) of the Magistrates' Courts Rules *read with* regulation 20(1)(d) of the Regulations to the Companies Act 71 of 2008 that provide for service of process that may be effected at the registered office of an external company; to this end, these rules most probably only deal with procedural matters.

10 *See* the definitions of "external company" in section 1 of the Companies Act 61 of 1973 and section 1 of the Companies Act 71 of 2008.

11 *See supra* note 7.

interests ("COMI"). But if local procedures are not available which may, for instance, compel local creditors or the external company to approach a foreign jurisdiction where the COMI of the foreign company is located, that step may in some instances be risky, impractical and/or very expensive for the local creditors in South Africa. It may also be the case that only the local branch operating in South Africa is in financial distress, a situation which in some instances could be addressed in South Africa.

1.5. A Snapshot of South African Company Laws on External Companies

A brief contrast between the legal positions under the Companies Act 61 of 1973 ("the 1973 Act") and the 2008 Act is helpful. The 1973 Act provided a procedure by which foreign companies operating in South Africa might register as external companies,[12] a step that made these external companies bodies corporate under South African law.

Chapter 14 of the 1973 Act also provided for the winding up (liquidation) of companies. Section 337(1) specifically included an external company for the purposes of winding-up in terms of the 1973 Act. In other words, although a foreign company registered in South Africa remained one and the same company registered elsewhere (under the single entity theory[13]), its local branch in South Africa could, for winding-up purposes, be treated as a separate entity capable of being wound up as though it were a separate entity. This process provides a practical solution to deal with the local assets and liabilities.

The 1973 Act also provided two formal procedures for rescuing companies in terms of that Act. The first was judicial management, in terms of its Chapter 15. The second was compromise and arrangements with creditors, in terms of section 311.

Under the 2008 Act, by contrast, the position is different. Registration as an external company under section 23 does *not* make the external company a body corporate in terms of South African law. Further, the 2008 Act deals mainly with solvent companies, and thus it provides for the winding up of solvent companies. By way of transitional arrangements in a schedule, though, it also preserves the provisions of the 1973 Act on the winding up of insolvent companies. And as regards its formal procedures for saving (solvent) companies, the 2008 Act also provides two options. The first is business rescue, in terms of (most of) its Chapter 6. At the end of that chapter, in section 155, the 2008 Act also provides for a statutory compromise with creditors.

1.6. The Problem: How to Help an External Company in its Hour of Need

Suppose the foreign company incorporated outside South Africa – such as CMC(Italy) – is subjected to a debt-enforcement procedure by its local creditors or slides into insolvency proceedings in its home jurisdiction. Either of these

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12 *See* secs. 322 & 323 of the Companies Act 61 of 1973.

13 *See supra* note 7.

procedures may then have an effect in other jurisdictions too, such as South Africa. The foreign creditors or insolvency representatives may seek assistance and assets situated in foreign jurisdictions – such as South Africa – by applying the rules of cross-border insolvency or of the enforcement of foreign judgments regarding the debtor company. The branch company in South Africa – such as CMC(SA) – may conceivably also suffer financial distress. It may also happen that the local branch in South Africa may face financial distress in relation to its South African business endeavours. How, then, might South African law help a foreign company doing business in South Africa as an external company in its hour of need? To answer this question, this article will analyse the *CMC(SA)* judgment; discuss the relevant law on financial distress and winding up of foreign companies under the 1973 and 2008 Acts; and propose possible amendments to the current law.

2. The Judgment in the *CMC(SA)* Case

2.1. The Facts of the Case

2.1.1. The Business Rescue Application in South Africa: The Main Application

The first applicant, CMC(SA), was a company incorporated under the laws of Italy. It was a branch of a foreign company, CMC(Italy), and, in law, the same company operating through CMC(SA), as a branch office, in South Africa. Because CMC(SA) conducted business in South Africa, it was registered under section 23(1) of the 2008 Act as an "external company" at the CIPC and so it met the definition of an "external company" in section 1 of that Act. In fact, CMC(SA) was registered as an external company under the 1973 Act but was deemed to have been registered as an external company under the 2008 Act in terms of the transitional arrangements of the 2008 Act.[14]

On 14 December 2018, the board of directors of CMC(SA) resolved to place it under voluntary business rescue in terms of section 129 of the 2008 Act. So the board filed the appropriate forms with the CIPC and began the process on 24 December, and filed its Form CoR123.1 attaching all the necessary documents. The notice of the resolution was published on 15 January 2019, and its effective date was published too. CMC(SA) appointed its two business rescue practitioners on 11 January.[15]

A problem arose when the CIPC withdrew the proceedings, ruling that "an external company cannot be placed into business rescue as envisioned under Chapter 6 of the Act."[16] So CMC(SA) and its business rescue practitioners applied to the High Court for a declaratory order that CMC(SA) was validly under business rescue as contemplated by section 129 of the 2008 Act pursuant to the resolution of the board of directors. The main relief sought by the applicants was therefore a court ruling confirming that

[14] *See* sec. 6 of Item 2 of Schedule 5 to the Companies Act 71 of 2008.

[15] *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, paras. 5–8.

[16] *Id.* paras. 3, 10.

CMC(SA) might use the business rescue procedure in Chapter 6 of the 2008 Act for the financially distressed branch, CMC(SA), registered as an external company and operating in South Africa.[17]

2.1.2. The Arrangement or Compromise in Italy, and the Alternative Relief Sought in South Africa

In the meantime, and before the CMC(SA) application in South Africa, CMC(Italy) approached an Italian court with a request to initiate an arrangement or compromise with its creditors. The company apparently experienced financial difficulties across various jurisdictions in which it operated. The Italian process was provided for by the Italian Bankruptcy Code,[18] and appeared to be an attempt to reorganise the company's debts under Italian bankruptcy law.[19] The relief was granted, and representatives called judicial commissioners were appointed to manage the process, which envisaged an offer of compromise to creditors, who could ultimately vote on it, and, if it were accepted, it could then be sanctioned by the Italian court. Everything was in place in Italy because the court granted the request and the postponements requested by CMC(Italy). However, when the South African application was heard, the Italian court had not yet given its final approval because the creditors' meeting was still to be held. These facts about the Italian proceedings were provided to the South African court when CMC(SA) and its business rescue practitioners, in their alternative prayer, sought a court order for the recognition and enforcement of the order issued by the Court of Ravenna (Bankruptcies Office), dated 6 December 2018, granting the Preventative Arrangement which CMC(Italy) had sought in the Italian proceedings ("the Italian order").[20]

2.1.3. The South African Creditor's Intervening Counter-Application

An intervening creditor of CMC(SA)'s opposed the company's application and brought a counter-application to liquidate the company.[21] This counter-application,

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17 *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 1.

18 *Id.* paras. 1, 11–22.

19 *Id.* para. 13, and *see* para. 43: "CMC's expert on Italian bankruptcy law enlightens this court that the Italian bankruptcy laws provide that CMC's board retains the power to administer and run its business. Furthermore, the Italian bankruptcy laws provide for only an automatic stay on attachments or other precautionary measures. Judicial property mortgages enrolled 90 days prior to the registration cannot be enforced and penalties and forfeitures are not imposed. CMC's expert opines that the Italian order was issued in anticipation of CMC's proposed plan to, inter alia, restructure the debt, set out whether assets and/or shares were to be sold and if financial instruments were to be offered to satisfy creditors. The plan must set out a subdivision of creditors into various classes and how these classes of creditors' debt are to be satisfied. Details of secured and unsecured creditors and how these classes' claims are to be satisfied must be reflected. CMC can thus still run its business and there is no general moratorium on legal proceedings against or for CMC."

20 *Id.* para. 1.

21 *Id.* para. 49.

which was heard together with the other applications, was not granted by the court but postponed indefinitely.[22] The winding up (liquidation) of companies and more particularly of external companies in South Africa is nevertheless discussed in this article because it casts an interesting light on aspects of the interplay between the 1973 Act and the 2008 Act.

2.2. The Arguments in the Main Application Regarding Business Rescue

As regards the main relief sought by CMC(SA), the confirmation that it was validly in business rescue, the following aspects were raised in argument:

– Section 129 of the 2008 Act provides for voluntary business rescue proceedings initiated by the board of directors regarding "companies."[23] The critical question for the court was whether CMC(SA) was therefore a "company" for the purposes of section 129;

– Section 1 of the 2008 Act defines "company" to include "a juristic person incorporated in terms of this Act," "a domesticated company," or a "juristic person that, immediately before the effective date was registered in terms of the [1973 Act], *other than as an external company as defined in that Act*";[24]

– CMC(SA) argued that, as an external company registered under the 2008 Act, it was included in the general definition because it was "a juristic person incorporated in terms of the Act."[25] Further, an external company, when "registered" in South Africa, was "notionally" incorporated in South Africa in terms of the 2008 Act. So CMC(SA) met the definition.[26] The words "juristic person" included a foreign company conducting business in South Africa;

– The CIPC indicated that the resolution to put the company into business rescue was erroneously adopted and withdrew the documents for registering the resolution because the CIPC argued that registration as an external company did not result in the incorporation of a secondary legal entity in South Africa. The external company was therefore subject to the laws of the jurisdiction in which it was first incorporated, namely, Italy. Accordingly, the external company was not a "company" for the purposes of the 2008 Act, and so was not subject to business rescue proceedings under that Act.[27]

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[22] *Id.* para. 55.

[23] *Id.* para. 23. *Note* that the initiation of business rescue by means of a court application as provided for in section 131 of the Companies Act 71 of 2008 also refers to "a company" and "the company."

[24] *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 23 (emphasis supplied).

[25] *Id.* para. 29.

[26] *Id.*

[27] *Id.* para. 10.

2.3. The Reasoning and Decision of the Court

2.3.1. The Main Application Concerning Business Rescue

The court rejected CMC(SA)'s argument by finding that external companies did not qualify for business rescue under the 2008 Act.[28] The court reasoned as follows:

As to the status of CMC(SA), it was initially registered as an external company under the 1973 Act in 2004. Under the transitional arrangements provisions of the 2008 Act,[29] CMC(SA) would be regarded as having been registered as an external company in terms of the 2008 Act. So CMC(SA) was deemed to be an external company under the 2008 Act because it was an external company in terms of the 1973 Act.[30] The court elaborated as follows:

As Chapter 6 of the 2008 Act did not specifically define a "company" for its purposes, the general definition of "company" in section 1 of that Act applied.[31] This general definition, for the purposes of the Act, includes:

– a company *incorporated* in terms of the provisions of the Act;

– a domesticated company which is a foreign company that has transferred its registration to South Africa; or

– a juristic person that was incorporated under legislation repealed by the 2008 Act and entities previously recognised as companies under the 1973 Act.[32]

The court noted that CMC(SA) was also not a domesticated company because it had not transferred its registration to become such a company in South Africa. Nor was CMC(SA) a company incorporated under the 2008 Act, because it was incorporated under Italian law.[33]

The court referred to the distinction between an external company, a foreign company, and a company that existed in terms of the 1973 Act.[34] In this context, "incorporation" and "registration" had always been regarded as two separate processes. There was simply no "notional" *incorporation* when a foreign company was *registered* in South Africa as an external company.

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28 *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 40.

29 *Id.* para. 30. Section 6 of Item 2 of Schedule 5 to the Companies Act 71 of 2008 states: "An external company that, immediately before the effective date [of the Companies Act 71 of 2008], was registered as such in terms of the previous Act [of 1973] must be regarded as having registered on the effective date as an external company in terms of this Act."

CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others, para. 31.

30 *Id.*

31 *Id*.

32 *Id.* para. 32.

33 *Id.* paras. 32–33.

34 *Id.* para. 34.

In interpreting the meaning of "company" for the purposes of section 129 of the 2008 Act, the court[35] followed the interpretational approach in *Natal Joint Municipal Pension Fund v. Endumeni Municipality*,[36] namely:

> The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon it coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document … The "inevitable point of departure is the language of the provision itself," read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

In doing so, the *CMC(SA)* court[37] also acknowledged the fact that the 2008 Act must be interpreted to give effect to the purposes set out in its section 7, which provides, amongst other things, that the purposes of the Act are to promote compliance with the Bill of Rights in the application of company law. In particular, sections 7(c) and (k) were referred to, namely:

> (*c*) promote innovation and investment in the South African markets; …
> (*k*) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders;

But, in essence, the court found that the definition of "company" in section 1 of the 2008 Act does not include an external company, and that section 129 does not expressly include an external company for the purposes of the business rescue chapter in the Act. In this context the court also drew from the fact that the provisions of the 2008 Act, unlike those of the 1973 Act, only apply to external companies to

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35 *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 24.

36 *Natal Joint Municipal Pension Fund v. Endumeni Municipality*, 2012 (4) S.A. 593 (SCA), at 603–604, para. 18.

37 *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 25.

the extent that such provisions are specifically made applicable.[38] In this regard, the court concluded:

> [T]he background to business rescue proceedings with regard to an external company is thus that, despite the old Act making provision for an external company, the new Act does not; the probable interpretation is that the legislature intentionally did not include an external company.[39]

Although it was not strictly necessary to explore any further, the court[40] nevertheless found further support for its approach in the observations of Cassim,[41] namely,

> that there was a specific legislative intent with the 2008 Act to reduce the regulation of external companies to promote investment in South African markets.

And the court also referred to the "paradigm shift from the 1973 Act, where external companies would be treated on the same footing as South African companies, to that of the 2008 Act, where overregulation of external companies would be reduced to cut the red tape to entice external companies."[42] There was also some reliance on the argument on behalf of the CIPC that an external company is not eligible for business rescue because "[r]egistration as an external company by CIPC does not result in the incorporation of a secondary legal entity."[43]

In particular, in rejecting the argument on behalf of CMC(SA) that an external company is included in the definition of "company" in section 1 of the 2008 Act because its registration causes a notional incorporation, the court reasoned:[44]

Even though CMC(SA) was registered in terms of the 1973 Act, and it is therefore deemed to be an external company under the 2008 Act because it was an external company under the 1973 Act,[45] the definition of a company and whether it includes an external company must be sought in the 2008 Act. There is no definition of "company" under Chapter 6 of the Act, and therefore the interpretation of "company" must bear the meaning assigned to it in section 1.

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38 *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 26.

39 *Id*.

40 *Id.* para. 27.

41 Farouk H.I. Cassim, *The Companies Act 2008: An Overview of A Few of its Core Provisions*, 22(2) South African Mercantile Law Journal 157, 164 (2010).

42 *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 27.

43 *Id.* para. 28.

44 *Id.* paras. 29–30.

45 *Id.* paras. 30–31 with reference to the Transitional Arrangements of the Companies Act 71 of 2008, contained in section 6 of Item 2 of Schedule 5 to the Companies Act 71 of 2008.

In this respect the court also found that an external company was not included in the definition of "company" because it was not incorporated as such in South Africa, and the court rejected CMC(SA)'s argument regarding notional incorporation.[46]

> In reaching this conclusion, the court mentioned that its interpretation is not insensible and does not attain unbusinesslike results; neither does it undermine the apparent purpose of the Act. Such interpretation does not impede the purposes of the Act as set out in s 7 of the Act. Certain specified sections do extend to external companies. The legislature thus reduced the red tape but maintained some "control": the duty to file an annual return, certain provisions on fundamental transactions, requirements for a special resolution by external holding companies, the obligation to maintain at least one office in South Africa and register the address or principal office, to mention a few.[47]

The court also mentioned that there is no case law on whether an external company can apply for business rescue in South Africa, but relied on commentators on insolvency and company law who hold the view that external companies do not qualify for business rescue because of the wording of the 2008 Act.[48]

The court thus explained that, as locally registered foreign (i.e. "external") companies were specifically excluded from the definition of a "company" in section 1 of the 2008 Act, an external company could not use the business rescue provisions in Chapter 6.[49] [This was the crux of the court's refusal of the main application.]

Accordingly, business rescue proceedings under section 129 of the 2008 Act were not available to CMC(SA) as an external company. The business rescue initiated by the board resolution under section 129 was therefore invalid, and the application failed.[50]

2.3.2. The Alternative Prayer for the Recognition of the Italian Order

As regards the alternative prayer regarding the recognition of the Italian order, the Italian court had sanctioned a compromise offer to creditors. CMC(SA) requested the South African court to recognise the Italian order under the principles for recognising and enforcing foreign judgments.[51] First, CMC(SA) argued that the Italian process

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[46] *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, paras. 34–35.

[47] *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 36.

[48] *Id.* paras. 37–39 with reference to Delport et al. 2019, at 458; Jennifer A. Kunst et al., *Meskin: The Law of Insolvency* (electronic version, Durban: LexisNexis, 2019), para. 18.3.3 (Sep. 7, 2020), available at https://www.mylexisnexis.co.za/Index.aspx; Jeffrey Salant, *Business Rescue Operations and the New Companies Act*, De Rebus (August 2009) (electronically accessed); and R.C. Williams, *Companies* in *The Law of South Africa. Vol. 4. Part 1* (W.A. Joubert (ed.), 2nd ed., Durban: LexisNexis, 2012), para. 275 (Sep. 7, 2020), available at https://www.mylexisnexis.co.za/Index.aspx.

[49] *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 35.

[50] *Id.* para. 40.

[51] At the time of the South African application, the Italian court only granted an order whereby by CMC(Italy) was assigned a deadline of 60 days to file the agreement with a creditors' proposal,

resembled the scheme of arrangement under section 311 of the 1973 Act; but CMC(SA) retracted this argument.[52] Next, CMC(SA) argued that the Italian process resembled the South African business rescue procedure under the 2008 Act. The South African court rejected this comparison[53] and went on to hold that the Italian order was not a final court order as required by South African law for the recognition and enforcement of a foreign court order.[54]

The South African court observed that a foreign judgment was not directly enforceable in South African law but constituted a cause of action.[55] [This means that a judgment creditor may apply to a South African court with a view to the recognition and enforcement of the foreign court order in South Africa against the debtor which has a presence in South Africa.] A foreign judgment would only be enforced in South Africa when

> (i) … the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by [South African] law with reference to the jurisdiction of foreign courts (sometimes referred to as "international jurisdiction or competence"); (ii) … the judgment is final and conclusive in its effect and has not become superannuated; (iii) … the recognition and enforcement of the judgment by [South African] Courts would not be contrary to public policy; (iv) … the judgment was not obtained by fraudulent means; (v) … the judgment does not involve the enforcement of a penal or revenue law of the foreign State; and (vi) … enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended.[56]

So, the application for the alternative prayer failed as well. (It is notable that this prayer was based on the recognition of a foreign judgment as such and that the rules of cross-border insolvency to recognise a foreign insolvency procedure and/or the appointment of a foreign estate representative were apparently not considered although the Italian procedure was based on Italian bankruptcy laws. It is assumed

alternatively a possible restructuring agreement, that CMC(Italy) must send a monthly summarised report, and three judicial commissioners were appointed. *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 41.

52 *Id.* para. 46.

53 *Id*.

54 *Id.* para. 44: "CMC does not pass the basic hurdle for enforcement of a judgment or order; the Italian order granted is not final and conclusive, simply because there is no finality to the order. It is correct that one has to look predominantly to substance or the effect of the order rather than the form of the order, but the effect of the order granted is not final."

55 *Id.* para. 42.

56 In this regard the court (*CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 42) referred to *Jones v. Krok*, 1995 (1) S.A. 677 (A), at 685A–E; *Society of Lloyd's v. Price*, 2006 (5) S.A. 393 (SCA); and *Richman v. Ben-Tovim*, 2007 (2) S.A. 283 (SCA).

that the South African creditors participated in the Italian procedure because the court was informed from the bar by counsel to this effect.[57])

The relevant aspects of the 1973 and 2008 Acts will now be discussed.

3. Relevant Aspects of the 1973 and 2008 Acts

3.1. The Practical Benefits of an External Company Being Treated as a Local Company[58]

This part of the article examines some aspects of the local treatment of debt owed by an external company recognised as such in South Africa. A company, such as CMC(SA), has *locus standi* to sue and be sued in a South African court, its registered office serving as its place of domicile. It can be a taxpayer under South African law and be liquidated under South African liquidation law as explained below. It is treated as though it were a South African incorporated company.

These choices bring practical benefits. The local creditors and the local branch can instead wind down its local affairs when circumstances so warrant, without involving the foreign parent and the foreign court and saving local creditors both time and expense in having to institute their claims against the (parent) company in its country of incorporation. Alternatively, if the appropriate remedies in South African law can be made available to the local branch of the company, it may be helped to survive its financial distress and emerge stronger rather than sliding into liquidation, thus preserving the local branch and enabling it to continue playing an important role in the economy of South Africa and the lives of her people. These considerations about practicalities form a consistent theme running through this article, which is written during the COVID-19 coronavirus pandemic when unemployment in South Africa, which was already running at little over 27 per cent towards the end of 2019,[59] is forecast to rise to 35 per cent by the end of 2020[60] or even perhaps as high as 50 per cent.[61] The preservation of jobs is one of the "felt necessities"[62] of our time.

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57 *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 46.

58 The ideas expressed in this section of this article will be referred to *infra* in the text accompanying footnotes 61, 76, and 85.

59 *See* the graph in H. Plecher, *Unemployment Rate in South Africa 2019*, Statista (October 2020) (Sep. 7, 2020), available at https://www.statista.com/statistics/370516/unemployment-rate-in-south-africa/. Plecher states: "This statistic shows the unemployment rate in South Africa from 1999 to 2019. In 2019, the unemployment rate in South Africa was around 27.32 percent."

60 South Africa Forecast: Unemployment Rate, CEIC (no date) (Sep. 7, 2020), available at https://www.ceicdata.com/en/indicator/south-africa/forecast-unemployment-rate: "South Africa's Unemployment Rate is forecasted to be 35.313% in Dec 2020 as reported by International Monetary Fund."

61 Staff Writer, *South Africa's Unemployment Rate Could Hit 50%: Report*, BusinessTech, 3 May 2020 (Sep. 7, 2020), available at https://businesstech.co.za/news/business/394654/south-africas-unemployment-rate-could-hit-50-report/.

62 Oliver Wendell Holmes said: "It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The

In the *CMC(SA)* case, the court mentions the paradigm shift in the treatment of external companies from the provisions of the 1973 Act to those of the 2008 Act.[63] The 1973 Act provides an external company with its relief except where the governing provisions expressly exclude that company or where it militates against the nature of that company. Blackman and others,[64] referring to section 2(2) of the 1973 Act, apparently support the broad application of the 1973 Act to external companies registered in South Africa. The authors also refer to the principles of private international law underpinned by the principle of comity which prescribes that bodies corporate duly created in one country are recognised as bodies corporate by other countries.[65] Next, the authors elaborate on the status enjoyed by these external companies in South Africa, explaining that a "further guideline is the principle that foreign companies should be placed on the same footing, as far as possible, as South African companies in relation to the Act".[66] In the authors' opinion, a foreign company recognised as a body corporate in South Africa and thus taking part in business and economic activity should, on the one hand, not receive preferential treatment under the Companies Act but, on the other hand, should also not be subjected to

felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past." *See* Oliver W. Holmes, Jr., *The Common Law* 5 (first published 1881, P.J.S. Pereira & D.M. Beltran (eds.), Toronto: University of Toronto Law School Typographical Society, 2011), available at http://www.general-intelligence.com/library/commonlaw.pdf.

63 *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 27.

64 *See* M.S. Blackman et al., *Commentary on the Companies Act* (electronic version, Cape Town: Juta, 2012), at ch1p1–ch1p2 (Sep. 7, 2020), available at https://jutastat-juta-co-za.uplib.idm.oclc.org/nxt/gateway.dll?f=templates&fn=default.htm&v.id=Publish:10.1048/Enu: "The definition of 'external company' read together with s 2(2) shows that the Act applies to a company incorporated outside the Republic once it acquires a place of business in the Republic, subject to those provisions of the Act which expressly or by implication exclude external companies from their application. Special provisions governing external companies are to be found in ss 322–36." *See also* Jennifer A. Kunst et al., *Henochsberg on the Companies Act 61 of 1973* 642 (electronic version, Durban: LexisNexis, 2011), available at https://www.mylexisnexis.co.za/Index.aspx.

65 *See* the extracts from the Supplementary Report of the Van Wyk De Vries Commission as referred to by Blackman et al. 2012, at ch13-p2. In fact, the court in *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others* seems to have followed the approach taken by Blackman et al.: *see* para. 26 ("Section 129 of the Act does not expressly include an external company. As background it is relevant to note that the old Companies Act, 1973, under s 2(2), had a catch-all phrase which provided that the sections of that Act would apply to every company, including external companies"). *See also* the commentary by Kunst et al. 2011, at 14(5)–15 on section 2(2) of the Companies Act 61 of 1973.

66 Blackman et al. 2012, at ch13-p2.

disadvantages that do not also apply to South African companies. For this proposition the learned authors rely on the principles of the comity of nations when these appear to be unobjectionable.

By contrast, the 2008 Act takes a much more restricted approach: only those provisions of the Act that are specifically made applicable to an external company will govern it.[67] It is submitted that whichever approach is followed, i.e. the 1973 or the 2008 Act, the external company remains one and the same as the foreign company[68] but that the South African legislature is at liberty to make rules regarding their treatment in terms of South African law. It is not clear whether it was indeed the intention of the legislature in the 2008 Act that all debt-related matters arising within the context of an external company in South Africa should be dealt with in the foreign jurisdiction, but it is submitted that a clear policy is required in order to direct the legislative provisions in this regard.

Here, besides considering the implications of the *CMC(SA)* judgment, questions are raised about the fact that the external company registered in South Africa is excluded from relief under Chapter 6 of the 2008 Act. It helps to discuss the 1973 Act before the 2008 Act.

3.2. The 1973 Act

The discussion relates to aspects of the definition of a company, winding-up (liquidation), and formal methods of corporate rescue.

3.2.1. Winding-Up (Liquidation)

Regarding liquidation under the 1973 Act, external companies recognised in South Africa under that Act were subject to its Chapter 14 providing for the liquidation of both solvent and insolvent companies.[69] Section 337(1) made it clear that, for the purposes of liquidation, an external company was included as such, except that it could not invoke the provisions on voluntary liquidation by resolution because of the exclusion in section 349.[70]

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67 *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, paras. 26–27.

68 *See Sackstein NO v. Proudfoot S.A. (Pty) Ltd.*, 2003 (4) S.A. 348 (SCA), para. 15.

69 *See* the definition of "external company" (in section 1 of the Companies Act 61 of 1973), and Kunst et al. 2011, at 642, 664 and Blackman et al. 2012, at ch14-p3.

70 *See* André Boraine & Jani van Wyk, *The Application of 'Repealed' Sections of the Companies Act 61 of 1973 to Liquidation Proceedings of Insolvent Companies*, 46(3) De Jure 644 (2013). *See also* Delport et al. 2019, at APPI-5, who maintain that both registered external companies and those not so registered were eligible for the liquidation procedure: "But even a company or other association of persons incorporated outside South Africa which complies with s 23 (2A) (and is therefore within the definition of "external company" in s 1) is, it is submitted, subject to the provisions of Chapter XIV even if it is not registered as such under the Act (see s 23 *ssv* Subsections (1), (2), (2A) and (6) and Registered external company of the 2008 Act; and see *Wiseman v ACE Table Soccer* (*Pty*) *Ltd* 1991 (4) SA 171 (W) at 175, 177)."

In view of the definition of "external company" in section 1 read with sections 2(2), 322 and 323 of the 1973 Act, Kunst and others[71] explain that a foreign company incorporated elsewhere is recognised as an "external company" if it falls within the definition in section 1: in other words, if, first, its memorandum of incorporation was lodged with the (then) Registrar of Companies in South Africa, under the former 1926 Companies Act, and, secondly, where such a company has, since the commencement of the 1973 Act, established a place of business in South Africa. Regarding the applicability of the 1973 Act, Kunst and others[72] also indicate that section 2(2) applies the 1973 Act to the defined external companies but section 323(1) indicates which provisions only apply to external companies registered as such under that Act.

It is important to note that section 337(1) specifically provides for the liquidation of external companies – foreign companies registered as such in South Africa – while section 349 excludes them from the application for voluntary liquidation by resolution.[73]

Furthermore, it is necessary to remember that although the external registered branch and the foreign company (incorporated) elsewhere – the foreign parent or "main branch" – are the same company, the local branch can for practical purposes be liquidated in South Africa as though it is a South African incorporated company. This practical possibility still does not create a separate legal persona, and the locally based branch, the external company, is treated as if it has a separate existence for the purposes of liquidation as such.[74] A concurrent liquidation could also occur where the foreign company is subjected to a liquidation order in the country of the centre of its main business (its COMI), while the local branch, as the external company in South Africa, is subjected to a South African liquidation procedure, even though the foreign (parent) company and the external (local branch) company remain one and the same company.[75] The grounds for liquidating a company in South Africa under the 1973 Act are listed in a footnote below so as not to interrupt the flow of the argument in this section of the article.[76]

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71 Kunst et al. 2011, at 642.

72 *Id*.

73 *Id.* at 664.

74 *Id*. *See supra* notes 7 and 9.

75 Kunst et al. 2011, at 664 with reference to *Ward v. Smit*, 1989 (3) S.A. 175 (SCA); *Sackstein NO v. Proudfoot S.A. (Pty) Ltd.*, 2003 (4) S.A. 348 (SCA), para. 15.

76 Section 344 states the circumstances in which the external company as a company may be wound up by the court:

"(a) the company has by special resolution resolved that it be wound up by the Court;

(b) the company commenced business before the Registrar certified that it was entitled to commence business;

It may seem to be a contradiction to liquidate an external branch of a company in South Africa because it is one and the same as the foreign incorporated company; but the availability of the liquidation procedure rather deems the branch to be treated as a separate, South African incorporated company for practical reasons.[77] So it is, for instance, sensible to have a process in place to end the presence of this company in South Africa when it wishes to withdraw from the country or when it is insolvent, without the need to liquidate the foreign incorporated company in terms of foreign law in a foreign court.[78] This process thus enables the dead branch to be severed from the foreign "tree" if it is no longer useful to it.

It must also be noted that, where the external company is put into liquidation because of its inability to pay its debts, the insolvency law will apply *mutatis mutandis* as provided for under section 339 of the 1973 Act.[79] This step will benefit local creditors: for example, a South African liquidator will attend to the affairs of the company, and rules on the payment of claims will apply. So, too, would the provisions on the personal civil and criminal liability of, for instance, delinquent directors and/or other company officers in terms of sections 423 to 426 in Chapter 14 of the 1973 Act. But the enforcement of such provisions in relation to, for instance, directors based outside South Africa will, of course, be problematic.

In passing, it may be noted that if the foreign company is put into a formal state of bankruptcy in its home jurisdiction, the foreign estate representative may, of course, in terms of South African cross-border insolvency law apply for recognition by a South African court in order to enable him to deal with local assets or apply for a local liquidation order in terms of South African insolvency law. This aspect is

(c) the company has not commenced its business within a year from its incorporation, or has suspended its business for a whole year;

(d) in the case of a public company, the number of members has been reduced below seven;

(e) seventy-five per cent of the issued share capital of the company has been lost or has become useless for the business of the company;

(f) the company is unable to pay its debts as described in section 345;

(g) in the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;

(h) it appears to the Court that it is just and equitable that the company should be wound up."

If the company is wound up because of its inability to pay its debts (*see* sec. 344(f) *read with* sec. 345), the insolvency law would apply *mutatis mutandis* in view of section 339 of the Companies Act 61 of 1973 because the company's inability to pay its debts would turn the liquidation into an insolvency liquidation. For practical reasons (*cf. supra* note 58), it is sensible to provide a liquidation mechanism for the external company in South Africa. The grounds listed *supra* in section 344 will be referred to *infra* in the text accompanying footnote 104.

77 *See* Kunst et al. 2011, at 842–843.

78 *Cf.* the practicalities mentioned *supra* note 11.

79 Kunst et al. 2011, at 667–70(2); Blackman et al. 2012, at ch-p13–ch14-p22.

not directly under discussion for the purposes of this article, and it suffices to say that when the external company is put into liquidation, the South African liquidator appointed to deal with the matter will first and foremost deal with its assets and liabilities in South Africa.

The discussion now moves from the winding up of an external company to the formal methods available to attempt dealing with its debts without liquidating it under the 1973 Act.

3.2.2. Judicial Management as the First Formal Method of Corporate Rescue

The 1973 Act also provided two formal methods of corporate rescue: judicial management, and compromises and arrangements with creditors. Judicial management was never considered to be very effective in practice,[80] and was replaced by business rescue for companies defined in the 2008 Act.[81]

It is still interesting to ask whether judicial management was available to external companies. Section 427 (now repealed) made it clear that judicial management was available when *any* company by reason of mismanagement or for any other cause was unable to pay its debts or was probably unable to meet its obligations, and it had not become or was prevented from becoming a successful concern, and there was a reasonable probability that, if it was placed under judicial management, it would be enabled to pay its debts or to meet its obligations and become a successful concern. This procedure was initiated by an application to the High Court, which was entitled to grant the order to place the company under judicial management if it appeared just and equitable to do so.

What is interesting is that neither in its definitions section 1 nor in its Chapter 15 did the 1973 Act define a company for the purposes of judicial management as that Act (still) does for the purposes of winding-up. However, section 427(1)(a) did make it clear that the judicial management procedure would apply to *any* company. It is submitted that one would first examine the definition of "company" in section 1, which included all companies incorporated under Chapter 4 and also anybody which, prior to the commencement of that Act, was a company in terms of any law repealed by that Act. It is concluded that, on the basis of this definition, the external company registered in South Africa is not a South African incorporated company and does not qualify as a company for the purposes of the 1973 Act. But Blackman and others[82] mention that it is not clear whether judicial management would apply

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80 *See* Anneli Loubser, *Some Comparative Aspects of Corporate Rescue in South African Company Law*, LLD thesis, University of South Africa (2010), at 3 (Sep. 7, 2020), available at http://hdl.handle.net/10500/3575: "judicial management was never regarded as an effective rescue measure for companies in financial distress."

81 *See* sec. 224 of the Companies Act 71 of 2008.

82 Blackman et al. 2012, at ch15-p4 n. 38.

to external companies.[83] This point of view is most probably due to the fact that section 427(1) uses the adjective "any" company read with the authors' views on the implications of section 2(2) of the 1973 Act.

It is not clear why section 427(1) described a company as "any" company. An interpretational approach to include external companies could find support in section 2(2), which makes the 1973 Act generally applicable to external companies. Some provisions, such as sections 63 and 64, are by their nature not applicable.[84] Thus the special provisions of the Act governing external companies do not apply to an external company whose branch has been incorporated as a section 21 company. So it could be argued that judicial management could, in fact, have applied to an external company in terms of the 1973 Act, but that, in the absence of clear authority, one may merely agree with Blackman and others, who mention that the position is not clear. As judicial management under the 1973 Act is no longer in force, this issue will not be explored further in this article.

3.2.3. Compromises and Arrangements as the Second Formal Method of Corporate Rescue[85]

As regards the second formal method of corporate rescue under the 1973 Act – compromises and arrangements between a company, its members, and its creditors – section 311 provided for this procedure which was sanctioned and supervised by the court.[86] The point raised but then abandoned in the *CMC(SA)* application, that the Italian compromise procedure resembled this section 311 process, therefore has some merit. Still, it is interesting to note that, although this relief is no longer available in this form in South African company and insolvency law, section 311(8) indicated that "company" for the purposes of section 311 meant *any company liable to be wound up in terms of the 1973 Act*.[87] So it seems that an external company would have been eligible to invoke this process because section 337(1) of the 1973 Act

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83 Forsyth 2012, at 276 states: "A court had jurisdiction under chapter 15 of [the Companies Act 61 of 1973] to place a company under judicial management [note 784 citing section 427]. But since item 5 saves only the provisions of chapter 14 of [the Companies Act 61 of 1973], an external company may no longer be placed under judicial management." It is submitted that in this passage, Forsyth intended to refer to Item 9 of Schedule 5 to the Companies Act 71 of 2008 (as he does on the preceding page 275) rather than to Item 5, which is a short item dealing with pre-incorporation contracts.

84 Blackman et al. 2012, at ch1-p1–ch1-p2. *See also* the commentary by Kunst et al. 2011, at 14–15 on section 2(2) of the Companies Act 61 of 1973.

85 On section 311, *see* Blackman et al. 2012, at p12-1 *et seq.* and Kunst et al. 2011, at 601 *et seq*. This passage of the article accompanying footnotes 85–88 is referred to *infra* in the text accompanying footnote 94.

86 Kunst et al. 2011, at 604 mention that the procedure has been used for a special or alternative means of winding-up or for the termination of a winding-up. A company liquidator of a company in liquidation also had the power if appropriately authorised to use it.

87 Kunst et al. 2011, at 608 discuss the inclusion of the external company in this section but indicate that the section 311 procedure will only be available to companies registered as external companies in South Africa.

specifically refers to companies eligible for the winding-up process and includes external companies for this purpose.

It is sensible that the section 311 provisions on compromise and arrangements were in principle available to the external company because they would at least offer some formal process for dealing with (local) debt, particularly where the branch company had several local creditors.[88]

3.3. The 2008 Act

3.3.1. External Companies and the Interpretation of the Word "Company" in Relation to Business Rescue

The *CMC(SA)* judgment has clearly demonstrated that the South African business rescue procedure in Chapter 6 of the 2008 Act is not available to external companies, even if they are registered as external companies in South Africa.

In interpreting the definition of "company" for the purposes of this procedure, the *CMC(SA)* court easily found that the definition of "company" in section 1 does not include "external company".[89] The court further compared section 2(2) of the 1973 Act, referred to as a catch-all phrase "which provided that the sections of that Act would apply to every company, including external company", and indicated that the 2008 Act had no such provision. The court then pointed out that Parliament would have been aware of section 2(2) of the 1973 Act but "chose to only make certain sections [of the 2008 Act] applicable to external companies". The court then concluded on this point:

> The background to business rescue proceedings with regard to an external company is thus that, despite the old Act making provision for an external company, the new Act does not; the probable interpretation is that the legislature intentionally did not include an external company.[90]

For its interpretation the court found support in Cassim's observation "that there was a specific legislative intent with the 2008 Act to reduce the regulation of external companies to promote investment in South African markets."[91] The court remarked that there was in fact a paradigm shift from the 1973 Act, where external companies would be treated on the same footing as South African companies, to that of the 2008 Act, where over-regulation of external companies would be reduced to cut red tape so as to entice external companies.[92] The aptness of relying on these salient

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88 *See supra* the reasons mentioned in the passages accompanying footnotes 58 and 78.

89 *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 26.

90 *Id*.

91 *Id.* para. 27, citing Farouk H.I. Cassim et al., *Contemporary Company Law* 97 (2nd ed., Cape Town: Juta, 2012).

92 *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 27, citing Cassim 2010, at 164.

points raised by Cassim with regard to the applicability of business rescue will be further discussed later in this article in relation to the purposes of the 2008 Act.[93]

3.3.2. The Compromise with Creditors

Although Chapter 6 of the 2008 Act contains the main procedure for business rescue, section 155 also provides for a compromise between the company and its creditors. It is clear from the reasons advanced in the *CMC(SA)* judgment that this compromise will likewise also not be available to external companies such as CMC(SA) because the same reasons provided by the court in relation to business rescue will apply to section 155. This position contrasts with that under section 311 as stated above in this article.[94]

3.3.3. The Liquidation of an External Company: Only a Solvent Company

A further significant change to South African company law is that sections 79 to 83 of the 2008 Act provide for a liquidation procedure for solvent companies.[95] Again, it seems that the reasoning in the *CMC(SA)* case may also apply regarding which type of company is covered by the liquidation procedures for solvent companies, and that external companies are therefore also excluded from the (solvency) liquidation procedures in the 2008 Act. The wisdom of this exclusion following the reservation of the provisions on solvent liquidation for companies in terms of the 2008 Act is questionable. A local liquidation even where it is solvent would be sensible where the foreign company, for instance, ceases to do business in South Africa.[96] (It must be noted again that the external company remains part of the foreign company but it may for certain purposes be treated as if it is a separate entity.[97])

3.3.4. The Liquidation of Insolvent Companies and the Transitional Arrangements[98]

The sections of the main body of the 2008 Act do not directly provide for the liquidation of an insolvent company. Nor do they provide the administrative procedure to execute a liquidation after a solvent company has been put into liquidation. In this regard, it must be noted that Item 9 of Schedule 5 to the 2008 Act, as part of the transitional arrangements of that Act, keeps Chapter 14 of the 1973 Act alive with respect to the winding up and liquidation *of companies under the 2008 Act*, as though

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93 *See infra* the text accompanying footnote 113.

94 *See supra* note 85.

95 Sections 79 to 83 make up Chapter 2 Part G Winding-up of solvent companies and deregistering companies (secs. 79–83).

96 *See supra* the reasons discussed in the text accompanying footnote 58.

97 *See supra* notes 7, 9 and 13.

98 The text accompanying this heading is referred to *infra* in the text accompanying footnote 101 of this article and also in the text accompanying footnote 146 regarding South African insolvency law reform.

the 1973 Act had not been repealed.[99] These transitional arrangements state that sections 343, 344, 346, and 348 to 353 of the 1973 Act do not apply to the winding up of a *solvent* company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2 – the procedures to initiate the liquidation of solvent companies.[100] This aspect will be discussed directly below,[101] but the use of the term "companies" under the 2008 Act may perhaps also cast doubt whether an external branch in South Africa can be liquidated at all – even if unable to pay its debts.

3.3.5. The Transitional Arrangements as Applied to External Companies[102]

The further question is therefore whether an external company is eligible for liquidation in terms of the 2008 Act in terms of the transitional arrangements relating to liquidation as was the case in terms of the 1973 Act. Chapter 14 of the 1973 Act still applies in principle: it regulated liquidations of companies, both solvent and insolvent. And in terms of the 1973 Act, an external company could be liquidated under Chapter 14 because section 337(1) made it clear that Chapter 14 applied to an external company. Although voluntary liquidation following a members' resolution was not possible in terms of section 349 of the 1973 Act, the liquidation by application to the court as envisaged by sections 343 to 347 was available. Section 344 stated various grounds[103] for such a liquidation application, in particular the ground in section 344(g) where the foreign company has been dissolved in the country of its incorporation or has ceased to carry on business or is only carrying on business for the purposes of winding up its affairs. The further grounds for liquidation would also probably exist, such as a special company resolution to wind up the company, for instance, when it wishes to cease business in South Africa, a failure to commence business within twelve months, or the cessation of such business in South Africa, or when it may be just and equitable to liquidate the company. The inability of the external company to pay its debts would establish a ground for a creditor to apply for a liquidation order in terms of section 344(f) read with section 345: the insolvency law would apply *mutatis mutandis* because of section 339 of the 1973 Act because the inability of the company to pay its debts would turn the liquidation into an insolvency liquidation.[104]

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99 *See* Item 9(1) of Schedule 5 to the Companies Act 71 of 2008.

100 *Id*.

101 *See infra* the text accompanying footnote 102.

102 This passage was referred to *supra* note 101.

103 *See supra* note 76 for the grounds on which the court might wind up a company.

104 From discussions with a practitioner (Mr Geoff Ferreira) who kindly commented on a draft of this article, it appears that liquidation applications would in the past frequently be based on section 344(a), in which the resolution simply states (without giving reasons) that the shareholders have resolved by special resolution that the company should be wound up by the court in terms of section 344(a). The case of *Ex parte Three Sisters (Pty) Ltd.*, 1986 (1) S.A. 592 (D) is instructive, the court holding that creditors had to be given notice of the application. Nowadays, because Regulation

The immediate question is whether Chapter 14 of the 1973 Act still applies to external companies under the transitional arrangements in the 2008 Act. In this regard it must be noted that Item 9(1) of Schedule 5 to the 2008 Act also states that it applies to companies – by implication, "companies" in terms of the 2008 Act. Item 9(2) of Schedule 5 then states that "despite subitem (1), sections 343, 344, 346 and 348 to 353 do not apply to winding-up of a solvent company, except to the extent to give full effect to the provisions of Part G of Chapter 2." Delport and others state that

> [w]hether an external company or a registered external company will be subject to winding up in South Africa, will depend on whether Chapter XIV of the 1973 Act or the 2008 Act applies.[105]

On a strict interpretation and according to the reasoning of the court in the *CMC(SA)* case, one could conclude that, despite section 337(1) of the 1973 Act, the external companies not registered in terms of the 1973 Act are not included because of the reference in Item 9(1) to "companies" presumably defined in the 2008 Act. This question has not yet arisen in the courts. What is clear, though, is that the grounds for liquidation by court order and voluntary liquidation in terms of Chapter 14 will only apply to companies that are not solvent. Yeats and others, whilst also appreciating the difficulty, hold the view that a purposive interpretation of Item 9(1) would include external companies for the purposes of Chapter 14 of the 1973 Act.[106] This opinion is respectfully shared.

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20 requires the filing of Form COR 20.1 (clearly referring to an "External Company"), the question arises whether the court will *mero motu* query whether the company is solvent or not. It appears that, although a solvent external company cannot be wound up in terms of Part G of Chapter 2 of the Companies Act 71 of 2008, it can be wound up in terms of Appendix I to the Companies Act 71 of 2008 (Part 1 Chapter XIV of the Companies Act 61 of 1973), specifically if the external company is wound up in terms of section 344(a) read with one or more of the other grounds in section 344. An application based on section 344(a) alone might suffice, because this is a separate substantive ground for the winding up of a company (including an external company) by the court; then it will be for the liquidator to decide, as he is entitled to do, whether the company is solvent or not and, if it is insolvent, then at which stage the company became unable to pay its debts. It appears that ultimately the answer would lie in the interpretation or application of Item 9 of Schedule 5 to the Companies Act 71 of 2008. If the purposive interpretation preserving the full scope of Chapter 14 of the Companies Act 61 of 1973 is applied (and not confined to insolvent companies), then it appears that a solvent external company can simply be wound up in terms of section 344(a) without giving any reason why the shareholders have resolved to wind up the company. The problem seems to lie in the fact that, in terms of Item 9(2) of the Companies Act 71 of 2008, there is an obligation to determine whether the company is solvent or not, and that if it is solvent, then a resolution in terms of section 344(a) of the Companies Act 61 of 1973 is prohibited.

105 Delport et al. 2019, at APPI-5, in relation to sec. 337 of the Companies Act 61 of 1973.

106 J.L. Yeats et al., *Commentary on the Companies Act of 2008* (electronic version, Cape Town: Juta 2017), Sched.-166–Sched.-167 (Sep. 7, 2020), available at https://0-jutastat-juta-co-za.oasis.unisa.ac.za/nxt/gateway.dll?f=templates&fn=default.htm&v.id=Publish:10.1048/Enu. The authors state (*Id.* at Sched.-166): "On a technical level, item 9 is an exception to the repeal of [the Companies Act 61 of 1973] and

Delport and others mention that the "purely procedural" nature of the registration of the external company is important for the purposes of the continued application of Chapter 14 of the 1973 Act because section 337(1) of this Act included external companies for the purposes of liquidation. They add:

> [N]otwithstanding that the registration of an external company in South Africa does not create a separate legal persona … such a company may be wound up in South Africa as an independent entity even if the foreign entity is not wound up.[107]

But they state that Chapter 14 will only apply to these external companies where the provisions of section 322 and 323 of the 1973 Act continue to apply. In such instances, the winding up of a South African registered company would therefore apply. [If the authors are correct, this may mean that the liquidation provisions in Chapter 14 will only apply to external companies initially registered in terms of the 1973 Act and recognised as such in terms of the 2008 Act.] The authors go on to state:[108]

> But even a company or other association of persons incorporated outside South Africa which complies with s 23 (2A) (and is therefore within the definition of "external company" in s 1) is, it is submitted, subject to the provisions of Chapter XIV even if it is not registered as such under the Act (see s 23 *ssv* **Subsections (1), (2), (2A) and (6)** and **Registered external company** of the 2008 Act; and see *Wiseman v ACE Table Soccer* (*Pty*) *Ltd* 1991 (4) SA 171 (W) at 175, 177).

From this remark it seems that it may be accepted that Chapter 14 will still apply not only to external companies that are registered in South Africa but also to external companies that are not registered in South Africa.

Again, on the policy shift between the 1973 and 2008 Acts concerning the recognition and treatment of external companies, Delport and others highlight the

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therefore Chapter XIV of [the Companies Act 61 of 1973] can only have application in so far as item 9 permits. From this, it can be asserted that the exception is limited by the use of the term 'company' in item 9 and, for all other purposes, Chapter XIV of [the Companies Act 61 of 1973] is repealed." However, after stating that "this literal reading does not sit well," the authors argue, with reference to canons of interpretation, that "the preferred view is that a purposive reading of item 9(1) supports a conclusion that the legislature intended to preserve the full scope of chapter XIV of [the Companies Act 61 of 1973] with regard to insolvent companies as defined in s 337 of [the Companies Act 61 of 1973], rather than as defined under [the Companies Act 71 of 2008]." For this broad interpretation the authors cite (*Id.* at Sched.-166–Sched.-167) Boraine & van Wyk 2013; *Botha NO v. Van den Heever NO*, 2012 J.D.R. 1202 (GNP); and *Van Der Merwe v. Duraline (Proprietary) Ltd.* [2013] Z.A.W.C.H.C. 213, paras. 16–30, especially para. 20.

107 *See* Delport et al. 2019, at 124 *read with* APPI-1-I and APPI-5, referring to *Sackstein NO v. Proudfoot S.A. (Pty) Ltd.*, 2003 (4) S.A. 348 (SCA), para. 15.

108 *Id.* at APPI-5 (bolding and italics in the original).

fact that section 23 of the 2008 Act "does not afford (South African) legal personality as the position was under s 323 of the 1973 Act."[109] It is noted that this question will have to be settled by a judgment and that, depending on the interpretational approach followed, the decision could go either way. Should a court decide that external companies are not eligible for liquidation in terms of the 2008 Act read with Chapter 14 of the 1973 Act, these companies may in principle still be eligible for sequestration in terms of the Insolvency Act[110] because they may be treated as "debtors as provided for in section 2 of the Insolvency Act" but the sequestration may then be directed to the foreign company and not the external branch as such.[111]

It is further submitted that external companies, when they do not have legal personality, should still be eligible for liquidation in South Africa. For practical purposes, they would then be wound up in South Africa even though still part of the foreign company, and the South African assets treated as a separate distinct estate. Where these external companies do not have legal personality, the situation can be compared with the sequestration of a partnership as provided for in section 13 of the Insolvency Act 1936, which deems the partnership to be a separate entity as if it were a body corporate, without clothing the partnership with legal personality for the purposes of sequestration. But this may be questionable in the absence of a specific statutory provision.

It must also be mentioned that the court in the *CMC(SA)* case did not raise this issue but postponed the liquidation counter-application indefinitely for other considerations. If Chapter 14 of the 1973 Act still applies to external companies, several matters must then be considered, namely:

- Will the term "external company" in section 337(1) of the 1973 Act be deemed to be an external company recognised by the 1973 Act or by the 2008 Act? It is submitted that a purposive interpretation regarding Item 9(1) of Schedule 5 to the 2008 Act would mean that the definition of the 2008 Act should be followed.
- It is clear from the exclusions in Item 9(2) of Schedule 5 to the 2008 Act that the grounds provided for liquidation in section 344 of the 1973 Act will generally not be available to the external company if it is solvent. So, to rely on any of these grounds, the inability of the company to pay its debts will have to be established, and that inability will clearly remain a ground for liquidation as provided by section 344(g) read with section 345 of the 1973 Act.

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109 *Id.* at 124.

110 Insolvency Act 24 of 1936.

111 *Lawclaims (Pty) Ltd. v. Rea Shipping Co. S.A.*, 1979 (4) S.A. 745 (N), at 755A–B; Eberhard Bertelsmann et al., *Mars: The Law of Insolvency in South Africa* (10th ed., Cape Town: Juta, 2019), para. 2.2.8 & footnote 174.

But, as mentioned before, a purposive interpretation is supported, and on such a basis an external company would at least be eligible for liquidation as envisaged in Item 9(1) of Schedule 5 to the 2008 Act read with section 337 of the 1973 Companies Act. It is, in fact, submitted that the external company should still be eligible for liquidation as provided for in the transitional measures of the 2008 Act. This procedure remains a prime example where the external company is treated as if it is a separate entity without in fact being one.

3.3.6. An Imaginative Purposive Interpretation of the 2008 Act: Sections 158, 5, and 7[112]

It must be remembered that, unlike the 1973 Companies Act, the 2008 Companies Act only applies to external companies in those instances where the Act clearly indicates this application. The court in the *CMC(SA)* case did acknowledge the purposes of the 2008 Act that must be considered when interpreting the Act, but in essence found that the Act was clear that external companies were not included for the purposes of business rescue.

It may well be asked whether a more imaginative argument and interpretation could not have been followed in the matter. For such a broader approach and to some extent one could also consider section 158 of the 2008 Act, which obliges a court to develop the common law and as necessary to improve the realisation and enjoyment of rights established by this Act. Amongst other things, the court is also obliged to promote the spirit, purpose, and objects of this Act, and where any provision in this Act or other document in terms of the Act, read in its context, can be reasonably construed to have more than one meaning, the meaning that best promotes the spirit and purpose of the Act and will best improve the realisation and enjoyment of rights should be promoted.

The interpretation of the 2008 Act is too extensive a subject to be squeezed into this article, and so only a few aspects will be raised here. Section 5(1) requires the Act to be interpreted and applied in a manner that gives effect to the purposes set out in section 7. One of those purposes, in section 7(k), is to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders. The 2008 Act introduced the notion of business rescue with a view to keeping companies that could be saved afloat rather than liquidating them; and the socio-economic benefits of the preservation of jobs are clear.[113] In the *CMC(SA)* judgment, the court refers to, amongst other

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[112] *Cf. supra* the text on the "felt necessities" of our time accompanying footnote 62.

[113] *Cf. CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 4, where it is stated that the external company had concluded lucrative contracts for the reconstruction of the port of Durban and work on the toll roads, which it may be assumed would have contributed to the South African economy and created a significant number of job opportunities for South Africans. It is submitted that CMC(SA)'s contracts may also therefore be regarded as giving tangible form to the purpose of section 7(d) of the Companies Act 71 of 2008 "to reaffirm the concept of the

authorities, Cassim's observation that Parliament, in regulating external companies in the 2008 Act, intended to do away with burdensome procedures and red tape.[114] This observation can be supported because it is aligned with the stated objectives of the 2008 Act. But the court's view is, with respect, questionable whether it is indeed burdensome to make the business rescue procedure (or at least the compromise with creditors) in Chapter 6 as such available to external companies and whether the provision of these remedies would deter these companies from entering the South African economy. On the contrary: these companies would thus be provided with the opportunity of dealing with their local debts in South Africa while it would still be possible for them to manage at least some instances of financial distress.[115] This more welcoming approach to foreign companies would also benefit South African creditors in providing a local platform to deal with the debt instead of approaching a foreign jurisdiction, for instance. Far from burdening these foreign companies, these remedies might in appropriate circumstances even lighten their burdens and help them to emerge stronger than before. But it is conceded that a purposive interpretation regarding business rescue as such is probably a stretch too far in view of the rather clear language relating to the type of companies to which Chapter 6 of the 2008 Act applies. The purposive approach may nevertheless be useful in considering and establishing a policy regarding the treatment of financial distress of external companies.

Another aspect to be considered as part of this discussion is the position of employees. The meaning of "company" could perhaps be expanded for the purposes of procedures such as business rescue, compromise and liquidation if one could further adopt an imaginative and broad purposive interpretation that could, for instance, be based on the approach to statutory interpretation that was followed by the Johannesburg Labour Court in the recent case of *National Union of Metalworkers*

company as a means of achieving economic and social benefits." *Cf. also* the text *supra* on the "felt necessities" of our time accompanying footnote 62.

114 *See supra* the text accompanying footnotes 91–93. It should also be noted that Forsyth 2012, at 274, having summarised the duties imposed on external companies under the Companies Act 71 of 2008 and the fact that the provisions governing voluntary winding up and deregistration of solvent companies do not apply to external companies and so they cannot be voluntarily wound up and deregistered under that Act, goes on to state: "This potential freeing of external companies from the ordinary consequences of doing business in the Republic is not as far-reaching as at first appears." Having then discussed the transitional arrangements, Forsyth concludes (*Id.* at 275): "The upshot is that as far as insolvent companies are concerned the old Act [i.e. the Companies Act 61 of 1973] will continue to apply until alternative arrangements are made, and that the old law applicable to the treatment of insolvent external companies will continue to apply to them."

115 *Cf.* the affidavit supporting the CMC(SA) board resolution commencing business rescue (*CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others*, para. 5): "Based on the above, the board of directors and I are of the opinion that there is a reasonable prospect of rescuing the company with business rescue proceedings. Business rescue proceedings will, it is hoped, allow the company to reorganise its affairs so that the Company can complete its projects and remain viable."

of South Africa v. South African Airways (SOC) Ltd. ("*Numsa*"),[116] applying the approach laid down by the Constitutional Court in *Cool Ideas 1186 CC v. Hubbard*:[117]

> A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.[118] There are three important interrelated riders to this general principle, namely:
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> (*a*) that statutory provisions should always be interpreted purposively;
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> (*b*) the relevant statutory provision must be properly contextualised; and
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> (*c*) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (*a*).

The *Numsa* court then held that it was obliged[119] to interpret section 136 of the 2008 Act[120] to promote the spirit, purport, and objects of the Bill of Rights in the Constitution of the Republic of South Africa, 1996 ("the Constitution") because section 136 of the 2008 Act implicated a right in the Bill of Rights, namely, the right to fair labour practices as prescribed in section 23(1) of the Constitution.[121] In turn, that right included the right to security of employment, itself a

> "core value" of the [Labour Relations Act],[122] the statute that primarily gives effect to section 23 of the Constitution (see *National Education Health & Allied*

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116 *National Union of Metalworkers of South Africa v. South African Airways (SOC) Ltd.*, 2020 (7) B.C.L.R. 888 (LC), paras. 26–28. It must be noted that this judgment was upheld on appeal but the Labour Appeal Court mentioned that the wording of section 136(1)(a) of the Companies Act 71 of 2008 was in fact clear and unambiguous – *see South African Airways (SOC) Ltd. (In Business Rescue) and Others v. National Union of Metalworkers of South Africa obo Members and Others* (JA32/2020) [2020] Z.A.L.A.C. 34 (9 July 2020), paras. 27, 31 & 40.

117 *Cool Ideas 1186 CC v. Hubbard*, 2014 (4) S.A. 474 (CC), para. 28.

118 For this principle the Constitutional Court (*Id.* para. 28, footnote 18) cited *SATAWU v. Garvas*, 2013 (1) S.A. 83 (CC), para. 37; *S v. Zuma*, 1995 (2) S.A. 642 (CC), paras. 13–14; and *Dadoo Ltd. v. Krugersdorp Municipal Council*, 1920 A.D. 530, at 543. This principle is relied on *infra* in the text accompanying footnote 136.

119 *National Union of Metalworkers of South Africa v. South African Airways (SOC) Ltd.*, para. 27, explaining that this obligation created by section 39(2) of the Constitution of the Republic of South Africa, 1996 is "a mandatory constitutional canon of statutory interpretation" (*Fraser v. ABSA Bank Ltd.*, 2007 (3) S.A. 484 (CC), para. 43) so that "courts must at all times bear in mind the provisions of section 39(2) when interpreting legislation" (*Makate v. Vodacom (Pty) Ltd.*, 2016 (4) S.A. 121 (CC), para. 88).

120 Section 136 of the Companies Act 71 of 2008 deals with the effect of business rescue on employees and contracts (*see* its heading).

121 *National Union of Metalworkers of South Africa v. South African Airways (SOC) Ltd.*, paras. 27–28.

122 Labour Relations Act 66 of 1995.

> *Workers Union (NEHAWU) v. University of Cape Town* […][123]). Section 39(2) of the Constitution is thus of necessity implicated, and section 136 (1) of the Companies Act must thus be read purposively in the light of the provisions of the Constitution. In short, if there is an interpretation of section 136(1) that better promotes the preservation of work security, that interpretation ought to be preferred.[124]

A rather different approach was taken when the case reached the Labour Appeal Court.[125] That court upheld the decision of the Labour Court that the business rescue practitioners' issuing of the notice under section 189 of the Labour Relations Act, without a business rescue plan, was "premature, unfair and had to be withdrawn."[126] In reaching this conclusion, the Labour Appeal Court held[127] that, in accordance with the subsidiarity principle,[128] the employees could not rely directly on section 23 of the Constitution regarding the right to fair labour practices or section 9 regarding the right to equality[129] but must first rely on the Labour Relations Act, passed in order to give effect to the right to fair labour practices, and challenge that statute if it did not adequately give effect to that constitutional right, which covered the interests of employers and employees.[130] The court went on to hold:

> There can be no question that s 23 recognises the rights of employers but simultaneously protects a range of rights of employees that are central to the democratic model promoted by the Constitution read as a whole.[131]

It is therefore submitted that, on the basis of the constitutionally supported reasoning applied above to one section of Chapter 6 of the 2008 Act, it is possible to argue that all the provisions of Chapter 6 of the 2008 Act on business rescue and compromise with creditors should similarly be interpreted in a way that better promotes the employees' right to fair labour practices, including the preservation of work security, when those employees are employed by external companies.

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123 *National Education Health & Allied Workers Union (NEHAWU) v. University of Cape Town*, 2003 (3) S.A. 1 (CC), para. 42.

124 *National Union of Metalworkers of South Africa v. South African Airways (SOC) Ltd.*, para. 28.

125 *National Union of Metalworkers of South Africa (NUMSA) v. South African Airways SOC Ltd.*, [2017] 9 B.L.L.R. 867 (LAC) ("*SAA*").

126 *Id.* para. 40.

127 *Id.* para. 38.

128 *Baron v. Claytile (Pty) Ltd.*, 2017 (5) S.A. 329 (CC), para. 10.

129 *Safcor Freight (Pty) Ltd. v. S.A. Freight & Dock Workers Union*, (2013) 34 I.L.J. 335 (LAC), para. 18.

130 *Amcu v. Royal Bafokeng Platinum Ltd.*, 2020 (3) S.A. 1 (CC), at 17, para. 50.

131 *National Union of Metalworkers of South Africa (NUMSA) v. South African Airways SOC Ltd.*, para. 39.

The rights of employees form an important feature of the business rescue process[132] and the compromise with creditors.[133] The scope for the application of these rights and obligations is intentionally excluded by the definition of "company" in the Act when those employees work for an external company. Nevertheless, the extension of the rescue provisions in Chapter 6 to external companies through including those companies in the definition of "company" may perhaps also by a stretch of the imagination find support by reliance on the Constitution[134] and other statutes when it is remembered that, if there is an inconsistency between any provision of the 2008 Act and a provision of any other national legislation, the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second, any applicable provisions of, among other named statutes, the Labour Relations Act prevail in the case of an inconsistency involving any of them, except to the extent provided otherwise in

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[132] André Boraine and Roger Evans explain: "In line with developments elsewhere, the new Companies Act of 2008 … introduced a new business rescue procedure with the rights of employees being paramount. In fact this Act provides that a rescue application may be brought to court even where a company is already subject to liquidation. It is clear that job preservation and the protection of employees are extremely important to the extent that rights of employees to receive their wages when the business is subject to such a rescue procedure, even trumps the rights of secured creditors in certain instances. These developments are indicative of the importance of what could be deemed to be fair labour practices as well as socio-economic rights. … The introduction and implementation of a new business rescue dispensation as proposed by the Companies Act of 2008 is … clearly rooted in fair labour practices and the rights of employees in general." André Boraine & Roger Evans, *The Law of Insolvency and the Bill of Rights* in *The Bill of Rights Compendium* (electronic version, Durban: LexisNexis, 2014), para. 4A8(d) (Sep. 7, 2020), available at https://www.mylexisnexis.co.za/Index.aspx. *Cf.* the summary: "Various sections of the Act also expressly recognise rights of employees as stakeholders, also through trade unions." Delport et al. 2019, at 54–54(1). *See also National Union of Metalworkers of South Africa (NUMSA) v. South African Airways SOC Ltd.*, para. 29: "The primary aim of a corporate rescue procedure is not merely to rescue a company business or potentially successful parts of the business. The procedure aims to rescue the whole company or corporate entity. This will naturally include preservation of jobs. Indeed one of the main drivers for the introduction of the business rescue regime in place of the system of judicial management was the rescue of an ailing business and thus the retention of jobs." The Labour Appeal Court then quoted commentary that "[t]he preservation of jobs is widely regarded as one of the many economic and social benefits that could result from the successful rescue of a company or business … the saving of jobs is a high priority for South Africa and the introduction of an effective and successful business rescue procedure was seen by government as an important measure to prevent further job losses"; and that employees enjoy a pre-eminent position in relation to other stakeholders of the company such as the creditors or shareholders. *See* Anneli Loubser & Tronel Joubert, *The Role of Trade Unions and Employees in South Africa's Business Rescue Proceedings*, 36(1) Industrial Law Journal 21, 21–22 (2015). *Consider also* the reference to the "felt necessities" of our time (*supra* note 62).

[133] *See* sec. 155 of the Companies Act 71 of 2008. Thus the assumptions and conditions of the required proposal must include the effect, if any, that the plan contemplates on the number of employees, and their terms and conditions of employment (sec. 155(3)(c)(ii)).

[134] The supreme law of South Africa (*see* sec. 2 of the Constitution of the Republic of South Africa, 1996).

sections 30(8) or 49(4).[135] So it could be argued that, by excluding external companies from the companies authorised to use the rescue provisions in Chapter 6 of the 2008 Act, the restricted definition of "company" in section 1 of the Act therefore also excludes the employees of those companies from enjoying their right to fair labour practices, including the preservation of work security – a right advanced by the Constitution and the Labour Relations Act – in relation to business rescue and compromise with creditors under Chapter 6, and that, in this respect, the definition of "company" in section 1 of the 2008 Act ought to be interpreted so as to make it possible for the external company's employees to enjoy those rights in the context of their relationships with the external company in a business rescue or a compromise with creditors. If too far-fetched to be adopted by a court of law, this argument could at least also be raised in considering the development of a firm policy regarding the treatment of external companies in relation to these statutory procedures.

3.3.7. A More Traditional Reply to the Purposive Interpretation of the Definition of "Company" in Section 1 of the 2008 Act

Against this overbroad and imaginative purposive interpretation of the definition of "company" in section 1 of the 2008 Act for the purposes of business rescue and compromise, it could be argued that the definition is clearly expressed and so the exclusion of external companies from Chapter 6 is also clear. This is, in essence, the approach of the court in the *CMC(SA)* matter. If the words of the definition are given their ordinary grammatical meaning, an exclusion but not an absurdity is the result.[136] The exclusion cannot be reasonably construed to have more than one meaning. Employees of external companies cannot enjoy their constitutional right to fair labour practices in terms of Chapter 6 because Chapter 6 simply does not apply to their employers. The *Numsa* case is distinguishable on its facts because the parties to it were all South African, whereas CMC(SA) in *CMC(SA)* was not. Clear statutory provisions cannot be rendered unclear by a purposive interpretation based on disapproval of the restrictions and exclusions in those clear provisions. Only Parliament, not the courts, can alter clearly expressed provisions such as the definition of "company" in section 1. By interpreting the unambiguously excluding definition of "company" in section 1 so as to include external companies and thus create the possibility for them to rely on the business rescue and compromise provisions of Chapter 6, the courts, even the Constitutional Court, would be making legislation[137] and thus infringing the principle of the separation of powers.

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[135] *See* sec. 5(4) of the Companies Act 71 of 2008, especially sec. 5(4)(b)(i)(bb) regarding the Labour Relations Act 66 of 1995.

[136] *Cf. supra* the main principle stated in *Cool Ideas 1186 CC v. Hubbard*, para. 28, footnote 18, in the text accompanying footnote 118.

[137] *Cf.* Delport et al. 2019, at 53, discussing *Smyth v. Investec Bank Ltd.*, 2018 (1) S.A. 494 (SCA), para. 28, "where the statement is made (with reference to *Standard Bank Investment Corporation v. Competition*

3.3.8. The Policy Considerations for a Constitutional Evaluation or Parliament

Such a response would nicely raise the question of whether a constitutional evaluation by, for instance, the Constitutional Court, exercising its considerable authority and powers in terms of the Constitution, could strike down the exclusion of external companies in the definition of "company" in section 1 of the 2008 Act for the purposes of business rescue and compromise, or to apply reading in for the purposes of Chapter 6 and liquidation. Failing that, and probably the better route to go, is to make a case for the necessary alteration to the definition by Parliament for the stated purposes. The current mindset is that foreign companies registered as external companies in South Africa and conducting business here can only do so for very limited purposes. So it is a policy consideration whether the formal debt-relief measures such as business rescue or the section 155 compromise with creditors should also be available to those external companies. The same question may arise should a court find that the liquidation provisions are also no longer available to external companies.

In instances where the external company experiences a setback and suffers financial distress, the same considerations to help it to return to profitability as for a South African company should apply. It may also be more convenient for local creditors to deal with the matter locally, rather than approaching a foreign court or authority. As it stands, without the possibility of entering into business rescue or a compromise with creditors in South Africa, the external company will have to resort to voluntary creditor workout procedures.[138] And if the company is neither registered in South Africa nor subject to local liquidation law, the recourse open to South African

Commission … 2000 (2) SA 797 (SCA) referring to the judgment of Innes CJ in *Dadoo Ltd & Others v. Krugersdorp Municipal Council* [1920 AD 530 at 543] … that it would be wrong for courts to ignore the clear language of a statute under the guise of adopting a purposive interpretation as doing so would be straying into the domain of the legislature: *see Natal Joint Municipal Pension Fund v. Endumeni Municipality* [2012 (4) SA 593 (SCA)] para. 18 but *see Panamo Properties* (*Pty*) *Ltd and Another v. Nel NO and Others* … 2015 (5) SA 63 (SCA) para. 31." The statement is echoed in *National Union of Metalworkers of South Africa (NUMSA) v. South African Airways SOC Ltd.*, para. 27. The Labour Appeal Court later added that "the language adopted by the legislature remains the starting point for any interpretative inquiry. Where the words employed admit of more than one plausible interpretation, the purpose of the legislation must be employed as a tiebreaker" (*Id.* para. 28). After considering sections 5(1), 7(k) and 128(1)(b) of the Companies Act 71 of 2008 and academic commentary as well as the Constitution of the Republic of South Africa, 1996 and the Labour Relations Act 66 of 1995, the Labour Appeal Court concluded that section 136(1) of the Companies Act 71 of 2008 should be construed so as to permit the retrenchment of employees only in terms of the company's business rescue plan, which in compliance with section 150(2) must specify, amongst other things, its effect on those employees (*see Id.* paras. 28–40).

138 In this instance, the workout principles of INSOL may be helpful: *see* INSOL International, *Statement of Principles for a Global Approach to Multi-Creditor Workouts II* (2nd ed., London: INSOL International, 2017) (Sep. 7, 2020), available at https://www.insol.org/_files/Publications/StatementOfPrinciples/Statement%20of%20Principles%20II%2018%20April%202017%20BML.pdf. Informal creditor workouts and their contribution to business rescue are discussed in Eric Levenstein, *South African Business Rescue Procedure* (electronic version, Durban: LexisNexis, 2017), para. 3.3 (Sep. 7, 2020), available at https://www.mylexisnexis.co.za/Index.aspx.

creditors locally is also limited, as in the circumstances of a case such as *Lawclaims (Pty) Ltd. v. Rea Shipping Co. S.A.*,[139] and they may then wish to consider pursuing the enforcement of debt by way of ordinary enforcement procedures or else even an application for the sequestration of the debtor's estate in terms of the Insolvency Act if the requirements for compulsory sequestration can be met. Alternatively, those creditors will have to pursue the more extensive and expensive route of debt enforcement in a foreign jurisdiction where the COMI of the foreign company is situated. It may be doubted whether such voluntary procedures, individual debt-enforcement initiatives by creditors, or applications for compulsory sequestration offer the extensive benefits that could be achieved for the external company, its local creditors, its stakeholders, and the nation by means of making the business rescue procedure, or at least the local compromise with creditors as provided for in section 155 of the 2008 Act, available.

4. Corporate Governance Structures of External Companies

As pointed out above,[140] the external company registered in South Africa remains part and parcel of the foreign company but for liquidation purposes is deemed to be a separate entity with a view to being eligible to be liquidated in South Africa as provided for in current legislation. (It is submitted that the same way of thinking applied in terms of the former section 311 procedure in terms of the 1973 Act that also applied to external companies.[141])

In this article the point is raised that the availability of statutory debt-relief measures such as business rescue and/or the section 155 compromise in terms of the 2008 Act could be considered for external companies but that in order to make such procedures available, and even in the case of the liquidation of such a company, certain governance structures need to be considered as well.

The directors of the external company are, in fact, the directors appointed and (mainly) based at the COMI of the foreign company. And although the external company will receive its instructions from the head office, it will need a local managerial structure as well. Although there may be variations, there will most probably be at least a local manager, being the corporate operating officer, and several other officers such as a finance officer. Some of them may even be directors of the foreign company too, but the (main) board of directors will not be seated in South Africa.

It is important to note that in the case of the liquidation of the external company in terms of South African company law, the directors will no longer be able to act on behalf of the company and that they are in fact replaced by the liquidator because

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139 *Lawclaims (Pty) Ltd. v. Rea Shipping Co. S.A.*, *supra* note 111.

140 *See supra* notes 9 and 13.

141 *See supra* note 87.

the control over the company and its assets will ultimately vest in the liquidator.[142] It should be clear that this principle will not apply to the directors situated outside South Africa but that the liquidator should nevertheless assume control of the external branch in so far as it relates to its South African affairs.

As discussed,[143] Chapter 14 of the 1973 Act will apply to external companies to the extent provided for by Item 9(1) of Schedule 5 to the 2008 Act. This chapter includes provisions in sections 424 and 425 relating to the personal and criminal liability of directors and other officers of companies for the fraudulent conduct of business. Although such situations may arise, it will be difficult to apply these provisions against directors and other officers on an extra-territorial basis by means of South African court orders. But local officers of such an external company will be subject to these provisions.[144]

In the case of a business rescue, it is important to note that the directors remain in their positions but that the appointed business rescue practitioner will take control of the company.[145] Currently this is not possible, but should the legislature consider making the business rescue procedure available to external companies, the relationship between the business rescue practitioner and the directors of the company should also be adjusted to avoid absurdities.

5. South African Insolvency Law Reform

As was mentioned above,[146] the transitional measure in Item 9(1) of Schedule 5 to the 2008 Act activates the use of Chapter 14 of the otherwise repealed 1973 Act for, amongst other things, the liquidation of insolvent companies because the 2008 Act does not deal with liquidations exhaustively in view of the envisaged new insolvency legislation. The background to this new insolvency legislation is that the review of South African insolvency law has been going on for some years.[147] During 1987 the then South African Law Commission commenced an investigation of the law of insolvency in its entirety, and a Project Committee was appointed to conduct and direct the review as Project 63. A series of working papers for discussion dealing with

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142 *See* sec. 361 of the Companies Act 61 of 1973.

143 *See supra* note 98.

144 Section 22 of the Companies Act 71 of 2008 also contains a provision on reckless trading but it refers to a "company." So, if the judgment in *CMC di Ravenna SC and Others v. Companies and Intellectual Property Commission and Others* is applied, it seems that section 22 of the Companies Act 71 of 2008 will not apply to external companies.

145 Sec. 140(1)(a) of the Companies Act 71 of 2008.

146 *See supra* the text accompanying footnote 98.

147 Prior to 1987, some *ad hoc* working documents were published, such as the South African Law Commission, Preferences on Insolvency, Working Paper 1, Project 37 (1982) and its subsequent Report on the Review of Preferent Claims in Insolvency, Project 37 Interim Report (1984).

selected topics, followed by reports, culminated in the Draft Insolvency Bill of 1996.[148] This first draft was replaced by an Explanatory Memorandum and a Draft Bill that were published by the South African Law Reform Commission during 2000. Paragraph 5 of the Explanatory Memorandum expressed support for the development of uniform insolvency legislation to deal with both corporate and individual insolvency but did not provide for corporate insolvency as such. Although the concept of a unified insolvency statute enjoyed the support of the South African Law Reform Commission and was accepted by the Cabinet in March 2003, this initiative has stalled for some time. However, probably because of the new interventions by the Companies Act 2008, further work was done and a working document containing a draft bill titled the Draft Insolvency and Business Recovery Bill dated 30 June 2010 compiled by the Department of Justice followed. An updated version of the working document was completed in 2015. It is, however, unclear when this initiative will be taken forward by the government.

Although the proposed bill contained in the 2015 working document is in the format of uniform insolvency legislation which provides for insolvency procedures relating to various types of debtors, including companies, it has no explicit provision dealing with external companies. It is submitted that this aspect and the problems relating to external companies in this respect in view of the current legal position should be considered before a draft bill is published for commentary. It must, however, be grasped that in order to consider all the relevant aspects concerning external companies, namely, liquidation of solvent and insolvent external companies, and statutory measures to deal with the debt, both the insolvency law as well as company law need to be considered because the statutory position seems to continue with a dual approach in that business rescue and compromises with creditors, for instance, have been inserted into the 2008 Companies Act rather than ideally forming part of all the insolvency-related procedures that should be covered by new uniform insolvency legislation.

The treatment of the debt of the external company, and the fact that the company remains one and the same company as the foreign company, should also be considered with a view to developing a clear policy in this regard to inform and direct the law reform process for the treatment of external companies in this regard.

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148 The 1996 Draft Insolvency Bill and Explanatory Memorandum were published for comment by the South African Law Commission as the Review of the Law of Insolvency: Draft Insolvency Bill and Explanatory Memorandum, Working Paper 66, Project 63 (1996). On these documents, *see* André Boraine & Kathleen van der Linde, *The Draft Insolvency Bill – An Exploration (Part 1)*, 4 Journal of South African Law 621 (1998) and *The Draft Insolvency Bill – An Exploration (Part 2)*, 1 Journal of South African Law 38 (1998).

Conclusion

This article has discussed the formal debt-relief and liquidation measures available in South African law to assist foreign companies doing business in South Africa during periods of financial distress, in particular in relation to their locally established branches, registered as external companies in South Africa.

Formerly, the 1973 Companies Act provided for judicial management as its primary method of corporate rescue. Although it can be argued that this rather inadequate process was perhaps available to external companies, the position is not clear and in the absence of reported cases on the point a case could be made that it was not. What is clear, though, is that the section 311 scheme of arrangement and compromise procedure was available to such companies.

It is also clear that South African law now offers more limited debt-relief measures to foreign companies registered in South Africa as external companies than it used to in terms of the 1973 Companies Act. The *CMC(SA)* judgment convincingly concluded that these companies are not entitled to the business rescue procedure in the 2008 Companies Act as the Act stands currently, and by similar reasoning one may conclude they are also denied the statutory compromise with creditors contained in section 155 of this Act. Nor is it certain to what extent and to which types of external companies the liquidation procedures of South African law are available, though it does seem that those procedures provided for solvent companies in the 2008 Act are not available to external companies for the same reasons accepted by the *CMC(SA)* court. Only the procedure for the winding up of a company by the 1973 Act may possibly still be available for liquidation purposes, as far as the 2008 Act allows; and it seems that this procedure is still used in practice.

Clearly, and following the reasoning of the court in the *CMC(SA)* judgment relating to the meaning of "company" in the 2008 Act, the liquidation procedures for solvent companies in the 2008 Act are closed to external companies. So the process of liquidating solvent external companies may still have to be based on Chapter 14 of the 1973 Act, assuming that these companies may still invoke it. But they may face another interpretational problem because Item 9(1) of Schedule 5 to the 2008 Act activates the use of Chapter 14 of the otherwise repealed 1973 Act for, amongst other things, the liquidation of insolvent companies but the transitional arrangements refer to companies in terms of the 2008 Act. A purposive interpretation is therefore proposed so as to include all external companies recognised by the 2008 Act; but should this approach fail to convince a court, this aspect will also need legislative attention.

Lacking formal debt-relief measures, external companies can possibly conclude a voluntary but informal settlement with their creditors following a creditors' workout. To finalise their business operations when unable to pay their debts, it seems that they can still file for liquidation in terms of South African law because they can be wound up even though still part of their foreign parent companies. Obviously, should

they not be registered in South Africa and not be subject to the South African law of liquidation as such, recourse against them is more limited, as in the rather rare *Lawclaims* instance, when their local creditors may most probably collect their debts by relying on ordinary debt-enforcement procedures or by proving the requirements of an application for compulsory sequestration under the Insolvency Act – assuming that all requirements set by South African law can be met.

Whilst acknowledging that local creditors will in principle also be entitled to make use of cross-border insolvency in case of foreign insolvency procedures or debt-enforcement measures, it is clear that these procedures will make the process much more cumbersome and costly if local creditors always have to follow up on their claims in a foreign jurisdiction, which will be the logical alternative route should local procedures be found to be inadequate or lacking. The position to allow local debt enforcement and possibly still the liquidation of an external company serves as proof that there may be good reason to enable such a company to deal with its local debt in South Africa. It must be noted, though, that local court orders, in so far as they are not met or cannot be enforced locally, need to be recognised and enforced in the jurisdiction of the foreign company. This comes with an element of risk and cost for the South African creditors because their fate regarding recognition and enforcement will be determined by the law of the foreign jurisdiction. It is also clear that the recognition of an ordinary judgment order will not be treated in the same way as a local liquidation order in that the liquidation order relating to the external company will not be deemed to apply to the foreign company as such.

It is said that the legislature adopted a new approach towards external companies in the 2008 Act in that they are only entitled to rely on provisions in the Act that specifically apply to them. It may also be argued that they are in fact treated as foreign companies with no special rules applicable to the local branches registered as external companies in terms of South African law. But it must be noted that they can be treated as separate entities for specific purposes such as ordinary debt enforcement, liquidation or, under the 1973 Act, the former section 311 scheme of arrangement and compromise. It is submitted that even liquidation is still available to an external company unable to pay its debt in spite of a paradigm shift in their treatment from the former 1973 Act to the current 2008 Act.

In closing, the question may be raised, as a policy decision possibly for the legislature, why business rescue or at least the section 155 compromise should not be available as formal debt-relief measures to external companies under given circumstances when several reasons suggest that they should be. These companies, especially if registered here, will act and operate as though they are local incorporated companies, become liable to pay local taxes, employ locals, benefit locals, and take part in and strengthen the local economy.

Should the 2008 Act be amended by clearly providing that "company" for the purposes of Chapter 6 includes these external companies for specific purposes such as local liquidation procedures and rescue, or at least the section 155 compromise

procedure, they would be given the tools to deal with their debt problems in ways that would benefit them, their creditors (who would be saved the time and expense of collecting from the foreign parents), their local stakeholders and communities, and ultimately the entire nation. Foreign investment[149] remains a desirable goal for all South Africans, now more than ever, and the convenient availability of these formal methods of debt relief to external companies suffering financial stress has its own part to play in the achievement of this urgent goal.

Finally, the legislature should attend to these issues and in doing so consider related issues concerning the governance of external companies as well in so far as the application of, for instance, local liquidation and debt-relief measures may lead to an absurd consequence. The aspects raised could be considered as part of the ongoing reform relating to new insolvency legislation referred to in Item 9(1) of Schedule 5 to the 2008 Companies Act and which has been under construction since 1987. Although this article raises some imaginative arguments regarding a purposive interpretation of the application of statutorily prescribed business rescue and compromise procedures, a clear policy regarding the treatment of external companies in this regard is needed. There are some firm proposals on the table and even a commitment from the Cabinet to develop uniform legislation that provides for both corporate and individual insolvency, but the latest working documents do not deal with external companies in particular. The alternative approach could, of course, be to follow the single entity approach strictly and thus to compel local creditors and the external branch under almost all circumstances to follow up against and/or through the jurisdiction of the foreign company as such – although some special rules to deal with local debt by or against the external company will not necessarily exclude such relief. But it is submitted that practical considerations of cost, time and the risks to litigate or apply for the opening of a foreign insolvency proceeding in a foreign jurisdiction should be considered when developing a policy in this regard. Nevertheless, the issues raised in this article clearly need further investigation and could perhaps be addressed as part of the ongoing reform efforts of South African insolvency law. To this end this article could hopefully serve as a starting point to consider the position of financially ailing external companies in greater depth and to develop a clear policy to direct statutory reform in this regard.

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[149] For a recent report, *see* Export Entreprises SA, Foreign Investment in South Africa, Santander Trade (October 2020) (Sep. 7, 2020), available at https://santandertrade.com/en/portal/establish-overseas/south-africa/foreign-investment. And section 7(c) of the Companies Act 71 of 2008 reminds us that the Act should be interpreted to "promote innovation and investment in the South African markets."

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FEDERALISM IN RUSSIA: CURRENT STATE AND EMERGING TRENDS

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The article considers the phenomenon of federal relations in modern Russia from a theoretical and normative point of view. Studying related categories, such as federalism, federation and federal system, the author comes to the conclusion that it is federal relations, which by their nature are purely legal relations, are the core of any federal system. It is the analysis of the dynamics of development of these relations that shows the viability of a particular federal system. Using the concept of systems theory, the author reveals the structure of federal relations, which includes their subjects, objects and content. In turn, the content of federal relations can be revealed using the principles of both the horizontal and the vertical separation of powers. In this regard, not only normative regulation (the Constitution, federal and regional laws), but also judicial practice are of great importance: namely, decisions of the Constitutional Court of the Russian Federation, which handed down a significant number of decisions revealing the essence of federal relations in specific cases and resolving existing problems. The development of the federal system, and, consequently, the actual federal relations can be traced in examples of an institutional and regulatory nature. Vivid examples of this development are structural changes in the federal system associated with the formation of a new constituent entity of the federation and the adoption of a new constituent entity in the federation. Such examples have occurred in modern Russia, although in the case of the adoption of new entities in the current regulatory framework, certain problems are found that should be eliminated by making appropriate amendments to the law governing the procedure for such adoption. The COVID-19 pandemic, unfortunately, has affected virtually every nation in the world. The relationship between the federal center and the constituent entities of the federation in such an extraordinary situation has been affected too and has undergone certain changes. Their analysis cannot but lead to a correction of the normative regulation of federal relations in the event of similar situations in the future. Amendments to the Constitution of the Russian Federation have affected a large layer of public relations. Federal relations are no exception, since the "Federated Structure" section of the Constitution includes a number of rather interesting changes.

Keywords: federal system; content of federal relations; Constitutional Court; constitutional amendments.

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Introduction

In science, there are many definitions of the concept of system. Representatives of various sciences, including the social sciences, are involved in systems analysis. The broadest definition was given in due time by Ludwig von Bertalanffy, who defined the system as a complex of interacting elements:

> We will call everything consisting of parts connected with each other a system.[1]

[1] *Берталанфи Л. фон.* Общая теория систем – обзор проблем и результатов // Системные исследования. Ежегодник [Ludwig von Bertalanffy, *General System Theory – Overview of Problems and Results* in *System Research. Yearbook*] 30 (Moscow: Nauka, 1969).

All systems can be divided into certain types. In science, there are many classifications of systems. We give one of them, given by I. Rodionov. According to this classification, systems should be subdivided according to specific criteria. So, according to their interaction with the external environment, systems are divided into open, closed and combined systems. By structure – simple, complex and large. By the nature of functions – specialized and multifunctional (universal). By the nature of development, they are stable and developing. According to the degree of organization – well organized and poorly organized (diffuse). By complexity of behavior – automatic, decisive, self-organizing, anticipating and transforming. By the nature of the relationship between the elements – deterministic and stochastic. By the nature of the management structure, they are centralized and decentralized. By purpose – production, management and maintenance. By content – real (material) and abstract (conceptual, ideal). In this case, real systems are divided into natural (natural systems) and artificial (man-made). The latter are created by mankind for their needs or are formed as a result of deliberate efforts. They, in turn, are divided into technical (technical and economic) and social (public). Social systems include various systems of human society.[2]

The federal system, being one of the social systems, is a complex structure, which, in our opinion, includes not only "simple," but also "complex" elements, namely, other systems. These include, for example, the political, legal, party, judicial, territorial, electoral systems, the system of state bodies, etc. Thus, if we follow this classification, then the federal systems existing in the world should be attributed to the number of real (material), artificial (man-made), social (public) systems.

Federal relations as internal relations between elements of the system are also included in it. Otherwise it would not be a system, but a simple set of elements. The system implies a synergistic effect arising from the interaction of all its elements. By analyzing the ideal structure of federal relations, including their subjects, objects and content, one can trace how a particular federal system actually functions, what problems it is experiencing and what solutions can be made at different stages of its development. The content of federal relations is the activity of their entities in the implementation of the subjects of competence and authority of the federation, its entities, their bodies and officials, as well as in the implementation of other constitutional provisions laid down in Ch. 3 of the Constitution of the Russian Federation "Federated Structure." The actual content of the relations under consideration can be seen in the analysis of the practice of the activities of certain subjects of federal relations. The latter can be considered from the point of view of the universal principle of the separation of powers, moreover, not only in horizontal (legislative, executive and judicial branches of government), but also in vertical (federal, regional and in some cases municipal levels of public authority) sections.

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[2] *Родионов И.Б.* Теория систем и системный анализ [I.B. Rodionov, *Systems Theory and Systems Analysis*] (Sep. 16, 2020), available at http://victor-safronov.ru/systems-analysis/lectures/rodionov/01.html.

A study of a functioning federal system allows us to identify the pros and cons of both the system itself and the links that exist between its elements (federal relations proper) and between the system and the external environment. Systems analysis makes it possible to highlight the essential characteristics of the system and, in some cases, to develop recommendations for the correction of existing properties, improving its regulatory regulation. An even greater effect can be achieved if this kind of consideration is supplemented by a comparative study, i.e. a comparative analysis of federal systems, especially those of them that have a long history of functioning so that positive experiences can be transferred to Russian soil.[3] Of course, this kind of borrowing should be undertaken only after careful research.

Federal relations connect all the elements of the federal system, ensure its stable functioning, make it possible to level out the shortcomings and problems that arise during its development, and also to perceive something positive that has been gained not only within the framework of the national federation, but also within the framework of foreign analogues of federal systems.

1. Meaning and Essence of Federal Relations

In the science of constitutional law, different categories are used to describe a specific form of government: federalism, federation, federal system, federal regime, federal model, etc.

The existing constructions, of course, are intended to indicate specific phenomena of the real structure of the federal state in one form or another and/or volume. At one time, we proposed a generalizing category – the federal structure. A federal structure is a combination of the most important federal relations characterizing the essence and basic characteristics of the current federal system of a given state, as well as the principles and mechanisms of its functioning, reflecting the dynamics of the development of federal relations in a given federation.

Closest to this category are federalism and the federal system. In our opinion, federalism can be defined as a harmonious concept or, more broadly, a doctrine that determines the nature of the interaction of various levels of public authorities on the basis of mutually agreed rules for achieving the goals facing this society and using ways and methods that are characteristic of the level of civilizational order.[4]

How to correlate federalism and the federal system? If federalism is, in fact, a theoretical model of federation, then the federal system is the practical

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[3] *See, e.g.*, Panch Rishi dev Sharma, *Comparative Federalism with Reference to Constitutional Machinery Failure (Emergency) in India and Pakistan*, 4(2) BRICS Law Journal 71 (2017); Marianna Muravyeva, *The Quest for Constitutionalism in South Africa*, 3(1) BRICS Law Journal 138 (2016).

[4] This definition was formulated by us back in 1998. *See Саликов М.С.* Сравнительный федерализм США и России [Marat S. Salikov, *Comparative Federalism of the USA and Russia*] (Yekaterinburg: Humanities University, 1998).

implementation of this model with all the positive and negative aspects inherent in a given state at a given time. As is well known, each state has a constitution, a legal system, development plans, including federal relations. However, as practice shows, the design that is not always set out in the basic law works clearly and without flaws. Often there are some internal and/or external factors that do not allow to fully realize the potential that the constitutional legislator has laid down in the ideal model of federalism in a given state. The federal system allows us to understand the essence of the current situation with all the existing deviations, to trace the dynamics of the development of federal relations as a whole, or in a specific environment, and to predict the further development of the situation, as well as to formulate certain measures to stabilize the federal system, to make certain adjustments so that the existing ones' deviations could be eliminated as scheduled.

If we compare the federal structure with the federal system, then it should be noted that the category of the federal system,[5] derived on the basis of systems analysis, allows one to identify all the elements of the system that exist in its complex relationships and the nature of its relationship with the external environment. The federal structure, firstly, includes a federal system, that is, it is wider in volume, and, secondly, it contains, in addition to the system itself, principles and mechanisms of functioning, as well as relations that are not purely federal, but are aimed at ensuring the "efficiency" of the system. For example, if a number of constituent entities of the federation are "sagging" in economic terms, the federal center can provide the necessary financial support in appropriate forms (subventions, loans, grants, write-offs or installment payments ...), etc.

Of course, the main relations forming the federal system are federal relations, which include subjects, objects and content. In the legal literature, the term "federal relations" is often used.[6] However, the doctrine does not contain sufficiently complete theoretical studies regarding the clarification of the essence of these relations, their structure, system, etc.

An analysis of the phenomenon of federal relations inevitably leads to the conclusion that these are legal relations. To conclude otherwise would mean a denial

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[5] Many authors use the term "federal system," moreover, not only to describe national and foreign systems, but also when conducting comparative studies. *See, e.g.*, Daniel Halberstam, *Federalism: Theory, Policy, Law* in *The Oxford Handbook of Comparative Constitutional Law* 576 (M. Rosenfeld & A. Sajy (eds.), Oxford: Oxford University Press, 2012); Todd A. Frommeyer, *Power Sharing Treaties in Russia's Federal System*, 21(1) Loyola of Los Angeles International and Comparative Law Review 1 (1999); Joseph F. Zimmerman, *Contemporary American Federalism: The Growth of National Power* (Westport, CT: Praeger Publishers, 1992); Ronald L. Watts, *Comparing Federal Systems in the 1990s* (Kingston: Queen's University, 1997); Daniel R. Mandelker et al., *State and Local Government in a Federal System* (3rd ed., Charlottesville, VA: The Michie Company, 1990); Marat S. Salikov, *Russian Federation Sub-National Constitutional Law* (The Hague: Kluwer Law International, 2011).

[6] *Морозова А.С., Карасев А.Т.* Проблемы совершенствования федеративных отношений в России: закономерности и отклонения // Конституционное и муниципальное право. 2015. № 10. Vol. 27–31 [Alexandra S. Morozova & Anatoly T. Karasev, *Problems of Improvement of Federal Relations in Russia: Regularities and Deviations*, 10 Constitutional and Municipal Law 27 (2015)].

of the normative, and more often constitutionally, fixed nature of the federal state and those relations that are taking shape within the federal system. By analyzing the ideal structure of federal relations, including their subjects, objects and content, one can trace the means by which a certain federal system actually functions, the problems it is experiencing and the potential ways of solving them at different stages of its development.[7]

2. Subjects and Objects of Federal Relations

The subjects of federal relations are participants in relations existing and arising between the federation and its subjects regarding the resolution of issues and problems that fall within the scope of their jurisdiction in accordance with the normatively established rules of this federal state. The system of subjects of federal relations includes the federation itself as an association of constituent entities as well as the constituent entities of the federation itself. However, it should be borne in mind that these public entities must be embodied in some form. Such forms are their organs. First of all, we are talking about government bodies: the head of state (the President of the Russian Federation), the highest officials of the constituent entities of the Russian Federation, the Federal Assembly of the Russian Federation, legislative (representative) government bodies of the constituent entities of the Russian Federation, and federal and regional courts. In addition, the subjects of federal relations include state bodies, for example, the Central Election Commission of the Russian Federation, election commissions of the constituent entities of the Russian Federation, the Audit Chamber of the Russian Federation and the audit chambers of the constituent entities of the Russian Federation. It seems that in some cases, the subjects of federal relations can also be municipalities and their bodies and officials. Such cases may be situations where separate state powers are delegated to the level of municipalities. When they are implemented, "municipal" participants become subjects of federal relations.

Objects of federal relations are objects or phenomena of reality, about which the subjects of these relations enter into them. Such objects can be most clearly seen, in particular, in the Constitution, namely in the norms that determine the scope of joint competence of the federation and its subjects within the federal system. So, in accordance with Article 72 of the Basic Law of the Russian Federation, the objects of federal relations include the rights and freedoms of man and citizen; minority rights; land, mineral resources, water and other natural resources; general principles of taxation and fees in the Russian Federation; general principles for organizing

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[7] More about this, *see Саликов М.С.* Субъекты, объекты и содержание федеративных отношений // Конституционно-правовой статус субъекта Российской Федерации: современное состояние и перспективы [Marat S. Salikov, *Subjects, Objects and Content of Federal Relations* in *Constitutional and Legal Status of a Subject of the Russian Federation: Current Status and Prospects*] (Tyumen: Tyumen State University Publ., 2016).

a system of bodies of state power and local self-government; international and foreign economic relations of the constituent entities of the Russian Federation, etc.

The content of federal relations is the activity of their entities in the implementation of the subjects of competence and authority of the federation, its entities, their bodies and officials. Actually, these matters of competence and authority are contained in the Constitution of the Russian Federation, namely, in Articles 71–73, as well as in the legislation establishing the powers of the relevant government bodies and officials. The actual content of the relations under consideration can be seen in the analysis of the practice of the activities of certain subjects of federal relations. The latter can be considered from the point of view of the universal principle of the separation of powers, and not only in horizontal (legislative, executive and judicial branches of government), but also in vertical (federal, regional and, in some cases, municipal levels of public authorities) sections.[8] We give some examples illustrating the content of federal relations in various fields.

3. Content of Federal Relations Depending on Separation of Powers Doctrine

3.1. The Content of Federal Relations in the Fields of Legislative and Executive Power

The content of federal relations in the field of legislative power

The federal legislative process provides for the right of the constituent entities of the Federation to express their own opinion on draft laws passed on subjects of joint jurisdiction. The Constitutional Court of the Russian Federation draws attention to this in its ruling of 23 April 2004. It states, in particular, that:

> In the Russian Federation, as a state with a federal structure, its constituent entities are given the opportunity to present to the State Duma for discussion their position on the bill on the subject of joint jurisdiction [which] contributes to the effective implementation by the Federal Assembly of legislative activity in this area. Therefore, the establishment of a procedure providing for the submission by the State Duma of bills to the constituent entities of the Russian Federation, consideration of the proposals and comments made by them in the committees of the State Duma and the creation of conciliation commissions consisting of deputies of the State Duma and representatives of interested constituent entities of the Russian Federation, in cases where a significant number of constituent entities of the Russian Federation speaks

[8] *See, e.g.*, Maria A. Pechenskaya-Polishchuk, *Issues of Improving Inter-Budget Relations Between the Region and the Federal Centre*, 6(24) Economic and Social Changes: Facts, Trends, Forecast 156 (2012); Ruslan R. Sadyrtdinov, *Interregional Trade Relations: The Republic of Tatarstan and Volga Federal District Regions of Russian Federation*, 17(1) Journal of Economics and Economic Education Research 30 (2016).

> out against the bill as a whole or in a significant part of it; it is called upon to ensure the adoption of the federation "Act reflecting the interests of both the Russian Federation and its constituent entities."

However, the Court then notes that,

> At the same time, such procedures should not impede the implementation of the powers of the Federal Assembly to adopt federal laws independently of the articles of joint jurisdiction arising from Articles 71 (clause a), 94 and 105 of the Constitution of the Russian Federation.

Of course, the federal parliament has the right and should adopt laws that are valid throughout the state, but Russia, in the form of state structure, is a federal state. And if the parliament of such a state is not obliged to take into account the opinion of the constituent entities of the federation (namely, this is indicated by the Court: "The approval procedure is aimed at achieving a mutually acceptable solution by coordinating the interests of all its participants. However, this does not imply the unconditional obligation of the State Duma to satisfy the requirements stated by the constituent entities of the Russian Federation."), then it is no different from the parliament of a unitary state. It seems that the constituent entities of the Russian Federation should have the right not only to state their position on this or that bill in the State Duma, but in a number of cases (if an appropriate mechanism is established, including the establishment of a minimum number of "dissenting" entities) and block its adoption.

Another decision (of 29 November 2006) of the Constitutional Court of the Russian Federation mediates the federal legislative process. In it, the Court considered the Regulation of the Government of the Russian Federation, according to paragraph 100 of which the draft law, submitted to the Government without financial and economic justification and other necessary materials, should be returned by the Government Office to the subject of the right of legislative initiative with the reasons why it is impossible to submit a conclusion. In its decision, the Court indicated that this norm

> distorts the constitutional and legal nature of the conclusion of the Government of the Russian Federation on bills specified in part 3 of article 104 of the Constitution of the Russian Federation, since it essentially gives the character of a mandatory assessment of the financial and economic feasibility of a draft law, and the uncertainty of the concept of "financial and economic substantiation of the bill" may lead to inequality of subjects of the right of legislative initiative in the implementation of this right.

With regard to federal relations, this part of the resolution quite rightly notes that,

> In relation to the legislative (representative) bodies of the constituent entities of the Russian Federation, such inequality also means a violation of the equal rights of all constituent entities of the Russian Federation enshrined in article 5 (part 4) of the Constitution of the Russian Federation in their relationship with federal government bodies.

The content of federal relations in the field of executive power

The federal system assumes the existence of a well-functioning system for coordinating the activities of the executive authorities of the federation and its constituent entities. Here, it is vital to take into account the views of the constituent entities of the Federation when adopting acts of both the federal Government and federal executive bodies on subjects of joint jurisdiction, as well as on other issues relating to the interests of the constituent entities.

According to part 2 of Article 77 of the Constitution of the Russian Federation,

> Within the jurisdiction of the Russian Federation and the powers of the Russian Federation on the subjects of joint jurisdiction of the Russian Federation and the constituent entities of the Russian Federation, the federal executive bodies and executive bodies of the constituent entities of the Russian Federation form a single system of executive power in the Russian Federation.

The Federal Constitutional Law "On the Government of the Russian Federation" repeats this norm and details it. In accordance with Article 43 of the said law:

> The Government of the Russian Federation, within its powers, in order to ensure the combination of interests of the Russian Federation and the constituent entities of the Russian Federation in the joint jurisdiction of the Russian Federation and constituent entities of the Russian Federation in the field of executive power, coordinates the activities of the executive authorities of constituent entities of the Russian Federation.

Further in this article, a mechanism is established for the interaction of the Government of the Russian Federation and state authorities of the constituent entities of the Russian Federation, and it refers not only to executive bodies, but also to legislative bodies:

> The Government of the Russian Federation shall consider proposals submitted to the Government of the Russian Federation in the prescribed manner in no more than one month legislative (representative) or executive bodies of state power of the constituent entities of the Russian Federation on matters within the jurisdiction of the Russian Federation and the joint

> jurisdiction of the Russian Federation and the Russian Federation, and reports to these bodies on the outcome of the proposals. The Government of the Russian Federation sends to the legislative (representative) and executive bodies of state power the constituent entities of the Russian Federation drafts of its decisions on the subjects of joint jurisdiction of the Russian Federation and constituent entities of the Russian Federation. The proposals of the legislative (representative) and executive bodies of state power of the constituent entities of the Russian Federation on such projects are subject to mandatory consideration by the Government of the Russian Federation.

Unfortunately, this does not give guarantees of taking into account the proposals of the constituent entities of the Federation, but only establishes the mandatory review of the federal Government.

The Basic Law provides for the possibility of exercising powers in the executive branch by both federal and regional bodies, and, if necessary, mutually transfer the exercise of part of their powers from one level of public authority to another. So, in accordance with parts 2 and 3 of Article 78 of the Constitution of the Russian Federation:

> Federal executive bodies, by agreement with executive bodies of the constituent entities of the Russian Federation, may transfer to them the exercise of part of their powers, if this does not contradict the Constitution of the Russian Federation and federal laws; The executive bodies of the constituent entities of the Russian Federation, by agreement with the federal executive bodies, may transfer to them the exercise of part of their powers.

This is an example of the interaction of the federation and its constituent entities to increase the effectiveness of activities in areas of mutual interest and to solve the problems existing in them.

In this regard, the "Rostov case" (decision of the Constitutional Court of the Russian Federation of 2 July 2018) is of interest. In this case the Constitutional Court ruled that the disputed provisions of the Code of Administrative Offenses of the Russian Federation do not contradict the Constitution of the Russian Federation because by its normative content in the system of existing legal regulation it assumes that:

1. The conclusion of agreements on the transfer of the exercise of authority to draw up protocols on administrative offenses provided for by the laws of the constituent entities of the Russian Federation that infringe on public order and public safety is aimed at ensuring that the officials of the Department of Internal Affairs (police) ensure a balanced combination of interests of the federal and regional administrative bodies forming the unified system of executive power of the Russian Federation, meeting the tasks of effective administrative legal protection of the rights and freedoms of citizens;

2. The initiative to conclude such agreements should come from the executive bodies of the constituent entities of the Russian Federation, which cannot be forced to sign them on unacceptable organizational, legal, financial or other conditions, and the federal executive bodies are not entitled to arbitrarily refuse to conclude the executive bodies of the constituent entities of the Russian Federation in cases when the draft relevant agreements meet the requirements established by federal laws and the laws of the constituent entities of the Russian Federation adopted in accordance with them; and

3. The officials of the police department (police) are obliged, within the framework of the powers vested in them by the Code of Administrative Offenses of the Russian Federation and the Federal Law "On Police," to provide assistance in bringing to justice those who commit administrative offenses provided for by the laws of the Russian Federation that infringe on general order and common safety even in the absence of relevant agreements concluded between the executive bodies of the constituent entities of the Russian Federation and the Ministry of Internal Affairs of the Russian Federation.

3.2. The Content of Federal Relations in the Field of the Implementation of the Judiciary

Considering this area, we can talk about judicial federalism, which we understand as the totality of the legal positions of the judicial body that performs the functions of a "constitutional regulator" (e.g. the U.S. Supreme Court or the Constitutional Court of the Russian Federation) regarding federal relations (as opposed to the ideas presented in the doctrine on judicial federalism as a system of the judiciary in a federal state). Thus, analyzing the decisions of the Constitutional Court of the Russian Federation, one can see how and when the positions of the federal center are strengthened, and the positions of the constituent entities of the Federation, respectively, are weakened, and vice versa. As examples, some decisions of the Constitutional Court of the Russian Federation can be cited.

Examples of "pro-federal" decisions

• The decision on the "case for the appointment of governors" (decision of 21 December 2005), in which the Court recognized the constitutional provision abrogating direct elections of the highest officials of the Federation. In this decision, it seems to us that the Court should have more clearly substantiated the need for a diametrical change in its legal position, as formulated in another decision.

• The decision on the "case of the Baltic Republican Party" (decision of 1 February 2005), in which the Court recognized the constitutional provision establishing a ban on the existence of political parties of the Russian Federation. Here, the Court's argumentation is based on hypothetical assumptions, which, in its opinion, will necessarily take place if the impugned norms are recognized as constitutional. As the Court pointed out,

> The creation of regional political parties – insofar as they would seek to uphold primarily their purely regional and local interests – could violate the state integrity and unity of the system of state power as the basis of Russia's federal structure.

It seems to us that the federation is precisely that form of government that presupposes the possibility and even the need for the functioning of political parties within individual entities, since they could reflect the urgent needs of certain regions. Of course, the regional branches of federal political parties should also work in the constituent entities of the Federation and compete with all political forces (including the regional political component) in a fair and law-based struggle.

• In another decision, in the "case of the judicial system of the constituent entities of the Russian Federation" (decision of 6 March 2003), the Court denied the regions of the Federation the right to have their own judicial systems. In our opinion, for a federal state, if it really considers itself as such, the presence of a judicial system in the constituent entities is, in fact, mandatory. Other federations have courts of land (states, cantons ...), i.e. regional judicial systems. It is different with us. Unfortunately, the Constitutional Court, not sufficiently substantiating its findings, denies the right of the subject of the Russian Federation to have its own judicial system. It seems that the presence of a single judicial system and, accordingly, the absence of regional judicial systems denies the universality of the principle realized in Article 10 of the Constitution of the Russian Federation.

• Of particular interest are the relations of the judicial bodies of the federation and the constituent entities of the federation. Here, a vivid example is the decision on the "Chelyabinsk case" (decision of 2 December 2013), in which the Constitutional Court of the Russian Federation recognized the constitutional norm of the regional law as previously recognized by the Charter Court of the Chelyabinsk Region as inadequate to its Charter and, accordingly, has lost force. Later in March 2014, the Legislative Assembly of the Chelyabinsk region abolished the Charter Court of the region.

Examples of "pro-regional" solutions

• Decision in the case of interpretation of part 2 of Article 137 of the Constitution of the Russian Federation (decision of 28 November 1995). In this decision the Constitutional Court established that a change in the name of a constituent entity of the Russian Federation is the exclusive prerogative of the entity of the Russian Federation, and the introduction into Article 65 of the Constitution of the new name of the entity of the Russian Federation is the responsibility of the head of state, i.e. the President of the Russian Federation.

• In the decision on the "Tatarstan case" (decision of 13 March 1992), the Constitutional Court noted that the subject of the Russian Federation is entitled to determine the procedure for conducting a regional referendum.

• In the "case of municipal qualifications" (decision of 24 December 2012), the Constitutional Court of the Russian Federation established that the constituent

entities of the Russian Federation have the right to determine the model for the election of their highest officials (direct election, or empowerment by the regional parliament).

• The decision in the "case on guarantees of the activities of deputies of the regional parliament" (decision of 5 April 2013) recognized the constituent entities of the Russian Federation the right to establish a lump-sum payment to the deputies of the legislative (representative) state authority of the subject of the Russian Federation, carrying out parliamentary activities on a professional permanent basis, upon termination of their powers.

As can be seen, the constitutional-legal (including judicial-legal) regulation of federal relations is aimed at the situation when their subjects operate in an ordinary mode. However, extraordinary cases also occur, i.e. when the subjects of these relations go beyond the framework outlined by the legislator. First of all, we are talking about the constituent entities of the Russian Federation (although the federal center should be responsible in case of violations on its part). In such cases, the mechanism of federal intervention in the affairs of the constituent entities of the Russian Federation should be included. At present, individual measures of federal intervention are established by the Federal Law "On General Principles of Organization of Legislative (Representative) and Executive Bodies of State Power of the Constituent Entities of the Russian Federation." These measures include: the dissolution of the legislative (representative) state authority of the constituent entity of the Russian Federation, the removal from office of a senior official of the constituent entity of the Russian Federation, the introduction of a temporary financial administration in the constituent entity of the Russian Federation, the temporary assignment of certain powers of the state authority of the constituent entity of the Russian Federation to federal government bodies and/or to officials appointed by federal government bodies. It seems, however, that the regulation of such measures does not fully fit into the subject of this law, whose task is to establish general principles for the organization of regional legislative and executive bodies of state power. In our opinion, the adoption of a separate federal law "On Federal Intervention in the Affairs of the constituent entities of the Russian Federation" is necessary, and the Constitution should be supplemented in the form of an article devoted to this institution and referring to the law that would establish the regime of such interference, its measures and procedure for their implementation.

An example of the implementation of federal intervention measures is the "Chechen conflict" (although at that time there was no regulation of this kind of relationship). The Constitutional Court of the Russian Federation in the decision on the "Chechen case" (decision of 31 July 1995), as is known, recognized the contested decree of the President of the Russian Federation as relevant to the Constitution.

Given that at present many federal laws directly allow the possibility of concretizing the mechanisms for the implementation of certain constitutional rights

and freedoms in the legislation of the constituent entities of the Russian Federation, we can give an example of a decision on the "case of public events" (decision of 14 February 2013). In accordance with the Federal Law "On Meetings, Meetings, Demonstrations, Processions and Pickets," the law of the constituent entity of the Federation additionally defines the places where public events are prohibited. In addition, the executive authorities of the constituent entities of the Russian Federation are empowered to determine specially designated or adapted places for holding peaceful meetings (part 1.1 of the said law).

Assessing the constitutionality of the last of the above provisions, the Constitutional Court of the Russian Federation came to the conclusion that the constituent entities of the Russian Federation have the opportunity, along with the basic guarantees of the rights of citizens enshrined in federal law, to

> establish additional guarantees of these rights in their law or other normative legal act aimed at specifying them, the creation of additional mechanisms for their implementation, taking into account regional peculiarities (conditions) and observing constitutional requirements on the non-contradiction of the laws of the constituent entities of the Russian Federation to federal laws and on the inadmissibility of restricting the rights and freedoms of man and citizen in a form other than federal law.

The Court emphasized the inadmissibility of the introduction by regional regulatory legal acts of procedures and conditions that distort the "very essence of certain constitutional rights" and reduce the "level of their federal guarantees."

For any system, not only the constituent elements themselves are important, but also their interconnections and interaction. The federal system also cannot function effectively without established connections and interaction within itself. It is they that personify the federal relations taking shape between their subjects. Deep knowledge and understanding of the processes occurring in the federal system, high-quality legal regulation of the status of subjects of federal relations, as well as the possibility of their correction, if necessary, is the key to the strength of the federation as a complex, but nonetheless, single state.

4. Changes in the Russian Federation's Structure

4.1. Procedure for Admission to the Russian Federation of a New Constituent Entity

The Constitution of the Russian Federation in Article 137 provides for the possibility of adopting a new subject(s) into the Federation. Federal Constitutional Law of 17 December 2001 No. 6-FKZ "On the Procedure for Admitting to the Russian Federation and Formation of a New Constituent Entity of the Russian Federation"

adopted in the development of this constitutional norm, regulates in detail the entire procedure for admission to the Russian Federation. In accordance with the said law, when admitting a new entity to the Federation (as well as when forming a new entity in its composition), the state interests of the Federation, the principles of its federal structure, human and civil rights and freedoms must be observed, and the historical, economic and cultural ties of the actors, and their socio-economic opportunities, taken into account.

The law provides that the initiator of the proposal for admission to the Russian Federation as a new entity is a foreign state, which, if a positive decision is received from the Russian state, enters into an international agreement with it. Within the framework of the agreement, issues related to the name and status of the new constituent entity of the Russian Federation, the procedure for acquiring Russian citizenship and the full distribution of the legal status of a citizen of the Russian Federation should be settled. Other legal aspects are also discussed, including the functioning of state authorities and local self-government of a foreign state on the territory of a new subject of the Russian Federation.

An international treaty may establish a transition period during which a new entity must be integrated into the economic, financial, credit and legal systems of Russia, as well as into the system of government bodies of the Russian Federation. On certain issues related to the admission to Russia as a new subject of a foreign state or part thereof, special protocols may be signed, subject to ratification simultaneously with the ratification of an international treaty.

After signing the international treaty, the President of Russia addresses the Constitutional Court of Russia with a request to verify the constitutionality of this international treaty. The next stage is the introduction into parliament of an international treaty for ratification and a draft federal constitutional law on the adoption of a new entity into the Russian Federation.

In the case of adoption and entry into force of these laws, amendments should be made to part 1 of Article 65 of the Constitution of the Russian Federation, which determines its composition. These changes are made on the basis of the federal constitutional law on the adoption of a new entity into the Russian Federation and are taken into account when reprinting the text of the Constitution of the Russian Federation.

The Republic of Crimea can serve as an example of the adoption of a new entity into the Russian Federation. As is well known, after the adoption of the Declaration of Independence of the Autonomous Republic of Crimea and the City of Sevastopol and the recognition by the Russian Federation of the "Republic of Crimea in Which the City of Sevastopol Has a Special Status," taking into account the will of the peoples of Crimea at the Crimean referendum on 16 March 2014, an international agreement was concluded between the Russian Federation and the Republic of Crimea on the admission to the Russian Federation of the Republic of Crimea and the formation

in the Russian Federation of new entities, which was ratified by the chambers of the Federal Assembly RF and recognized by the Constitutional Court of the Russian Federation in accordance with the Constitution of the Russian Federation. Given that the Constitutional Court decides exclusively on issues of law, it did not assess the political feasibility of concluding this international treaty, recognizing its compliance with the Constitution of the Russian Federation in terms of content, in form, in order of signing, conclusion, adoption, publication and enforcement, from the point of view of the separation of state power established by the Constitution of the Russian Federation into legislative, executive and judicial, from the point of view established by the Constitution of the Russian Federation the distribution of powers between the federal bodies of state power, in terms of distribution of powers between the authorities of the Russian Federation and bodies of state power of constituent entities of the Russian Federation established by the Constitution, Federal and other treaties on the delimitation of powers.

On 21 March 2014, Federal Constitutional Law No. 6-FKZ "On the Admission to the Russian Federation and the Formation of New Constituent Entities of the Russian Federation – the Republic of Crimea and the City of Federal Significance Sevastopol" was adopted. Based on this law in Article 65 of the Constitution of the Russian Federation, the relevant changes were introduced.

Thus, at the moment, the Russian Federation includes 85 constituent entities: 22 republics, 9 territories, 46 regions, 3 cities of federal significance, 1 autonomous region and 4 autonomous districts.

Analyzing the first experience of the use of the Federal Law "On the Procedure for Admitting to the Russian Federation and Formation of a New Subject of the Russian Federation" regarding the adoption of new constituent entities into the Russian Federation, it should be noted that during its practical implementation there were known discrepancies. For example, the law provides that the completion of the procedures for both formation and adoption of a new entity must be formalized by the relevant federal constitutional law. Nevertheless, as is known, the adoption and formation of new entities within the Russian Federation in 2014 was formalized by one law – "On the Admission to the Russian Federation and the Formation of New Entities of the Russian Federation – the Republic of Crimea and the City of Federal Significance of Sevastopol." Thus, the legislator, in fact, combined the two procedures into one. This, among other things, allowed the legislator to solve another problem, namely, the transformation of the city into a city of federal significance. In this case, we are not talking about changing the status of the subject, since Sevastopol was not a subject of the Russian Federation (although in the Soviet period it was a city of republican subordination). As we can see, this violates the procedure established in the law for the adoption of a new entity(ies) into the Russian Federation. Indeed, the law establishing these procedures directly states that the result of all necessary measures for formation or adoption of a new subject must be the corresponding law – either on formation or

on the adoption of a new subject. Thus, there is an obvious contradiction. However, taking into account the rather acute period during which the legislator was forced to make decisions that are quite important for the country, this "procedural economy" (combining the two procedures into one) seems quite justified. Moreover, the legislator himself has the right to both establish and change the "rules of the game."

The Constitutional Court noted in its decision of 19 March 2014 that:

> The Treaty in question provides in Article 2 and a number of other articles for the combination of the procedures for admitting the Republic of Crimea to the Russian Federation and formation – as a consequence of this adoption – in the Russian Federation new entities of the Russian Federation – the Republic of Crimea and cities of federal significance Sevastopol. In accordance with Articles 5 (parts 1, 2 and 3) and 65 (part 2) of the Constitution of the Russian Federation, the adoption on the basis of the Treaty of the Republic of Crimea under consideration in the Russian Federation with the simultaneous formation of two new constituent entities of the Russian Federation – the Republic of Crimea and the city of federal significance Sevastopol should be implemented by establishing the features of this combined procedure in the federal constitutional law on the adoption of the Republic of Crimea to the Russian Federation.

As can be seen, the Court points to the need to "establish the features of the combined procedure" in the "special" law, i.e. in the law mediating the adoption of a specific subject, in this case, the Republic of Crimea. It seems, however, that subsequently it is necessary to make appropriate adjustments to the "general" law, which establishes the procedural rules for the formation and adoption of new entities. In particular, it should consolidate the right of the legislator, if necessary, to formalize changes in the composition of the Federation in the forms of formation and adoption of a new subject(s) by one law.

4.2. Procedure for Formation of a New Constituent Entity of the Russian Federation

In accordance with Article 137 of the Constitution of the Russian Federation, the composition of the Russian Federation can also be changed by the formation of a new constituent entity of the Russian Federation. The procedure for that is regulated by the above-mentioned Federal Constitutional Law of 17 December 2001 No. 6-FKZ "On the Procedure for Admitting to the Russian Federation and Formation of a New Constituent Entity of the Russian Federation." In accordance with this law, when forming in its composition a new constituent entity, the state interests of the Federation, the principles of its federal structure, human and civil rights and freedoms must be observed, as well as the historical, economic and cultural ties of the constituent entities, and their socio-economic capabilities.

The procedure for the formation of a new constituent entity in the Russian Federation provides for a change in the composition of the constituent entities of the Russian Federation as a result of the merger of two or more neighboring entities. The formation of a new entity may entail the cessation of the existence of entities whose territories are to be merged. The initiative to form a new entity belongs to the constituent entities of the Russian Federation in whose territories it is being formed. The proposal on the formation of a new subject is sent to the President of the Russian Federation, who notifies the chambers of the Federal Assembly of the Russian Federation about it, the Government of the Russian Federation and, if necessary, conducts appropriate consultations with them. This proposal should be justified and contain the proposed name, status and boundaries of the new entity, a forecast of the socio-economic and other consequences associated with the formation of a new entity within the Federation, and also contain a number of supporting materials, including proposals for the succession of the new entity in relation to the property of interested constituent entities in relations with state authorities of the Federation, other constituent entities; proposals for amendments and additions to the federal law on the federal budget for the current year in connection with the formation of a new entity; information on the estimated dates for the referenda of interested parties, etc.

The issue of the formation of a new constituent entity is subject to referenda of interested entities and should be approved in all entities where a referendum is held. After receiving official data on the results of referenda, the President of the Russian Federation submits to the State Duma a draft federal constitutional law on the formation of a new constituent entity in the Russian Federation. The project should contain provisions defining the name, status and boundaries of the new entity, provisions on the termination of the existence of the entity (entities), if provided for by the merger plan, as well as provisions establishing the time frame within which the following issues should be resolved: the formation of public authorities of the new constituent entity; the making of amendments and additions to the federal law on the federal budget for the current year, if the formation of a new entity involves the redistribution of budget funds of the current year; the functioning of the territorial bodies of federal executive bodies and federal courts in the territory of the new entity; action of laws and other regulatory legal acts of interested entities in the territory of a new entity, etc.

After the adoption of the federal constitutional law on the formation in the Russian Federation of a new entity, amendments are made to part 1 of Article 65 of the Constitution of the Russian Federation, determining its composition.

At the time the Constitution of the Russian Federation entered into force in 1993, it included 89 entities: 21 republics, 6 territories, 49 regions, 2 cities of federal significance, 1 autonomous region and 10 autonomous districts. The process of unification of the constituent entities of the Federation, which took place in 2004–

2008, reduced their number by combining the territories, regions and their constituent autonomous districts to 83. In all these cases, the relevant federal constitutional laws were adopted in accordance with the requirements of the Constitution of the Russian Federation.

So, from 1 December 2005, as a result of the unification of the Perm Region and the Komi-Permyak Autonomous District, the Perm Territory was formed; from 1 January 2007, as a result of the merger of the Krasnoyarsk Territory, the Taimyr (Dolgan-Nenets) Autonomous District and the Evenki Autonomous District – the Krasnoyarsk Territory; from 1 July 2007, as a result of the merger of the Kamchatka region and the Koryak Autonomous District – the Kamchatka Territory; from 1 January 2008, as a result of the merger of the Irkutsk region and the Ust-Orda Buryat Autonomous District – the Irkutsk Region; since 1 March 2008, as a result of the merger of the Chita region and the Aginsky Buryat Autonomous District – Zabaikal Territory.

The Federal Law "On the Procedure for Admitting to the Russian Federation and Formation of a New Constituent Entity of the Russian Federation" as part of the Russian Federation stipulates that the formation of a new constituent entity within the Russian Federation can take place only in the form of a combination of two or more entities, although the Constitution does not stipulate specific forms, the application of which may result in a new entity of the Federation appearing. For example, in the history of Russian federalism there has been a case of the division of one subject into two (the Chechen-Ingush Republic was divided into the Chechen and Ingush republics). Does this mean that the said law is contrary to the Constitution? It seems that the state in the person of the legislator has the right to determine the strategy and tactics in the field of federal construction, namely to determine specific forms of transformation of the federal system, in particular, changing the composition of the Federation at each given historical segment. At this stage, it is obvious that an increase in the number of constituent entities is hardly justified from many points of view. In this regard, the legislator has established that the formation of new entities can be carried out only in the form of an association. In the future, when specific historical conditions change and the need arises for the use of other forms, in particular separation, they can be provided for by the legislator.

The practice of changing the constitutional and legal status of constituent entities of the Russian Federation is still absent. To date, the federal constitutional law provided for by the Constitution of the Russian Federation, designed to regulate the procedure for such a change, has not been adopted. Nevertheless, we can talk about a peculiar transformation of the constitutional legal status of the constituent entities of the Russian Federation in situations of actual joining of one constituent entity of another constituent entity (although the legislator does not recognize this form of formation of a new constituent de jure, it exists de facto). Examples are the Perm Region, which was essentially transformed into the Perm Territory after the Komi-Permyak Autonomous District was annexed to it; the Kamchatka Region,

which became the Kamchatka Territory after the Koryak Autonomous District was annexed; and the Chita Region, now called the Zabaikal Territory as a result of the takeover of the Aginsky Buryat Autonomous District. In all these cases, the regions, in fact, were transformed into territories.

In May of this year (2020), the acting governors of the Arkhangelsk Region and the Nenets Autonomous District signed a memorandum of intent to create a single entity of the Federation. It was assumed that a referendum on unification would be held before the year's end. However, the merger process was interrupted two weeks after the signing of the memorandum. The fact is that the local population of the Nenets Autonomous District came out sharply against the association. Evidence of this was apparent in public events in the district's administrative center Naryan-Mare such as pickets, collection of signatures against the association, etc. The reason for the negative attitude of the population of the district is their dissatisfaction with the distribution of funds between the district and the region. Residents of the district believe that

> depriving a district of a constituent entity's status means a reduction in power and budget structures, loss of work and income by many residents, a reduction in investments in social infrastructure, and an increase in all kinds of costs associated with the need to travel to Arkhangelsk for many reasons.[9]

Given this situation, the political unification of the regions was postponed; instead, a joint program for the economic development of the regions will be developed. The authorities intend to return to the question of unification of regions after its implementation.

5. Contemporary Trends in Federal Relations Development

5.1. The Impact of the Global COVID-19 Pandemic on Federal Relations

The Russian federal system has always been considered quite centralized. If one compares it, say, with the American federal system, one can see the obvious differences, which lie in the greater freedom of the states. This is due to historical preconditions that led to the formation of the Confederation first, and then to its transformation into a federation. At the same time, federal relations in Russia did not remain without a certain influence of events that shocked mankind this year. This refers to the COVID-19 pandemic. The fact is that, given the huge size of the country, as well as the different parameters of infection with this disease in the constituent

[9] *Винокуров А., Литвинова М., Кадик Л.* Необъединяемый автономный округ: Как Архангельская область не стала супер-регионом // Коммерсантъ. 31 мая 2020 г. [Andrey Vinokurov et al., *Unified Autonomous Okrug: How the Arkhangelsk Region Did Not Become a Super-Region*, Kommersant, 31 May 2020] (Sep. 16, 2020), available at https://www.kommersant.ru/doc/4364004.

entities of the Federation, its leadership in the person of the head of state could not but delegate certain powers to the regional level, although these powers are exercised by the federal authorities in ordinary situations.

So, despite the fact that the possibility of vesting the highest official of a constituent entity of the Russian Federation with additional powers by a presidential decree is not directly provided, by decree of the President of the Russian Federation of 2 April 2020 No. 239 "On Measures to Ensure Sanitary and Epidemiological Welfare of the Population in the Russian Federation in Due to the Spread of a New Coronavirus Infection (COVID-19)," authorities of the constituent entities were given additional powers to develop and implement additional powers to develop and implement a set of restrictive and other measures.

Later, namely on 11 May 2020, Presidential Decree No. 316 was adopted "On Determining the Procedure for Extending the Measures to Ensure Sanitary and Epidemiological Welfare of the Population in the Constituent Entities of the Russian Federation in Connection with the Spread of a New Coronavirus Infection (COVID-19)." By this Decree, the heads of the regions were instructed to determine the territories on which restrictive measures could be extended if necessary, the specifics on which making such decisions were established, and a list of organizations which were not subject to these restrictions. Among them are hospitals, pharmacies, convenience stores, continuously operating organizations and banks.

It seems that in these conditions such a delegation of powers is justified. At the same time, by providing additional powers to the highest officials of the constituent entities, control over their implementation remained in the jurisdiction of the federation. In connection with the stabilization of the pandemic and even its weakening in a number of regions, their highest officials began to mitigate restrictive measures. But in this situation, the federal government, in fact, regained its regulatory role and established certain rules in this area. Thus, on 16 May 2020, the Government of the Russian Federation adopted Regulation No. 694 "On the Procedure for Coordinating Draft Decisions of Highest Officials (Heads of the Highest Executive Bodies of State Power) of the Constituent Entities of the Russian Federation on Suspension (Limitation, Including by Determining the Characteristics of the Operating Mode, Number of Employees) Activities Located on the Territory of Certain Organizations and Individual Entrepreneurs Located Within the Boundaries of the Respective Constituent Entity of the Russian Federation." This Regulation approved the Rules for coordination of such actions of regional authorities with federal departments. Such departments include the Ministry of Economic Development of the Russian Federation, the Federal Service for Supervision of Consumer Rights Protection and Human Well-Being, and the Ministry of Finance of the Russian Federation.

It should be noted that the federal authorities are taking actions to support the regions in this difficult situation. For example, it was decided to adjust the schedule for their payments on budget loans. Under Regulation of the Government of the

Russian Federation of 30 April 2020 No. 619 in 2020, the regions are completely exempted from paying off debt. In 2021–2024, they will pay 5% of the debt annually; in 2025–2029 they will pay the balance in equal parts with the possibility of early repayment. Funds that will be released in 2020 can be used by entities to eliminate the consequences of the spread of the coronavirus infection, as well as to compensate for the reduction in tax and non-tax revenues. This will ensure the stability of regional budgets in the face of a difficult socio-economic situation.

5.2. The Impact of the Constitutional Amendments on Federal Relations

As is well known, recently the federal Constitution has been amended significantly. Let us consider which amendments affect federal relations.

Now the Constitution in Article 67 provides for the creation of so-called federal territories. The organization of public authority in these federal territories will be established by federal law. The status and purpose of such territories is not yet clear, but it is assumed that it is the federal authorities that will determine which territories should be separated from the relevant entities and made directly subordinate to the federation. Most likely, these will be some nature reserves, natural parks of national importance, as well as, possibly, objects related to the defense and security of the state.

A new norm has appeared (part 2.1 of Art. 67), according to which the Russian Federation ensures the protection of its sovereignty and territorial integrity. Actions (with the exception of delimitation, demarcation and re-demarcation of the state border of the Russian Federation with neighboring states) aimed at alienating part of the territory of the Russian Federation, as well as calls for such actions, are not allowed. The emergence of this norm is due to the existing claims of some states against Russia, for example, Japan's demands to transfer the so-called "northern territories" to it, namely a number of the Kuril Islands. According to the authors of this amendment, this constitutional provision will ensure the territorial integrity of the state.

A new article appeared in the Fundamental Law (Art. 67.1), according to which the Russian Federation, united by a thousand-year history, preserving the memory of ancestors who transmitted to us ideals and faith in God, as well as continuity in the development of the Russian state, recognizes the historically established state unity. As one can see, this rule is also aimed at maintaining the unity of the state. However, when discussing its content before the All-Russian vote on amendments, there were opinions that it contradicted the principles of a secular state, enshrined in the first chapter of the Constitution, as it allows the mention of God, which has never happened before.

The amendment concerning the state language seems quite interesting (Art. 68). The Constitution enshrined Russian as a state language before this amendment. But now its essential characteristic is added. The state language is defined here as the language of a state-forming people, a member of the multinational union of equal peoples of the Russian Federation. That is, it speaks of the people of all of Russia,

which is called state-forming, and of the peoples inhabiting the Russian Federation, which are defined as equal, which is important, including for federal relations.

An addition made to Article 69 of the Constitution continues this theme. According to this amendment, the state protects the cultural identity of all the peoples and ethnic communities of the Russian Federation, and guarantees the preservation of ethnocultural and linguistic diversity. Thus, here, in essence, the Federation's duty to ensure the existing ethnocultural and linguistic diversity is formulated, which also seems to be extremely important.

Article 70 of the Constitution established that the capital of the Russian Federation is the city of Moscow. However, now the article is supplemented by the provision according to which the place of permanent residence of individual federal bodies may be another city defined by federal constitutional law. That is, by its law, a federation can establish a city other than Moscow where individual federal bodies may be located. Such practice already exists. So, the federal Constitutional Court was once moved from Moscow to St. Petersburg, which was enshrined in the federal constitutional law "On the Constitutional Court of the Russian Federation."

The Constitution establishes the division of powers between the federal and regional bodies. Thus, Article 71 establishes federal powers, and Article 72 joint powers of the Federation and its constituent entities. Let us first consider the additions made to Article 71 of the Constitution.

To begin with, "organization of public authority" is now referred to federal jurisdiction. This means that the federation has taken upon itself the issues of organization of both state and municipal authorities, since it is precisely these in the aggregate that is public authority. This provision conflicts with Article 12 of the Constitution, which stipulates that local authorities are not included in the system of state bodies. This caused a rather lively discussion in the legal scientific community. So, the chairman of the Constitutional Court V. Zorkin, even before the process of amending the Constitution began, wrote that the construction of Article 12 of the Constitution of the Russian Federation gives rise to the opposition of local governments to state bodies (including representative bodies of state power), while local governments by their nature are only the lower, local link of public authority in the Russian Federation.[10]

The federal jurisdiction now also includes: establishing the foundations of federal policy and federal programs in the field of scientific and technological development of the Russian Federation; the establishment of a unified legal framework for the healthcare system, the system of upbringing and education, including continuing education; ensuring the safety of individuals, society and the state in the application of information technology, the circulation of digital data; and metrological service.

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[10] *Зорькин В.Д.* Буква и дух Конституции – о тревожных призывах к кардинальным конституционным реформам // Российская газета. 9 октября 2018 г. [Valery D. Zorkin, *The Letter and Spirit of the Constitution – On Alarming Calls for Radical Constitutional Reforms*, Rossiyskaya Gazeta, 9 October 2018] (Sep. 16, 2020), available at https://rg.ru/2018/10/09/zorkin-nedostatki-v-konstitucii-mozhno-ustranit-tochechnymi-izmeneniiami.html.

In addition, now the federal jurisdiction has the right to establish restrictions for filling state and municipal posts, positions of state and municipal service, including restrictions related to the presence of citizenship of a foreign state or residence permit or other document confirming the right of permanent residence of a citizen of the Russian Federation on the territory of a foreign state, as well as restrictions related to the opening and availability of accounts (deposits), storage of cash and valuables in foreign banks located outside the territory of the Russian Federation. Such restrictions were established by federal laws; however, now this is enshrined in the Constitution of the Russian Federation.

The joint powers, as already noted, are enshrined in Article 72 of the Constitution, which was also supplemented by the following subjects, namely: agriculture; general issues of youth policy; ensuring the provision of affordable and high-quality medical care, maintaining and strengthening public health, creating the conditions for a healthy lifestyle, and creating a culture of responsible citizens' attitude to their health; protection of the family, motherhood, fatherhood and childhood; defending the institution of marriage as a union of a man and a woman; creation of conditions for a decent upbringing of children in the family, as well as for the fulfillment by adult children of the obligation to take care of their parents. It is easy to notice that at the constitutional level the institution of marriage is fixed, which is defined as the union of a man and a woman. Thus, the constitutional legislator, relying on the centuries-old traditions and cultural code of the Russian people, unlike many states that have liberalized their legislation in this area, allowing gay marriage, establishes, in fact, a constitutional ban on such marriages. Prior to this, the definition of marriage as a union of a man and a woman was contained in the Family Code, i.e. at the level of federal law.

For the first time, the Constitution mentions the highest official of a subject of the Russian Federation. Prior to this, his status was regulated by federal and regional laws. Now the Constitution establishes certain requirements and restrictions relating to the highest officials of the constituent entities of the Russian Federation. Article 77 was supplemented by the following provision:

> The highest official of a subject of the Russian Federation (the head of the highest executive body of state power of a subject of the Russian Federation) may be a citizen of the Russian Federation who has reached the age of 30 years, has resided permanently in the Russian Federation and does not have citizenship of a foreign state or residence permit or other document confirming the right to permanent residence of a citizen of the Russian Federation in the territory of a foreign state. The highest official of a subject of the Russian Federation (the head of the highest executive body of state power of a constituent entity of the Russian Federation) is prohibited from opening and having accounts (deposits), storing cash and valuables in foreign banks located

outside the territory of the Russian Federation in the manner established by federal law. Federal law may establish additional requirements for a highest official of a subject of the Russian Federation (head of the highest executive body of state power of a constituent entity of the Russian Federation).

That is, these restrictions are not exhaustive. Federal law may establish additional requirements for regional heads.

Conclusion

Federal relations reflect the essence and specificity of a particular federal system in terms of normative regulation of its parameters, establishing the status of its entities, including rights, duties and responsibilities. This kind of consolidation is carried out both at the time of the emergence of such relations, for example, the adoption of the Constitution or the conclusion of treaties and agreements between the federation and its constituent entities, and in the process of developing federal relations. Thus, the modern period is characterized by filling these relations with new constitutional content by virtue of the adoption of amendments to the Constitution of the Russian Federation. The expediency and operability of these amendments will be shown with the passage of time.

The current modern period is overshadowed by the situation with the global pandemic, which has also affected federal relations, moreover, not only in the Russian Federation, but also in other federations. This difficult situation shows that the federal center should trust the constituent entities of the Federation more and, accordingly, transfer to them the implementation of those powers that are advisable to be carried out precisely by the regional authorities. However, the transfer of powers alone cannot lead to the decentralization of the federal system itself. More dramatic steps are required, namely, reforming the tax system in order to provide greater financial opportunities to regions and municipalities. It is the principle of subsidiarity that should underlie the functioning of any federal system, if the goal is its sustainable development.

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THE LEGAL MODEL OF RESPONSIBLE PARENTHOOD ON THE EXAMPLE OF REGIONAL LEGISLATION OF THE RUSSIAN FEDERATION

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The relevance of the research issue is its novelty and socially significant conditionality provided by law of the legal and social "scenario" of responsible parenthood, prescribing common standards for parents raising minors. It is well known that the regulation of family relations, including parents and children, is one of the most relevant international research topics. In this regard, this article aims to obtain an overall view of the institution of responsible parenthood, included in the legal regulation in a set of rules and regulations established by the state and forming its special content. The leading approach (method) to the study of this problem is legal and sociological, allowing for a comprehensive review of the legal and social content of responsible parenthood on the example of regulation. The article presents relevant issues of responsible parenthood and its development based on specific laws; revealing its legal and social content while considering the potential of this type of parenthood. The research has scientific novelty, as it is the first attempt to consider the legal model of responsible parenthood on the example of Russian legislation. These materials can provide theoretical and practical value for further scientific research, as well as updating the regulatory approach to the regulation of family relations.

Keywords: responsibility; parenthood; legislation; family; society; minor; parent; upbringing; the Law of Responsible Parenthood (LRP); Russia; the Republic of Sakha (Yakutia).

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Introduction

According to the legacy of Jean-Jacques Rousseau, a great philosopher and thinker, it is believed that "a wise legislator begins not with the publication of laws, but with the study of their suitability for a given society."[1] It is widely known that public relations need legal regulation. This regulation must be adequate, appropriate, effective, and responsive to all legal and social realities.

The value of family relations consists of its social, moral significance, and the impact on the formation of a harmoniously developed personality of a young citizen. Therefore, in all spheres of state activity, the family and childhood are in the field of increased attention. Using the term "minor" or "child" in the legislation, denoting the status of this person as a subject of differentiated regulation, the legislators of many states have established a legal boundary between the age of majority and minor, thus forming a particular group of people – holders of specific rights and obligations.[2] According to scientists, this approach focuses on the fact that age inadaptability for changing living conditions requires compensation through special and increased legal protection.[3]

Due to Article 38 (parts 1 and 2) of the Constitution of the Russian Federation, the state protects motherhood, childhood, and families, along with child care, as

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[1] *Руссо Ж.-Ж.* Политические сочинения [Jean-Jacques Rousseau, *Political Writing*] (Saint Petersburg: Rostok, 2013).

[2] United Nations, Universal Declaration of Human Rights of 10 December 1948, Art. 25, para. 2 (Jul. 25, 2020), available at https://www.un.org/en/universal-declaration-human-rights/; United Nations, International Covenant on Civil and Political Rights от 16 December 1966, Art. 24, para. 1 (Jul. 25, 2020), available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx; United Nations, Convention on the Rights of the Child, Arts. 1–5 (Jul. 25, 2020), available at https://www.ohchr.org/en/professionalinterest/pages/crc.aspx.

[3] *Мельникова Э.Б.* Ювенальная юстиция: проблемы уголовного права, уголовного процесса и криминологии [Evelina B. Melnikova, *Juvenile Justice: Problems of Criminal Law, Criminal Procedure and Criminology*] (2nd ed., Moscow: Delo, 2001); *Ястребов О.А., Морозов Н.И., Морозова А.Н., Корнев А.В. и др.* Ювенальная юриспруденция: учебник: в 4 т. Т. 3 [Oleg A. Yastrebov et al., *Juvenile Law: Textbook. In 4 vols. Vol. 3*] (N.I. Morozova & A.N. Morozova (eds.), Moscow: Prometheus, 2017).

their education is an equal right and duty of parents. As provisions of universal legal value, these norms are reflected in the Constitution of the Republic of Sakha (Yakutia). Therefore, in Article 11 (part 2), it is said that education in the family and society aims to develop a free, moral, and enlightened identity, respecting honour and dignity, freedom of other people, a bearer of national and universal culture.

In support of the above acts, the period between 2018 and 2027 has been declared as the Decade of Childhood in the Russian Federation (by the Decree of the President of the Russian Federation).[4] This decision is based on the results of the implementation of the national strategy for children adopted several years earlier in the Russian Federation.[5] It was the first time when problems including insufficient protection of the rights and interests of minors, non-performance of international standards in the field of children's rights, and low effectiveness of preventive work were indicated.

In this regard, Russian law pays active attention to the formation and development of legal regulation of family relations. Initiative normative proposals in this direction also come from subjects of the Russian Federation. In some cases, their legislative activity is ahead of the Federal (Central) government. One of these subjects is the Republic of Sakha (Yakutia), located in the North-Eastern part of the Eurasian continent. This is the largest territory (the biggest administrative and territorial unit in the world).

Meanwhile, the region is low in population density (the population of the Republic is less than one million people). The Republic of Sakha (Yakutia) has repeatedly become a so-called pilot region in the development and adoption of juvenile legislation. For example, the Republic is the first subject in the Russian Federation to adopt a Law on the Rights of the Child. Moreover, it has accumulated many years of experience in supporting positive demographic dynamics, protecting the family, motherhood, fatherhood, and childhood, along with the formation of an anti-alcohol policy aimed at saving human capital. Meanwhile, the most significant response, in public and expert opinion, including negative character was caused by the law "On Responsible Parenthood" adopted by the State Assembly of Il Tumen of the Republic of Sakha (Yakutia) (of 14 March 2016, 1604-Z No. 737-V).[6] The novelty of the studied law lies in its exceptional (unprecedented) nature, which for the first time in the normative

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[4] Указ Президента Российской Федерации от 29 мая 2017 г. № 240 «Об объявлении в Российской Федерации Десятилетия детства» // СПС «Гарант» [Decree of the President of the Russian Federation No. 240 of 29 May 2017. On the Announcement of the Decade of Childhood in the Russian Federation, SPS "Garant"] (Jul. 25, 2020), available at http://base.garant.ru/71684480/.

[5] Указ Президента Российской Федерации от 1 июня 2012 г. № 761 «О Национальной стратегии действий в интересах детей на 2012–2017 годы» // СПС «Гарант» [Decree of the President of the Russian Federation No. 761 of 1 June 2012. On the National Action Strategy for Children for 2012–2017, SPS "Garant"] (Jul. 25, 2020), available at http://base.garant.ru/70183566/.

[6] Закон Республики Саха (Якутия) от 14 марта 2016 г. 1604-3 № 737-V «Об ответственном родительстве» // СПС «КонсультантПлюс» [Law of the Republic of Sakha (Yakutia) 1604-Z No. 737-V of 14 March 2016. On Responsible Parenthood, SPS "ConsultantPlus"] (Jul. 25, 2020), available at http://www.consultant.ru/regbase/cgi/online.cgi?req=doc;base=RLAW249;n=57187#03550053918118927.

space established a legal model of responsible parenthood. Any person acquiring status as a parent can become a subject of legal influence under this act. Moreover, there are additional legitimate grounds for the qualification of the act in the field of education of children as wrongful when not following the requirements of the law on responsible parenthood.

The initiator of the adoption of the Law on Responsible Parenthood is the Yakut regional Department of the all-Russian social movement "Mothers of Russia." The State Committee for Justice developed the draft act with the participation of social ministries and authorities. The studied law includes only 22 articles with such chapters as "Chapter 1. General provisions," "Chapter 2. Rights, duties, and responsibilities of parents," "Chapter 3. Measures for the formation of responsible parenthood," "Chapter 4. Liability for non-performance or improper performance of this law."

The legal model of responsible parenthood in the authors' understanding is a set established in the normative legal act of the rights and obligations of parents, implemented concerning the measures for the formation of responsible parenthood, taken by the authorised bodies of state and municipal authorities for consolidated achievements of specific tasks. This ensures the safe development of children to prevent negative manifestations in their behaviour.

Under the legal structure of responsible parenthood, the authors propose to understand the set of fundamental rules established in the normative legal act that defines parenthood as responsible following the elements of legal norms and legal responsibility.

Under the social composition, the authors understand the set of established social norms of fundamental values that define parenthood as responsible, according to the spiritual and moral foundations of social regulation.

Materials, methods and results of survey

Sociological, formal legal, comparative legal, as well as system research and modelling, and historical legal and logical legal methods were used in the process of research.

As a result of the research, the following new results have been obtained:

– the definitions of basic concepts that complement the system of general and particular ideas about responsible parenthood have been formulated;

– the legal and social potential of responsible parenthood is revealed;

– the limits of responsible parenthood (based on the analysis of the composition of legal responsibility) have been identified;

– the purpose of the law on Responsible Parenthood is justified;

– the legal model of responsible parenthood is defined.

1. Purpose of the Law on Responsible Parenthood

The Law on Responsible Parenthood aims to form parents' responsibility, i.e. conscientious, conscious, meaningful approach to the upbringing and care

of minors. Following the legal "scenario" established in it, the authorities have an opportunity to show the official image of the responsible parent by the example of this act. Even though the assessment of the scope of the Law on Responsible Parenthood arises from its pilot assignment since in its explanatory note, it is called "a long-term view of further implementation in the federal status."

The law itself explains how to implement parents' rights and obligations to maintain, educate, and preserve the health of children, based on their legitimate interests and needs, along with the creation of conditions in which a child can fully develop (Art. 2, part 1, para. 5). It should be noted that this concept is to be introduced into legal regulations for the first time. Also, the term "responsible parenthood" is considered, as a rule, in the social or theoretical appointment within the pedagogical and psychological disciplines.[7] In foreign scientific literature, responsible parenthood is understood to be the pedagogical competence of parents, involving caring for children, encouraging their development, and at the same time, the formation of interpersonal relationships based on the implementation of personal and social expectations.[8] Some foreign scientists study responsible parenthood at the intersection of clear questions or problems, such as the parents' responsibility to choose a child's name or religion,[9] and general family relations.[10] It is necessary to emphasise that in the traditional understanding of previous periods, the idea of responsible parenthood was evaluated by technologies, not of legal, but of pedagogical origin, for example, in the works of famous teachers.[11]

Recognising the link with pedagogical, moral, and other sources without legal origin, the law is replete with social norms. So, in its text, such concepts as "ethnopedagogics," "family traditions," "respect," "national traditions," "customs," "spiritual and moral foundations of society,""moral development,""traditional family values," etc. The first introduced principles of responsible parenthood (Art. 4), also assume the presence of moral principles in it. The list of their content is as follows:

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[7] *Смалько О.В.* Родительское отношение и родительская ответственность как основные составляющие родительства // Карельский научный журнал. 2015. № 1(10). С. 70–73 [Oksana V. Smalko, *Parental Attitude and Parental Responsibility as the Main Components of Parenthood*, 1(10) Karelian Scientific Journal 70 (2015)]; *Науменко Н.М.* Педагогическое просвещение родителей как механизм формирования ответственного родительства // KANT. 2017. № 1(22). Vol. 42–46 [Natalia M. Naumenko, *Pedagogical Education of Parents as a Mechanism for the Formation of Responsible Parenthood*, 1(22) KANT 42 (2017)].

[8] Maja Ljubetiж et al., *Competent (and/or Responsible) Parenting as a Prerequisite for a Complete Child Development*, 13(12) European Scientific Journal 311 (2017).

[9] Rebecca Probert et al., *Responsible Parents and Parental Responsibility* (Oxford: Hart Publishing, 2009).

[10] Jo Bridgeman et al., *Responsibility, Law and the Family* (London and New York: Routledge, 2016).

[11] *Макаренко А.С.* Книга для родителей [Anton S. Makarenko, *Book for Parents*] (Leningrad: Lenizdat, 1981); *Макаренко А.С.* Педагогическая поэма [Anton S. Makarenko, *Pedagogical Poem*] (Moscow: ITRK 2003); *Сухомлинский В.А.* Родительская педагогика [Vasily A. Sukhomlinsky, *Parental Pedagogy*] (Saint Petersburg: Peter, 2017); *Корчак Я.* Как любить ребенка [Janusz Korczak, *How to Love a Child*] (Moscow: Alphabet, 2016).

1) recognition and parents' awareness of responsibility for the maintenance, education, training, development, health, along with the protection of the rights and legitimate interests of the child;

2) voluntary parents' choice of techniques, educational methods, which are not contradicting to the law and the spiritual and moral foundations of society;

3) equal participation of parents in the upbringing and development of the child;

4) the realisation of a child's right to express their opinion in the family in any matter affecting their interests.

If we refer to a brief description of each of these principles, it is possible to note the following. The first principle assumes the formation of the internal belief that development of the child depends on parental well-being, conscience, and recognition of personal responsibility for the happy future of the child, and an aspiration to develop opportunities, knowledge, and abilities for this purpose. The second principle requires the parent to have specific and sufficient expertise in the field of pedagogy, medicine, cultural studies, theology and psychology, as well as jurisprudence since it is from their equal totality that the parents have the right to choose the techniques and methods of a child's upbringing that do not contradict the law or the spiritual and moral foundations of society. A critical factor in the third principle is the equal division of child-rearing obligations between parents, taking into account gender, along with social and personal characteristics. The fourth principle intends to respect and recognise the child as a person with independent needs and interests, and parents should consider their child a part of the discussion of family decisions by explaining the right to express a personal opinion.

The main directions of formation of responsible parenthood, thus, are not only legal but also social, that is, having a psychological, pedagogical, and moral origin of the relationship. The totality of these principles makes it clear that a parent forms responsible parenthood not because of his biological or another right concerning his child, but because of the acquisition of specific knowledge, skills, and abilities. It is not enough to have only feelings and personal inner urges guided by individual opportunities. Responsible parenthood, according to the studied law is, first of all, a set of competencies presented in the three-tier structure of the criteria "know" – "be able" – "own."

Accordingly, it seems necessary to describe the competence approach in the formation of responsible parenthood, based on the content of the law and disclosure of each criterion of legal and social obligations of the parent in the interests of completeness.

Thus, the responsible parent should "know":

– national traditions and customs;

– spiritual and moral foundations of society and the state;

– the mechanism of protection of interests of the child in accordance with the legislation;

– age and individual features of spiritual and moral, physical, intellectual, creative development of abilities of the child;

– bases of preservation of children's health;

– education techniques and methods of the child, not contradicting the legislation;

– system of the state and other bodies having powers in the sphere of implementation of family relations;

– the rights and duties, types of legal responsibility of minors and parents established by law;

– fundamentals of general education (education, forms of education, the system of organisations engaged in educational activities, the content of educational programs, etc.);

– fundamentals of ethnopedagogics, family traditions, traditions and customs of ancestors, native language and culture;

– the content and types of state, municipal and private property;

– fundamentals of law-abiding behavior, rights, freedoms, and dignity of other people;

– laws of nature and all living things;

– harm of destructive processes, such as the use of alcohol and alcohol-containing products, tobacco, drugs, and psychoactive substances;

– the content of harmful information, moral and spiritual development of the child;

– legitimate interests and needs, the rights of the child; etc.

Responsible parents, based on the content of the law, should be able to:

– create conditions in which the child can fully develop, including through self-determination and self-realisation on the basis of spiritual and moral values and accepted rules and norms of behavior in society;

– form relationships with the child to direct them to his/her successful material, intellectual, physical, and spiritual development in accordance with age and gender criteria;

– explain to the child in an accessible language and in ways of knowledge, skills, and abilities that are necessary for the development of abilities, the acquisition of experience and the application of knowledge in everyday life, the formation of motivation for further self-development;

– protect the interests and rights of the child, including in conditions that threaten his/her safety and health, proper mental development, including information, propaganda, and agitation that are harmful;

– take measures to prevent the use of alcohol and alcohol-containing products, tobacco, drugs, and psychoactive substances by the child;

– take steps to prevent the presence of the child at night in public places;

– recognise and identify information harmful to the development of the child and to take measures to protect from national, class, social intolerance, from advertising

of alcohol and tobacco products, from the promotion of social, racial, national, and religious inequality, from information of a pornographic nature, from information promoting non-traditional sexual relations, posted on the internet and the media or distributed in any other way, as well as from the distribution of printed materials, audio- and video products that promote violence and cruelty, drug addiction, substance abuse, or antisocial behavior.

Responsible parents, based on the content of the law, must "own":

– the skills of caring for physical and mental health, intellectual, spiritual, and moral development of their child;

– the skills of sober and healthy lifestyle for education on their own example, the recognition of spiritual and moral values and the rules and norms of behavior accepted in society;

– the skills of developing a respectful and trusting communication with the child in order to realise the right of children to express their opinion;

– the skills to form the child's ability to look after himself, the requirements to work, including training and performance of household duties;

– skills of search, development, and compilation of all types of information relevant to the interests of the child;

– skills of entry into circulation (contact) with representatives of educational institutions, authorities for the effective implementation of rights and obligations as a legal representative;

– skills of the timely recognition of the presence of conditions that threaten the health and safety of the child;

– skills of optimal choice of techniques, methods of education, which are not contradictory to the law and the spiritual and moral foundations of society; etc.

Thus, modern parenthood moves to a new level approach, which allows its subject to be divided into "responsible parent" or "irresponsible parent." According to the text of the Law on Responsible Parenthood, a parent is the father and mother of a child, adoptive parents, guardians, foster parents (Art. 2, part 1, para. 3). The people in this list are obliged to strive for the development of competencies required by the law since these provisions of the law require not only compliance but also execution. It should be noted, however, that the law does not divide the gender-related requirements, but assumes that they are addressed equally to mothers and fathers.

2. Implementation of the Law on Responsible Parenthood

As we have seen from the content of the law, the required expectation from parents looks like a degree course. In this regard, the Republic of Sakha (Yakutia) as an initiator of the official consolidation of the formation of responsible parenthood is obliged to create, provide, and control the appropriate conditions. Primarily, through information and training, as familiarisation with the provisions of responsible parenthood to the parent only occurs in cases where it is a purposeful explanatory

and advisory work of authorised entities. Thus, the Ministry of Youth Affairs and Social Communications of the Republic of Sakha (Yakutia) together with the Ammosov North-Eastern Federal University is implementing a social project "School of responsible parents at NEFU." A similar school also works with Yakutsk regional representation of national social movement "Mothers of Russia."

To implement the work of the school, an educational program has been developed, a working team of the best lecturers and specialists of a narrow profile has been assembled, many seminars for parents in the municipalities of the Republic of Sakha (Yakutia) have been organised, agreements and contracts on cooperation with educational institutions of the Republic have been signed, while sociological surveys of students have also been conducted.

The main listeners of the school are parents who have expressed a desire to attend its courses, which are either paid or free, depending on the topic of lectures and the level of invited specialists. The North-Eastern Federal University provides material and technical conditions, and information support is provided by the permanent forum of women of the Republic "Girlfriends," as well as other public organisations and educational institutions. To study the activities of the responsible parent school, we surveyed its students, familiarisation with the constituent documents, curriculum, and materials published in the media. This revealed that the main part of the audience is usually women (81%) aged 20 to 45 years, most of them from full families. The survey showed a positive assessment of the school, interest in its development, recognition of the impact on the education of children. Given its young age, the school is not yet able to solve all the problems of parenthood or cover the need for all kinds of information. It plans to expand the specifics of training single parents, as well as those whose families are registered as disadvantaged.

"School of responsible parents at NEFU" is included in the regional action plan for the implementation of the Decree of the President of the Russian Federation of 29 May 2017 No. 240 "On the Announcement of the Decade of Childhood in the Russian Federation," the Concept of the State Family Policy in the Russian Federation until 2025 in terms of the event "Activities to educate parents in the field of pedagogy and age psychology," as well as the implementation of the Law on Responsible Parenthood in the Republic of Sakha (Yakutia).

The project under parental education (universal education) implies the enrichment of knowledge, attitudes, and skills of parents necessary for the care of children and their education, along with the harmonisation of family relations. The project involves the best specialists of the region in narrow profiles: paediatrician, psychologist, teacher, speech therapist, gynaecologist, urologist, lawyer, family therapist, etc.

The creation of conditions implies the preparation of young parents for the role of the first spiritual mentors, forming the children's future trajectory of life; increasing the level of psychological comfort in families and increasing the motivation of parents to a conscious process of education; education of the parent community about the legal aspects related to the responsibility of parents for the upbringing of children.

The curriculum's content implies the preparation of young parents for the role of the first mentors; formation of a future trajectory of life in children; increasing the level of psychological comfort in families and increasing the motivation of parents to a conscious process of education; education of the parent community on the legal aspects related to the responsibility of parents for raising children.

Concerning the legal application of the law on responsible parenthood, the main authorising load on the implementation of the Law of the Republic of Sakha (Yakutia) "On Responsible Parenthood" is assigned to the state and municipal authorities. Thus, Chapter 3 lists the executive bodies of the state power of the Republic of Sakha (Yakutia), carrying out their activities in the field of: youth affairs, general and vocational education, health, culture, and spiritual development, physical culture and sports, social development, affairs of minors and the protection of their rights, custody and guardianship, and local government. In addition to the authorities, the list also includes socially oriented non-profit organisations.

As can be seen, for the most part, the law lists bodies with social and preventive powers. Among them, the only body that has the right to apply measures of influence against parents for the unfair performance of their duties on education, training and (or) maintenance is the Commission on Juvenile Affairs. A body that responds to messages and monitors the implementation of imposed measures of influence is the guardianship authority. According to Article 21, these bodies are responsible for violating the provisions of the Act on Responsible Parenthood. A literal interpretation of this article gives reason to believe that if a parent commits an offence, these bodies should also be responsible for the improper fulfilment of requirements for the formation of responsible parenthood.

Highlighted is the fact that the law does not confer authorities that are responsible for the formation of responsible parenthood and the right to arbitrary control and interference in family life. The law protects the inviolability of the person, home, private life (personal, family confidentiality). Therefore, the implementation of control functions concerning a particular family of state and local authorities can begin upon the occurrence of certain circumstances specified in Article 9:

1. For non-performance or improper performance of parents' duties on the maintenance, education, training, protection of the rights and interests of the child administrative responsibility according to the Code of the Russian Federation about administrative offences is provided.

2. For malicious evasion of payment for the maintenance of the child criminal liability by a court decision and following the code of the Russian Federation is provided.

3. For the involvement of a child by a parent in the commission of a crime by means of promises, deception, threats, or otherwise, including with the use of violence or the threat of its use, the involvement of a child in a criminal group or in the commission of a serious or particularly serious crime, as well as in the commission of a crime based on political, ideological, racial, national, or religious hatred or enmity, or on

the grounds of hatred or enmity against a social group, criminal liability is provided for following the Criminal Code of the Russian Federation.

4. For the involvement of a child in systematic use (drinking) of alcoholic and alcohol-containing production, drugs, psychotropic and intoxicating substances, in occupation by vagrancy or begging, including involvement with the use of violence or with the threat of its application, criminal liability according to the Criminal Code of the Russian Federation is provided.

5. For non-performance (improper execution) by the parent of duties on the education of the child if this act is connected with cruel treatment of it, criminal liability according to the Criminal Code of the Russian Federation is provided.

6. For the deliberate abandonment without the help of a person who is in a life or health-threatening condition and is deprived of the opportunity to take measures for self-preservation in adolescence, illness, or because of his helplessness, in cases where the perpetrator had a chance to assist this person and was obliged to take care of him or put him in a life or health-threatening condition, criminal liability is provided following the Criminal Code of the Russian Federation.

7. Parents (one of them) may be deprived of parental rights if they:

1) refuse to fulfil the obligations of parents, including at malicious evasion of payment for support or maintenance of children;

2) refuse to take their child from the maternity hospital (department) or another medical organisation, educational institution, social service organisation or similar organisations (without valid reasons);

3) abuse their parental rights;

4) mistreat a child, including physical or mental violence against him; encroach on his sexual integrity;

5) have chronic alcoholism or drug addiction;

6) have committed a deliberate crime against the life or health of their children, another parent of children, a spouse, including a non-parent of children, or against the life or health of another family member.

8. Taking into account the interests of the child, the court may decide on the removal of the child from the parents (one of them) without deprivation of their parental rights (restriction of parental rights).

Restriction of parental responsibility is allowed if leaving the child with the parents (one of them) is dangerous for the child due to circumstances beyond the control of the parents (one of them) (mental disorder or another chronic disease, the confluence of severe circumstances, and others).

Restriction of parental rights is also permitted in cases where the abandonment of the child with the parents (one of them) due to their behaviour is dangerous for the child, but there are not sufficient grounds for the deprivation of the parents (one of them) of parental rights. If the parents (one of them) do not change their behaviour, the guardianship authority, after six months after the court decision on the restriction of parental rights, is obliged to file a claim for deprivation of parental rights. In the

interests of the child, the guardianship body has the right to sue for the denial of parents (one of them) of parental rights before the expiration of this period.

9. Guardianship bodies can take legal actions in court about the alimony on the maintenance of the child, about the restriction of the parental rights, about deprivation of the parental rights, about the revocation of adoption according to the legislation of the Russian Federation.

From the content of this article, it is evident that in the matters of parents' involvement in legal responsibility, legal violations of criminal, administrative, and civil origin are concentrated.

It should be emphasised that parental responsibility relating to the legal prohibitions given in Article 9 is regulated by other laws (federal), such as the Criminal Code of the Russian Federation, the Civil Code of the Russian Federation, the Code of Administrative Offences of the Russian Federation, etc. And to bring parents (found guilty) to responsibility, other state bodies (court, Prosecutor's office, law enforcement agencies, bodies of preliminary investigation, etc.) of the federal status which is not mentioned in the Law on Responsible Parenthood are authorised. In this regard, the law does not need the procedural part of the regulation of prosecution. Since Article 9 is placed in the law with only one purpose – to inform, that is, to bring to the attention, even by duplicating the text of another law. Therefore, it should also be noted that the law on responsible parenthood does not establish new criminal and other unlawful acts or sanctions. Meanwhile, taking into account the fact that in the Russian Federation, there is no law explaining responsible parenthood, commentary on their qualification can be used.

In general, it should be emphasised that the investigated Law on Responsible Parenthood consists mainly of rules of a blanket nature. Blanket norms differ in that their participation in legal regulation depends on the standards of other normative legal acts, to the content of which they refer.[12] In this regard, the blanket rule operates at the expense of another, based on its normative force. Thus, out of 22 articles of the Law on Responsible Parenthood, 15 have similar content in other laws, primarily federal (the Family Code, the Criminal Code, the Code of Administrative Offences of the Russian Federation, the Convention on the Rights of the Child, prevention of neglect and juvenile delinquency, the activities of guardianship, the Commission on Juvenile Affairs, etc.).[13]

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[12] *Демин А.В.* Бланкетный и отсылочный способы формирования правовых норм: понятие, систематизация, проблематика // Вестник Нижегородской академии МВД России. 2015. № 2(30). Vol. 25–32 [Alexander V. Demin, *Blanket and Reference Ways of Formation of Legal Norms: Concept, Systematization, Problems*, 2(30) Bulletin of the Nizhny Novgorod Academy of the Ministry of Internal Affairs of Russia 25 (2015)].

[13] *Корякина З.И., Павлова А.А.* Проблемы применения Закона Республики Саха (Якутия) об ответственном родительстве // Общество: политика, экономика, право. 2018. № 1. Vol. 66–70 [Zinaida I. Koryakina & Arzulana A. Pavlova, *The Issues of Implementation of the Law of the Republic of Sakha (Yakutia) "On Responsible Parenthood,"* 1 Society: Policies, Economics, Law 66 (2018)].

The innovations established by the analysed law relate to the conceptual apparatus (Art. 2), the subject of responsible parenthood (Art. 1), its principles (Art. 4), the powers of state and municipal authorities in terms of their participation in the formation of responsible parenthood (Ch. 3). Thus, the law for the first time gives a legitimate interpretation of the content of such concepts as "responsible parenthood," "family," "maintenance of children by parents," "education of children by parents," "preservation of children's health by parents," "children's development by parents," "protection of children's rights and legitimate interests by parents."

Given this fact, it is assumed that the control part of the proper application of this law belongs to two main subjects: parents and their children, as well as bodies with authority to form responsible parenthood. On the example of this law, therefore, it can be emphasised that as such it does not perform a punitive role, but is a model of synthesis of mutual responsibility and obligations that form the basis of legal regulation.

To apply the law in the legal field of the Republic of Sakha (Yakutia), some of its bodies, such as the Commission on Juvenile Affairs, guardianship authorities and several others have the right to assess and determine the presence or absence of responsible parenthood, i.e. to recognise the family as dysfunctional.

An analysis of law enforcement practice has shown that the law on responsible parenthood has not yet been widely applied in the practice of courts, prosecutors, and other authorised authorities. Since priority in selecting, a law is given to federal legislation, which is explained by the principle of observing the hierarchy of acts. According to the results of interviewing employees of the juvenile unit, guardianship and guardianship authorities, the provisions of this law are applied primarily for outreach. Therefore, the law at this time is valid only in terms of education about responsible parenthood.[14]

Meanwhile, this law has enormous potential, since with the development of juvenile technologies, including repressive ones, this law can become one of the main ones.[15] For example, when certain authorities (the Commission on Juvenile Affairs, guardianship authorities) use the right to assess and determine the presence or absence of responsible parenthood, that is, recognise the family as dysfunctional.

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[14] *Корякина З.И., Павлова А.А., Варламова Д.К.* Эффективность Закона Республики Саха (Якутия) об ответственном родительстве // Евразийская адвокатура. 2018. № 1(32). Vol. 103–107 [Zinaida I. Koryakina et al., *The Effectiveness of the Law of the Republic of Sakha (Yakutia) "On Responsible Parenthood,"* 1(32) Eurasian Bar 103 (2018)].

[15] *Кисличенко А.* Законопроект «Об ответственном родительстве» – конец российской семьи // LiveJournal. 12 марта 2016 г. [Anna Kislichenko, *Draft Law "On Responsible Parenthood" – the End of the Russian Family*, LiveJournal, 12 March 2016] (Jul. 25, 2020), available at https://annatubten.livejournal.com/484140.html; *Мишустин Н.* Закон об ответственном родительстве – разгул ювенальщины // Русская народная линия. 19 марта 2016 г. [Nikolay Mishustin, *Law on Responsible Parenthood – Juvenile Rampant?*, Russian People's Line, 19 March 2016] (Jul. 25, 2020), available at http://ruskline.ru/special_opinion/2016/mart/zakon_ob_otvetstvennom_roditelstve_razgul_yuvenalwiny/.

The assessment of responsible parenthood is understood as a set of actions and measures taken by the authorised bodies to identify signs of conscientious fulfilment of the rights and obligations imposed on the parent by the legislation during the upbringing of minor children. Taking into account that the law on responsible parenthood concerns the life of each family, law enforcement officers have considerable responsibility for the correct determination of facts and events, conclusions, verification actions, etc. In the authors' view, many factors must be taken into account for a fair and objective assessment: the status of the parent, family income, interests, needs, abilities, and opportunities of each participant in family relations. For example, the law defines the subject of its regulation as legal relations aimed at the formation of responsible parenthood, promotion of traditional family values according to national traditions and customs, natural and climatic conditions, along with spiritual and moral foundations of society and the state (Art. 1). It should be taken into account that not every modern family can be a supporter of such values. Especially when, according to Article 14 of the Constitution of the Russian Federation, the Russian Federation is a secular state, and no religion can be established as state or compulsory, and religious associations are separated from the state and equal before the law.

Concerning different living conditions of families, expressed in various social, property, economic, intellectual, and physiological differences, an acceptable option is an individual approach to the assessment of parenthood as responsible. At the same time, the authors believe that it is necessary to proceed from the parent's integrity, when, depending on individual capabilities and within the framework of real abilities, they take care of the child. The concept of "responsible parenthood" forms the image of "ideal parenthood," the high requirements of which not every parent can fulfil. Especially if the family is in difficult living conditions in which a large proportion of the Russian population lives (income below the subsistence level, unemployment, illness, etc.) and it is not possible to introduce all into the regulatory framework of responsible parenthood, as well as to predict what kind of person the child will grow up to be. The law on responsible parenting, on the one hand, requires freedom of opinion of the child, on the other – it forces him and the parent to perform specific actions dictated by him, to report on them. In this regard, there are many problematic issues. For example, what is the difference between the legitimate interests of the child and his needs; whether the child's development is guaranteed by the efforts invested in it and what to do if the expectations of responsible parenthood are not met; what category of parents may be unable for specific reasons to fulfil the obligations of the responsible parent, etc.

According to the data of the All-Russian Public Organization for the Protection of the Family "Parental All-Russian Resistance," the invasion of the family with the subsequent removal of children is growing every year, especially after the Federal Law of 1 January 2015 No. 442 "On the Basics of Social Services for Citizens in the Russian Federation." According to experts, it was this act that made it possible to turn

the family into the sphere of social services, since it allows social support for families, that is, supervision of citizens "for prevention." The demand for children for a "family arrangement" is, according to experts from non-profit organisations in this field, at least 20 thousand children a year. Senator E. Mizulina relying on official statistics gives an even high figure – about 60 thousand people.[16] Usually, single parent and large families are at risk. Poverty is still becoming the most popular reason for most interventions by guardianship authorities, namely "poor living conditions, lack of repair, lack of furniture, lack of furniture, lack of food in the refrigerator." Against this background, in the last few years, new dangerous grounds for seizures have appeared. "For example, when there is a conflict between teenage children and parents. If parents strictly raise their children, and the children are dissatisfied, in this case, the guardianship authorities often take the kid's side to protect them.

Another example is cases of absenteeism at schools, such as when a child is educated at home, when the parents took the child out of school or kindergarten at the wrong time, left them with relatives or other adults, or conflicts with neighbours who don't like that the kids are noisy. This system is also suitable for schools and children's organisations to manage with uncomfortable parents. Today, any careless step can lead to the fact that guardianship authorities come and take away children from families. At present, too broad and vague criteria are applied to families that are recognised as socially dangerous. Families in a socially dangerous situation should be understood, as before, only those in which parents are addicted to psychoactive substances – alcoholism, drug addiction, and involve children in an antisocial lifestyle and offences."[17]

Identifying the fact that the family "has children who can be removed" is the responsibility of the guardianship authorities. Still, today this identification service can be transferred to different structures – medical, educational, non-profit organisations and others. That is, organisations that can provide social services to children and families who are in stressful situations, put on social accounting. Thus, a message can come from everywhere.

Based on the analysis of social realities occurring in society, it is possible to identify the following factors that prevent the formation of responsible parenthood (not related to offences and foundations for deprivation or restriction of parental rights):

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[16] Детство без родителей. Законодательство и практика. Итоговый альтернативный доклад РВС: Материалы независимого мониторинга, проведенного Общероссийской общественной организацией защиты семьи «Родительское Всероссийское Сопротивление» (2017) [Childhood Without Parents: Legislation and Practice of Removing Children from Russian Families – Final Alternative Report: Materials of Independent Monitoring Conducted by the All-Russian Public Organization for the Protection of the Family "Parental All-Russian Resistance" (2017)] (Jul. 25, 2020), available at https://rvs.su/statia/detstvo-bez-roditeley-zakonodatelstvo-i-praktika-itogovyy-alternativnyy-doklad-rvs.

[17] Родительская общественность бьет тревогу: количество необоснованных изъятий детей из семей растет // Накануне.RU. 28 марта 2017 г. [Parent's Associations Sound the Alarm: The Number of Unjustified Removal of Children from Families Is Growing, Nakanune.RU, 28 March 2017] (Jul. 25, 2020), available at https://www.nakanune.ru/news/2017/03/28/22465122/.

– insufficient funds for child support, low income (below the subsistence level), unemployment;

– the disease of a parent or a child, excluding a full life without deviations;

– recognition of parents as incapable or partially capable;

– systematic use (drinking) of alcoholic and alcohol-containing products, drugs, psychotropic and intoxicating substances by parents;

– low level of intellectual development of the parent, which is not a mental disorder (dementia or other mental illness);

– minor age of parents;

– divorce or termination of cohabitation of parents; etc.

Despite the blanket incorporation of regulations from different legal sources into one legal act, the Law on Responsible Parenthood focuses on the content of the behavioural role required concerning the child.

The theory of law distinguishes several circumstances excluding legal responsibility, which "represent an interdisciplinary legal institution, providing for a set of circumstances (phenomena) of a universal nature, in which an act committed by a person, externally containing signs of the offence, is recognised socially useful and lawful, bringing a person to any kind of negative legal responsibility is excluded, and the application of protection measures to it in law is limited by special instructions of the law."[18]

The fact of commission of the offence and its legal structure is the only and necessary basis for bringing perpetrators to justice. Legal liability is the adverse consequences established by law, occurring to the offender in connection with the commission of the offence.[19]

Taking into account legal and social realities, in the legal regulation, some rules recognise circumstances of the offence to be respectful and subsequently, there may be grounds for exclusion and exemption from legal liability. Full institutional registration of conditions excluding legal responsibility received in the Criminal Code of the Russian Federation and their list can be presented in the following form:

– The insignificance of the act (Art. 14, part 2 of the Criminal Code of the Russian Federation). The commission of an action, or inaction, although formally containing the indicia of any act provided for by this Code, which, because of its insignificance, does not represent a social danger, which caused no harm and has not created damage to a person, society, or the state, shall not be deemed a crime;

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[18] *Степанов В.В.* Правовая природа обстоятельств, исключающих юридическую ответственность // Вестник Пермского университета. Юридические науки. 2014. Вып. 3(25). Vol. 186–195 [Vitaly V. Stepanov, *The Nature of the Liability-Excluding Circumstances*, 3(25) Perm University Herald. Juridical Sciences 189 (2016)].

[19] *Ячменев Ю.В.* Юридическая ответственность: понятие, виды и особенности // Вестник Санкт-Петербургского университета МВД России. 2012. Т. 54. № 2. Vol. 66–74 [Yuri V. Yachmenev, *Legal Responsibility: Concept, Types and Features*, 2(54) Bulletin of St. Petersburg University of the Ministry of Internal Affairs of Russia 65 (2012)].

– The age of criminal liability (Art. 20 of the Criminal Code of the Russian Federation). The age of criminal responsibility is 16 years, and it is 14 years on separate structures (this provision can concern those who became a parent at a minor age);

– Insanity (Art. 21 of the Criminal Code of the Russian Federation). A person who, at the time of committing a socially dangerous act, was insane, that is, was unable to understand the actual character or social danger of his actions (inaction) or to govern them as a result of a chronic or temporary mental disorder, mental deficiency, or any other psychiatric condition, shall not be subject to criminal liability;

– Innocent infliction of harm (Art. 28 of the Criminal Code of the Russian Federation) – an act is recognised as committed innocently if the person who committed it did not realise and in the circumstances of the case could not realise the public danger of his actions (inaction) or did not foresee the possibility of socially dangerous consequences and in the circumstances of the case should not or could not anticipate them (incident). The act is also recognised as committed innocent if the person who committed it, although foresaw the possibility of socially dangerous consequences of their actions (inaction), but could not prevent these consequences due to the inconsistency of their psychophysiological qualities to the requirements of extreme conditions or neuropsychiatric overload;

– Justifiable defence (Art. 37 of the Criminal Code of the Russian Federation). It should not be deemed a crime when harm is inflicted in the state of justifiable defence against an attacking person, i.e. in the case of the protection of the person and the rights of the defendant or other persons, law-protected interests of the society or the state against a socially dangerous attack if such an attack involved violence threatening the life of the defendant or another person or an immediate threat of use of such violence;

– The infliction of harm on a detained person who has committed a crime (Art. 38 of the Criminal Code of the Russian Federation). The infliction of harm on a person who has committed a crime during his detention or during his delivery to the authorities, or in thwarting the possibility of the commission by him of further offences, shall not be deemed a crime unless it was possible to detain such person and there was an excess of the measures taken for this detention;

– Extreme necessity (Art. 39 of the Criminal Code of the Russian Federation). The harming of legally-protected interests in a state of absolute necessity that is, for the purpose of removing a direct danger to a person or his rights, to the rights of other persons, or to the legally-protected interests of the society or the state shall not be deemed to be a crime if this danger could not be removed by other means and if there was no exceeding the limits of extreme necessity;

– Physical or mental coercion (Art. 40 of the Criminal Code of the Russian Federation). The infliction of harm to legally-protected interests as a result of physical coercion shall not be a crime if, in consequences of such coercion, the offender could not control his actions (inaction).

Also, in other areas of law, other similar circumstances are established. Thus, the conditions that exempt parents from legal liability can also include:

– Termination of obligation for the impossibility of performance (Art. 416 of the Civil Code of the Russian Federation). The impossibility of performance shall terminate an obligation if it was caused by a circumstance for which none of the parties is liable;

– Termination of obligation by the death of citizen (Art. 418 of the Civil Code of the Russian Federation);

– Urgent need (Art. 2.7 of the Code of Administrative Offences of the Russian Federation). Where a person inflicts wrong against interests protected by the law in the event of urgent necessity, that is, for the prevention of a direct danger to a person, or to the rights of the given person, or of other persons, as well as to the interests of the state or society protected by the law, and where this danger could not be prevented by other means and the inflicted wrong is less than the one that has been avoided, it shall not be deemed an administrative offence;

– Insanity (Art. 2.8 of the Code of administrative offences of the Russian Federation). A natural person who, when committing wrongful actions (omission), was insane, that is, could not comprehend the actual nature and wrongfulness of his actions (omission), or could not direct them as a result of a chronic mental disorder, or a temporary mental disorder, or imbecility, or any other psychological disease, shall not be administratively liable.

Thus, the liability of parents provided for by legislation may be revised in the light of various legal circumstances, including exemption from legal liability or mitigation of punishment.

3. Expected Results of the Implementation of the Law on Responsible Parenthood

According to the prevailing opinion of legal scholars, the effectiveness of the law can be determined by studying its content, continuous legal monitoring, evaluation and analysis of its application.[20] The quality of the law can be assessed by comparing its expected and actual potential, the impeccable legal technique of its preparation, timeliness and suitability of adoption. In this regard, the successful implementation of the Law on Responsible Parenthood should be expected to reduce the number of:

– offences committed by parents against their minor children;

– deprivations and restrictions of parental rights;

– orphans or children left without parental care;

[20] *Тихомиров Ю.А.* Эффективность закона: от цели к результату // Журнал российского права. 2009. № 4(148). Vol. 3–9 [Yuri A. Tikhomirov, *The Effectiveness of the Law: From the Goal to the Result*, 4(148) Journal of Russian Law 3 (2009)]; *Белоусов С.А.* Качество закона и эффективность его применения: пути преодоления негативных последствий законодательного дисбаланса // Вестник Поволжской академии государственной службы. 2014. № 4(43). Vol. 11–17 [Sergey A. Belousov, *The Quality of the Law and the Effectiveness of its Application: Ways to Overcome the Negative Consequences of the Legislative Imbalance*, 4(43) Bulletin of the Volga Region Academy of Public Service 11 (2014)].

– consisting in different types of registration of dysfunctional families with minor children;

– offences committed by minors themselves;

– neglect, vagrancy, and begging.

One of the common grounds for parental responsibility is the commission of an offence by a child. The causes and conditions of offences are different. According to the Presidential Commissioner for Children's Rights of the Russian Federation, 80% of children without parental care are so-called social orphans whose parents are alive.[21] The main cause of social orphanhood is an antisocial family, where parents are deprived of parental rights due to alcoholism or drug addiction and child abuse. The antisocial family also encourages children to become addicted to psychoactive substances, which undoubtedly jeopardises their health and well-being. According to the Ministry of Internal Affairs of Russia in the Republic of Sakha (Yakutia), at the end of 2017, 2,177 parents are registered in the internal affairs bodies, who do not perform duties on the education and maintenance of children (similar indicators of last year – 1945), of which 1,740 drink alcohol (similar indicators of last year – 1,670), drugs – 23 (similar indicators of last year – 20), having children under the age of 3 years – 449 (similar indicators of last year – 616). The analysis of statistical data shows that antisocial parents and dysfunctional family environment are the main factor (the basic reason) causing the illegal behaviour of minors. In special literature, they are paid special attention.[22] According to scientists, it is not possible to eliminate all the causes and conditions of offences because it is impossible to eliminate all the contradictions that exist in society. Meanwhile, people should strive to reduce their number, the state and society are obliged.[23] Thus, one of the objectives of the

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[21] *Брынцева Г.* Детям пора домой // Российская газета. 8 февраля 2013 г. [Galina Bryntseva, *Children Are to Go Home*, Rossiyskaya Gazeta, 8 February 2013] (Jul. 25, 2020), available at https://rg.ru/2013/02/08/astahov.html.

[22] *Ганишина И.С.* Неблагополучная семья и девиантное поведение несовершеннолетних [Irina S. Ganishina, *Dysfunctional Family and Deviant Behavior of Minors*] (Moscow: Publishing House of the Moscow Psychological and Social Institute; Voronezh: Publishing House of NGO "MODEK," 2006); *Лелеков В.А.* Ювенальная криминология [Victor A. Lelekov, *Juvenile Criminology*] (2nd ed., Moscow: Unity-Dana, 2014); Общество и преступность несовершеннолетних: сборник статей, включающий материалы социологического исследования «Общественное мнение о несовершеннолетних правонарушителях», проведенного в феврале – мае 2004 г. в Санкт-Петербурге, Саратове, Ульяновске [Society and Juvenile Delinquency: Collection of Articles, Including Materials of Sociological Research "Public Opinion on Juvenile Delinquents," Conducted in February – May 2004 in Saint Petersburg, Saratov, Ulyanovsk] (L. Ezhova & M. Makoli (eds.), Saint Petersburg: Center for Independent Sociological Research, 2007); *Сухов А.Н.* Социальная психология преступности [Anatoly N. Sukhov, *Social Psychology of Crime*] (Moscow: Moscow Psychological and Social Institute, 2007); *Васкэ Е.В.* Эволюция преступности несовершеннолетних в России: психолого-правовой анализ [Ekaterina V. Vaske, *Evolution of Juvenile Delinquency in Russia: Psychological and Legal Analysis*] (Moscow: Genesis, 2010).

[23] *Чернова С.С.* Профилактика правонарушений на современном этапе // Научно-методический электронный журнал «Концепт». 2014. Т. 20. Vol. 1101–1105 [Svetlana S. Chernova, *Crime Prevention at the Present Stage*, 20 Scientific-methodical electronic journal "Concept" 1101 (2014)] (Jul. 25, 2020), also available at http://e-koncept.ru/2014/54484.htm.

effective implementation of the Law on Responsible Parenthood is to deal with offences committed against the family and minors or by minors themselves.

The effectiveness of the law on the formation of responsible parenthood also depends not only on the awareness of the parent of his responsibility but also on the specific personal results of the child. System analysis of the content of the law suggests that such results can be attributed if the child:

– received his general education;

– does not use psychoactive substances;

– is of sound mind;

– spiritually-morally and intellectually developed;

– respects labor;

– has self-service skills;

– respects the customs and traditions of ancestors, social values, the rights of other people, someone else's property;

– has tolerance, the ability to manage the actions and critically evaluate them;

– is able to express his opinion when the family discusses an issue affecting his interests;

– law-abiding, deviant manifestations in behavior are absent;

– does not visit public places at night, including streets, stadiums, parks, squares, public vehicles, objects (in territories, in premises) of legal entities or citizens performing business activity without formation of legal entity which are intended for ensuring access to the internet, and also for implementation of services in the sphere of trade and public catering (the organisations or points), for entertainment, leisure where in the order established by the law retail sale of alcoholic products is provided, and in other public places without their support (persons replacing them) or persons carrying out activities with the participation of children.

4. Discussion of Some Results of a Sociological Survey on Responsible Parenthood

Despite such complex tasks and requirements for parents, sociological studies have shown a generally positive perception of the law. The authors conducted a questionnaire survey in 2017–2018 of 617 respondents who are parents and residents the Republic of Sakha (Yakutia), it shows that, nevertheless, 95.0% of respondents consider themselves a responsible parent, and only 1.6% of respondents do not consider themselves as such. 3.4% of respondents found it difficult to answer. Parents' confidence in their responsibility is likely to indicate a positive perception of their actions, positive self-esteem and a low threshold of self-criticism.

To identify the parents' understanding of the term "responsible parenthood," respondents were asked to choose one of its two definitions or to enter their version of the answer. 51.4% of the parents surveyed chose the variant of the answer as "the

fulfilment of the rights and duties of the parent, respect for the rights of the child, taking into account the opinion and needs of the child, the maximum fulfilment of his desires," which corresponds to the definition in the law. The other half of parents (44.4%) understands responsible parenthood as "raising children in love and care within my capabilities," demonstrating the priority of moral aspects in education. 4.2% of parents surveyed gave a different answer. The lack of a shared understanding of responsible parenthood is partially explained by the fact that some respondents are not able to take into account the views and needs of their children, inevitably involving some material costs. For example, 42.9% of respondents noted that "there is enough money for food and clothing, but buying a refrigerator, TV, and furniture is a problem," 20.8% –"there is enough money for food, but it is difficult to buy clothes," 4.2% of respondents "there is not enough money even for food." That is, only $^{1}/_{3}$ of the respondents do not experience financial difficulties. The fact that parents see the limits of their responsible approach more in moral guidelines than in legal ones can also lead to fragmentation in the ideas about the content of responsible parenthood.

One of the principles of responsible parenthood (according to the law) is the realisation of children's right to express his or her opinion in the family concerning any matter affecting his or her interests. The results of the parents' survey have shown that only 1.4% of respondents do not agree with this principle, they believe that "a child has no right to express his opinion; he must fully obey the will of his parents and the interests of the family." The absolute majority is sure that the child can express his opinion, but parents have the final say (86.3%). The absolute right of the child to express his or her opinion is supported by only 10.6 per cent of parents.

The results of the survey have shown that the majority of respondents do not deny their child's participation in the discussion of issues affecting his interests. Still, in terms of the fulfilment of the desire, the decision of the parents is given priority. According to the majority of parents, the child, due to his social and physiological immaturity, is not yet able to solve any issue not to the detriment of their own and common interests of the family, because he is not able to be fully responsible for his actions. Also, according to parents, the fulfilment of any desires of the child can negatively affect his socialisation, forming his mainly consumer attitudes.

Currently, there are ongoing disputes about the extent of state intervention in intra-family relations.[24] To identify the attitude of parents to this discussion question, respondents were asked the following question: "Do you agree with the provision that the state has the right to determine the directions and methods of education of children in the family?" (To give birth and raise a child is no longer

[24] *Тендрякова М.В.* Детские доносы и ювенальная юстиция // Образовательная политика. 2010. № 9–10(47). Vol. 106–114 [Maria V. Tendryakova, *Children's Denunciations and Juvenile Justice*, 9–10(47) Educational Policy 106 (2010)]; *Цинченко Г.М.* Ювенальная юстиция: риски внедрения // Управленческое консультирование. 2015. № 8(80). Vol. 114–127 [Galina M. Tsinchenko, *The Juvenile Justice System: Implementation Risk*, 8(80) Managerial Consulting 114 (2015)].

a personal, private matter of parents and family, but a state, common cause). The survey revealed that parents do not have a single, dominant opinion on this issue – they were divided almost equally. More than half (53.9%) of the respondents were against state interference in family affairs. Some parents expressed their opinions in the questionnaires, most of which agreed with the fact that the state had the right to intervene in domestic affairs only if the family was dysfunctional. The ordinary, prosperous family has the right to choose the methods of education in the family; the state should not interfere here. The opposite view is expressed by 39.7 per cent of parents: "The state has the right to regulate the relationship between children and parents in the family." 6.4% of the respondents have a different opinion.

The results of the focus group held with the participation of representatives of the legal community to discuss the law on responsible parenthood revealed the following main provisions:

– the law is "naively" stated, it is perfectionist (utopian) and challenging to implement, thereby it will not give rise to significant consequences, it is declarative, divorced from real life, does not deserve the status of the law, but the Concept or Program;

– there are too high requirements for parents, do not take into account the complicated social, economic, legal situation in the state, the law is divorced from reality, will harm the improvement of the demographic situation, and gives the installation of "reduced lifetime fertility";

– doesn't take into account the balance of interests of the individual and the state, the state wants to remove the responsibility to help and create conditions for the quality of education of children, completely shift everything to the parents and then control them for juvenile terror;

– the birth of children and parenthood is taken under the "certification" by the state, so only the state has the right to recognise the parent responsible, i.e. suitable for parenthood;

– the law abounds in blank rules, the hierarchy of sources of law and competition rules is not subject to application. Thus, the law can be classified as declarative ("dead branch");

– it may create a risk of discrimination against parents (by nationality, religion, health, property, and social status);

– contains many concepts that are not amenable to legal explanation (social, moral, religious origin);

– the law will be effectively implemented only if a clear and coherent mechanism is developed, based on the interaction and mutual responsibility of all the actors mentioned in it, in the presence of monitoring and continuous monitoring, as well as with adequate funding for the formation of responsible parenthood;

– the law will have a real impact on parents and children only if the population is adequately informed, due to its unusual specificity, it needs a detailed commentary on it with its further dissemination for proper application and use;

– the law due to the dominating presence of binding norms in the legal regulation may be the subject of an appeal by citizens to initiate judicial or supervisory proceedings.

Conclusion

Formal legal, systematic and comparative legal analysis of the entire text of the law allowed the authors to determine the legal model, social and legal composition of responsible parenthood, to assess its purpose, to form an idea of the role status of each subject of its regulation.

Modern understanding of responsible parenthood is going through a stage of transformation from social and moral origin to legal, i.e. official and documented format.

The novelty of the law lies in the implementation of new terminological explanations in the legal space, the definition of the principles and content of responsible parenthood, the establishment of a circle of authorised and responsible for its formation bodies.

The Law on Responsible Parenthood will be effective only if it is brought to the attention of the population and if it fulfils its main task – to inform and explain, to consolidate efforts together with the authorised bodies for the formation of responsible parenthood. The law has the right to exist as long as parents need education and assistance to raise their minor children, and the state can ensure this right in free and unhindered access. The effectiveness of the law under study is not punitive, but preventive and auxiliary.

The legal regulation of responsible parenthood on the example of the studied law can expand the international understanding of it, as the issues of parenting are of global importance and covered by international law. On the legal experience of the Republic of Sakha (Yakutia), there is an opportunity to make sure that for the formation of responsible parenthood, consisting not only of legal but also personal (private) interests of citizens; the state has the right to give their respective authorities the power of their participation for its formation by establishing a mutual set of rights and obligations between society, the individual, and the state. In this regard, it is evident that the law is addressed not only to parents but also to the authorities and public institutions. Meanwhile, the expansion of the subject composition of the formation of responsible parenthood at the expense of authorities and public institutions can give rise to many complex problems that complicate family relations and limit the sovereignty of the family.

Despite its profound significance, the law on responsible parenthood is far from perfect. First, it does not take into account those legal circumstances that can affect the responsibility of parents by exclusion given external, independent of the obstacles. Therefore, it becomes vital to correctly and adequately, that is, without undue interference in the space of family and personal relationships, to determine responsible parenthood.

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CONFERENCE REVIEW NOTES

PEOPLE-CENTERED APPROACH AND YOUTH PARTICIPATION IN BRICS: A CASE OF BRICS SCHOOL*

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Introduction

International Research and Educational Program "BRICS School" took place in Moscow on 5–10 October 2020. It was the 4th school organized by the National Committee for BRICS Research jointly with the Russian Foreign Ministry in the frameworks the Russian BRICS Chairmanship. The School participants were young researchers, earlier career leaders, bachelor, master and PhD students, diplomats, public activists, entrepreneurs from Brazil, China, India, Russia, South Africa and other countries. Eighty participants had been chosen by the Contest for BRICS Young Leaders among several hundred applicants. The objective of the annual BRICS School is to identify the most talented and involved representatives of BRICS youth and to build a community of young leaders developing the relevant agenda of the BRICS countries.

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1. Background of BRICS International School

The BRICS International School is an annual event aimed at training young experts specializing in BRICS studies in political, economic, humanitarian fields and other relevant areas of interaction within the five countries – Brazil, Russia, India, China, and South Africa. The School is a unique research and educational program giving its participants an exclusive opportunity to broaden their professional horizons, to develop communication skills, and to study specifics of cooperation among the BRICS countries. In 2020, within the framework of the Russian BRICS Chairmanship an exceptional School program has been worked out with the primary goal to expand a pool of young experts – "BRICSologists" for further development of a youth track of cooperation within BRICS as well as to support future-oriented projects and ideas from the young leaders from BRICS countries. The idea of 2020 BRICS School is to accumulate intellectual potential of the young experts and to develop their professional community. It has become a powerful gathering of young people under the leadership of mentors – top Russian and international experts, practitioners, representatives of governmental and non-governmental organizations, ministries and agencies, think tanks with considerable experience in BRICS research. The BRICS School program was divided into subject-specific modules developed by partner organizations such as Russian Council for International Affairs, Agency for Strategic Initiatives, Russian Presidential Academy of National Economy and Public Administration, Far Eastern Federal University, Alexander Gorchakov Public Diplomacy Fund, Moscow School of Management SKOLKOVO (Russia), Institute for Applied Economic Research (Brazil), Observer Research Foundation (India), China Council for the BRICS Think Tank Cooperation (China) and South African Centre for BRICS Research (South Africa).

2. Summary of the BRICS International School

In October 2020, BRICS School participants have had a unique opportunity to attend a comprehensive course of lectures specifically developed by prominent politicians, university professors, research well-known for their activities in the BRICS cooperation and development. Among them, Dr. Vyacheslav Nikonov, the Chairman of the Committee on Education and Science of the State Duma of the Russian Federation and the Chairman of Russian National Committee on BRICS Research, the Dean of the Faculty of Public Administration at Moscow State University provided an appealing lecture on the topic "Hegemony *vs.* Democracy on International Arena: Who's Gonna Lead?". Mr. Sergey Ryabkov, the Deputy Minister of Foreign Affairs of the Russian Federation; Sherpa in BRICS talked about the challenges for BRICS cooperation in the post-COVID era.

The School program included not only lectures, but also master classes, tutorials, case studies, webinars. Educational webinar facilitated by Ms. Ksenia Kuzmina, the

Program manager of Russian International Affairs Council introduced experts – Prof. Georgy Toloraya, the Founder and Deputy Chairman of the Board of Russian National Committee on BRICS Research, Dr. Dmitry Razumovskiy, the Director of the Institute for Latin American Studies and Prof. Alexey Maslov, the Director of the Institute of Far Eastern Studies at Russian Academy of Sciences, as well as senior researchers of the Russian Academy of Sciences. Best practices of BRICS entrepreneurship were introduced by business experts in cooperation with Agency for Strategic Initiatives and facilitated by Ms. Veronika Peshkova, the Goodwill Ambassador of the United Nations Industrial Development Organization (UNIDO); the President of the Foundation for the Development of Public Diplomacy "Women's Perspective."

Also, the participants discussed a Case-study "How to Build a Successful Startup," had tutorials "BRICS Education: Skill Development for the 21st Century" and "BRICS Youth Cooperation," were involved in round table discussions "Public Diplomacy: Alternative Ways on How to Foster IR" and "Implementation of the Sustainable Development Goals in BRICS Countries."

The most memorable events became the foresight webinar "Digital BRICS: Managing Technology for the Post-Digital Era" facilitated by Moscow School of Management SKOLKOVO and the seminar "Global Governance in Post Pandemic World and Implications for BRICS Cooperation" leaded by the Russian Presidential Academy of National Economy and Public Administration (Moderator: Dr. Marina Larionova) which includes the experts from all five BRICS countries – Dr. André De Mello E Souza, a senior researcher of the Institute of Applied Economic Research (IPEA) in Brazil, Prof. Sachin Chaturvedi, the General Secretary of Research and Information System for Developing Countries (RIS) in India, Mr. Wang Chenxing, the Deputy Secretary General at Chinese Association for Russian, East European and Central Asian, China Studies in China, Dr. Philani Mthembu, the Executive Director at the Institute for Global Dialogue (IGD) in South Africa.

Participating in discussions and workshops, seminars, gave the young leaders an opportunity to expand their professional knowledge, to develop communication skills, to explore the specifics of cooperation between the BRICS states, their place on the international arena, future goals and objectives of the five. As the result of their activities within the School the young "BRICSologists" have become capable to formulate their positions about the global agenda and foresee the prospects of institutionalization of the BRICS format, goals and priorities of the grouping for the future.

3. Summary of the BRICS International Contest

A specific feature of the International School has become its conjunction with the Contest for BRICS Young Leaders. The objective of the Contest was to identify the most promising projects and papers to enhance practical cooperation among the youth from BRICS countries and beyond. The Contest was targeting at mobilizing

the intellectual potential of promising young leaders to develop strategies and solve the most acute problems of BRICS development; supporting BRICS studies and promote projects and ideas for BRICS development. The contest encourages young scientists and specialists in the field of international relations, economics, finance, trade, humanitarian cooperation to engage in the process of the intellectual search for BRICS new development models.

The contest accepted materials within the following three areas:

– the original research on the problems and prospects of BRICS development until 2050;

– projects aimed at the development of practical cooperation within BRICS;

– academic articles and essays devoted to issues of positioning the BRICS in the international arena.

As the result 124 works have been submitted and evaluated by the Jury of BRICS experts. The topics of the submission were grouped as follows:

(1) "Towards a Brighter Future" – original research/article/project that can make a real contribution to the development of the BRICS.

(2) "BRICS in the Changing World Order" – original research/article/project devoted to the development of a new strategy for BRICS to promote its role in global governance.

(3) "Digital BRICS" – original research/article/project on BRICS cooperation in the digital era.

The best works were presented at the following topic – "Possible Legal Cooperation for a BRICS's Perspective on International and Transnational Economic Law" (Bruce Campos and Emilio Silva, University of Sro Paulo, Brazil), "Prospects for the BRICS-EU Relationship" (Mikhail Porunkov, Udmurt State University, Russia), "A Long-Term Vision for BRICS Youth" (Reon van der Merwe, University of Cape Town, South Africa), "The Role of Social Scoring in the National Banking Systems of the BRICS Countries" (Kirill Cherevko and Mikhail Poliakov, South Ural State University, Russia), "BRICS and the Western-Centric Global Film Industry: Possibilities of the Digital Era" (Georgii Paksiutov, Lomonosov Moscow State University, Russia), "Participatory Methodologies and Technological Tools for Urbanization of Precarious Settlements: A Bridge Between BRICS Urban Actors" (Marcelo Santos, University of Sro Paulo, Brazil), "Quantitative Dynamics of Intra-BRICS Trade Relations" (Mohd Nayer Rahman, Nida Rahman and Zeenat Fatima, Aligarh Muslim University, India), "BRICS Population Trends: Developments and Projections" (Lucas Gualberto do Nascimento, State University of Sro Paulo, Brazil), "Comparing and Analyzing Public Health Data from BRICS Countries in an Economic Perspective" (Diego Tavares Albuquerque Cunha Federal University of Goiбs, Brazil and Diana Tereshchenko, Far Eastern Federal University, Russia), "Not Business as Usual in South Africa's Foreign Policy Under Ramaphosa: An Afrocentric Critique of Russia-South Africa Relations Within the Context of BRICS" (Vongani Muhluri Nkuna, University of Limpopo, South Africa).

The results of the Contest and "BRICS School" reveal that themes related to BRICS agenda are various and diverse. However, they are all crucial for the BRICS countries

and various stakeholders within the BRICS countries. These themes shape the BRICS and global agenda changing in this time of global crisis. The BRICS community having made great progress, but also how it can continue to grow and evolve. The world we live in today is characterized by volatility, uncertainty, complexity and ambiguity. The networks and linkages that make up our societies are being bent, rearranged and broken, by previously unforeseen challenges such as pandemics, the effects of rapid technological change and the need for a reformed international global order. BRICS represents one of the ways that nations are seeking to overcome these challenges and create a framework and network for international cooperation that can undo the hegemonies of the past and usher in a fairer and more just future. The main role in the global future as well as in BRICS cooperation belongs to the youth. The youth is one of key stakeholders within the broader BRICS community that has remained a largely untapped resource to date and which will undoubtedly determine the future of all BRICS countries.

4. The Role of Youth in a More People-Centered BRICS Community

Youth are roughly defined as those between the ages of 15 to 29. They form a unique sub-group that can be classified as "liminal agents" in society. This simply means that they are positioned at the cusp between childhood and adulthood, where their political and social subjectivities i.e. how they position themselves in relation to the world around them, are sufficiently developed to form a coherent identity, yet flexible enough to navigate and adapt to change and uncertainty.[1] This unique transitional state make youth vital to the future of a renewed multilateral order which has entities like BRICS at its center. Youth both shape and are shaped by the world around them, they are adept to learning and innovating. However, because of their open-minded vision of the world, they are also better able to identify shortcomings in the way that things have conventionally been done. While this means that youth tend to be more vulnerable to unhealthy forms of radicalism, this is all the more reason to provide positive channels through which the energies of youth can flow. The liminal features of youth are important qualities that societies and the world now need as they venture into the uncharted waters of a post-pandemic world. A long-term vision for youth in BRICS has the potential of becoming the cornerstone of a sustainable and successful people-to-people approach to the future of the bloc.

In the contemporary world states are no longer the only important stakeholders in international cooperation and development. The inclusion of the private sector, civil society and other sectors of society into the global political landscape has

[1] Bronwyn E. Wood, *Crafted Within Liminal Spaces: Young People's Everyday Politics*, 31(6) Political Geography 337 (2012).

presented both opportunities and challenges. Non-state actors have promoted more people-driven international linkages, which in turn has helped to improve global economic activity and cultural exchange. However, these activities are difficult to regulate and can sometimes serve the interest of individuals of select groups rather than the societies in which they operate. The failure of multilateral institutions and groups to adequately and effectively bring these diverse non-state stakeholders to the table as essential partners has further exacerbated the problem. Non-state actors and stakeholders are still viewed with suspicion by states at the expense of meaningful collaboration. Yet the people-to-people ties which are crucial to for achieving a reformed international order cannot be fostered through top down state-level relations alone.

Within BRICS there has been an increasing recognition that people-to-people ties serve a vital role in ensuring the sustained viability and future of the bloc. This is evidenced by Point 60 of the Xiamen Declaration adopted after the 2017 BRICS Summit which highlights "the importance of people-to-people exchanges to promoting development and enhancing mutual understanding, friendship and cooperation among BRICS peoples."[2] There is a dire need to promote not only greater cultural understanding, but also grassroots cross-regional cooperation between the citizens of the BRICS nations. Brazil, Russia, India, China and South Africa each face distinct stigmas and biases in the international community due to the Eurocentric view through which the BRICS nations have been studied in the field of international relations. The current post-Cold War order is based on the idea that there is only one model that nations should strive towards i.e. the Western model. However, the BRICS community is based on a fundamentally different premise. BRICS is built on the idea that each nation has its own unique journey and that while nations can and must seek to cooperate, no one nation can walk the journey that has been laid out for another. This pluralistic thinking is the key philosophy that must underpin a new people-centered multilateralism that respects the different contexts and histories of others. To achieve stronger people-to-people ties, that promote cross-societal learning and cooperation, must go beyond superficial levels and become a tangible reality for people on the ground.

Youth make up an important group within BRICS nations. To date, the BRICS nations have instated several projects to reach and include young people into the community. This includes initiatives like the BRICS Young Scientists Forum, increased cross-national education exchange, BRICS Civil Forum, BRICS Youth Parliamentarian's Forum, BRICS Youth Forum and the BRICS Games. These initiatives have been pioneering in promoting people-to-people ties in the BRICS community. However, it is vital for BRICS to also move towards forging a new political identity and vision by

[2] BRICS Leaders Xiamen Declaration (2017) (Oct. 1, 2020), available at http://www.bricschn.org/English/2017-09/05/c_136583711.htm.

allowing youth in the bloc to contribute in setting the course of the BRICS community. In recent years there has been a growing focus on youth inclusion into national and international politics via platforms that facilitate sustained engagement over time.[3] This shift is seen as part of a broader trend where globalization and the internet-age have transformed the way that everyday citizens engage with their societies and the international community. Political and social identities are being shaped transnationally and youth have been impacted the most by this shift.

COVID-19 has revealed that the world is only as resilient as the most vulnerable country and person. This moment of global reflection offers an opportunity to reconsider how the international community can implement the people-centric, inclusive, participatory development envisioned in guiding frameworks like the 2030 Agenda and Sustainable Development Goals. The crisis has exposed the inequalities and vulnerabilities in both developed and developing countries. It has highlighted the exclusion of many stakeholders in society such as the poor, women and the youth.[4] As a result of the pandemic the multilateral system, which was already on a back-foot due to a global rise in nationalism and protectionism, has been further disrupted. Nations are pulling away from collective decision-making processes at a domestic level as well as in the global political system. In many societies around the world the state has stepped into its rightful role as lead actor in the fight against the pandemic and its socio-economic consequences. However, there has also been a tendency for decision-making in this time of crisis to become too state-centric and unilateral. What this crisis has thus shown is that to truly address the needs of our time, domestically and internationally, states must seek to work cooperatively, among each other and with the various relevant stakeholders in their respective societies. This calls for states to pursue a new form of people-centered politics, that seeks to bring all people within society together and include the voices of the most marginalized, vulnerable and impoverished into the discourse. Employing a people-centered politic at both a national and international level remains key to reviving the multilateral system.

The youth are a major part of the population which are both affected by the aftermath of the pandemic but also play a key role in combatting it. This pandemic has limited the exposure of young people to certain essential resources and assets, such as healthcare, livelihoods, employment, and more, leading to the breakdown of the social networks and linkages that youth rely on.[5] Young people are most likely

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[3] Soo Ah Kwon, *The Politics of Global Youth Participation*, 22(7) Journal of Youth Studies 926 (2019).

[4] U.N. Committee for Development Policy, Development Policy and Multilateralism after COVID-19, Policy Note (July 2020) (Oct. 1, 2020), available at https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/CDP-Covid-19-and-Multilateralism.pdf.

[5] International Labour Organisation, Youth & COVID-19: Impacts on Jobs, Education, Rights and Mental Well-Being, Global Report (2020) (Oct. 1, 2020), available at https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_753026.pdf.

to be affected by the high unemployment caused by the pandemic, which makes the group more vulnerable to social ills such as crime or substance abuse. This has also been shown in U.N. reports on COVID19, which highlights that young people are some of the most affected by the pandemic's socioeconomic impacts as well as being the most active group among those fighting on the frontline, yet are being overlooked due to the limited health effect that the virus itself is having on this demographic group.[6] For these reasons, it's important to highlight that youth remain excluded from the conversation on the social, economic and political decisions being taken regarding the pandemic. However, beyond mitigating the effects of the pandemic youth play a central part in establishing a new multilateral world order. As agents of change youth inclusion can strengthen the BRICS bloc at a grassroots level. It's therefore vital that BRICS be promoted among young people of the bloc, not merely as a multi-national alliance but as a group embodying a new way of doing international politics. As actors positioned in diverse communities, youth and youth organizations form part of the frontline of communicating and leading the struggles in their communities, thus making this group a vital partner.

However, many youth and youth organizations face significant challenges in engaging meaningfully as actors in society. This is due to limited access to resources for projects and programs, a lack of platforms for coordination and skill-building as well as overall exclusion from the policy-making process.[7] To address this shortcoming the BRICS community must consider a global partnership to promote and support the activism of young people that strengthens dialogue and cooperation related to the developmental policy challenges in the pandemic/post-pandemic world. Youth make up a quarter of the population of the planet yet their participation in political discourse remains limited. There has also been a steady decline of youth participation in conventional political spaces such as elections, yet in the age of the internet, the youth are more conscious of political issues than ever before.[8] This disjunct between youth and politics highlights a serious flaw in the pre-pandemic approach to stakeholder participation in societies across the globe and particularly in the BRICS nations.

Nevertheless, youth voices remain marginalized in the political sphere and the impact of their actions often fail to have sustained effect due to the lack of formalized platforms through which they can engage in policy issues. BRICS governments are hesitant to engage young people through institutionalised platforms due to their

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6 U.N. Department on Economic and Social Affairs, Special Issue on COVID-19 and Youth, 27 March 2020 (Oct. 1, 2020), available at https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2020/04/YOUTH-FLASH-Special-issue-on-COVID-19-1.pdf.

7 Rashmi Thapa, *Mapping a Sector: Bridging the Evidence Gap on Youth-Driven Peacebuilding* (New York: UNOY Peacebuilders and Search for Common Ground, 2020).

8 Maria Tsekoura, *Debates on Youth Participation: From Citizens in Preparation to Active Social Agents*, 19(1) Revista Katálysis 18 (2016).

unconventional ideas, inexperience and even "radical" views. However, these features of the youth population must be harnessed not feared and marginalised. Building a more resilient BRICS community amid a crisis that will shape the coming decade requires that youth voices, views and concerns be address. Lack of understanding of the benefits of youth engagement in policymaking and programs of action limits the extent to which governments are willing to engage young people. Similarly, limited capacity, skills, resources, and tools are hindrances for the youth to articulate and shape their political views effectively.[9] To establish a new post-pandemic world order where BRICS can become a more closely-knit community, governments must promote youth inclusive participation and improve the capacity of young people to develop trust among BRICS cultures and build networks across BRICS borders.

The impact of existing initiatives remains marginal and sporadic in their impact. Engagements that are open to youth usually privilege those with the means to participate and even then, they are not spaces where mobilization and effective coalition building can take place. Rather they boil down to spaces for discussion or individual upliftment, in particular when measuring their effectiveness with regards to the least privileged youth within BRICS nations, whose voices must be heard the most. Platforms such as these rarely reach the majority of young people and all-together exclude those in rural and peri-urban areas. However, in a time of crisis and change BRICS has an opportunity to give meaningful content to youth engagement and utilise youth views, input and energy to promote and build a new kind of people-centred multilateralism. Youth offer a key part of building the people-to-people ties necessary for a more resilient BRICS in a time of global isolationism and can help BRICS become a better model for a new kind of people-centered politics, where youth engage and build social trust across borders. BRICS governments should involve youth in their policy design, monitoring and implementation processes and provide safe spaces for young people to interact on these measures, express their needs and mobilise to achieve the goals of the government within communities. This approach is in line with the U.N. concept of "Leaving no one behind" and can further enhance the role of BRICS as an advocate for development that hears, sees and includes all people in society.

Conclusion

BRICS School and BRICS International Contest are a vivid example of people-to-people approach and exchanges. It has brought together young people focusing on BRICS issues and aspiring to contribute to BRICS development and cooperation. The idea and the design of BRICS School reflect the main principles of the BRICS block – pluralistic thinking, cross-societal learning and cooperation. This format

[9] Jennifer S. Earl et al., *Youth, Activism, and Social Movements*, 11(4) Sociology Compass e12465 (2017).

of cooperation is particularly important for the BRICS youth who are the driving force of future innovations and the inheritors of BRICS and its legacy. In line with this people-centered approach, the way that BRICS states choose to engage youth and include this sub-group into dialogues on policymaking and pandemic/post-pandemic response strategies will impact the place that the bloc can take on in a reformed global order. The COVID-19 pandemic has given governments the unique opportunity to reshape the terms of the interaction between themselves and the various stakeholders in their societies, using the events and formats like BRICS School to achieve and adopt creative approaches to policy, regulation, and partnerships.

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