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BRICS LAW JOURNAL (BRICS LJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

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

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

Notes for Contributors

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

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

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

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CHIEF EDITOR'S NOTE ON NEW OPPORTUNITIES FOR BRICS-RELATED RESEARCH AND COLLABORATION

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In 2020, Russia held the chairmanship of BRICS, the association of five major countries that are home to almost half of humanity, that produce about one-third of the world's gross domestic product and that increasingly determine the global political agenda and balance of power. The BRICS countries have successfully established strong partnerships between their governments and their business, scientific and public societies. Today, BRICS are working together to withstand a variety of threats and challenges, from terrorism and international financial crises to the Covid-19 pandemic and the unprecedented dangers in brings in its wake. The united and efficient efforts of all the BRICS countries have allowed the nations to consistently uphold the principles of political and diplomatic settlement of inter-state disputes and conflicts, advocate building a fair and democratic system of international relations, and promote constructive dialogue and cooperation among all the members of the international community.[1]

During Russia's chairmanship of BRICS, the priorities the five countries set for cooperation and development included:

• strengthening multilateral principles in global politics and promoting the shared interests of the BRICS bloc;

• promoting the central role of the United Nations in international relations;

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[1] Introductory Note from the President of the Russian Federation, BRICS, edition dedicated to the year (2020) of the Russian Federation's presidency in the BRICS organization (Dec. 1, 2020), available at https://eng.brics-russia2020.ru/images/134/25/1342528.pdf.

• consolidating collective efforts to respond to global and regional threats and challenges;
• enhancing dialogue on issues relating to international development cooperation;
• developing cooperation in trade, economy and finance;
• promoting cooperation in the fields of energy, digital economy and innovation;
• cooperating and building networks in cultural and humanitarian fields;
• strengthening people-to-people contacts.

New perspectives and spheres of interaction and activities continue to open for the positions taken by BRICS in the global arena, including the potential of the New Development Bank, BRICS integrated national payment systems, the BRICS Women's Business Alliance, and BRICS tax, customs and antimonopoly line agencies.

The year 2020 was extraordinary and challenging for people across the globe. The world became more unpredictable. We continue to face turbulence in all spheres of our lives, which tests our resilience. The threats and challenges already alluded to, and particularly the global pandemic, have forced all countries to reevaluate and modify governing principles and legal rules.

In these circumstances, the legal research, funding and publishing landscapes are experiencing rapid and dramatic changes. Research journals and legal institutions in the BRICS countries have started playing more active and constructive roles. Researchers, think tank fellows, academia, judges and practicing lawyers in the BRICS countries must take up higher responsibility for formulating a new agenda and offering real solutions for people, for the citizens of the BRICS countries, for businesses and for public authorities.

At this juncture, it is appropriate for me as the new Editor-in-Chief of *BRICS Law Journal* to share some thoughts about my vision for the *Journal*'s role in the rapidly changing historical and cultural setting and to discuss new opportunities for BRICS-related research and collaboration.

BRICS Law Journal was founded in 2014 on the initiative of the academic community in Brazil, Russia, India, China and South Africa. The University of Tyumen became the *Journal's* publisher in 2016 with the objective of creating a forum for legal discussion and a channel for the dissemination of research findings on issues of importance to the BRICS countries. During its seven years of publication, *BRICS Law Journal* has become a recognized open forum for legal scholars, practitioners, decision makers and young career legal professionals to reflect on issues that are relevant to the BRICS countries and internationally significant. The *Journal* has been placed on the map of widely recognized law journals, resulting in its indexing by the international research databases HeinOnline, EBSCO, Scopus and Web of Science. The *Journal* has assembled an exceptional team of outstanding authors and reviewers, and attracted readers throughout the world. It has moved from a regional publishing project to a well-known platform for relevant comparative research and legal development, not only in and between the BRICS countries themselves, but also between BRICS and the wider world. The editorial team believe that such forums as *BRICS Law Journal*

can suggest effective, efficient and adequate tools for our countries to respond to global threats and challenges of every sort. The view of the *Journal* has been in the past and remains today an ever increasing recognition that BRICS bloc development and people-to-people ties are crucial means to that end.

With this new year of 2021, *BRICS Law Journal* has reached a new benchmark and enters a new stage of its development. Building upon its legacy and supported by a newly established team of Editorial Council and Editorial Board, the *Journal* is committed to strengthening its expertise and influence, and to growing into an internationally recognized journal with broader scope. Now, the *Journal* is calling for papers and research from diverse fields intersecting with law – political studies, history, anthropology, sociology, economics and others as well. The topical areas may include, but are not limited to, the following:

- trade, economy and finance;
- tax, customs and antimonopoly;
- sustainable development, energy and alternative energy;
- digital economy and innovation;
- healthcare, including BRICS joint measures in fighting infectious and non-infectious diseases;
- agriculture and food security;
- prevention and elimination of the consequences of emergencies and natural disasters;
- cultural and educational cooperation;
- BRICS Network University activities;
- youth development and cooperation;
- public diplomacy formats.

These topics are applicable to BRICS development and cooperation, and they were prioritized during Russia's chairmanship of BRICS with the aspiration that the relevant studies, discussions and decisions would bring the BRICS countries to prosperity, sustainable development and world leadership. Joint effort and collaboration of BRICS researchers will increase academic excellence and expertise in our countries, and develop deeper understanding and better communication, not only within the BRICS countries, but also within the entire global community.

This, however, does not mean that *BRICS Law Journal* will radically change its philosophy and direction. The *Journal* will retain its legal core, but it will become more inviting for scholars and scholarly work from other relevant fields of study, as the editorial team believes in the importance of a truly comprehensive approach to BRICS research.

Let the new chapter of *BRICS Law Journal* begin then, and let us hope that it will serve for the benefit of the BRICS countries and their peoples.

ARTICLES

BRICS IN INTERNATIONAL LEGAL SPACE: HUMANITARIAN IMPERATIVES OF INTERNATIONAL SECURITY

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https://doi.org/10.21684/2412-2343-2021-8-1-8-34

The article is devoted to the examination of the formation of new vectors for international relations development within the global format of cooperation. The establishment and unification of BRICS in the international legal sphere through a wide range of common interests and views of its members towards issues facing the modern world reflect objective tendencies of world development to the formation of a multipolar international relations system and determination of particular large country actors of broad integration and having many dimensions. The authors reveal particular characteristics of the international-legal status of BRICS, which make it possible to have an effective impact on challenges facing the modern world. The legal BRICS status differs crucially from traditional legal approaches to international organizations. Acting as a special subject of world politics, creating more trusted interaction conditions, BRICS focuses its attention on the alternative world order principles within the new model of global relations. Such a format of multilateral cooperation, as well as more trusted and additional mechanisms of international interaction, gives the members an opportunity to demonstrate their geopolitical and geoeconomic world significance, and in addition their demanded

humanitarian role, which, as the analysis of the mentioned actor demonstrates, is aimed at forming its own interaction model. The logic of the BRICS agenda extension to the level of an important global management system element demonstrates the goal in the field of action and, accordingly, intensive progress of humanitarian imperatives. For these humanitarian imperatives, the issues of international peacekeeping, security, protection, encouraging human rights and providing stable development are an objective necessity, especially for active demonstration of the members' viewpoints on the international scene. For understanding the process of the alignment of international security humanitarian imperatives it is necessary to study the existing objective needs in conjunction with each country, member of BRICS.

Keywords: international legal space; BRICS countries; humanitarian cooperation; humanitarian imperative; soft power; international and regional security.

Recommended citation: Babek Asadov et al., *BRICS in International Legal Space: Humanitarian Imperatives of International Security*, 8(1) BRICS Law Journal 8–34 (2021).

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Introduction

In recent decades, the processes of globalization and regionalization have become the most important objective factors in the development of trends in the field of shifting decision centers on the international scene. As part of a new coordinate system formation for international cooperation, special interest was increasingly growing regarding the issues relating to the prospects of a polycentric world, the transition to which was clearly demonstrated, including the most recent new large interstate associations and structures that had been created recently.

In the existing geopolitical realities, in order to intensify the efforts of such actors, representing coalitions of individual regional powers, new horizons of development and cooperation have opened up on a number of topical issues in international life. This was expressed in the need for the aspirations of individual regional powers to create new mechanisms and use the potential of established mechanisms of

international relations for joint efforts in expanding relationships in the field of economy, politics and the development of the world community. Today a state cannot exist in isolation from other states, refraining from participating in various formats of regional and global cooperation.

The existing (complex) features of the system of international relations is able to generate new alliances, formations and structures for deep integration and expansion of joint action channels on issues relating to world development and which have become the most popular mechanisms of interaction. Based on the principles of collective interaction, the activities of international organizations and actors of a multilateral format have become increasingly relevant for developing common approaches to solving common problems, concerted actions, as well as international legal norms on the most important issues of world sustainable development and ensuring the safety of society.

One of such actors in interstate cooperation, acting as a major integration association, is BRICS, as evidenced by the expansion of its global reach, which characterizes the strengthening of the collective influence and the growing dynamics of interaction among its participants. The rapprochement of individual large state actors suggests the development of joint approaches also for the legal development of the planned path of transnational cooperation.

It seems relevant to understand the position of a global actor in the international legal space as a new phenomenon in modern international relations. Without going into detail of analyzing the important aspects of legal approaches to regulating multilateral cooperation within the framework of this format, the participants of which "build their system of relations solely on the basis of international law,"[1] the authors consider it necessary to focus on certain aspects of the emerging "doctrinal-targeted communities" of BRICS countries-members due to multilateral factors.

The growing interest in the role of BRICS, which in a short time has become a significant factor in world politics and one of the important elements of the emerging multipolar world, is due to the fact that there is a special "international legal" format for cooperation among the participants of this entity, in particular, "normativity, characteristic of international legal BRICS doctrine,"[2] allows within this platform to search for new approaches and models in order to ensure geopolitical security, balanced development of the global economy, and the preservation of a variety of spiritual and legal cultures.[3]

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[1] *Толстых В.В.* Некоторые аспекты правового развития стран – участников БРИКС // Вопросы российского и международного права. 2017. № 1А(7). С. 215 [Vladimir V. Tolstykh, *Some Aspects of the BRICS Countries Legal Development*, 1A(7) Matters of Russian and International Law 213, 215 (2017)].

[2] *Мартынов Б.Ф.* Страны БРИКС и концепции международного права // Международные процессы. 2016. № 1. С. 33 [Boris F. Martynov, *BRICS Countries and Concepts of International Law*, 1 International Processes 33 (2016)].

[3] БРИКС: контуры многополярного мира: монография [*BRICS: Contours of a Multipolar World: Monograph*] 121 (Talia Ia. Khabrieva ed., 2015).

The developing relations within the BRICS framework are based on international law with a common position aimed at supporting a multipolar world, which obviously has many dimensions, and this requires taking into account issues of a humanitarian nature as well as the formation of a common security space. Ensuring the formation of this space is impossible without a sustainable balanced development of multifaceted and balanced relations. At the same time, a significant number of international law subjects in this process could not but affect the nature of the development of the interaction and the attempts of individual members to position themselves as a world leader. The basis of the influence of relations in the BRICS format can be characterized not only by the consolidated potential of the participants, but also by the strengthening of their geopolitical, geo-economic and especially humanitarian potential.

This new emerging security system, which includes a set of legal norms and institutions, taking into account the above aspects and the sphere of interaction between the BRICS members, can be considered a key element for ensuring international security, in accord with Article VIII of the United Nations Charter.

At the same time, the expansion of the security space of the BRICS countries is due to the inclusion of non-military, humanitarian factors in the overall integrated security field. Active inclusion of the humanitarian theme in the summit agenda, which was not originally the basis for the creation of BRICS, occurred after the technogenic catastrophe in Japan (at the Fukushima-1 nuclear power plant) that followed the March 2011 tsunami.[4] Expanding the agenda of the meetings of the BRICS leaders due to the consistent penetration of humanitarian issues was necessary and provided them with a number of advantages of cooperation in an attempt to increase the international significance of the issues considered.

Nevertheless, against the backdrop of rapidly changing conditions, the growth of negative trends that create threats to humanitarian security, the choice of priorities for creating sustainable mechanisms to minimize the impact of the latter on society is determined primarily by the work of the BRICS countries in the field of facilitating humanitarian development. The presence of a "consolidated" humanitarian potential allows the BRICS countries to create real interfaces and new forms of interaction and cooperation in many areas, which has a security dimension.

The regularities of the process of globalization of international relations, which led to the integration of the BRICS participants and the growth of their significant influence on the development of the world community, fully fit into this understanding and the proposed perspective of the vision of the especially emerging humanitarian imperative of BRICS. In this sense, the expansion of the role of the new format of cooperation in the international legal space can be considered to be the

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[4] Сотрудничество стран – членов БРИКС в сфере оказания гуманитарной помощи: «новые» доноры и старые правила // РСМД. 28 мая 2014 г. [Cooperation of BRICS Member Countries in the Field of Humanitarian Assistance: "New" Donors and Old Rules, RSMD, 28 May 2014] (Dec. 25, 2020), available at https://russiancouncil.ru/blogs/digest/1199/.

result of deliberate "contact," which allows for additional channels of dialogue and interaction, due to which collective strategic initiatives on a number of pressing issues have been identified.

At the same time, in order to understand the laws of the emergence of objective needs for the use of collective efforts in resolving pressing issues of world development, it is informative to trace the evolution of the main BRICS imperatives from summit to summit.

1. BRICS as a Multilateral Format for Interaction in the Legal Field

As the historical practice of recent decades shows, large international structures of interaction arose primarily as a tool for reconciling and smoothing out existing contradictions with the aim of jointly developing separate territories as well as creating a single socio-cultural and humanitarian space. There were other aims in the creation of such structures, which were largely oriented towards consultations avoiding the complex process of further institutionalization. In this context, it should be noted that during the creation of BRICS none of the just-listed possible motivational factors were inherent in the many new and existing separate institutions of multilateral cooperation.

Today, the BRICS members are the fastest growing countries, which have not only a favorable geographical and economic position, but are also influential state actors in world politics, representing the largest civilizational areas in which about 3 billion people live. The emergence of a new global BRIC actor and its further transformation into BRICS (with the accession of South Africa to the bloc in 2011), having a certain common basis, largely accompanied the process of the emergence of other similar specific participants in international relations.

Against the background of the observed significant increase in the study of the issues relating to the formation and development of the interaction format of BRICS, which represents different socio-economic models (providing about half of world economic growth) and civilizations, and at the same time "the level of common interests both in relations with each other and towards the world order is small enough,"[5] the views of individual researchers elucidate the main reasons for the unification of the five countries within the framework of the existing objective and market conditions. In the opinion of Russian expert V. Panova, the latter

> are determined by the current position of each of the five countries in the international hierarchy and the desire for the full-scale projection of their

[5] Carlos Eduardo Lins da Silva, *BRICS: De acrônimo esperto a fórum influente* (2012) (Dec. 25, 2020), available at http://www.nkibrics.ru/system/asset_bulletins/data/53cf/aecd/676c/7665/0015/0000/original/bulleten-brics-7.pdf?1406119629.

> own power on the form and content of the existing system of international relations.[6]

The formation of a new platform for international partnership of the largest states-civilizations, which are "the main subjects of historical development,"[7] including with the aim of putting forward an alternative to the existing world order to the world community, receives a new impetus in the context of strengthening the intentions of countries to bolster the basis of strategic unity. According to Russian expert V. Lukov,

> Strategic interests serve as the deep foundation for the rapprochement of the BRICS countries.[8]

The historical retrospective of certain aspects of becoming one of the leading global institutions testifies to the objective political and economic preconditions at the beginning of the 21st century and the interests of dissimilar states that represent the largest civilizational areas for the formation of such a non-standard association in the international arena. The need to strengthen integration within the framework of the new group of countries that have actively shown their commitment to the principles of commonality, similarity or coincidence of positions on the main issues of international relations has increased, especially against the backdrop of crisis situations in the world economy and financial sphere. That is, individual major regional powers, which are increasingly defending the priorities of developing a polycentric world, building a fair economic architecture, supporting the central role of the U.N., the inviolability of international law, the non-use of force and the collective approach to conducting world affairs, are becoming particularly relevant. Clearly important in this regard were the applications on creating channels of cooperation with large countries (the "Declaration on Cooperation between Russia and Brazil, aimed at the 21st Century"), and especially the attempts to establish "preferential cooperation" between Russia, China and India ("Primakov's Triangle").[9]

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[6] *Панова В.В.* БРИКС: проблемы взаимодействия и потенциал сотрудничества // Обозреватель. 2013. № 1(276). С. 39–53 [Victoria V. Panova, *BRICS: Problems of Interaction and Potential for Cooperation*, 1(276) Observer 39 (2013)].

[7] *Яшкова Т.А.* БРИКС как вариант мягкой силы // Потенциал современной науки. 2014. № 8. С. 58–62 [Tatiana A. Iashkova, *BRICS as an Option of Soft Power*, 8 Potential of Modern Science 58 (2014)].

[8] БРИКС: глобальные проблемы от Форталезы к Уфе // Индекс безопасности. 2015. № 2(113). С. 102 [BRICS: Global Problems from Fortaleza to Ufa, 2(113) Security Index 101, 102 (2015)].

[9] *Мартынов Б.Ф., Ивановский З.В., Симонова Л.Н., Окунева Л.С.* Ключевые интересы и целевые ориентиры Бразилии как участницы формата БРИКС // Стратегия России в БРИКС: цели и инструменты: сборник статей [Boris F. Martynov et al., *Key Interests and Targets of Brazil as a Member of the BRICS Format* in *Russia's BRICS Strategy: Goals and Tools: Collected Papers*] 86 (Viacheslav A. Nikonov & George D. Toloraia eds., 2013).

Although the idea of creating a strategic Eurasian triangle of the largest regional powers in the area was expressed as far back as the late 1990s;[10] the practical interaction between the participants of this informal interstate association began at the moment of its creation. In many ways, it focused on the development of new formats of global cooperation.

The existing practice of international cooperation "on many issues of mutual interest"[11] has been built and formed through annual summits and other working meetings. The start of these gatherings was laid in the framework of the St. Petersburg Economic Forum in 2006 with the participation of the ministers of economy of Brazil, Russia, India and China. Meetings on the "sidelines" of the U.N. General Assembly session in Japan as part of the G8 events in 2008 gave a new impetus to the development of this format of cooperation.

The existing BRICS system of activities, developed on the basis of the principles of equality, indicates that the activities of this global institution are carried out in two directions. Firstly, these are consultations on issues of mutual interest. For this purpose, within the framework of BRICS, meetings of leaders, ministers of finance, trade, health, education and other authorities are organized. Secondly, this is practical cooperation, which occurs in separate areas through separate mechanisms (meetings of working groups, senior officials).[12] Of course, the key events that determine the path of institutionalization and the search for a particular model for the development of this format of cooperation are the BRICS summits, whose location alternates annually among the member countries. The annual summits determine the main directions of the BRICS work in accordance with the action plans adopted during their implementation. The summits that have become the central element of the multidisciplinary dialogue within the framework of BRICS are a rotational process in which all members participate in turn. Within the framework of the existing rules for the equality of all participants, this does not mean that the receiving party has special rights and preferences, which are often reflected in individual publications and media materials. Certainly, administrative concerns and financial expenses, and other actions that make up the organizational process, are generally conducive to the successful promotion of the planned initiatives of the host country.

To date, the following ten summits have taken place: I BRICS Summit Yekaterinburg, 16 June 2009; II BRICS Summit Brasilia, 15–16 April 2010; III BRICS Summit Sanya, 13–14 April 2011; IV BRICS Summit New Delhi, 28–29 March 2012; V BRICS Summit

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[10] *Мареева Ю.А.* Стратегический треугольник «Россия–Индия–Китай» в международных отношениях (теория и историческая практика) // Вестник МГИМО-Университета. 2012. № 5(26). С. 240–249 [Julia A. Mareeva, *Strategic Triangle "Russia–India–China" in International Relations (Theory and Historical Practice)*, 5(26) MGIMO Review of International Relations 240 (2012)].

[11] *Smart Cities Movement in BRICS* 7 (Rumi Aijaz ed., 2017).

[12] Leslie E. Armijo & Cynthia Roberts, *The Emerging Powers and Global Governance: Why the BRICS Matter* in *Handbook of Emerging Economies* 503 (Robert E. Looney ed., 2014).

Durban, 26–27 March 2013; VI BRICS Summit Fortaleza and Brasilia, 15–16 July 2014; VII BRICS Summit Ufa, 8–10 July 2015; VIII BRICS Summit Goa, 15–16 October 2016; IX BRICS Summit Amoy, 4–5 September 2017; X BRICS Summit Johannesburg Declaration, Johannesburg, South Africa, 26 July 2018.

The general practice of holding summits and other numerous working meetings is quite consistent with the position recently voiced by the Russian side that it proposes to transform BRICS into a full-fledged mechanism for strategic interaction.[13] Within the framework of summits and other events, the BRICS member countries largely adhere to an agreed policy line that characterizes the development of integration in the form of a horizontal system of obligations. An important stage in respect of advancing such a mechanism and system was the I Summit of country leaders at the highest level, which took place in Russia (Yekaterinburg, 2009). The global financial crisis and its consequences made it possible to take a fresh look at the concept of joint actions within the framework of the emerging format of cooperation. Along with identifying important principles for reforming the financial and economic architecture of the world, which demonstrate the aspirations of participants to create a more balanced and fair system of world economic relations, topical issues of world development as well as prospects for further strengthening of cooperation within BRIC were considered at the summit.

Despite the fact that the final decisions of the summits are largely declarative in nature, some specific actions have led to the institutionalization of this global actor which are increasingly acquiring some of the features of international organizations. Moreover, BRICS, which has become one of the modern global institutions of cooperation, does not act as a subject of international law, rather it remains a complex and controversial phenomenon in international legal space. In fact, today, occupying a specific place as a subject of world politics, it possesses the features that characterize it as an interstate entity (i.e. not an integration association nor an international organization), but which does not have an international treaty, formal membership, charter, permanent bodies, etc.

This global actor, having a limited membership, does not have the main features inherent in international organizations, which are considered in the framework of the theory of international organizations. International organizations that do not have all the features of an international intergovernmental organization give the grounds for the expert community to call these structures informal international institutions, international quasi-organizations or para-organizations.[14]

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[13] Россия предлагает трансформировать БРИКС в полноформатный механизм стратегического взаимодействия – Владимир Путин // ТАСС. 22 марта 2013 г. [Russia Suggests Transforming BRICS into a Full-Scale Mechanism for Strategic Interaction – Vladimir Putin, TASS, 22 March 2013] (Dec. 25, 2020), available at https //tass.ru/interviews/1598809.

[14] *Абашидзе А.Х., Солнцев А.М.* БРИКС – международная квазиорганизация? // Актуализация процесса взаимодействия стран БРИКС в экономике, политике, праве: материалы научного семинара,

At the same time, despite "lacking legal personality and law-making properties and obvious institutional qualities,"[15] the BRICS interstate structure can be qualified as a permanent format of cooperation using signs of behavior inherent in international intergovernmental organizations. Unlike the latter, which are subjects of international law and are able to conclude agreements, bear responsibility under international and national law, the BRICS decisions are not binding. The obligations of the parties recorded in joint documents are not legally enforceable. The actual implementation of obligations and decisions at the BRICS level is motivated by mutual expectations and pressure from partners. Thanks to the decisions made by each participant, according to certain obligations and acts, within the framework of BRICS, there is a legalization of countries' policies to achieve their goals and overcome obstacles.

Still, BRICS, creating its own new mechanisms, at the same time strengthens existing channels of cooperation according to the management model in alliance with multilateral organizations.[16] An important element of the institutionalization of actions that had a positive impact on the expansion of international cooperation among the BRICS member countries is the existing mechanisms of interaction within the United Nations, UNESCO and other inter-international organizations. The BRICS member states are participants in leading international structures, such as the Non-Aligned Movement and the G20. The basis for the development of interaction between the BRICS partners in a multilateral format is bilateral relations and interactions within large international platforms.

Regarding the prospects of BRICS as an international organization, it should be noted that in the expert community there are similar fair points of view. These assessments are in many respects connected with increasing external challenges and conditions of interdependence, which are pushing countries closer to all types of institutional consequences, which are inherent in the process of formation and development of certain binding supranational regional structures. According to B.A. Heifets, such an organization is unlikely to be created in the longer term.[17] In general, in the expert community, there is an understanding that the appearance within BRICS of an international actor similar to the European Union model, which takes away

Москва, 9 октября 2012 г. [Aslan Kh. Abashidze & Alexander M. Solntsev, *Is BRICS an International Quasi-Organization?* in *Updating the Process of Interaction Between the BRICS Countries in the Economy, Politics, and Law: Materials of the Scientific Seminar, Moscow, 9 October 2012*] 10 (Ksenia M. Belikova ed., 2012).

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

[16] *Ларионова М.В.* Российское председательство в БРИКС: модели взаимодействия с международными институтами // Вестник международных организаций. 2016. № 2(11). С. 113–139 [Marina V. Larionova, *The Russian Chairmanship in BRICS: A Model of Interaction with International Institutions*, 2(11) Bulletin of International Organizations 113 (2016)].

[17] *Хейфец Б.А.* Россия и БРИКС. Новые возможности для взаимных инвестиций [Boris A. Kheifetz, *Russia and the BRICS. New Opportunities for Mutual Investment*] 196 (2014).

much of the sovereignty of the member countries of the association and, accordingly, establishes supranational bodies, will not be delegated mandatory law.[18]

Nevertheless, today, due to the presence of a number of factors of various components of an internal and external nature, as well as the existing status of BRICS, and developing the level of responsibility, BRICS manifests itself as an influential actor in interstate interaction. Some individual specialists in the field are in favor of the growing role of the multilateral format of interaction between large state actors and express the point of view which, in this context, includes the following factors:

• vulnerability caused by crisis phenomena (which appeared in such areas as finance, food security as well as in the form of armed conflicts);

• collective superiority and equal opportunities of the BRICS countries and the presence of common characteristics and principles;

• high degree of control by the BRICS leaders over the internal political situation in their countries and the controlled nature of club membership;

• ineffective activities of well-known multilateral institutions.[19]

Despite the fact that today one of the most important imperatives of the world community (and one which is included in the U.N. Charter) is the principle of the prohibition against the use of force, individual state actors increasingly make attempts to change its content, which poses a threat to international security. The realities of international relations show that this practice was clearly manifested in the inability of the U.N. Security Council to prevent NATO military intervention in Libya. As is well known, following the Libyan conflict, the solution of which is still the focus of the attention of large multilateral institutions, criticism by representatives of the expert community appeared as a free interpretation of the wording of the resolution (U.N. Security Council Resolution 1973 of 17 March 2011), and often an open violation of the principles of international law.[20]

Thus, the above aspects characterizing some of the features of this informal actor allow us to note that, for cooperation in order to form common positions in the international arena, BRICS objectively currently has acceptable institutional capacities inherent in international organizations and multilateral institutions. The most effective channels of interaction covering the relevant topics of the BRICS agenda along with annual summits and meetings of leaders on the sidelines of G20 summits and other gatherings, are meetings of foreign ministers and heads of other sectoral ministries

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[18] Участие России в БРИКС рассчитано «всерьез и надолго», считает Никонов // ТАСС. 25 марта 2013 г. [Russia's Participation in BRICS Is Intented to Be "Serious and for a Long Time," says Nikonov, TASS, 25 March 2013] (Dec. 25, 2020), available at https://tass.ru/arhiv/591443.

[19] *Белова В.А.* Институциональное развитие БРИКС // Социально-экономические явления и процессы. 2015. № 9(10). С. 174–183 [Veronika A. Belova, *Institutional Development of BRICS*, 9(10) Socio-Economic Phenomena and Processes 174 (2015)].

[20] *Галицкий В.П.* Международное право по-натовски // Обозреватель. 2011. № 11(262). С. 101–108 [Vladimir P. Galitsky, *International Law in the NATO Way*, 11(262) Observer 101 (2011)].

and departments dealing with issues of trade economics, finance, the environment, education, health, science, technology and innovation, labor, employment, etc.

With the expansion of the field of activity of the BRICS countries due to their growing economic power, which formed the basis of the influence of BRICS in the international arena, new formats of interaction in the field of security appeared. For example, meetings of senior representatives in charge of national security issues and the availability of many institutional opportunities, fully complying with the BRICS philosophy, stimulate participants in the developing format of transnational interaction and make it possible to have accessible and acceptable tools to achieve the goals of the organization.

Namely, these recent best opportunities for legitimizing the agreements of the BRICS participants contribute to the growing role of this format in the international legal space in order to strengthen the rule of international law in world affairs.

The current picture actualizes the need for the basis of the legal development of the mechanism of cooperation within the BRICS framework, which requires ensuring the legitimacy of decisions and actions. This is dictated by the intensity of the processes taking place in a rapidly changing world and, accordingly, the growing demand of large state entities in the formation of new security spaces and the creation of additional channels of influence on the nature of international relations.

2. Security Cooperation: Humanitarian Aspects

Throughout the existence of BRICS, its members, whose political and economic systems vary, so too do their cultures and traditions, and who periodically make general political declarations, have formed joint micro-political positions on a wide range of international issues. The range of issues, addressed within the BRICS framework, starting with issues of integration and mutual interest, has expanded significantly on the agenda of summits and other meetings of this association. This was the result of many years of discussions and commitment of the parties to the selected format of partnership and interaction on pressing issues of international politics and on agreements of mutual interest.

Analysis of the issues considered within the BRICS framework allows us to identify the main areas and priorities of the participants from the moment of its formation. It is known that in the formation of their own BRICS agenda, the participants mainly focused on the issues of interaction and cooperation in the economic field. Despite the dominance of this topic in the work of BRICS for the initial period of its activities, problems of a political nature and security issues in recent years (especially starting with the second declaration and subsequent actions of the BRICS member countries) are increasingly being included in the agenda of the annual summits. Clears signs have appeared for the need to discuss peace and international security as one of the main imperatives of BRICS. Based on this, it is necessary to determine some

features of the practice of multilateral cooperation, in which the development and promotion of the important humanitarian priorities of the BRICS participants in the field of peace and international security are the defining characteristic of the new reality of the modern world.

Taking into account the fact that the development of BRICS continues to take place in the conditions of new geopolitical realities, which highlight the intensification of competition between individual power centers and integration groups, the formation of the priorities of the BRICS countries could not but be significantly affected by the consequences of the existing contradictions, both global and regional aspects. In this sense, aspirations to solve specific issues of peace and security, as well as the development of various mechanisms that contribute to overcoming new threats, which have become a priority area of international dialogue, are seen as a logical step on the part of the BRICS countries. Against the background of the institutionalization of BRICS, security has become a more common topic of discussion at the annual summits of heads of state and at the level of meetings of ministers and national security advisers.[21]

We agree with the Russian definition that,

> The security of the state is a state of protection of the state, society and its citizens from manifestations of various actions aimed at undermining the constitutional foundations of the Russian state, violation of human and civil rights and freedoms in the Russian Federation, which is ensured by specially created state bodies.[22]

This definition seems to be relevant for determining the security of any state.

Separate prerequisites predicting the intentions of the countries participating in cooperation in this area were reflected in statements and joint documents at the initial summits and working bilateral meetings. By expanding the institutional development opportunities for BRICS, great opportunities have appeared for cooperation in the formation of a common security space, based on the agreed positions of the participants on the issues of maintaining stability in the world in various contexts.

The documents of the initial summits confirmed the willingness of the members to act together in solving problems that have a significant impact on the security status of individual countries. In particular, the "deep concern" of the BRICS members

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[21] *Абденур А.Е.* Могут ли страны БРИКС сотрудничать в вопросах международной безопасности? // Вестник международных организаций. 2017. № 3(12). С. 73–95 [Adriana E. Abdenur, *Can the BRICS Cooperate in International Security?*, 3(12) International Organisations Research Journal 73 (2017)].

[22] *Винокуров В.А.* Безопасность государства: конституционно-правовой аспект // Конституционное и муниципальное право. 2017. № 12. С. 33–36 [Vladimir A. Vinokurov, *The Security of the State: Constitutional Legal Aspect*, 12 Constitutional and Municipal Law 33 (2017)].

was recognized in connection with the situations in certain regions of the world (the Middle East, North and West Africa). The issues noted in the Declaration of the Sanya Summit (PRC) of 14 April 2011 to achieve a world of stability, prosperity and progress should ensure that those regions have a decent and worthy position in the world in accordance with the legitimate aspirations of their peoples. This was seen as a "sincere desire" and a collective position of the BRICS participants, that is to say, on the principle of the non-use of force. This approach to the issues of ensuring international security acquired a special character in the work of subsequent summits. For example, the topic of the IV Summit in New Delhi (India, 2012) "The BRICS Partnership for Global Stability, Security and Prosperity" showed the members' desire to increasingly use the new interaction mechanism to discuss these issues in the Middle East and North Africa, as well as to consider Iran's nuclear program and the situation involving Afghanistan, by the position of the participating countries in the Etequin Declaration (at the V Summit in Durban, South Africa):

> We are committed to building a harmonious world order based on lasting peace and prosperity, and we reaffirm that the 21st century should be the century of peace, security, development and cooperation.

BRICS continues to demonstrate its desire to act in a consolidated manner according to the mentioned priorities.[23]

The logic of the evolution of the expansion of the multilateral format agenda, BRICS, testifies to the deliberate filling of the field of action in which international security issues become an objective necessity for actively demonstrating the position of participants in the international arena. Despite the lack of clear guidelines and programmatic actions to create a military coalition and other specific mechanisms to counter threats of a military-political nature, there has been the practice of coordination on issues of strategic importance such as information security and countering international terrorism.

The agendas of subsequent summits included the issues of further militarization of the Syrian conflict, the spread of instability from North Africa, especially the Sahel and the Gulf of Guinea, the achievement of lasting peace and stability in Afghanistan, security and stability in the Republic of Iraq, the settlement of the conflict between Israel and Palestine, support for the convening of a conference on the establishment in the Middle East of a zone free of nuclear and all other types of weapons of mass destruction, the creation of safe and open digital and Internet spaces, and other issues clearly demonstrated a unity of position on pressing issues of international security.

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[23] Этеквинская декларация и Этеквинский план действий на V саммите БРИКС от 27 марта 2013 г. [Etequin Declaration and Etequin Action Plan at the V BRICS Summit of 27 March 2013] (Dec. 25, 2020), available at http://www.kremlin.ru/supplement/1430.

Thus, along with the expansion of the BRICS institutional capacities, several initiatives have been launched aimed at international security and especially the fight against terrorism. In this context, the adopted Declaration following the Goa Summit in 2016 in which the terms "security" and "terrorism/terrorist" were used almost as much as the term "economic"[24] is important. Despite the fact that the security issue was considered in the framework of separate meetings at the level of national security advisers in the BRICS countries, this area of the organization's activities does not essentially receive wide development for discussion and implementation of specific steps. In a certain respect on security issues, there were signs of discrepancies in the consideration of certain pressing international issues in this area.

This was especially clearly demonstrated by some of the BRICS participants in the 17 March 2011 vote on the well-known Resolution 1973, which opened up NATO's ability to bomb Libya and discussion on the situation in Syria, in which Russia and China vetoed a resolution that opened the way for intervention. In this matter, Brazil, India and South Africa held a different political position.

The issue of political coordination in order to develop common approaches and especially to resolve the existing differences, which indicates the excessive relevance of this problem for a new large mechanism of collective interaction, according to the Indian researcher Jagannath Panda is not an easy task, because the political interests of members clash at different levels.[25]

When assessing the role and place of this actor in the modern world, in the expert community the point of view of a Russian specialist, the general director of the Russian International Affairs Council, Andrei Kortunov, who considers them in the framework of two conflicting approaches, also deserves attention. As the expert has noted, as the BRICS develops, the contradictions between these two approaches will become more and more obvious. The presence of this is due to the fact that in the formulated approaches to which Russia and, partly, China follow, BRICS is considered to be an alternative to the Western world order, while India, Brazil and South Africa profess the other. That is to say, they see BRICS as a tactical alliance, membership in which can be used to bargain with the West and solve their own internal problems.[26]

Obviously, the critical views of individual authors regarding the role and existing practice of political coordination, especially on issues of international security, are largely due to the fact that these countries are inherent in the traditional character

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[24] Декларация Гоа на VIII саммите БРИКС от 16 октября 2016 г. [Goa Declaration at the VIII BRICS Summit of 16 October 2016] (Dec. 25, 2020), available at http://www.kremlin.ru/supplement/5139.

[25] Jagannath P. Panda, *New Delhi BRICS Summit: New Prospects, but More Challenges?* (Dec. 25, 2020), available at https://idsa.in/idsacomments/NewDelhiBRICSSummit_jppanda_190312.

[26] БРИКС становится слишком многополярным. Саммит в Гоа выявляет проблемы альянса // Коммерсантъ. 14 октября 2016 г. [BRICS Is Becoming Too Multipolar. The GOA Summit Reveals the Alliance's Problems, Kommersant, 14 October 2016] (Dec. 25, 2020), available at https://www.kommersant.ru/doc/3114823.

of behavior in the international arena and because of the presence of overlapping and dissimilar interests of some members, particularly between India and China. The interests are both military-political and economic in nature.

At the same time, despite the presence of many negative factors that remain between these countries in the expert community[27] and at the level of individual statesmen, the role of BRICS has been increasingly perceived as an actor that has a significant impact on world stability; differently, however, at one point then U.S. Secretary of Defense Leon Panetta characterized BRICS as a threat to U.S. national security and international security.[28]

But it should be emphasized that the "The concept of the Russian Federation's participation in BRICS" (developed in 2015) does not provide for the consideration of issues of a military-political nature and the creation of mechanisms for cooperation in the military field.[29] But urgent issues in the sphere of international and regional security are the subject of agreed positions.

The considered aspect of the BRICS activity, which is a new type of organization, is gaining recognition among domestic as well as international experts. The expanding role of this actor in international interactions is considerable. BRICS sets itself global tasks and recognizes that all of them can be realized through the prism of security.[30]

At the same time, today in the broad sense security is becoming more and more a task demanded of the states that are members of BRICS. In this context, the views of well-known experts in the field of international relations B. Buzan and O. Wæver deserve mention, which notes that interstate unions in which participants share common ideas about security become dominant actors in international relations within the framework of security complexes.[31] In this regard, the possibility of using the potential of various international mechanisms in order to strengthen their own position and minimize the impact of new challenges and threats due to factors of collective efforts seems to be one of the important priorities for states in creating a common security space.

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[27] Peter van Ham, *The BRICS as an EU Security Challenge: The Case for Conservatism*, Clingendael Report (September 2015), at 10–27 (Dec. 25, 2020), available at https://www.clingendael.org/sites/default/files/2016-02/the_brics_as_an_eu_security_challenge.pdf.

[28] Melissa C. Tyler & Michael Thomas, *BRICS and Mortar(s): Breaking or Building the Global System?* in *The Rise of the BRICS in the Global Political Economy: Changing Paradigms?* 254 (Vai Io Lo & Mary Hiscock eds., 2014).

[29] Концепция участия РФ в БРИКС (2015 г.) [The Concept of the Russian Federation's Participation in BRICS (2015)] (Dec. 25, 2020), available at http://static.kremlin.ru/media/events/files/41d452a8a232b2f6f8a5.pdf.

[30] *Еремина Н.В.* БРИКС в решении задач безопасности: основные аспекты // Азимут научных исследований: экономика и управление. 2017. № 3(20). С. 393–395 [Natalia V. Eremina, *BRICS in Solving Security Problems: Main Aspects*, 3(20) Research Azimuth: Economics and Management 393 (2017)].

[31] Barry Buzan & Ole Wæver, *Regions and Powers: The Structure of International Security* 40–45 (2003).

Today, BRICS has emerged as a universal global action actor that is able to take responsibility and put forward various initiatives on many aspects of security issues. BRICS has expressed its firm commitment to the core responsibilities of the United Nations, which has the responsibility to assist the international community in maintaining international peace and security, protecting and promoting human rights and ensuring sustainable development.[32] An important aspect of this activity, both today and in the future, is to consider the humanitarian components of security, which go far beyond the protection of human rights and fundamental freedoms. At the BRICS summits, discussions on food, energy, information, cooperation in the areas of security and the exchange of information technologies, financial, economic and other issues indicate that collective action is aimed at stabilizing the international situation. This form of activity requiring the development of legal policy and program regulation of the problems within this sphere is aimed at assisting the rule of law and building democratic institutions and creating an atmosphere of tolerance in the BRICS collective security zone.

As an analysis of the formation of the BRICS humanitarian dimension process shows, to which individual initiatives gave important impetus, agreements on many aspects of the development of relations, and awareness of the common interests of countries in this area, are the objective needs of the BRICS countries. Obvious preconditions for the development of cooperation in the area of humanitarian action, although significantly inferior to economic and political motives, were seen at the initial stages of the countries' interactions. Starting from the first summits, the urgent problems within the humanitarian sphere were included in the sphere of the BRICS interests, and these issues along with "multilateral obligations" were periodically reflected in the final documents of the summits and other working meetings.

For example, in the final document of the BRICS summit in Ekaterinburg, it was noted that participants confirm their intention to develop cooperation in socially significant areas, and to strengthen their efforts to provide international humanitarian assistance and reduce the risk of natural disasters. There was a commitment to the practice of multilateral diplomacy in combating global challenges and threats, and the importance of the BRICS countries' attention to food security was noted.[33]

The practice of readiness to bolster multidisciplinary cooperation continued in subsequent summits. At the same time, taking into account the special needs of developing countries, the acute problems of the least developed countries, small island states and African countries, BRICS expanded the range of issues in the field of

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[32] Форталезская декларация на VI саммите БРИКС от 15 июля 2014 г. [Fortaleza Declaration at the VI BRICS Summit of 15 July 2014] (Dec. 25, 2020), available at http://static.kremlin.ru/media/events/files/41d4f1dd6741763252a8.pdf.

[33] Совместное заявление лидеров стран БРИК от 16 июня 2009 г. (Екатеринбург, Россия) [Joint Statement by the BRIC Leaders of 16 June 2009, Yekaterinburg, Russia] (Dec. 25, 2020), available at http://nkibrics.ru/pages/summit-docs.

ensuring humanitarian security. Focusing on the pressing issues of international life such as combating poverty, social marginalization and inequality, BRICS calls on the international community to make all necessary efforts to minimize the negative impact of these challenges on the state of societies and people (II BRIC Summit, Brazil, 2010). Consideration of the issue of eradicating extreme poverty, which "is the ethical, social, political and economic imperative of mankind and one of the most important global challenges facing the world ... ,"[34] received a new development in the framework of the Sanyan Declaration (China, 2011) following the results of the III BRICS Summit.

In choosing the topic for discussions in the new cycle of summits of "Inclusive Growth: Sustainable Solutions," BRICS considers the issues of responding to the challenges that humanity is facing. This motivates participating countries to attempt to simultaneously ensure growth, inclusion, protection and conservation. The initial BRICS summits also focused on questions of intentions to comprehensively promote sustainable social development, ensure social security and achieve full employment, and implement decent policies and programs in the field of labor relations. In this regard, special attention was paid to the most vulnerable groups of the society, such as the poor, women, youth, migrants and people with disabilities. As an analysis of the record of the BRICS countries shows, social protection mechanisms for both able-bodied and disabled people are legally fixed.

In developing this topic, the BRICS Goa Declaration (India, 2016) paid special attention to the implementation of the 2030 Agenda for Sustainable Development and the aspirations, goals and priorities of the African Union (AU) in Africa's development, as stipulated by the Agenda to 2063.

The BRICS members support actions focused on human interests and a holistic approach to sustainable development, the implementation of which should be carried out taking into account national conditions and the development context in accordance with "the spectrum of political opportunities."[35] And along with these pressing problems, the agenda covers the problems of the acute humanitarian crisis in certain regions of the world. Especially, the leaders of the BRICS countries devoted their attention to the prevailing acute humanitarian situations in Syria, Mali and the Central African Republic in terms of providing unhindered access for humanitarian assistance.

Peacekeeping was considered an equally important area of joint activity of the countries, for which support the South African Republic advocated. Despite the formation of special attention to such an urgent issue, which was motivated by the special need to regulate numerous conflicts on the African continent, BRICS has to

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[34] Декларация, принятая по итогам саммита БРИКС 14 апреля 2011 г. (г. Санья, о. Хайнань, Китай) [Declaration adopted at the BRICS Summit of 14 April 2011, Sanya, Hainan Island, China] (Dec. 25, 2020), available at http://nkibrics.ru/pages/summit-docs.

[35] Goa Declaration, *supra* note 24.

overcome many obstacles, in particular, the development of general formulations of mandates for peacekeeping missions that do not go beyond U.N. resolutions.

The emphasis on important humanitarian imperatives of our time, in particular the eradication of poverty, the importance of ensuring food security, addressing the problem of malnutrition, eradicating hunger, the global nature of health challenges and infectious diseases, including HIV and tuberculosis, the prevention and elimination of natural disasters and many acute problems of modern societies, which were reflected in the BRICS documents, indicate a significant expansion of the humanitarian agenda. At the same time, notwithstanding the general nature of intentions and aspirations of the international agenda, which are not always provided with specific resources and mechanisms, BRICS creates more opportunities for a global policy dialogue and ideological influence on international humanitarian relations.

The issues relating to international peace and security, which in fact were the focus of attention of the participants at the Goa Summit, have become the subject of wide discussion among representatives of the academic community. Along with the issues of transforming global governance and regulation of common spaces, and ensuring sustainable development and environmental issues, particular attention was paid to issues of joint counteraction to new threats and challenges. In the opinion of the Russian scientist Vladimir Orlov, one of the serious challenges for the BRICS countries is terrorism by means of weapons of mass destruction, and for this purpose they indulged in developing mutually acceptable international legal approaches to respond to the threat of chemical and biological terrorism. In particular, according to Orlov, there is a need to develop a common terminology on cyber terrorism, and recommendations and standards for nuclear facilities against cyber attacks.[36]

Of course, in the modern world, within the framework of the activity of such structures, more and more sound arguments are made about the influence of new safety factors and challenges for modern societies. At the same time, there are individual points of view of experts who note the various interests of the BRICS participants regarding the issue of developing a common approach to cyber security, for example, Russia and China focus on information security but Brazil focuses on technical and infrastructural matters, while in general it is suggested that it is necessary prevent the militarization of the Internet.[37]

In the scientific discourse on the activities of BRICS there is an increasing presence of the recognition of the impact of soft security challenges, which have a greater impact on the security and development of the BRICS countries than ever before,

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[36] Vladimir A. Orlov, *New Threats and Challenges to Global Security: A View from Russia*, BRICS 2016 Academic Forum, Goa, India, 19–21 September 2016 (Dec. 25, 2020), available at https://www.pircenter.org/media/content/files/13/14742852490.pdf.

[37] *Масиел М.* Выступление на VI Российском форуме по управлению Интернетом [Marilia Maciel, *Speech at the VI Russian Internet Governance Forum*] (Dec. 25, 2020), available at https://www.pircenter.org/media/content/files/13/14303080980.pdf.

and which some members are now feeling particularly painful. Among other key threats to international security, corruption has been noted as an urgent issue for all of the BRICS countries.[38]

Today in the era of globalization, the growing interdependence of individual regions and territories with regard to acute social problems and shocks, humanitarian crises of various kinds opens up new horizons and opportunities for wider international cooperation within the BRICS framework. At the level of the world community, it is increasingly understood that health as a security factor and humanitarian protection of a person, including equal access to primary care and collective protection against transnational threats, are a shared responsibility. The problems of global health formation, in which these basic values are increasingly coming to the fore in the framework of specialized international humanitarian actors, are associated with the growth of new challenges, the preservation of negative trends in several regions of the world and, of course, the ineffective role of individual states and international structures in this area.[39]

The acuteness of the issues relating to preserving and strengthening "global health" as the provision by the world community of the need for health of all people on the planet leads to increased coordination of the BRICS members in this area. At the same time, against the background of economic growth, the existing practice of health inequality remains an important urgent problem in most of the BRICS countries. Given that these countries account for about 50% of the world's poor, this humanitarian issue can have serious negative consequences for the population of these countries.[40] According to Andrew Harmer, who was one of the first researchers to study the role of the BRICS countries in healthcare, BRICS activities in this area, unlike the United States, which follows the path of bilateral relations, are manifested in their desire to promote the development of multilateralism in the field of health. Until recently, considering BRICS to be a new center of power in global health care, which has its own new set of priorities opposing the dominant Western development paradigm in health care, emphasized the prospects for promoting this direction based on the experience of participants through collaboration with a focus on partnerships and equality.

An important channel in building the humanization of[41] international relations of a safe world is considered to be to promote the dialogue of civilizations, cultures,

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38 Orlov, *supra* note 36.

39 *Асадов Б.Р.* Глобальное здоровье – фактор безопасности в контексте партнерства ВОЗ и акторов международной гуманитарной деятельности // Право. Безопасность. Чрезвычайные ситуации. 2019. № 2(43). С. 43–53 [Babek R. Asadov, *Global Health Is a Security Factor in the Context of Partnership Between the WHO and Actors in International Humanitarian Activities*, 2(43) Law. Security. Emergencies 43 (2019)].

40 Shambhu Acharya et al., *BRICS and Global Health*, 92(6) Bulletin of the World Health Organization 386 (2014).

41 Andrew Harmer, *BRICS Countries: A New Force in Global Health?*, 92(6) Bulletin of the World Health Organization 394 (2014).

religions and peoples. In this area, the Alliance of Civilizations initiative was supported, which was aimed at developing contacts, expanding knowledge of each other and deepening mutual understanding around the world. A significant factor in deepening the relationship between peoples is considered "the role of culture and cultural diversity in promoting sustainable development" (Xiamen Declaration, China, 2017). The expansion of communication channels from a humanitarian aspect was continued both in terms of increasing the number of issues addressed, and in terms of qualitatively changing the implementation of individual programs and projects (BRICS Network University, Academic Forum, Citizens Forum, Forum of Young Diplomats, Youth Forum, Forum of Young Associated Institutions for the Development of Cooperation between Institutions) in civil society.

As an analysis of the record of the BRICS summits and other working meetings shows, actions aimed at meeting the growing needs of the participating countries in the field of protection, the preservation of people and society is filled with new content. By deliberately expanding the range of issues addressed, BRICS continues to declare its commitment to a people-centered approach in promoting development, which encompasses all sectors of the population. Particular attention within the framework of BRICS began to be paid to strengthening coordination and cooperation in the field of vaccine research and development which supported the establishment of the BRICS Vaccine Research and Development Center. Thus, promoting the development of safety as a health issue and protection in difficult crisis situations and conflicts have become increasingly important and require the development of the most effective organizational and legal decisions.

A characteristic feature of the BRICS activities in this area is the ability to use both its own resources and those of other actors in international relations in order to promote mutual interest. BRICS seeks to establish cooperation with well-known actors in international relations aimed at promoting humanitarian development and solving the political problems of the poorest countries. An analysis of this practice of cooperation with international organizations and structures shows that interactions with the latter have been gaining positive momentum since the creation of BRICS. And today, BRICS is characterized by two main models of interaction: "catalytic impact" and "parallel control"[42] that contribute to the most acceptable conditions for cooperation.

At the same time, a very necessary channel of interaction for the BRICS participants is the practice of using the platform of international institutions to create the necessary mechanisms for joint coordination of positions on pressing issues on the United Nations agenda. This practice of interaction is applied within the framework

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[42] *Шелепов А.В.* БРИКС и международные институты: модели взаимодействия в процессе осуществления многостороннего управления // Вестник международных организаций. 2015. № 4(10). С. 7–28 [Andrei V. Shelepov, *BRICS and International Institutions: Models of Interaction in the Process of Implementing Multilateral Governance*, 4(10) Bulletin of International Organizations 7 (2015)].

of the G20, the WTO, the IMF, the World Bank as well as with regional organizations such as the Eurasian Economic Union (EAEU), the African Union, the League of Arab States, the Organization of Islamic Cooperation, the integration structures of Latin America, ASEAN and others in terms of improving the effectiveness of decisions.

The formation of a sustainable model of multilateral interaction is a necessary component of security issues; humanitarian problems should take into account the existing effective practice of cooperation, which is available within the framework of both bilateral and individual international structures, which will allow development of effective mechanisms and development strategies for BRICS in world politics. The gradual formation of humanitarian policy, which has become one of the channels of dialogue between partners and, consequently, the increasing influence of BRICS in this area become an objective inevitability.

3. Strengthening Russia's BRICS Positions: The Human Dimension

Recently, the growing role of Russia in new international institutional formations has become particularly relevant for the development of new channels of integration and cooperation of an inter-regional and transnational nature. Participation in international structures, which has many dimensions, gives it a number of significant advantages, opening up wider access to various resources, and the ability to act on the wider international space of political, economic and humanitarian interaction.

In view of the aforementioned significant role of Russia in global international cooperation, where a new place is given to new international structures, the strategic importance Russia's activities within the BRICS framework should be highly appreciated.

It is acknowledged that in the development of BRICS as a forum for discussion on a wide range of issues, a special place is given to the Russian side. Today, Russia continues to play its special multi-faceted role in the development of new vectors of international cooperation within the framework of BRICS. The existing point of view that the Russian approach in this structure is to gradually transform this association into a new center of political influence[43] is fully consistent with its strategic goals in the global governance system. The importance of the role of the Russian factor, in particular, "the orientation of Russia towards the creation of a serious international organization in the person of BRICS is calculated seriously and for a long time" was noted by the head of the National Committee for the Study of this organization and one of the authors of the report "Russia in BRICS. Strategic goals and means of achieving them"[44] in the initial periods of institutionalization of this structure.

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[43] *Колдунова Е.В.* Роль стран БРИКС в глобальном управлении // Сравнительная политика. 2014. № 1(14). С. 60–64 [Ekaterina V. Koldunova, *The Role of BRICS Countries in Global Governance*, 1(14) Comparative Politics 60 (2014)].

[44] Russia's Participation in BRICS, *supra* note 18.

In the context of minimizing the channels of cooperation with the West, the transnational coordination of interaction with the BRICS countries on topical issues of today is an objective and necessary direction for building Russia's capabilities on a wide range of issues. The interests of the Russian side in BRICS, which, as an additional platform, provides it with the position of a global player, are fully consistent with the process of purposeful institutionalization of this structure, and the initiation of joint projects in its main areas of activity.

One notes that the recognition of the important role of Russia in the formation of BRICS, which is increasingly acquiring the features of an influential interstate union, is logical, given its special role in taking real steps in the context of rapprochement of positions on many pressing issues. The stated Russian initiatives in separate documents[45] and actions demonstrating the need to expand the framework of ongoing dialogue and cooperation as a way to ensure stability of peace and security give a special impetus to the development of relations between the BRICS members.

Many decisions within the framework of this format are of particular importance, which has not only a political and economic, but also a humanitarian dimension. Such interaction in international affairs contributes to the formation of favorable external conditions with in fact many dimensions.

Against the background of the expansion of cooperation channels, Russia's active involvement in the system of interstate relations, in which it occupies the most flexible position, especially in the field of international peace and security (e.g. the issue of terrorism, including cyber terrorism and energy security), humanitarian relations continues to have special content and dynamism. The practice of past years shows that close cooperation between Russia and other BRICS participants in order to strengthen their role in the humanitarian field opened up new possibilities for its influence and the formation of the BRICS international agenda. The application of new channels of inter-civilization dialogue and forms of interaction by bringing together the practical approaches of the BRICS member states to expanding humanitarian cooperation is determined by the participation in this process of various actors along a non-state line, increasing the potential of "soft power."

One of the key priorities of Russia during its chairmanship of BRICS in 2015–2016 was to deepen humanitarian cooperation in the BRICS format. It is in this that, thanks to events such as the Parliamentary, Civil, Trade Union, Youth Forums, as well as the Global University Summit, the further development of non-governmental relations takes place. Among the outcomes of Russia's chairmanship was the strengthening of BRICS' position in the world as an influential factor in international life, and BRICS was seen as an effective mechanism for coordinating positions on the pressing challenges of our time.[46]

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[45] Стратегия экономического партнерства БРИКС [The Strategy for the BRICS Economic Partnership] (Dec. 25, 2020), available at http://www.tunisie.mid.ru/brics/brics_09.pdf.

[46] Доклад по итогам председательства Российской Федерации в межгосударственном объединении БРИКС в 2015–2016 гг. [Report on the Results of the Russian Federation's Chairmanship of the BRICS

In the context of ensuring humanitarian security, a special place in BRICS was occupied by issues relating to providing humanitarian assistance in the context of the conflict in Syria. In the adopted BRICS Summit Declaration, the BRICS leaders, supporting the proposal of the Russian side, called on the international community to step up efforts to provide humanitarian assistance to the Syrian people "taking into account the urgent need for reconstruction of the country."[47]

Of course, like other participants, it is also natural for Russia not only to strive to demonstrate its leadership qualities during its chairmanship, but also to ensure a qualitatively new level of interaction between partners. In this area, the practice of previous periods of Russian leadership and successful international summits and forums matters.

At the same time, it should be noted that recently Russia's participation in such a multilateral format as BRICS has been quite often criticized by the expert community. In this context, it was characterized by the fact that the priority of BRICS is inexplicably overstated in Russian foreign policy. And, accordingly, Russia's policy towards BRICS is a classic "foreign policy of prestige."[48] In the expert community, many increasingly focused on such issues as the lack of real innovative potential, dependence on energy exports, high levels of state control, corruption and poor investment attractiveness than well-known factors – Russia's geopolitical, socio-cultural and military potential.

In recent years, of course, in the process of the in-depth nature of cooperation for the Russian side, the issue of maintaining its strategic independence as a key actor in international relations and, accordingly, the level of relations with key centers of power from the West in matters of participation in the development of important decisions in the field of international stability and security remain important. The participation of Russia and other state actors such as China and India to a certain extent predetermines the appearance of new risks genesis of Russia and other countries, especially in the current practice of Sino-American contradictions. Periodically, the aggravation of relations between these large states will probably have a certain influence on the behavior of individual participants (China and India) in the framework of their BRICS activities.

Thus, despite the indicated BRICS humanitarian imperatives, joint concrete actions in this area have not been carried out so intensively compared to economic, political and other areas. An analysis of the agendas of the BRICS summits and other working events indicates that the possibilities of using the BRICS institutional experience

Interstate Association in the Years 2015–2016] (Dec. 25, 2020), available at http://brics2015.ru/news/20160212/885593.html.

47 Йоханнесбургская декларация на X Саммите БРИКС от 26 июля 2018 г. [Johannesburg Declaration at the X BRICS Summit of 26 July 2018] (Dec. 25, 2020), available at http://www.kremlin.ru/supplement/5323.

48 *Байков А.А.* Место БРИКС в приоритетах России // МГИМО. 23 ноября 2016 г. [Andrei A. Baikov, *The Place of BRICS in Russia's Priorities*, MGIMO, 23 November 2016] (Dec. 25, 2020), available at https://mgimo.ru/about/news/experts/mesto-briks-v-prioritetakh-rossii.

as a sustainable model of transnational coordination of humanitarian cooperation are limited.

Despite the large volume of material on the record, a brief chronological retrospective of selected sides of the expansion of humanitarian activities of BRICS indicates that this process takes place both in the context of the development of the principle of community, as well as in the context of the existing contradictions, and the issue of the desire of each of the participants to claim the role of an independent center in the emerging international device. With the expansion of the institutional framework of the BRICS activities, participating countries continue to discuss quite a few topics on the summit agenda. This institutional practice, requiring the application of an additional set of bureaucratic actions, etc., does not always lead to the desired results in terms of the timely implementation of the intended humanitarian goals, which are more limited, including due to many existing problems at the bilateral level.

Nonetheless, a number of results of recent summits and other working events allow us to note that the existing institutional basis for the functioning of cooperation mechanisms contributes to the targeted implementation of the BRICS goals outlined in the field of ensuring certain aspects of humanitarian security.

Conclusion

In the modern world, international cooperation is taking on new forms and models of global relations having many dimensions. The efforts of individual large countries, independently or jointly with others, to promote new integration mechanisms and projects continue to be in the center of attention of representatives of the scientific and practical community.

The formation of BRICS and the design of its international legal format reflect the objective trend of world development towards the formation of a multipolar system of international relations and the strengthening of economic interdependence. Today, the position of BRICS as one of the important factors in the modern system of international relations, which represents not only different socio-economic models, but also civilizations in the international legal space, allows us to note that the member states of the informal actor, purposefully forming new interaction vectors and promoting all new initiatives and solutions, create the necessary conditions for the formation of a more just and representative multipolar world order. In international law, this well-known subject of world politics, while not possessing the important features inherent in traditional international organizations, purposefully demonstrates certain properties that make it possible to ensure global coverage due to the desire of the participating states to exert political, economic and humanitarian influence on the development of the world order.

The intentions of countries in this area, and especially strengthening the foundations of the strategic unity of countries, are not only related to improving

the financial and economic order, but also the problems of ensuring international, regional and national security. Continuing to influence the entire spectrum of international processes of global and regional development, the participants strive to greater manageability of international relations. Significant components of the BRICS actions in this area are consistency in expanding cooperation and active steps in promoting collective interests in the international arena.

From the very beginning of the functioning of BRICS, which sought to act as a new pole of political influence and proposed a new design for the future world order, the practice of combining economic topics with the external political agenda and security issues was an acknowledged necessity within the framework of this actor's consideration of humanitarian components. Today, through this structure, through various acts, and documents formally not legally binding, but having important political significance, there are other institutional opportunities, especially for building and developing a system of relations in order to carry out actions aimed at maintaining international security and solving the urgent multidimensional humanitarian problems of our time.

Despite the limited nature of the BRICS activities in the humanitarian field, which was more related to the initial period, the expansion of the summit agenda due to issues of ensuring international peace and security clearly have strengthened its position as a recognized actor in world politics. Promoting its own, including humanitarian, priorities, a flexible but still consistent actor in international relations creates the necessary legal framework for enhancing cooperation in this area.

The gradual strengthening of the humanitarian influence of BRICS in the system of modern international relations and, for this purpose, building dialogue at different levels on a wide range of issues with interested partners is an existing objective reality, which is dictated by the growing role and importance of its participants in the world arena. Format and interaction, which, along with economic and political imperatives, should serve to create a space of peace, security and joint prosperity.

Giving due attention to the positive aspects of the BRICS activities, about which there are many scientific works and media materials, it is necessary to avoid idealizing and evaluating them in such a way that does not reveal the objective aspects of the influence of this informal transnational actor in the system of international relations. Having a strong commitment to international law, in particular in counteracting trends aimed at eroding its fundamental principles and a multilateral approach, and in supporting this central element of the United Nations Charter, presupposes a wide coverage of the activities of this global actor. In this regard, special attention at the BRICS level will undoubtedly continue to be devoted to complex humanitarian issues, which in the face of the growing challenge and command of new centers of threats, man-made and natural disasters, humanitarian crises, etc., remain the most demanding quick response and effective coordination of joint efforts.

Given that today the prevention and elimination of emergencies and natural disasters has become one of the most important basic functions of a modern

developed state, the cooperation of the BRICS countries in the field of prevention and elimination of accidents, disasters and catastrophes could become another form of dialogue in the development of humanitarian imperatives of global security.

The practice of continuing the development of many organizational mechanisms, including regulatory ones, requires in the future not only the purposeful filling of the content of cooperation through humanitarian components, but also a certain rethinking of the prospects for the formation of our models of humanitarian interaction. Namely, in the context of building up channels of cooperation, there is the need to identify new priorities and timely consideration of changes in relations with multidimensional interests. The impact on the humanitarian content of the BRICS activities can significantly contribute to the process of effective coordination of the joint efforts of the participating countries within the framework of bilateral, multilateral and other structures of world politics. In the future, it seems that the BRICS format in this area will develop as against aspirations of the participating countries to closer forms of cooperation, as well as growing challenges and issues, which inevitably lead to the formal character of the humanitarian imperatives of this organization.

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CONSTITUTIONAL LEGAL FRAMEWORK OF LOCAL GOVERNMENT IN RUSSIA AND SOUTH AFRICA

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The article examines certain issues relating to the constitutional and legal regulation of local self-government in Russia and South Africa in the context of their cooperation within the partnership of the BRICS countries, as well as the constitutional reforms of local self-government carried out in these states. It is noted that, despite the fundamental difference in the historical prerequisites for their implementation, the constitutional and legal approaches to determining the legal nature of local self-government and identifying its status in the general system of public authority in these countries have similar features. This circumstance, according to the author, indicates the potential for a convergence of the systems of legal regulation of these countries and actualizes the need to exchange experience in legal regulation in this area in order to solve similar problems of development of local self-government.

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Introduction

The relations of the Russian Federation with the Republic of South Africa are developing dynamically, including in terms of interaction between the two states within the BRICS group of countries.

On 5 September 2006 in Cape Town, Russian President Vladimir Putin and South African President Thabo Mbeki signed an Agreement of Friendship and Partnership Between the Russian Federation and the Republic of South Africa. The Agreement states that the parties regard each other as friendly states and seek to develop partnership relations based on their common fundamental national interests, ideals of freedom, democracy, equality, universally recognized principles and norms of international law, and will also maintain a regular dialogue at the level of the political leadership of the two states.[1]

The participation of countries in interstate associations is predetermined by the orientation of the participating countries towards achieving common goals, which in turn determines certain processes of convergence of their legal systems, as well as the associated appearance of scientific research on this topic. For example, work on the prospects of unification of private law in the BRICS countries, including in Russian legal literature, already takes place.[2] This circumstance, in turn, is due to the prioritization of the development of financial, economic and trade relations of the participating countries within the framework of this association. At the same time, it seems that comparative legal studies aimed at identifying the similarities and differences between the political and legal systems and institutions of the BRICS states, the exchange of practices in the field of public administration, are no less relevant.[3]

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[1] Договор о дружбе и партнерстве между Российской Федерацией и Южно-Африканской Республикой от 5 сентября 2006 г. [Agreement of Friendship and Partnership Between the Russian Federation and the Republic of South Africa, 5 September 2006] (14 Dec. 2020), available at http://kremlin.ru/supplement/3731.

[2] Национальные особенности и перспективы унификации частного права стран БРИКС: учебник: в 2 т. [*National Characteristics and Prospects for the Unification of Private Law of the BRICS Countries: Textbook. In 2 vols.*] (Ksenia M. Belikova ed., 2015).

[3] Актуализация процесса взаимодействия стран БРИКС в экономике, политике, праве: материалы Научного семинара, Москва, 9 октября 2012 г. [*Updating the Process of Interaction Between the BRICS Countries in Economics, Politics, Law: Materials of the Scientific Seminar, Moscow, 9 October 2012*] (Ksenia M. Belikova ed., 2012).

This thesis, in our opinion, is not least applicable to the institution of local self-government.

So, the effective implementation of the goals of socio-economic development, they being raising the standard of living of citizens and creating conditions and opportunities for self-realization of individuals, is possible with the coordinated interaction of all authorities at all levels (federal, regional and local). At the same time, a significant part of the burden falls precisely on local self-governed bodies as institutions of public authority that are closest to the population and on whose effective activities the vital activity of citizens, the well-being of people, and the provision of a comfortable living environment depend. The possibilities of innovative development of territories, the quality of implementation of national projects, and the level of services rendered to residents will depend on municipal governments as they are closest to the people. In this regard, the issues of increasing the efficiency of municipal governance, development and improvement of the legal framework of local self-government, including from the point of view of its interaction with other levels of government, acquire particular relevance and importance from the point of view of the overall goal of economic development of states.

The scope of these circumstances determines the research interest in the topic of legal regulation of local self-government in South Africa.

It should be noted that such interest is also due to the distinctive specificity of the legal principles underlying this topic, which, fundamentally, are the principles of decentralization and developmentalism. So, in itself, the principle of decentralization is one of the basic concepts through the prism of which the modern theory of state and municipal government is considered. At the same time, despite the fact that this principle is widely known in the practice of municipalism in many countries, in South Africa it has a separate independent content, not least due to the history of the formation and development of local self-government in this country. The principle of developmentalism is also specific, orienting the activities of local self-governing bodies to create conditions for improving the well-being and quality of life of citizens, which is the basis for the constitutional reform of local self-government in South Africa.

Considering the institution of local self-government in Russia and South Africa in a comparative legal aspect, it should be noted that the prerequisites for municipal reform in these countries have different specifics.

Municipal reform in South Africa is closely related to overcoming the consequences of apartheid, resulting in the leveling of the positions of the population living in the "white" territories and the African ("colored") population living in the so-called "Bantustans" as well as the integration of the previously disenfranchised "colored" population into a single political nation. In this regard, even the boundaries between the municipalities were drawn in most cases in such a way that in each of them one part of the territory would be part of the former Bantustan while the other part would contain land previously intended for the residence of the "white" population.

Related to this is the idea of social orientation of the municipal authorities, the creation of favorable conditions for the "colored" population as a population that previously suffered from unfair social conditions, as well as the idea of the accelerated development of depressed territories and alignment of their position with prosperous territories. The idea of involving the local population in the implementation of municipal power in South Africa, including the creation of various advisory institutions, is largely due to the characteristics of the local population, including the existence of local leaders ("traditional leaders") who have great authority among the local African population. The involvement of leaders in the sphere of local government through forms of participatory democracy also pursued the goal of integrating the local population.

Obviously, such prerequisites are specific to South Africa.

What has been said, in our opinion, does not, however, mean the fundamental impossibility of a comparative study of modern legal regulation of local self-government in South Africa and in Russia, especially taking into account the fact that the actual problems of the development of local self-government in these countries (in particular, problems such as the low level of qualifications of municipal employees, the need to find new ways to develop the economic basis of local government, etc.) are similar.

In addition, we consider it possible to note the following.

On 15 January 2020, Russian President Vladimir Putin addressed a message to the Federal Assembly in which he pointed out the need for a comprehensive constitutional reform in Russia.[4]

The process of changing the constitutional text was initiated by the President himself through the introduction of a draft law on an amendment to the Constitution of the Russian Federation[5] which provided for a number of complex constitutional

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[4] Послание Президента Федеральному Собранию от 15 января 2020 г. [Address of the President of the Russian Federation to the Federal Assembly of the Russian Federation, 15 January 2020] (14 Dec. 2020), available at http://kremlin.ru/events/president/news/62582.

[5] On 20 January 2020, a draft law on an amendment to the Constitution of the Russian Federation "On Improving the Regulation of Certain Issues of Organizing Public Authority" was submitted by the President to the State Duma (draft No. 885214-7) (14 Dec. 2020), available at http://publication.pravo.gov.ru/Document/View/0001202003140001. For the purpose of discussing and finalizing this draft, the President signed an order "On the Working Group for Preparing Proposals for Amending the Constitution of the Russian Federation." *See* Распоряжение «О рабочей группе по подготовке предложений о внесении поправок в Конституцию Российской Федерации» от 15 января 2020 г. [Order "On the Working Group for Preparing Proposals for Amending the Constitution of the Russian Federation," 15 January 2020] (14 Dec. 2020), available at http://kremlin.ru/events/president/news/62589. As a result of its activities, amendments to the part of local self-government were finalized at the stage of the second reading and substantively expanded in comparison with the originally introduced edition.

According to the Decree of the Central Election Commission of the Russian Federation of 3 July 2020 No. 256/1888-7 "On the Results of the All-Russian Vote on the Approval of Amendments to the Constitution of the Russian Federation," which summed up the results of the nationwide vote on the approval of amendments to the Constitution of the Russian Federation, the changes are considered approved.

novelties related both to the constitutional consolidation of additional guarantees of social rights of citizens and to the procedure for the formation and powers of public authorities.

One of the blocks of the recent constitutional reform was a set of changes dedicated to improving the constitutional and legal regulation of local self-government.

As the President pointed out in his Address to the Federal Assembly, the main task of the modern Russian state is to ensure "high living standards, equal opportunities for every person, and throughout the country," and, at the same time, to "eliminate the gap between the state and municipal levels of power" and the "division, confusion of powers" of public authorities at various levels.[6]

That is why the President pointed out the need to consolidate (in the Constitution) the principles of a unified system of public power, the effective interaction between state and municipal bodies. In addition, the President also indicated the need to expand the powers and real capabilities of local self-government – "the level of power closest to the people."[7]

The ultimate goal of municipal reform in South Africa was to create such a system of local self-government, the functioning of which would be focused on improving the quality of life of the population. Within its framework, local government bodies were given extensive powers while the local government itself began to be positioned not as a "lower" level of government, but as an area of public administration equivalent to the national and provincial levels of power. In the course of the constitutional reform, local self-government bodies were guaranteed independence and non-interference in their activities by public authorities from other spheres of public administration – national and provincial.

Despite the different conditions and prerequisites, as well as the historical context of the reform of the local self-government system in South Africa in 1996 and in Russia in 2020, a parallel is clearly seen between the stated goals, which in turn allows us to speak of the existence of universal values of local self-government characteristic of two data (as well as other states), as well as the possibility of studying it from these positions.

It seems that the consolidation of the term 'united public authority' within the framework of the constitutional reform in Russia gives the studied topic additional relevance and interest.

In accordance with the Decree of the President of the Russian Federation of 3 July 2020 No. 445 "On the Official Publication of the Constitution of the Russian Federation as Amended," amendments to the Constitution of the Russian Federation, provided for by the Law of the Russian Federation on the amendment to the Constitution of the Russian Federation of 14 March 2020 No. 1-FKZ "On Improving the Regulation of Certain Issues of the Organization and Functioning of Public Authorities," entered into force on 4 July 2020.

6 Address of the President of the Russian Federation, *supra* note 4.

7 *Id.*

1. Local Self-Government in the System of Public Authority in Russia and South Africa

Considering the experience of South Africa, it seems possible to note a turning point in the adoption of the 1996 Constitution of South Africa, which signified the final abandonment of the policy of apartheid and the transition to a democratic system of local self-government bodies, the primary goal of which was proclaimed to ensure the social and economic development of local territorial communities.[8]

At the same time, as noted by foreign researchers, with the transition to a new democratic legal order, "local government was given a critical developmental role to play in rebuilding local communities and environments, as the basis for a democratic, integrated, prosperous and non-racial society."[9] The implementation of the goals set to improve the quality of life of the population, including through local government bodies working closely with citizens and public associations and identifying their needs and requirements, was objectively assumed in the context of transferring the necessary functions and powers to the local government level.[10]

The 1996 Constitution of South Africa devotes all of Chapter 7 and its fifteen articles to local self-government, which forms the very title of the chapter. The norms of legal regulation of this institution of power are also contained in other chapters of the Constitution, the fundamental importance of which from the point of view of determining the constitutional and legal nature of local self-government are the provisions of Article 40 in Chapter 3 Cooperative Government.

According to the provisions of this article, in the Republic (of South Africa), government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. This provision of the Constitution is a general rule that enshrines the basic characteristics of the public government system in South Africa, according to which the distribution of political power occurs in three areas. Moreover, all these spheres coexist in the system of cooperative government and must exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

The academic approval that defines the status of local self-government, as "not as a lower level of government, but as a sphere of government with an equal status along with the national and provincial spheres of government,"[11] seems to be of fundamental

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[8] The White Paper on Local Government, 9 March 1998, at 23 (14 Dec. 2020), available at https://www.gov.za/sites/default/files/gcis_document/201409/whitepaper0.pdf.

[9] Andrew Siddle & Thomas A. Koelble, *Local Government in South Africa: Can the Objectives of the Developmental State Be Achieved Through the Current Model of Decentralized Governance?*, ICLD, Research Report No. 7 (2016) (14 Dec. 2020), available at https://icld.se/app/uploads/files/forskningspublikationer/siddle-koelble-icld-report-7.pdf.

[10] The White Paper, *supra* note 8.

[11] *Id.*

importance. The rationale for this claim is in the contents of the provisions of Article 151 of the Constitution, in accordance with parts 3 and 4 of which a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution. At the same time, the national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

Regarding the legal nature of local self-government as well as the principle of independent exercise of its powers, in its decisions the South African Constitutional Court formulated a number of fairly detailed legal positions and, in particular, noted that under the current Constitution, local government was granted more autonomy than was provided by the 1993 Interim Constitution, and this autonomy derived directly from the constitutional text itself, and not from any acts or decisions of the provinces.[12]

The Constitutional Court of South Africa also noted the following:

> The constitutional status of a local government is thus materially different to what it was when parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates.[13]

Furthermore, the Court commented:

> The Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, "inviolable and possesses the constitutional latitude within which to define and express its unique character" subject to constraints permissible under our Constitution. A municipality under the Constitution is not a mere creature of statute otherwise moribund save if imbued with power by provincial or national legislation. A municipality enjoys "original" and constitutionally entrenched powers, functions, rights and

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[12] Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) (14 Dec. 2020), available at http://www.saflii.org/za/cases/ZACC/1996/26.html.

[13] *Fedsure Life Assurance Ltd. and Others v. Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998) (14 Dec. 2020), available at http://www.saflii.org/za/cases/ZACC/1998/17.html.

duties that may be qualified or constrained by law and only to the extent the Constitution permits.[14]

Summarizing the legal positions of the Constitutional Court of South Africa regarding the constitutional and legal nature of local self-government, it seems possible to note the following.

From the point of view of its legal and ontological status, local government is a separate sphere of public administration, functioning in the general system of public authority in the Republic of South Africa, along with the national and provincial spheres of government.

In accordance with the 1996 Constitution, local government in South Africa is a constitutionally guaranteed and constitutionally protected institution of government. As a consequence, the powers of local governments, firstly, have their own constitutional and legal nature, and, secondly, proceeding directly from the constitutional text, cannot be abolished or canceled by acts of the bodies of the national or provincial spheres of government.

In this context, it is fundamentally important to note the fact that local government, both from the standpoint of constitutional judicial law enforcement practice and from the standpoint of legal doctrine, is considered not to be a level of public authority, but to be an independent sphere of public administration, functioning on an equal basis and having an equal constitutional and legal status relative to other spheres of public authority (national, provincial).

The legal logic in this case is based on the previous historical experience of legal regulation of the institution of local self-government in South Africa, according to which the establishment and status of municipalities was provided for and regulated by the provisions of provincial legislation, which made the very existence of local self-government dependent on the discretion of regional authorities. It is the statement about the rejection of such legal regulation and giving local government the status of a constitutionally protected institution of power, functioning on the basis of the principle of autonomy, that is the basis for the interpretation of constitutional norms on local self-government.

Thus, when considering the legal nature of local self-government in South Africa in the doctrine and constitutional law enforcement practice, emphasis is placed on the independence and full rights of this institution in relation to other spheres of public authority, as well as on the relationship of coordination and interaction between them while maintaining the guarantees of municipal autonomy.

It should be noted that the issue of independence of local self-government, issues related to its relationship with state power and the definition of its place in the

[14] *City of Cape Town and Other v. Robertson and Other* (CCT 19/04) [2004] ZACC 21; 2005 (2) SA 323 (CC) (29 November 2004), paras. 58–60 (14 Dec. 2020), available at http://www.saflii.org/za/cases/ZACC/2004/21.pdf.

system of Russian statehood, are classic and traditionally debatable in the Russian science of municipal law.

The starting point for many discussions is Article 12 of the Constitution of the Russian Federation (contained in its first chapter, devoted to the foundations of the constitutional system), according to which local self-government is independent within the limits of its powers; local government bodies are not part of the system of government bodies.

Even before the constitutional reform was carried out by one of the most authoritative constitutionalists, Chairman of the Constitutional Court of the Russian Federation V. Zorkin, the design of this article was assessed as not devoid of shortcomings.[15] As noted at the time, its content

> gives rise to the opposition of local self-government bodies to public authorities (including representative bodies of state power), while bodies of local self-government are by their nature only the lower, local link of public power in the Russian Federation.[16]

This statement in particular entailed two fairly broad parallel discussions. They took place both at numerous conferences dedicated to the 25th anniversary of the Constitution of the Russian Federation and in the framework of scientific publications. At the same time, the first of them concerned the solution of the issue of the existence of constitutional prerequisites for the separation of local self-government bodies from the state, and the second – about the need to amend the Constitution.

At the same time, regarding the first discussion, it seems possible to note that, in our opinion, the issue concerning the legal nature of local self-government and its relationship with state power had already been resolved by that time within the framework of constitutional judicial law enforcement practice.

In particular, the Constitutional Court of the Russian Federation had already formulated the position that municipal power is not actually state, or proper public, power and is a special kind of power that unites these principles. As noted by the Court:

> Article 12 of the Constitution of the Russian Federation, as if recognizing the "non-state" principles of local self-government, makes it possible to reveal the specific, municipal-legal nature of the corresponding level of power relations, which by their own side (self-government) simultaneously invade the system of civil society institutions But this cannot serve as a basis for denying the

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15 *Зорькин В.* Буква и дух Конституции // Российская газета. 2018. 9 октября. № 226 [Valery Zorkin, *The Letter and Spirit of the Constitution*, Rossiyskaya Gazeta, 9 October 2018, No. 226] (14 Dec. 2020), available at https://rg.ru/2018/10/09/zorkin-nedostatki-v-konstitucii-mozhno-ustranit-tochechnymi-izmeneniiami.html.

16 *Id.*

> constitutional value of exercising the functions of the state through local self-government at the appropriate territorial level, which, however, does not imply the deprivation of local self-government – under the pretext of its recognition as an institution of statehood – of its own essential characteristics, of the constitutional system, local self-government should maintain status independence, on the one hand, but according to its constitutional and legal characteristics, its public-power nature cannot exist and function isolated from the state power – on the other. On this constitutional basis, it becomes possible to understand local self-government as a special kind of public power, which is realized on the basis of a combination of state and "non-state" (public) principles, which follows from the legal position of the Constitutional Court of the Russian Federation, expressed back in the Decision of 2 November 2000 No. 236-O.[17]

In its other decisions, the Constitutional Court has also repeatedly noted in the context of considering certain issues that the constitutional nature of local self-government as a public authority closest to the population makes it necessary to take into account the peculiarities of this public authority; in turn, this predetermines the need to achieve a balance of autonomy of local self-government within the limits of its powers with other constitutionally protected values.[18]

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[17] Определение Конституционного Суда Российской Федерации от 2 ноября 2000 г. № 236-О «По запросу Верховного Суда Кабардино-Балкарской Республики о проверке конституционности пункта «е» статьи 81 Конституции Кабардино-Балкарской Республики, статьи 2 и пункта 3 статьи 17 Закона Кабардино-Балкарской Республики «О местном самоуправлении в Кабардино-Балкарской Республике»» // СПС «Гарант» [Determination of the Constitutional Court of the Russian Federation No. 236-O of 2 November 2000. At the Request of the Supreme Court of the Kabardino-Balkarian Republic on the Verification of the Constitutionality of Paragraph "e" of Article 81 of the Constitution of the Kabardino-Balkarian Republic, Article 2 and Paragraph 3 of Article 17 of the Law of the Kabardino-Balkarian Republic "On Local Self-Government in the Kabardino-Balkarian Republic," SPS "Garant"] (14 Dec. 2020), available at https://www.garant.ru/products/ipo/prime/doc/12022019/.

[18] *See, e.g.*, Постановление Конституционного Суда Российской Федерации от 5 июля 2017 г. № 18-П «По делу о проверке конституционности части 2 статьи 40 Федерального закона «Об образовании в Российской Федерации» в связи с жалобой администрации муниципального образования городской округ город Сибай Республики Башкортостан» // СПС «КонсультантПлюс» [Resolution of the Constitutional Court of the Russian Federation No. 18-P of 5 July 2017. In the Case of Checking the Constitutionality of Part 2 of Article 40 of the Federal Law "On Education in the Russian Federation" in Connection with the Complaint of the Administration of the Municipal Formation of the Urban District of the City of Sibay of the Republic of Bashkortostan, SPS "ConsultantPlus"] (14 Dec. 2020), available at http://www.consultant.ru/document/cons_doc_LAW_219531/; Определение Конституционного Суда Российской Федерации от 9 ноября 2017 г. № 2516-О «По жалобе администрации города Барнаула на нарушение конституционных прав и свобод пунктами 4 и 5 части 1 статьи 16 Федерального закона «Об общих принципах организации местного самоуправления в Российской Федерации»» // Официальный интернет-портал правовой информации [Determination of the Constitutional Court of the Russian Federation No. 2516-O of 9 November 2017. On the Complaint of the Administration of the City of Barnaul on Violation of Constitutional Rights and Freedoms by Paragraphs 4 and 5 of Part 1 of Article 16 of the Federal Law "On General Principles of Organization of Local Self-Government in the Russian Federation," Official Internet Portal of Legal Information] (14 Dec. 2020), available at http://publication.pravo.gov.ru/Document/View/0001201711210020.

The most authoritative modern textbooks also emphasize that municipal government is a special form of public power. As the authors note:

> The traditionally emphasized dualism of the legal nature (a combination of public power, coercive ("state") and social principles) is an inalienable property of municipal power that distinguishes it from other forms of public power. This is an institutional form of political self-government that allows citizens to take himself the management of local affairs that form part of public affairs.[19]

In accordance with the amendments made to the Constitution of Russia by the Law of the Russian Federation on the amendment to the Constitution,[20] Article 132 was supplemented with a new part 3, according to which local governments and public authorities are included in the unified system of public power in the Russian Federation and interact to most effectively solve problems in the interests of the population living in the relevant territory.

As some researchers note, this rule should be considered to be an element of smoothing out contradictions linking state power and local self-government:[21]

> The wording is new: in no other article of the Constitution of the Russian Federation before the adoption of this Law on amendments … was [anything] said about public authority or public functions of state or local government, nor about publicity in general. The common feature that unites local government and state power is called publicity, that is, both state power and municipal power are forms of public power.[22]

Thus, it should be stated that the approach to determining the constitutional and legal nature of local self-government, developed in Russian constitutional judicial

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[19] Муниципальное право России: учебник [*Municipal Law of Russia: Textbook*] 136 (Suren A. Avakyan ed., 2019).

[20] Закон Российской Федерации о поправке к Конституции Российской Федерации от 14 марта 2020 г. № 1-ФКЗ «О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти» // СПС «КонсультантПлюс» [Law of the Russian Federation on the Amendment to the Constitution of the Russian Federation No. 1-FKZ of 14 March 2020. On Improving the Regulation of Certain Issues of the Organization and Functioning of Public Authorities, SPS "ConsultantPlus"] (14 Dec. 2020), available at http://www.consultant.ru/document/cons_doc_LAW_346019/.

[21] *Пешин Н.Л.* Конституционная реформа местного самоуправления: единство публичной власти как новый всеобщий принцип организации местного самоуправления // Конституционное и муниципальное право. 2020. № 11. С. 24–29 [Nikolai L. Peshin, *Constitutional Reform of Local Self-Government: The Unity of Public Power as a New Universal Principle of the Organization of Local Self-Government*, 11 Constitutional and Municipal Law 24 (2020)].

[22] *Id.*

law enforcement practice, received its normative expression at the constitutional level in the framework of the adoption of new constitutional amendments.

As well as adding a new part 3 to Article 132 of the Constitution, the Law on Amendments to the Constitution[23] introduced other changes concerning local self-government, a number of which received a negative assessment in Russian legal literature.

So, according to a number of researchers, new norms on local self-government, with their certain interpretation, provide additional grounds for promoting, both at the level of municipal theory and at the level of legislative regulation, the idea of nationalizing local self-government or, otherwise, the idea of embedding it in the system of state power.

This trend, as noted by a number of prominent municipalists, has long and fairly widely realized itself in the modern legal regulation and practice of local self-government and continues, strengthened by new constitutional amendments. It manifests itself, in particular, in the institutions operating at the level of law, the transfer of certain state powers to local governments and the redistribution of powers between regional and municipal authorities,[24] and in the actual formation of the structure of local governments by regional authorities[25] and the actual constitutional consolidation of the possibility of participation of state authorities in the formation of local authorities.

At the same time, for example, if earlier the last provision was realized exclusively in legislation and in a rather limited form,[26] then the new amendments consolidate

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[23] So, e.g., in part 1 of Article 131 it was established that the types of municipalities are now established by federal law, and it is also clarified that the structure of local self-government bodies is determined by the population independently, but now in accordance with the general principles of organizing local self-government in the Russian Federation, established by the federal law. In addition, this article was also supplemented with part 1.1, according to which state authorities can participate in the formation of local self-government bodies, the appointment and dismissal of local self-government officials in the manner and cases established by federal law.

[24] *Зубарев С.М.* К вопросу об огосударствлении местного самоуправления // Lex Russica. 2018. № 12. С. 83–89 [Sergey M. Zubarev, *On the Nationalization of Local Self-Government*, 12 Lex Russica 83 (2018)]; *Тимофеев Н.С.* Тенденции и направления концептуального развития местного самоуправления в России (статья первая) // Конституционное и муниципальное право. 2018. № 10. С. 52–63 [Nikolai S. Timofeev, *Trends and Directions of Conceptual Development of Local Self-Government in Russia (Article One)*, 10 Constitutional and Municipal Law 52 (2018)].

[25] *Пешин Н.Л.* Конституционная реформа местного самоуправления: механизмы встраивания местного самоуправления в систему государственной власти // Конституционное и муниципальное право. 2020. № 8. С. 25 [Nikolai L. Peshin, *Constitutional Reform of Local Self-Government: Mechanisms of Embedding Local Self-Government into the System of State Power*, 8 Constitutional and Municipal Law 24, 25 (2020)].

[26] We are talking, in particular, about the provisions of part 2.1 of Article 36 of the Federal Law of 6 October 2003 No. 131-FZ "On General Principles of Organization of Local Self-Government in the Russian Federation," which provides for the possibility of a senior official of a constituent entity of the Russian Federation in some cases to participate in the formation of half of the composition of the competition commission for the selection of candidates for the position of the head of the municipal formation.

the general constitutional rule on the fundamentally admissible possibility of participation of state bodies in the formation of local self-government bodies in the manner prescribed by federal law.

As A. Dzhagaryan notes in this regard,

> Attaching constitutional significance to the corresponding institution of "participation" creates obvious preconditions for much more serious state intervention in issues of local importance.[27]

At the same time, such constitutional regulation is inconsistent with the legal position of the Constitutional Court of the Russian Federation, as expressed by the Court in its decree of 1 December 2015 No. 30-P, according to which the independence of local self-government is not absolute, "but, however, excludes the decisive participation of public authorities in the actual formation of local self-government bodies."[28]

It should be noted that in the current articles devoted to the consideration of the reform of constitutional norms on local self-government[29] there are already reflections and assumptions about the possible further recognition and normative implementation of the idea of the state nature of local self-government and even the subsequent consolidation in Article 12 of the Constitution of the provision that local self-government is exercised by the population directly or through local government bodies formed by the population.[30]

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[27] *Джагарян А.А.* Исправленному верить? Субъективные заметки в связи с Заключением Конституционного Суда РФ от 16 марта 2020 года № 1-3 // Конституционное и муниципальное право. 2020. № 8. С. 9–17 [Armen A. Dzhagaryan, *Whether to Believe the Corrected? Subjective Notes in Connection with the Conclusion of the Constitutional Court of the Russian Federation of 16 March 2020 No. 1-3*, 8 Constitutional and Municipal Law 9 (2020)].

[28] Постановление Конституционного Суда Российской Федерации от 1 декабря 2015 г. № 30-П «По делу о проверке конституционности частей 4, 5 и 5.1 статьи 35, частей 2 и 3.1 статьи 36 Федерального закона «Об общих принципах организации местного самоуправления в Российской Федерации» и части 1.1 статьи 3 Закона Иркутской области «Об отдельных вопросах формирования органов местного самоуправления муниципальных образований Иркутской области» в связи с запросом группы депутатов Государственной Думы» // СПС «КонсультантПлюс» [Resolution of the Constitutional Court of the Russian Federation No. 30-P of 1 December 2015. In the Case of Checking the Constitutionality of Parts 4, 5 and 5.1 of Article 35, Parts 2 and 3.1 of Article 36 of the Federal Law "On General Principles of Organization of Local Self-Government in the Russian Federation" and Part 1.1 of Article 3 of the Law of the Irkutsk Region "On Certain Issues of the Formation of Local Self-Government Bodies of Municipalities of the Irkutsk Region" in Connection with the Request of a Group of Deputies of the State Duma, SPS "ConsultantPlus"], para. 1 of cl. 2.1 (14 Dec. 2020), available at http://www.consultant.ru/document/cons_doc_LAW_189899/.

[29] *Пешин Н.Л.* Конституционная реформа местного самоуправления: новая (старая) модель соотношения государственной и муниципальной формы публичной власти // Конституционное и муниципальное право. 2020. № 6. С. 15 [Nikolai L. Peshin, *Constitutional Reform of Local Self-Government: A New (Old) Model of Correlation between State and Municipal Forms of Public Power*, 6 Constitutional and Municipal Law 10, 15 (2020)].

[30] *Чеботарев Г.Н.* Как укрепить единую систему публичной власти? // Конституционное и муниципальное право. 2020. № 3. С. 19–23 [Gennady N. Chebotarev, *How to Strengthen a Unified System of*

It seems, however, that such a reading of the new constitutional norms on local self-government contradicts the approaches that have developed in modern Russian constitutional judicial law enforcement practice regarding the determination of the legal nature of this institution of power.

In addition, one should also pay attention to the legal position expressed by the Constitutional Court of the Russian Federation in its Opinion of 16 March 2020 No. 1-Z, in which the Court recognized the compliance of the new constitutional norms on local self-government with the provisions of the Constitution on the foundations of the constitutional order (Chapters 1, 2, 9) and once again reiterated its position that local self-government bodies, by their nature being public authorities, are not part of the system of state authorities.

In this opinion, considering the provisions of the new part 3 of Article 132, the Court, in particular, noted

> local self-government … [as] being a collective form of realization by the population of the right to resolve issues of local importance and at the same time – an expression of the power of the local community, at the same time in the person of its bodies integrated into the general institutional system for the implementation on the relevant territory of the functions of a democratic legal social state on the basis of interaction both with federal government bodies and, above all (bearing in mind the objectively existing closest interrelationships of public functions and tasks carried out by regional and municipal authorities), with the state authorities of the constituent entities of the Russian Federation. The Constitution of the Russian Federation imposing on the local self-government bodies the independent solution of issues of local importance does not interfere with the constructive, based on the recognition and guarantee the activity of local self-government, interaction between local self-government bodies and public authorities for the most effective solution of common tasks directly related to issues of local importance, in the interests of the population of municipalities, as well as the participation of local self-government bodies in the performance of certain public functions of state importance and tasks in the relevant territory - both in the order of endowing local self-government bodies with separate state ones, and in other forms. Thus, the unity of the public power system is understood primarily as functional unity, which does not exclude the organizational interaction of public authorities and local governments in solving problems in the relevant

Public Authority?, 3 Constitutional and Municipal Law 19 (2020)]. It should be noted that the relevant assumptions are not new and were expressed long before the adoption of the current constitutional amendments. *See Пешин Н.Л.* Государственная власть и местное самоуправление в России: проблемы развития конституционно-правовой модели [Nikolai L. Peshin, *State Power and Local Self-Government in Russia: Problems of the Development of the Constitutional and Legal Model*] 58 (2007).

> territory. This does not deny the independence of local self-government within the limits of its powers and does not indicate the entry of local self-government bodies into the system of public authorities.[31]

It seems, therefore, that the emphasis in reading the relevant new constitutional norms should be shifted from the idea of embedding local self-government into a unified system of public administration (especially since such an interpretation directly contradicts Article 12 of the Constitution of the Russian Federation, which has not undergone any changes) to the need to establish effective interaction between state and municipal public authorities acting in the interests (expressing and transmitting them) of local territorial communities.

It is this idea, in our opinion, laid down in the new constitutional norms on local self-government (at least, they can be interpreted in this way) and, in particular, in the provisions of the new part 3 of Article 132 of the Constitution, according to which local self-government bodies and state bodies are part of the unified system of public authority in the Russian Federation and carry out interactions for the most effective solution of problems in the interests of the population living in the corresponding territory.

Also interesting is the constitutional text's use of a new constitutional concept – "unified system of public power" – which was included in Chapter 4 President of the Russian Federation (pt. 2 of Art. 80) and Chapter 8 Local Self-Government (pt. 3 of Art. 132) of the Constitution.

As the Constitutional Court noted in its conclusion:

> The principle of a unified system of public power, although it has not found a literal consolidation in Chapter 1 of the Constitution of the Russian Federation, at the same time implicitly follows from the constitutional provisions on the unification of the multinational people of the Russian Federation by a common destiny on their land, the established state unity and the revival of the sovereign

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[31] Заключение Конституционного Суда Российской Федерации от 16 марта 2020 г. № 1-3 «О соответствии положениям глав 1, 2 и 9 Конституции Российской Федерации не вступивших в силу положений Закона Российской Федерации о поправке к Конституции Российской Федерации «О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти», а также о соответствии Конституции Российской Федерации порядка вступления в силу статьи 1 данного Закона в связи с запросом Президента Российской Федерации» // СПС «КонсультантПлюс» [Conclusion of the Constitutional Court of the Russian Federation No. 1-Z of 16 March 2020. On Compliance with the Provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation of the Provisions of the Law of the Russian Federation on the Amendment to the Constitution of the Russian Federation "On Improving the Regulation of Certain Issues of the Organization and Functioning of Public Authorities," as Well as the Compliance with the Constitution of the Russian Federation of the Procedure for the Entry into Force of Article 1 of This Law in Connection with the Request of the President of the Russian Federation, SPS "ConsultantPlus"] (14 Dec. 2020), available at http://www.consultant.ru/document/cons_doc_LAW_347691/.

> statehood of Russia (preamble), about the Russian Federation – Russia as a democratic federal rule of law with a republican form of government, about the only source of power – the multinational people of the Russian Federation, which is the bearer of sovereignty that extends to the entire territory of Russia, and exercises its power directly and through public authorities and local self-government bodies … The category "unified system of public authority" is thus derived from the fundamental concepts of "statehood" and "state," about significant political union (unification) of the multinational Russian people. The general sovereign power of this political union extends over the entire territory of the country and functions as a single systemic whole in specific organizational forms determined by the Constitution of the Russian Federation. Consequently, local self-government bodies, which, according to Article 12 of the Constitution of the Russian Federation, are not included in the system of government bodies specified in its Articles 10 and 11, in any case, are included in the unified system of public power of the political union (association) of the multinational Russian people. Anything else, in particular, would entail a violation of the state unity of the Russian Federation and would mean the inapplicability of the basic constitutional and legal characteristics of the Russian state to local self-government, which is constitutional and legal nonsense.[32]

Thus, by disclosing and defining the basic characteristics of the concept of "a unified system of public authority," the Constitutional Court of the Russian Federation put forward additional arguments in favor of including local government bodies in this system.

It should be additionally noted that the concept of a unified public system was normatively fixed and defined in the Federal Law of 8 December 2020 No. 394-FZ "On the State Council of the Russian Federation" adopted to develop the constitutional amendments. According to the provisions of part 1 of Article 2 of this Law, the unified system of public power means federal bodies of state power, bodies of state power of the constituent entities of the Russian Federation, other state bodies, local self-government bodies in their totality, exercising within the constitutionally established limits on the basis of the principles of coordinated functioning and established on the basis of the Constitution of the Russian Federation and in accordance with the legislation of organizational, legal, functional and financial and budgetary interaction, including on the transfer of powers between levels of public authority, its activities in order to observe and protect the rights and freedoms of man and citizen, and create the conditions for social-economic development of the state.[33]

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[32] Conclusion of the Constitutional Court of the Russian Federation No. 1-Z, *supra* note 31.

[33] Федеральный закон от 8 декабря 2020 г. № 394-ФЗ «О Государственном Совете Российской Федерации» // СПС «КонсультантПлюс» [Federal Law No. 394-FZ of 8 December 2020. On the State

Thus, it should be noted that the new constitutional amendments introduced normative clarity to the definition of the legal nature of local self-government bodies in Russia as public authorities of a special kind, revealed earlier in the practice of the Russian body of constitutional judicial control. Having constitutionally secured the status of local self-government as one of the levels of public authority, the constitutional amendments introduced additional clarifications regarding the way of building relations between state authorities and local self-government, namely, interaction predetermined by the goals of the most effective solution of problems in the interests of the population living on the corresponding territory.

It seems possible, therefore, to note the general direction of constitutional approaches in defining the legal nature of local self-government in Russia and South Africa as one form (variety) of public authority (or in foreign terminology – public administration) functioning on an equal basis with public authorities.

In this context, we consider it possible to note that, in our opinion, the independent exercise of the powers of local self-government bodies seems to be an approach according to which local self-government is considered not to be a level of public authority, but to be an independent sphere of public administration that enjoys equal constitutional legal status on a par with other spheres of public authority (federal (national), regional), characteristic of the constitutional practice of South Africa.

In our opinion, this approach is more consistent with the basis for the emergence of municipal power, as a special way of decentralizing government in the state.

2. Certain Aspects of the Application of the Principle of Decentralization in Legal Regulation of Local Self-Government in Russia and South Africa

As noted in the literature, before the democratic elections in 1994, the situation of municipalities in South Africa was characterized by difficult housing conditions, delays in the provision of services to the population, unequal property status of municipalities, local struggles against the apartheid system, high unemployment rates and a high number of poor households.[34]

That is why the new municipal system was conceived as evolutionary (focused on the development and improvement of the quality of life of the local population) and decentralized, and the constitutional reform of local self-government was based on two fundamental principles – developmentalism and decentralization.[35]

Council of the Russian Federation, SPS "ConsultantPlus"] (14 Dec. 2020), available at http://www.consultant.ru/document/cons_doc_LAW_370105/.

[34] *Democracy and Delivery: Urban Policy in South Africa* (Udesh Pillay et al. eds., 2006).

[35] Siddle & Koelble, *supra* note 9.

As also noted in the literature, the principle of decentralization in the Republic of South Africa was carried out on three planes: political, administrative and fiscal.[36] At the same time, the main interest is the sequence of the implementation of the principle of political decentralization in legislation and in practice.

Political decentralization, as a rule, is understood as the complete or partial transfer of public authority from the center to lower levels of government. As noted in the literature, an integral element and the primary formal expression of political decentralization is the holding of democratic elections at the municipal level. In addition, commentary also highlights the relationship between political decentralization and the involvement of the population in the implementation of local self-government. Thus, some authors believe that real political decentralization takes place where there is an increase in the forms of participation of the population in the decision-making process at the local level, which in turn also leads to an improvement in the procedure and quality of the provision of municipal services. Close interaction of government bodies, citizens and public organizations contributes to a better coordination of interests, identification of the real needs of the population,[37] and solutions to pressing problems of local territorial communities that "can no longer be resolved only through elections."[38]

In this context, it should be noted that the legislation of the Republic of South Africa has quite consistently carried out the idea of the need to involve the population in the decision-making process at the local government level, both from the point of view of the content of legislative norms of an ideological-orienting nature (norms-principles, norms-goals) and from the point of view of normative consolidation at the national level of various forms of participatory democracy.

Thus, the preamble to the Municipal Systems Act of South Africa[39] states that a "fundamental aspect of the new local government system is the active engagement of communities in the affairs of municipalities of which they are an integral part" and that "there is a need to create a more harmonious relationship between municipal councils, municipal administrations and the local communities through the acknowledgement of reciprocal rights and duties."

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36 Siddle & Koelble, *supra* note 9.

37 John M. Cohen & Stephen B. Peterson, *Administrative Decentralization: A New Framework for Improved Governance, Accountability, and Performance* (1997); Larry Diamond, *Developing Democracy: Towards Consolidation* (1999).

38 *Черкасов А.И.* Прямая и партисипационная демократия как средство вовлечения населения в процесс принятия решений на местном уровне // Труды Института государства и права РАН. 2018. Т. 13. № 2. С. 202 [Alexander I. Cherkasov, *Direct and Participatory Democracy as a Means of Involving the Population in the Decision-Making Process at the Local Level*, 13(2) Proceedings of the Institute of State and Law of the Russian Academy of Sciences 190, 202 (2018)].

39 Municipal Systems Act of South Africa No. 32 of 2000 (14 Dec. 2020), available at https://www.gov.za/documents/local-government-municipal-systems-act.

In accordance with the provisions of parts 1, 2 of Article 4 of the Municipal Systems Act, municipalities are assigned such duties as: govern on its own initiative the local government affairs of the local community; encourage the involvement of the local community; consult the local community about the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider and the available options for service delivery; and contribute to the realization of the rights provided for by the Constitution of South Africa.

In addition, a separate special chapter of this Act (Chapter 4 Community Participation) is devoted to the regulation of issues of involving the population in the implementation of local self-government.

Thus, in accordance with the provisions of Article 16 of the Municipal Systems Act, a municipality must develop a culture of municipal governance that complements formal representative government with a system of participatory governance. For this purpose, municipalities are obliged to encourage and create the conditions for the participation of the local community in the affairs of the municipality, including in the preparation, implementation and review of its integrated development plan; the monitoring and review of its performance, including the outcomes and impact of such performance; the preparation of its budget; and strategic decisions relating to the provision of municipal services and other issues. The South African Local Systems Act provides that these provisions should not be interpreted as permitting interference with the constitutional right of municipal councils to exercise executive and legislative power in municipalities.

Municipalities also have a general responsibility to create the necessary conditions for wider public participation in the decision-making process, and it is also stipulated that the activities of local governments should be transparent and the decisions taken should be available for public discussion.

At the national level it is possible to create and operate such forms of participatory democracy as: receiving and considering petitions and complaints filed by members of the local community; public discussions of adopted municipal acts and other decisions related to issues of local importance; public meetings organized by municipalities; participation (presence) of citizens in hearings (sessions) of the municipal council; and consultative meetings with local public organizations (Art. 16 of the Municipal Systems Act).

In addition, in accordance with the Municipal Structures Act,[40] in certain categories of municipalities it is possible to create district committees consisting of a member of the municipal council (representative body of a municipality in South Africa), elected in this district, as well as ten representatives of the public. These committees have the right to adopt acts of a recommendatory nature concerning the development of the

[40] Municipal Structure Act of South Africa No. 117 of 1998 (14 Dec. 2020), available at https://www.gov.za/documents/local-government-municipal-structures-act?gclid=CjwKCAjw74b7BRA_EiwAF8yHFGs_dHQp1cbHjEESJJFPY3vq4Y0bQMJrewq7LgYqpkVeq9.

municipal district and send them to the representative of the district, or directly to the municipal council. In addition, the Municipal Structures Act also allows the possibility of delegating certain powers of the municipal council to district committees (with the exception of issues of budget approval and economic development plans).

Thus, it is necessary to state the presence in the legislation of South Africa on local self-government of a number of both value-oriented and practical norms, indicating, on the one hand, the need to involve the population in the process of local self-government, and, on the other hand, specifically regulating the methods of such involvement. Also necessary to note is the legislative consolidation of the relevant terms – "participation" and "involvement of the population" in the solution of issues of local importance.

In the context of the modern understanding that municipal democracy should be interactive,[41] the presence in legislation of terms, concepts and mechanisms that guide local governments to involve citizens in solving local self-government issues, the formulation of relevant ideas and tasks at the level of legal provisions seems to be a progressive practice of legal regulation.

In this sense, the absence in Russian legislation of a legal definition of the term 'public involvement in the implementation of local self-government' seems to be an omission,[42] despite the fact that sufficient attention is paid to this problem in Russia – conferences and round tables are held, public involvement is considered to be a criterion for evaluating the best municipal practices, and this term is contained in a number of regional acts.[43]

The development and strengthening of the democratic potential of local self-government in Russian municipal practice, the need to establish effective interaction of municipal bodies with civil society institutions, public associations and citizens seems to be in demand.

At present, as rightly noted in some publications, in Russia "there are problems of overcoming the risks of reduced transparency and guarantees of taking into account the interests of local communities."[44] To look upon local self-government as one of the elements (levels) of a unified system of public power, declared in the

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41 Cherkasov 2018.

42 Taking into account the fact that the mechanisms of participatory democracy differ in their essence and the way of elaborating and making decisions from the mechanisms of direct (both imperative and consultative) democracy.

43 For more on this, *see Шугрина Е.С.* Муниципальная демократия: тенденции развития в материалах правоприменительной практики // Правоприменение. 2019. № 3(3). С. 110–113 [Ekaterina S. Shugrina, *Municipal Democracy: Development Trends in the Materials of Law Enforcement Practice*, 3(3) Enforcement 108, 110–113 (2019)].

44 *Джагарян А.А., Джагарян Н.В.* Функционально-правовые ориентиры местного самоуправления: теоретический аспект // Сравнительное конституционное обозрение. 2017. № 5(120). С. 94–115 [Armen A. Dzhagaryan & Natalia V. Dzhagaryan, *Functional and Legal Guidelines of Local Self-Government: Theoretical Aspect*, 5(120) Comparative Constitutional Review 94 (2017)].

course of the constitutional reform of local self-government, should not diminish the democratic importance of this institution in the general system of public administration. In particular, given that a systemic reading of the relevant norm, in our opinion, should be interpreted not in the context of a principle of nationalization of local self-government, but exclusively in the context of building a logical system of distribution of powers between levels of government and effective interaction between them.

Considering the concept of decentralization, it is also possible to note that in foreign legal literature mention is also made of certain necessary elements of the legal regulation of relations related to public administration, reflecting the processes of decentralization.

Among these elements are the following:

• Consolidation at the constitutional level of provisions guaranteeing the legal status and competence of local self-government bodies;

• The presence, in legislation, of mechanisms regulating the interaction of both different levels of government and different public authorities;

• Existence of normative rules defining the processes by which public authorities perform their functions;

• Availability of legislative guarantees of the economic basis for the activities of local self-government bodies;

• Legislative consolidation of the principles of accessibility of local self-government bodies, their accountability to the population.[45]

It seems possible to note that the above analysis of the constitutional and legal regulation of local self-government in South Africa allows us to conclude that most of these principles have been carried out quite consistently. However, the real results of South Africa's decentralization experiment, as noted in the literature, are mixed at best.

While basic services are now much more affordable than ever before, individual municipalities are not coping with the proper implementation of their powers, let alone able to cope with their new evolutionary role and provide breakthrough economic and social development of the municipality.[46] It is noted that in many municipalities the proper level of management, including financial, is not achieved, which is largely due to the insufficient qualifications of the staff of municipal employees. Attention is also drawn to cases of non-compliance or improper implementation of the provisions of national and provincial legislation, both in the implementation of functions of municipal government and in the provision of services to the local population.

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[45] James Manor, *Local Government in South Africa: Potential Disaster Despite Genuine Promise*, SLSA Working Paper 8 (2000) (14 Dec. 2020), available at https://www.gov.uk/research-for-development-outputs/slsa-working-paper-8-local-government-in-south-africa-potential-disaster-despite-genuine-promise.

[46] *Id.*

As noted by individual authors, although South Africa's decision to follow the principle of decentralization and give local government a decisive role in improving the socio-economic situation of citizens, the quality of life of their people, and development, this decision was based on the assumption that all municipalities would be governed by competent employees, provided there were sufficient material and financial resources, in the exercise of municipal powers by officials guided exclusively by the interests of the population. In reality this assumption has not fully justified itself.

As noted in the research, with the Republic of South Africa,

> there is a serious discrepancy between the officially pursued state policy and public expectations, on the one hand, and the real potential (including leadership qualities) of local governments and their resource base, on the other. Municipalities, as a rule, poorly implement the rights and obligations assigned to them, including in conditions of limited resources and opportunities.[47]

It seems possible to note that the difficulties that exist in the exercise of their powers by local governments in South Africa are in many respects similar to those that occur in the exercise of municipal power in the Russian Federation.

An insufficiency of the revenue base of local budgets and other difficulties associated with the formation of a solid economic basis for local self-government,[48] the generally low level of qualifications of municipal employees[49] and the inconsistency of the stated issues of local importance with the real possibilities of municipalities are typical problems associated with the implementation of local self-government in the Russian Federation.

As noted in the domestic literature:

> The modern correction of Russian democracy by the people, primarily due to local civic activity in the context of the nationalization of local self-government, should be associated primarily with the stimulation of the territorial community, generating social capital. It should be borne in mind that this is … about the formation of a political regime, the collectivist principles of which do not suppress the individual, but, on the contrary, contribute to

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47 Manor, *supra* note 45.

48 *Шугрина Е.С.* Экономическая основа местного самоуправления: правовой анализ // Правоприменение. 2018. № 2(3). С. 89–109 [Ekaterina S. Shugrina, *The Economic Basis of Local Government: Legal Analysis*, 2(3) Enforcement 89 (2018)].

49 Recommendations of the round table "Constitutional and Legal Mechanisms of Interaction Between State Authorities and Local Self-Government Bodies at the Present Stage," Federation Council of the Federal Assembly of the Russian Federation, Moscow, 26 November 2018.

the realization of civil rights and freedoms not only at the municipal level, but also at the national level.[50]

In this context, another specificity of the system of legal regulation of local self-government in South Africa is of interest, namely, the presence in it of a general guiding principle for the activities of local self-government bodies – the principle of developmentalism.

3. The Principle of Developmentalism in the System of Legal Regulation of Local Self-Government (in the Context of the Experience of the Republic of South Africa)

Taken outside the framework of legal studies, the concept of developmentalism can be viewed as an economic theory or economic policy which involves active government intervention in the market economy and industrial development of the country in order to accelerate its modernization.

As noted in the literature, currently there is no single definition of the term "developmentalism"; the narrowest definition from the standpoint of economics comes down to the concept of reducing poverty by increasing the income of the population.[51] Despite the fact that this concept is still unclear, it correlates with the ideas of sustainable development in favor of improving the quality of life of people, reducing and ultimately eradicating poverty, as well as ensuring a decent standard of living and equal opportunities for all.[52]

From a political and legal point of view, the idea of developmentalism is based on the concept of "development state," ideologically based on the country's own ability to achieve high-quality economic growth that transforms the lives of citizens.

Various authors single out certain constituent elements of the concept of the state of development. Some elements are different, but most of them show similarities. In particular, the following are distinguished:

• Higher government positions are replaced by representatives of the political elite, focused on achieving the growth of the state's economy;

• The state has extensive powers to influence the economy and set the conditions for the private sector;

• The state apparatus is distinguished by a high level of professionalism, adherence to the ideas of the country's economic growth;

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50 Timofeev 2018.

51 Kealeboga J. Maphunye, *Public Administration for a Democratic Developmental State in Africa: Prospects and Possibilities*, Centre for Policy Studies, Research Report 114 (2009) (14 Dec. 2020), available at https://media.africaportal.org/documents/RR114.pdf.

52 Milton J. Esman, *Management Dimensions of Development: Perspectives and Strategies* (1991).

• The role of civil society in the management of public and political affairs is insignificant and controlled by the state;

• The legitimacy of the political elite is closely related to the state's ability to ensure the country's economic growth.[53]

The ideas of developmentalism were actively discussed in South Africa on numerous political discussion platforms and, in particular, put forward by the African National Congress as the basic means of modernizing the state economy in the mid-2000s.

Separate ideas of developmentalism were initially laid down in the basis of the constitutional model of local self-government in South Africa.

In particular, these ideas found their constitutional embodiment in the provisions of Article 152 of the 1996 Constitution of South Africa, which enshrines the objects of local government's active role, among which the following are indicated:

a. to provide democratic and accountable government for local communities;

b. to ensure the provision of services to communities in a sustainable manner;

c. to promote social and economic development;

d. to promote a safe and healthy environment; and

e. to encourage the involvement of communities and community organizations in the matters of local government.

This role is also clearly seen in the provisions of Article 153 of the 1996 Constitution, according to which a municipality must structure and manage its administration, and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community, and participate in national and provincial development programs.

Thus, as noted in the literature, in the general system of public administration, municipalities are entrusted with the role of agents ensuring a high standard of living for citizens.[54] At the same time, the need for economic development of municipalities ("local economic development") is seen not just as a right, but as a direct constitutional requirement and a corresponding obligation of local governments.[55]

One of the most important official documents that reveals the role of local government in ensuring the progressive development of society and modernization of the economy is the so-called White Paper on Local Government in South Africa –

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53 Jan Laubscher, *The South African Developmental State: Myth or Reality?*, Economic Insight, Economic Commentary (2007); William Gumede, *Delivering the Democratic Developmental State in South Africa*, Development Planning Division, Working Paper Series No. 9 (2009).

54 Isaac Khambule, *The Role of Local Economic Development Agencies in South Africa's Developmental State Ambitions*, 33(3) Local Econ. 287 (2018).

55 Costa Hofisi et al., *Scoring Local Economic Development Goals in South Africa: Why Local Government Is Failing to Score*, 4(13) Mediterr. J. Soc. Sci. 591 (2013); Richard D. Kamara, *Creating Enhanced Capacity for Local Economic Development (LED) Through Collaborative Governance in South Africa*, 1(3) SocioEconomic Challenges 98, 100 (2017).

a program document that describes the socio-political vision of implementing the local self-government.[56]

The White Paper contains the concept of "developmental local government," which is local government whose purpose is social development or, as the document itself describes it, local government which is based on a commitment to working with the local community in order to develop sustainable ways to identify their social, economic and material needs and provide them with a high standard of living.[57]

The White Paper determines that local self-government is assigned a central role in expressing the interests of local communities, protecting human rights, as well as meeting the basic needs of the population. All activities of local government bodies should be focused on improving the quality of life of the population.

The concept of developmental local government is also contained in the Municipal Systems Act of South Africa.[58] In particular, the preamble to the Act indicates that the ideas of evolutionary local self-government are based on the processes of effective planning, resource mobilization and organizational change. Section 23 of the Act specifies that municipal planning should be development-oriented in order to ensure that the objectives of local self-government specified in section 152 of the Constitution are achieved, as well as to properly fulfill the responsibilities assigned to municipalities by section 153 of the Constitution.

Thus, the principle of developmentalism was put forward as the defining principle of the democratic reform of local self-government in South Africa and was sufficiently explicitly expressed in the provisions of the Constitution in 1996, as well as in the provisions of national legislation, and program documents.[59]

It should be noted that the principle of developmentalism as an economic concept has certain ideological foundations rooted in decolonization and is closely related to the idea of accelerated socio-economic development of countries that have freed themselves from colonial dependence or dictatorial regimes. For this reason, this term has always been used to denote a certain type of economic policy in Asia, Africa and Latin America – mainly the countries of the "third world." The use of the term "developmental state" is also limited to a certain context. In this regard, the perception of this theory as an ideological basis for the development of the financial and economic base of local self-government bodies in Russia, the prerequisites for the formation of which are not due to difficulties similar to those of South Africa, is objectively difficult.

At the same time, leaving behind the framework of the purely economic aspects of the principle of developmentalism, which are expressed in the point of view of

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56 The White Paper, *supra* note 8.

57 *Id.*

58 Municipal Systems Act of South Africa No. 32, *supra* note 39.

59 Kgalema Mashamaite, *Role of the South African Local Government in Local Economic Development*, 10(1) International Journal of eBusiness and eGovernment Studies 114, 118–21 (2018).

the need to strengthen state intervention in the market economy, the practice of carrying out certain elements of this principle at the level of legislative provisions seems to be positive: for example, the norms concerning the functions of local self-government bodies in the aspect of the normative consolidation of goals that orient their activities towards the creation and provision of conditions for the socio-economic development of the population and high living standards of citizens.

It seems that the consolidation of goals that orient the activities of local self-government bodies to the need to ensure a decent standard of living create conditions and opportunities for self-realization of citizens is possible and justified in Russian legislation, not only in the context of national goals and strategic objectives,[60] but also in terms of implementation of the constitutional principle of the social state, enshrined in the provisions of Article 7 of the Constitution of the Russian Federation, as well as the provisions of the new Article 75.1, introduced by the latest constitutional amendments, according to which conditions are created in the Russian Federation for sustainable economic growth of the country and improving the welfare of citizens.

In our opinion, the content and operation of this new constitutional principle (which, with a certain degree of conditionality, can also be designated as the principle of developmentalism) should be carried out not only from the point of view of strengthening the social rights of citizens, which was repeatedly pointed out in the development of this norm, but also can and should be extended to the activities of local self-government bodies. At the same time, its action in the context of issues of effective implementation of local self-government should permeate the activities of public authorities at all levels.

Thus, the federal authorities and, first of all, the federal legislature, in the framework of working to improve federal legislation in the field of local self-government, could be guided directly by Article 75.1 of the Constitution, as a rule of direct action.

From the point of view of the powers of regional authorities, one could talk about adjusting the principles of their activities listed in Article 1 of the Federal Law of 6 October 1999 No. 184-FZ "On the General Principles of Organization of Legislative (Representative) and Executive Bodies of State Power of Subjects of the Russian Federation."

We also consider it possible and reasonable to supplement the Federal Law of 6 October 2003 No. 131-FZ "On the General Principles of Organization of Local Self-Government in the Russian Federation" with a new article that fixes the goals of the activities of local self-government bodies and directs their work, including the need to improve the quality of life of citizens, and creating comfortable living conditions.

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[60] Указ Президента Российской Федерации от 7 мая 2018 г. № 204 «О национальных целях и стратегических задачах развития Российской Федерации на период до 2024 года» // СПС «КонсультантПлюс» [Decree of the President of the Russian Federation No. 204 of 7 May 2018. On National Goals and Strategic Objectives of the Development of the Russian Federation for the Period Until 2024, SPS "ConsultantPlus"] (14 Dec. 2020), available at http://www.consultant.ru/document/cons_doc_LAW_297432/.

It is obvious that the legislative consolidation of these ideas and values in Russian legislation is hardly the key to solving the problems existing in Russia and related to the organization and implementation of local self-government. At the same time, it seems that such legislative practice would provide the necessary value-oriented basis for the activities of local self-government bodies.

Conclusion

According to the Concept of the Russian Federation's Participation in the BRICS Association, taking into account the novelty and complex nature of issues related to such participation, an important task is an in-depth study of the economic, domestic and foreign policies of the BRICS partner states with Russia, as well as the formation of an independent research area for this interstate association. Increased awareness of the peoples of the BRICS member states about the history, modern life, culture and traditions of each other's countries contributes to the growth of mutual understanding between them.

These circumstances are due to the interest in comparative legal studies of public administration systems in Russia and South Africa, in identifying the features, similarities and differences in the internal legal order of these countries. Despite the different historical and economic prerequisites for the formation of local self-government systems in Russia and South Africa, it seems possible to note the similarity of modern approaches to determining the legal nature of this institution of public authority, as well as its relationship with public authorities of the federal (national) and regional levels in these countries.

The approach to defining local self-government as an independent, independent and equal type of publicity of power is characteristic of legal regulation and constitutional judicial law enforcement practice in both countries.

From the point of view of researching the issue of guarantees of the independence of local self-government for Russian legal doctrine, it is characteristic to study the independent socio-political principles of this institution of public power and the specifics of its legal nature, which distinguishes it from public authorities (not in the least, such discussions are predetermined by the unsuccessful construction of the constitutional norm on local self-government contained in the chapter on the foundations of the constitutional order). Research interest in South Africa is largely concentrated around purely legal, constitutional, guarantees of independence of local self-government from national and regional authorities.

Despite the use of various legal arguments and an appeal to legal justifications of a different order, the principle of autonomy of local self-government as a separate sphere of public authority that is closest to the population (which bears the main burden in matters of ensuring the welfare of citizens) is a distinctive characteristic of the constitutional system of both states.

The issues of increasing guarantees of the independence of local self-government in the conditions of similar difficulties faced by local governments in Russia and South Africa (low qualification of municipal employees, the need to find new ways to develop the economic basis of local self-government) are given considerable attention in both countries, which additionally actualizes the need for exchange of experience and achievements between them in this direction.

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THE IMPACT OF GLOBALISATION ON THE CONSTITUTIONAL REGULATION OF HUMAN RIGHTS

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The objective of this research paper is to provide an in-depth analysis of the essence of the constitutional and legal regulation of personal status, which is the primary obligation of present-day national governments with respect to preserving and protecting major human values when globalisation processes are underway. Consistent and comprehensive human development, politicisation of the law, the elimination of poverty, the fight for equality, global economic injustice, the search for a new ideal constitutional model and other issues are relevant and are on the agenda for the entire global society. Countries with different economic levels of development, historical traditions, cultural origins, and legal systems have varying concepts of human rights, freedoms and duties, which they implement in practice in various ways. These issues are of paramount importance for Russia, which has equal participation rights in matters of international relations and in the system for global governance and international law making. Solving the problem of satisfying the national interest and preserving prestige and the standard of living of every person depends on the primary social responsibility of each person and on the active role of the modern state. Most of all, it is necessary to solve functional problems that are simultaneously political, scientific, organisational, and legal. The most important task here is to enhance the effectiveness of the activity of the state system and the local self-government authorities. To achieve its objective, the paper utilises general scientific-scholarly methods, and specific scientific-scholarly research methods including those denominated concrete-historical, logically historical, system-based, comparative legal (law), among others.

Keywords: human rights; globalisation of law; global constitutionalism; new constitutional model; constitutional dimension.

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Introduction

The modern world is increasingly faced with issues arising from the impact of globalisation on the constitutional and legal regulation of personal status, mechanisms of national and international defence of human rights and freedoms, and identification of tendencies for international public and constitutional law to develop, interact and mutually exert inf luence.

Globalisation, as a phenomenon and a process, is an ambiguous concept for today's experts in the fields of international and constitutional law. Publications may be encountered in the scientific-scholarly literature that are representative of the problematic nature of globalisation processes and their impact on the constitutional and legal regulation of relationships, which collectively define the subject of legal regulation of constitutional law.[1]

At the same time, the subject matter of such categories as "global constitutionalism,"[2] "constitutional monitoring" and "constitutional diagnostics,"[3] "constitutional futuristic,"[4]

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[1] For more detail please refer to *Умнова-Конюхова И.А.* Современное понимание предмета конституционного права в условиях бинарного развития внутригосударственного (национального) и международного права // Актуальные проблемы российского права. 2018. № 10(95). С. 151–162 [Irina A. Umnova-Konukhova, *Contemporary Understanding of the Subject of Constitutional Law in Conditions of Binary Development of Domestic (National) and International Law*, 10(95) Actual Problems of Russian Law 151 (2018)].

[2] Anne Peters, *Global Constitutionalism and Global Governance*, Max Planck Institute for Comparative Public Law and International Law (Jan. 5, 2021), available at http://www.mpil.de/de/pub/forschung/nach-rechtsgebieten/voelkerrecht/global-constitutionalism.cfm.

[3] *See Арутюнян Г.Г.* Конституционный мониторинг как гарантия преодоления дефицита конституционализма (концептуальные подходы) (доклад на Ереванской международной конференции 22 октября 2016 г.) [Gagik G. Arutyunyan, *Constitutional Monitoring as a Guarantee for Overcoming Deficit of Constitutionalism (Conceptual Approaches)*, Speaker Paper at the Yerevan International Conference on 22 October 2016] (Jan. 5, 2021), available at http://www.concourt.am/armenian/structure/president/articles/yerevan_conf2016_ru.pdf.

[4] For more detail please refer to *Умнова-Конюхова И.А.* Конституция Российской Федерации 1993 года: оценка конституционного идеала и его реализации сквозь призму мирового опыта // Lex Russica.

"constitutional ideal" and new "constitutional model,"[5] and many others, has not been fully studied and specified. All this indicates the need for and relevance of developing and studying the multiple problematic aspects of such a complex phenomenon as globalisation and its impact on human rights.

Nowadays, the issues of the constitutional and legal regulation of personal status, defence of human rights, elimination of poverty, global economic justice, among others, have constantly been the main focus of attention for the international community, transnational institutional structures, governmental entities, human rights organisations and the mass media. These issues have agitated people and have been regularly discussed during various academic and research events, as they are directly associated with all areas and conditions of the activities of human life. As M. Marchenko rightly states,

> Studying the issues arising from the impact of globalisation and regionalization on the state, legal, social and political lives is of enormous value from both the theoretical and the practical perspective.[6]

The objective of this research paper is to provide an in-depth analysis of the essence of the constitutional and legal regulation of personal status, which is the primary obligation of present-day national governments with respect to preserving and protecting human values in the conditions of the worldwide globalisation processes.

Pursuant to this objective, the following central issues have been formulated for the purposes of this research:

• explore the problematic aspects of the subject matter of the constitutional and legal regulation of legal personal status in Russia;[7]

• examine specific aspects of the impact of the globalisation processes on the observance and defence of human rights and civil rights and freedoms in Russia;

2018. № 11(144). С. 23–39 [Irina A. Umnova-Konukhova, *Constitution of the Russian Federation, 1993: Assessment of the Constitutional Ideal Model and its Implementation in the Context of the World's Experience*, 11(144) Lex Russica 23 (2018)].

5 For more detail please refer to *Хабриева Т.Я.* Конституционная реформа в современном мире: монография [Talia Ia. Khabrieva, *Constitutional Reform in the Modern World: Monograph*] 36 (2017).

6 *Марченко М.Н.* Государство и право в условиях глобализации [Mikhail N. Marchenko, *State and Law in Conditions of Globalisation*] 7 (2015).

7 With no intention of fully and thoroughly analysing the concept of "legal personal status," both due to the limited scope of this paper and taking into account somewhat different research issues, one will specify some important aspects of the impact globalisation processes have on the most essential structural elements of legal personal status in the context of defending human rights in the modern state. For more detail on the concept of the constitutional-legal status of a person please *see Балаян Э.Ю.* Проблемные аспекты конституционно-правового статуса личности в современном государстве // Вестник Кемеровского государственного университета. 2015. № 4(64). С. 177–181 [Ellada Iu. Balayan, *Problematic Aspects of Constitutional-Legal Status of a Person in the Modern State*, 4(64) Bulletin of Kemerovo State University 177 (2015)].

• analyse the shortcomings of the Russian Federation legislation in effect and suggest specific measures to improve it.

The conclusions and suggestions provided herein may be used to enhance the effectiveness of the activity of governmental authorities as well as local self-government bodies.

The author of this research paper has made an attempt to highlight several issues and does not purport to have found final, comprehensive solutions; she would appreciate any and all constructive feedback that not only stems from a formal interest in the discussed subject matter, but also reflects personal involvement in preserving and protecting the most fundamental human values in the modern conditions of the globalisation of constitutional law.

1. Materials and Methods

The background for the methodology of the research constitutes such rigorously developed and standard-practice, key scientific methods as the dialectical cognitive method that allows analysing all phenomena and processes in their development, interrelations and interdependence, as well as general and specific scientific-scholarly methods and analysis, including those denominated concrete-historical, logically historical, system-based and comparative legal (law), among others.

The theoretical background for the research involves the works of foreign and domestic specialists in the fields of constitutional law, theory of state and law, international law and other areas of legal science. The materials of the research paper is based on examining various scientific-scholarly information sources, such as monographs, theses, papers, material from research and practical conferences, and similar. As far as the issues discussed in the paper are concerned, the author has studied and taken into account the opinions of a number of highly respected legal experts, such as G. Arutyunyan, N. Bondar, T. Vasilieva, A. Dzhagaryan, A. Zakharov, V. Kartashkin, I. Kravets, E. Lukasheva, I. Lukashuk, S. Narutto, V. Nevinsky, I. Umnova-Konukhova, V. Chirkin, T. Khabrieva, B. Ebzeev, I. Brownlie, E. Engle, T.J. Farer, P.M. Kennedy, K. Möller, K. Nicolaidis, K. Ohmae, A. Peters, D. Rodrik, and others, to whom the author expresses a deep sense of gratitude.

The regulatory framework for the study was as follows: the Constitution of the Russian Federation dated 1993, other Russian laws, the constitutions and case law of other countries, judgments of the constitutional courts of a number of countries, individual judgments of the European Court of Human Rights and key international legal acts.

The structure of the research paper is related to the position of the author on the issues in question. First, the author specifies relevant issues that will be further studied in depth and in an integrated manner.

Thereafter, certain particular constitutional characteristics of the Russian state are considered in the context of globalisation's impact on them; the importance

of a state's ability and commitment to carry out an effective social policy in the challenging conditions of the modern world is especially emphasised.

The issue of the impact of globalisation on the individual person, on his or her rights and duties, and on the fundamentals of social interaction is of the highest importance for Russia particularly because until recently the Soviet literature had not recognised as relevant the issue of human rights nor the issue of the thorough constitutional and legal regulation of personal status. Moreover, exercising the right to freedom of speech and thought (criticism of authorities, in particular) was considered an illegal activity with all of the consequences that could entail.

It is supposed that the comprehensive and natural development of an individual, a state, the international community, the constitutional dimension of the interaction and interdependence between the earlier listed subjects of law will specify the importance of examining globalisation-related transformations and their impact on creating a new constitutional model.

On the basis of the above, this research paper examines the issue of the impact of globalisation on the basic law of a state, on the regulation of the most important aspects with regard to observing and protecting major human rights and civil rights and freedoms, and on the duties and guarantees for implementing common human values in the conditions of contemporary globalisation processes, as a constitutional duty of a social state, which is an indispensable prerequisite for stability in society and the state.

2. Discussion

2.1. Processes of Globalisation and the Specific Constitutional Characteristics of the Russian State

What is globalisation? This is the central question to be answered. There is no general consensus in the literature on how this phenomenon is definitively defined. On the whole, one may agree that globalisation is an on-going process during which political, social, economic and cultural impacts become identical across the entire worldwide community.[8]

While there may be differing views on globalisation, it is nonetheless an objective and natural process of development of the modern world, constitutional law and public international law. All possible aspects and contexts of this trajectory of development across the globe have been examined by experts in various scientific-scholarly fields. The opinions voiced about expectations and perspectives of globalisation have been, remain and will be different.[9]

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[8] A similar in meaning definition of "globalisation" may be found in the Cambridge Dictionary (Jan. 5, 2021), available at https://dictionary.cambridge.org/ru/.

[9] For more detail please refer to Paul M. Kennedy, *Preparing for the Twenty-First Century* (1993); Kenichi Ohmae, *The Borderless World: Power and Strategy in the Interlinked Economy* (1990); Dani Rodrik, *Has Globalization Gone Too Far?* (1997).

Globalisation processes have an enormous impact on the law as a whole and on constitutional law in particular, most notably affecting the subject of the legal status of an individual. As it is rightly stated in law books, the constitutional development of any state occurs under the multi-aspect influence of globalised processes on the national legal system.[10] Constitutional and legal institutions have become involved in these processes to the greatest possible extent.

In the conditions of Russia's integration into the international and European legal framework, the importance of reverse impact of global constitutionalism theory and practice on Russian national law will be considered in the context of the interrelation between national specific features and global regularities in the development and enhancement of the main principles and institutions of modern constitutionalism.[11]

Russian constitutional law is no exception. The constitutional dimension of the phenomena and processes that form the basis of the activities of life of an individual in the modern state comes to the forefront. Here, it should be taken into account that a state, as a key subject of law, also constitutes a principal political player. And one can hardly disagree with A. Zakharov's opinion that,

> The level of impact of global factors on the national state and law depends on the exterior, formal component of state and legal institutions, and substantially involves their intrinsic and conceptual components.[12]

At the same time, as M. Marchenko states:

> However, an institutional component shall not be ignored, since globalisation affects a state and a law both with its functional component (through the system of integrative factors), and its institutional one (through the system of institutions, engendered and cultivated by globalisation).[13]

The modern world, society and the individual person are experiencing changes with dramatic speed. The law, including constitutional law, under the impact of

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[10] For more detail please refer to Khabrieva 2017, at 6.

[11] *Кравец И.А.* Два гаранта Конституции в российском конституционализме и концепция сильного государства // Конституционное и муниципальное право. 2014. № 1. С. 5 [Igor A. Kravets, *Two Guarantors of Constitution in the Russian Constitutionalism and a Concept of a Powerful State*, 1 Constitutional and Municipal Law 4, 5 (2014)].

[12] *See Захаров А.В.* Влияние глобализации на функции современного государства // Юридический мир. 2016. № 11. С. 47 [Alexander V. Zakharov, *Impact of Globalisation on the Functions of a Modern State*, 11 Juridical World 46, 47 (2016)].

[13] *Марченко М.Н.* Государство и право в условиях глобализации [Mikhail N. Marchenko, *State and Law in Conditions of Globalisation*] 21 (2015).

intense globalisation processes, has become ever more politicised. States do whatever it takes to preserve their social, cultural and spiritual identity, and ideological independence, and retain their national sovereign rights and interests

> against the background of financial and economic, geopolitical, ethno-confessional and other social contradictions. It is eventually related to the system crisis in the traditional institutions of constitutional state mechanism, including critical deficit of trust for … the state itself, its authorities, and the enacted laws.[14]

Thus S. Narutto rightly specifies the negative consequences which may a priori arise due to violation of the requirements of legal workmanship:

> Statutory provisions that do not meet the criteria of clarity, transparency, intelligibility, stability engender contradictory law-enforcement practices, create potentially ambiguous interpretation and arbitrary application of such, thus, leading to violating constitutional guarantees of the state and, among others, judicial, defence of rights, freedoms, and legal interests of citizens, guaranteed by the Constitution.[15]

These and other problems aggravate global social injustice and social inequality; they lessen the possibilities of national governments to overcome poverty; and they facilitate the lack of legitimacy of state authorities and local self-government authorities, and, eventually, of the state constitution and even the generally recognised norms of international law.

Nevertheless, the generally recognised norms and principles of international law are conceptually associated with the constituent function of the Constitution of the Russian Federation,[16] form an integral part of the legal system of the state, constitute the basis of legal personal status, and are a measure and a guarantee for ensuring and protecting human rights and freedoms, including those in the conditions of globalisation.

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[14] For more detail please refer to *Бондарь Н.С., Джагарян А.А.* Правосудие: ориентация на Конституцию: монография [Nikolai S. Bondar & Armen A. Dzhagaryan, *Public Justice: Orientation to Constitution*] 5 (2018).

[15] For more detail please refer to *Нарутто С.В.* Определенность законодательства как гарантия прав и свобод человека и гражданина в конституционно-судебной доктрине // Lex Russica. 2018. № 10(143). С. 41 [Svetlana V. Narutto, *Definiteness of Law as a Guarantee for Human and Civil Rights and Freedoms in Constitutional-Judicial Doctrine*, 10(143) Lex Russica 40, 41 (2018)].

[16] *See Эбзеев Б.С.* Глобализация и становление транснационального конституционализма // Юридическая техника. 2017. № 11. С. 601–609 [Boris S. Ebzeev, *Globalisation and Emergence of Transnational Constitutionalism*, 11 Juridical Techniques 601 (2017)].

The Constitution of the Russian Federation proclaims the country to be a democratic state (Art. 1), acknowledging that the multi-national people of Russia[17] are the only holder of sovereignty and the source of power (pt. 1 of Art. 3). The prerequisites of democracy are recognition and consolidation of human rights and freedoms, true sovereignty, adherence to the principle of checks and balances in the context of exercising public authority, political diversity and pluralism, legitimacy of the Constitution and its true action.

The Constitution of the Russian Federation asserts that the people exercise their power directly and through the state authorities and local self-government authorities, namely in two forms: direct and indirect democracy.

The direct form of democracy implies that each citizen is involved in managing the state and public affairs through taking part in referendums, meetings, demonstrations and other mass events. The mechanisms and guarantees for exercising human rights are enshrined in the Constitution (Arts. 32 and 130) and in the country's federal laws.[18] For instance, the enacting clause of the Federal constitutional law of the Russian Federation "On the Russian Federation referendum" proclaims that,

> The state guarantees the Russian Federation citizens free act and deed in the referendum of the Russian Federation, and defence of democratic principles and norms of law, which specify the right of the citizens to take part in the referendum.

In terms of global constitutionalism, the most important norm is part 5 of Article 12, declaring the provision which states that referendum issues shall not restrict or abolish generally accepted human rights and civil rights and freedoms, and constitutional guarantees of exercising such rights and freedoms.

Since the Constitution recognises that the people are the only source of power, it is therefore methodologically justified that the laws on referendums acknowledge the people as a subject that might initiate referendums. The problem is that when creating and establishing a democratic state governed by the rule of law what is critical

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[17] Thus, in all general laws of countries with democratic systems, a formula "All power belongs to the people" gained general recognition, with minor differences in formulation. For example, Federal constitutional law of Austria (Art. 1), Constitution of Belgium (Art. 33), Constitution of the Federal Republic of Germany (cl. 2 of Art. 20), Constitution of Greece (cl. 3 of Art. 1), Constitution of Italy (Art. 1) and the respective articles of general laws of other countries. Конституции государств Европейского Союза [*Constitutions of European Union Countries*] 11, 113, 187, 245, 423 (1995).

[18] *See* Федеральный конституционный закон от 28 июня 2004 г. № 5-ФКЗ «О референдуме Российской Федерации» // Собрание законодательства РФ. 2004. № 27. Ст. 2710 [Federal Constitutional Law No. 5-FCL of 28 June 2004. On the Russian Federation Referendum, Legislation Bulletin of the Russian Federation, 2004, No. 27, Art. 2710]; Федеральный закон от 12 июня 2002 г. № 67-ФЗ «Об основных гарантиях избирательных прав и права на участие в референдуме граждан Российской Федерации» // Собрание законодательства РФ. 2002. № 24. Ст. 2253 [Federal Law No. 67-FL of 12 June 2002. On the Main Guarantees for Voting Rights and a Right to Participate in Referendum of the Russian Federation Citizens, Legislation Bulletin of the Russian Federation, 2002, No. 24, Art. 2253].

is the degree to which the people are the holders and the source of the power that belongs to them.

Another very important constitutional form of exercising the people's sovereignty in a democratic state is representative democracy,[19] which implies that the people manage state affairs through free and fair elections via forming the most important and basic state institutions (president, parliament, local self-government authorities).[20] These authorities, as the authorised representatives of the people, within their terms of reference, adopt legal acts, through which the will of the people expressed by majority is transformed into compulsory rules of conduct, a political will.

Moreover, as per Federal Law of 6 October 2003 No. 131-FL "On the General Principles of Organizing Local Self-Government in the Russian Federation" (pt. 1 of Art. 1):

> Local self-government constitutes one of the foundations of the constitutional system of the Russian Federation, is recognized, guaranteed, and performed throughout the entire Russian Federation.

Moreover, "Local self-government in the Russian Federation is a form of the people's exercising their authority …" (pt. 2 of Art. 1).[21] Hence, an active and proper participation of the *residents* of municipal entities is indispensable when solving the problems of local significance. Therefore, it is quite justified to ensure that non-citizens, who permanently live in this community and have a residence permit, may have the right to participate in the election of local self-government authorities and referendums on local issues. This idea, with certain restrictions, is enshrined in Russian law.[22]

One more essential attribute of the Russian democratic state in the conditions of global constitutionalism is the national selection of a liberal concept of legal personal status, which implies legislative recognition and provision of natural and undeniable

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[19] On representative democracy, for more detail please refer to *Масленникова С.В.* Народное представительство и права граждан в Российской Федерации [Svetlana V. Maslennikova, *Representation of People and Civil Rights in the Russian Federation*] (2001); *Городецкий В.М.* Пути формирования механизма народовластия на основе действующей Конституции Российской Федерации // Конституционное и муниципальное право. 2000. № 1. С. 15–21 [Victor M. Gorodetsky, *Ways of Creating a Mechanism of People's Sovereignty Based on the Effective Constitution of the Russian Federation*, 1 Constitutional and Municipal Law 15 (2000)].

[20] The opinion prevails in legal literature that elections are the core of democracy since through them the people deliver their mandate to their representatives, namely deputies. *See Невинский В.В.* Гражданин и основополагающие принципы Конституции Федеративной Республики Германии: автореф. дис. ... докт. юрид. наук [Valerii V. Nevinsky, *Citizen and Fundamental Principles of the Constitution of the Federal Republic of Germany: Thesis*] 18–19 (1994).

[21] Федеральный закон от 6 октября 2003 г. № 131-ФЗ «Об общих принципах организации местного самоуправления в Российской Федерации» // Собрание законодательства РФ. 2003. № 40. Ст. 3822 [Federal Law No. 131-FL of 6 October 2003. On the General Principles of Organizing Local Self-Government in the Russian Federation, Legislation Bulletin of the Russian Federation, 2003, No. 40, Art. 3822].

[22] Federal Law on the Main Guarantees for Voting Rights, *supra* note 18.

human rights and freedoms.[23] In the context of putting into action part 4 of Article 15 of the Constitution of the Russian Federation, the obligation of the state to recognise, observe and defend the principal human rights and freedoms enshrined in the norms of international law is acknowledged as legal.[24] By way of example, a norm from the International Covenant on Civil and Political rights (16 December 1966) may be cited, according to which each state-participant shall: (a) for any person whose rights and freedoms, recognised by this Covenant are infringed, provide "a required legal remedy," even if this infringement was committed by an executive officer; (b) provide for any person in need of legal defence establishment of such a right of defence from judicial, administrative, or statutory competent authorities, or other authority, provided for by the legal system of the state, and the possibility of improving judicial defence; (c) arrange for implementing defence measures on the part of the competent authorities, in case of their availability (cl. 3 of Art. 2).[25]

However, application of the provisions enshrined in key international legal documents may be provided only through their detailed and specific representation in the domestic laws. In a similar manner, state authorities enter into a legal relationship and communicate with the persons living in the territory of the state and having various statuses (citizens, foreigners, non-citizens).

The provisions on human rights, enshrined in the norms of international law, find their expression primarily in the primary state law. For example, the Constitution of the Russian Federation declares the primary human rights and civil rights, freedoms and duties (Chapter 2). As in the basic international legal acts, they are enshrined in the Constitution of the Russian Federation in a system-based form that facilitates their effective use. At the same time, when improving legislation and enhancing the effectiveness of the state and municipal public institutions and public human rights organisations, it is advisable to systematise all norms according to which an individual has qualified legal assistance. For example, it is herewith suggested to develop the project of a codified act of the Russian Federation on the professional legal defence of human rights.

The meaning of the rights enshrined in the Constitution, for the state and the society, lies in the fact that it is the exercise of those rights that enables the implementation of the essential attributes of a democratic state governed by the rule of law.[26]

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[23] *See Подмарев А.А.* Конституционное закрепление концепции статуса личности в правовых системах и семьях // Вестник РУДН. Серия «Юридические науки». 2014. № 4. С. 42 [Alexander A. Podmarev, *Constitutional Consolidation of the Concept of Personal Status in Law Systems and Families*, 4 RUDN Journal of Law 41, 42 (2014)].

[24] *See Карташкин В.А.* Международные механизмы защиты прав человека. Как подать жалобу в международные органы [Vladimir A. Kartashkin, *International Mechanisms of Protecting Human Rights. How to Make a Complaint to International Authorities*] 5 (2003).

[25] *Human rights: A Compilation of International Instruments* 21 (1994).

[26] *See Ерицян А.Г.* Права и свободы человека и гражданина в демократическом государстве: система, институты, юридический механизм реализации и защиты: монография [Armen G. Eritsyan, *Human and Civil Rights and Freedoms in a Democratic State: System, Institutions, Legal Mechanism of Implementation and Protection: Monograph*] 37 (1998).

The basic laws of most modern countries involve provisions and criteria of the documents adopted by universal and regional international organisations. It is natural that the states are keen to maximise alignment in the areas of constitutional norms and de facto reality in the country, which is possible only in conditions of the established and existing democratic system in the country.

The Constitution of the Russian Federation (Chapter 2) also proclaims the human rights and freedoms provided for by key international legal documents, and, like any democratic and law-bound state, declares (pt. 1 of Art. 17):

> In the Russian Federation, human rights and civil rights and freedoms are recognized and guaranteed according to the generally accepted principles and norms of international law and pursuant to the present Constitution.

Here, the Constitution provides a number of human rights only to citizens, which are recognised as such by international law.

Therefore, it is advisable in the conditions of the contemporary globalisation when putting constitutional reforms into practice to declare the right of everyone to hold meetings peacefully and without weapons present.[27]

A similar controversy (between the Constitution, the law in effect[28] and international legal standards) arose in the Republic of Armenia prior to introducing amendments to that country's constitution.[29]

The way out of this difficulty is as follows: it is necessary to specify and prescribe a global constitutional methodology on human rights through recognising and guaranteeing the supremacy of the law.

At the same time, in terms of effective defence of human rights and civil rights and freedoms, not only statutory consolidation and recognition of these common human values seem to be important, but also the adequacy and legitimacy of enforcement that is applied as those rights are being provided and secured. A democratic state not merely agrees on the point of enforcement, but, on the contrary, suggests that it should be performed, as may be required by law. For example, defence of human rights and freedoms, and the prevention of crime and other infringements of law, is a primary obligation of any state.

This is shown by the content of Article 114 (cl. "e" of pt. 1) of the Constitution of the Russian Federation and the norms of the Criminal and Civil Codes of the Russian Federation.

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[27] The norm mentioned is detailed in Федеральный закон от 19 июня 2004 г. № 54-ФЗ «О собраниях, митингах, демонстрациях, шествиях и пикетированиях» // Собрание законодательства РФ. 2004. № 25. Ст. 2485 [Federal Law No. 54-FL of 19 June 2004. On Meetings, Political Meetings, Demonstrations, Processions, and Picketing, Legislation Bulletin of the Russian Federation, 2004, No. 25, Art. 2485].

[28] Law of the Republic of Armenia of 28 April 2004 "On Holding Meetings, Political Meetings, Processions, and Demonstrations," Official Bulletin of the Republic of Armenia, 2004, No. 26(325).

[29] After introducing changes, Article 29 of the Constitution of the Republic of Armenia declares: "Everyone has the right to hold peaceful meetings without weapons."

It is considered methodologically valid to take various legal liability measures against law-breakers (federal state authorities, state authorities of the subordinate entities of the Federation, local self-government authorities, executive officers) in the event of failure to comply with the requirements of the laws, their evasion or abuse.

Thus, as per part 2 of Article 19 of the Constitution of the Russian Federation:

> The state guarantees equality of human rights and civil rights and freedoms independently of gender, race, nationality, language, origin, financial and employment status, place of residence, religious beliefs, beliefs, affiliation with public associations, and other conditions. Any forms of restricting civil rights on grounds of social, race, national, language, or spiritual identity are prohibited.

In the event of failure to comply with the provisions of this constitutional norm, the indicated executive officers may, as prescribed by the Criminal Code of the Russian Federation, be brought to justice on the charge of exceeding their authority or abuse of official position (Arts. 201, 202, 285).

Therefore, human rights represent a superior value and a reference point for the modern state to be guided by. If this idea is accepted and implemented in practice, the society is characterised as stable,[30] otherwise tension and a threat to progressive development of the country may arise. It is important to emphasise that a global model of human rights is formed in the present-day conditions.[31] One might agree with the opinion of leading Russian and foreign scholars that various models (usually, three global models are specified, in conformity with the three main legal systems) differ from one another in their socio-cultural natures. The processes of convergence of these global models occur differently, do not lead to needed changes in the legal regulation of various human rights, and sometimes may involve components of antagonistic contradictions. These contradictions may be overcome through changing the essence of these legal systems as such.[32]

The value of overcoming these contradictions becomes clearer in terms of general regularities, from which it is evident that with no convergence and identification of the people's and the state's interests, the existence of both the society and the state is put in jeopardy, since the interests of the state are of higher priority and more important to the degree to which they affirm and protect the rights and freedoms of the society and its members. To this extent, the subject matter of the Constitution

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30 *See Лукашева Е.А.* Права человека как фактор стратегии устойчивого развития [Elena A. Lukasheva, *Human Rights as a Factor of Sustainable Development Strategy*] (2000).

31 Kai Möller, *The Global Model of Constitutional Rights* 239 (2012); *Чиркин В.Е.* Современные глобальные модели основных прав человека: новый подход // Вестник университета им. О.Е. Кутафина (МГЮА). 2015. № 5. С. 128 [Veniamin E. Chirkin, *Modern Global Models of the Main Human Rights: A New Approach*, 5 Bulletin of Kutafin Moscow State Law University 127, 128 (2015)].

32 For more detail please refer to Chirkin 2015.

of the Russian Federation proclaims that the Russian Federation rejects the idea of solving the "individual-state" issue in favour of the state, when the state deals with addressing the issues of the activities of human life, and an individual is "made happy" and loses the opportunity to realise his or her human potential to the fullest.[33]

The priority of the individual with respect to the state allows one to define the individual's position and role in the global community. In the modern conditions, a democratic state regulates the behaviour of the individual only in general, and in such a way as not to infringe human rights, but to sustain and protect the interests of the members of society and their continuous and free development.

That the individual person, the state and society co-exist to provide natural development for all, clearly does not mean that human rights are absolute and cannot be limited. Basically, it is impossible to imagine real freedom of a person with no harmony between the interests of the person and the interests of society and the state.[34] This is reflected not only in the national legislation, but in key international legal documents. In particular, the Universal Declaration of Human Rights declares the potential restriction of human rights to "ensure … common wealth in a democratic society" (cl. 2 of Art. 29).

The Constitution of the Russian Federation, in accordance with the norms of international law in whole and in detail, does not contain constitutional limitations on restricting human rights in general nor in emergency situations. Thus, the Constitution (pt. 3 of Art. 55) states that,

> Human and civil rights and freedoms may be limited by the federal law only to that extent, to which it is needed for the purposes of protecting the foundations of the constitutional system, morality, health, rights, and legal interests of other individuals, country's defence support and safety of a state.

Being in accord with the idea of such a provision,[35] it should be noted at the same time that a required restriction of any right specified in the constitutional norm must always be justified.

Along with that, the recognition of the priority of the rights and freedoms of an individual will violate one of the most essential and fundamental principles of democracy: exercising an individual's rights and freedoms must not infringe the rights of other persons. Therefore, it is noteworthy that in the constitutions of some

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[33] *Баглай М.В.* Конституционное право Российской Федерации [Marat V. Baglai, *Constitutional Law of the Russian Federation*] 100 (2001).

[34] *See* Права человека и процессы глобализации современного мира [*Human Rights and Globalisation Processes in the Modern World*] 59–60 (Elena A. Lukasheva ed., 2007).

[35] *See Лебедев А.В.* Политические права и свободы граждан Российской Федерации (конституционно-правовое исследование): автореф. дис. … канд. юрид. наук [Anton V. Lebedev, *Political Rights and Freedoms of the Russian Federation Citizens (Constitutional-Legal Research Study): Thesis*] 34–35 (2003).

countries certain norms are enshrined that prevent a legislative authority of a country from adopting laws the purpose of which is to restrict human rights.[36]

Naturally, restrictions on human rights and civil rights and freedoms are not related to the entire complex of rights and freedoms included in an individual legal status.

The subject matter here will also be in compliance with certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, since it enables the temporary restriction of some rights, taking into account the extent of applying restrictions with respect to the rights provided for by the Convention (Art. 18), and departing from the obligations in conditions of emergency situations[37] (Art. 15).

Additionally, when considering Article 56 of the Constitution of the Russian Federation in detail, federal law will take into account the provisions of the Convention. The point is that, based on Article 15 of the Convention, in emergency situations a state is enabled to depart from the obligations provided for by the Convention. However, any restriction as a result of such departure should be based on legitimacy and necessity and, as much as possible, be short-term, and not cause any harm to the obligations of the state with respect to human rights and freedoms undertaken under other international agreements.

Along with that, for a quite in-depth understanding of the purpose and essence of Article 15 of the Convention, it is essential to become familiar with the General Comment No. 29 of the Human Rights Committee on article 4 of the Covenant on Civil and Political Rights,[38] where it is emphasised that the remedies of departing from the Covenant provisions must be exceptional and temporary. Furthermore, prior to referring to article 4 of the Covenant, a state must adhere to two fundamental principles: the emergency situation has to pose a threat to the nation's life, and a state-participant must officially declare a state of emergency.[39]

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[36] Thus, according to Article 18 of the Constitution of the Federal Republic of Germany, everyone who exercises the freedom of expressing opinions, in particular, the freedom of the press (pt. 1 of Art. 5), teaching freedom (pt. 3 of Art. 5), freedom of meetings (Art. 8), freedom of association, postal secrecy, secrecy of post, telegraph and telephone messages (Art. 9), ownership rights, or the right of asylum to fight against the foundations of a free democratic system, loses these basic rights. The fact and the scope of forfeiting these rights shall be defined by the Federal Constitutional Court.

[37] Thus, the European Convention on Human Rights authorises countries-participants in certain circumstances to limit certain rights guaranteed by this international legal document. First, the states may, based on Article 57 of the Convention, when signing it or depositing its instrument of ratification, enter a reservation to any provision of the Convention. Second, if there are grounds, listed in the second clauses of Articles 8–11 of the Convention, the state might interfere in exercising the rights guaranteed by it and limit them. Third, states are authorised, in exceptional cases, to withdraw from the obligations undertaken and limit most (provided for by the Convention) rights, the exercise of which must be in strict compliance with the order prescribed by the Convention.

[38] *See* General Comment No. 29: States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001.

[39] Thus, observance of the provisions of the European Convention on Human Rights is mostly guaranteed owing to the international court that functions within the system of the Council of Europe. The binding nature of its decisions forces the countries-participants of the Convention to undertake their

One of the basic principles of establishing a democratic state, the principle of the separation of powers, plays an important role in respect of the issue of ensuring the protection of human rights in the conditions of globalisation.

The principle implies that for the effective assurance and defence of human rights and civil rights and freedoms, various functions of state authority (power) are fulfilled by different government bodies, which are independent, balanced owing to legal provisions and mutually restrain each other.[40] As a consequence, the potential threat of centralising power is eliminated, and the prerequisites needed to observe and ensure the guaranteed protection of human rights and civil rights and freedoms are created. Here, a step-by-step implementation of the principle of the separation of powers also guarantees the independence of the judicial power.

The constitutional system of Russia may be characterised by a number of basic attributes: the people's sovereignty and the existence of the state as an organisation of all the people; a duty to ensure the protection of the individual, their rights and freedoms; democracy, as a foundation of the political system (regime) and mode of living in Russia; ideological variety and political pluralism; freedom of economic activity and a variety of ownership forms, etc. However, the problem is that to establish a constitutional system (and a global constitutionalism as well), it is not yet sufficient to have a Constitution in a state governed by the rule of law.[41] *How* this constitutional system behaves in the life of the community is important, so too is the extent to which the principles enshrined in the Constitution are implemented and the people hold the power, which belongs to them, how human rights and freedoms are guaranteed and protected in reality and how the international and legal obligations undertaken by the state are satisfied.

Each state may fully provide and protect the rights and freedoms of its citizens and each person in its territory only when sovereignty is an essential attribute of the state. Hence, part 1 of Article 4 of the Constitution of the Russian Federation declares: "Sovereignty of the Russian Federation extends to its entire territory."[42] This means

international obligations on protecting human rights more seriously and in a more responsible manner. For more details, please refer to judicial judgments made: with regard to the case *Lawless v. Ireland* (Judgment of 1 July 1961); the case *Ireland v. United Kingdom* (Judgment of 18 January 1978); the case *Aksoy v. Turkey* (Judgment of 18 December 1996); the case *Jersild v. Denmark* (Judgment of 23 September 1994); and the case *Demir and Others v. Turkey* (Judgment of 23 September 1998).

40 The "Founding Fathers" of the Constitution of the United States considered the principle of the separation of powers to be a principal guarantee, which is in opposition to the seizure of power and specifies a prerequisite for protecting human rights. *See, e.g.*, *Алибастрова И.А.* Основы американского конституционализма [Irina A. Alibastrova, *Fundamental Concepts of American Constitutionalism*] 83 (2001).

41 For more detail please refer to Gagik G. Arutyunyan, *From Constitution to Constitutionalism* 41–61 (2004) (in the Armenian language).

42 Конституция Российской Федерации (принята всенародным голосованием 12 декабря 1993 г.) (с учетом поправок, внесенных Законами РФ о поправках к Конституции РФ от 30 декабря 2008 г. № 6-ФКЗ, от 30 декабря 2008 г. № 7-ФКЗ, от 5 февраля 2014 г. № 2-ФКЗ, от 21 июля 2014 г. № 11-ФКЗ) // Собрание законодательства РФ. 2014. № 31. Ст. 4398 [Constitution of the Russian

that the Russian Federation is capable of expressing the will of its citizens and provide and protect the rights and freedoms of the persons under its jurisdiction.

Sovereignty is the supremacy of the state's authority, the independence of the state in its own territory and in relations with other states.

The legal nature of state sovereignty is manifested in the supremacy of the state's authority, its oneness and independence (inwardly and outwardly). As a sovereign state, the Russian Federation has an international legal personality, that is to say, it is a full-fledged member of the present-day international community[43] (here, what is involved is a global political system, the elements of which are states[44]), it may freely and independently become a member of international organisations and unions, it may sign or join international treaties and agreements, and individually solve problems of war and peace, and so on.

The issue of the adequate protection of human rights involves not only the essential role of the principle of state sovereignty, but also the central principle of modern international law: non-interference in the affairs of a state. Interference in the affairs of a state[45] is qualified

Federation (adopted by a nationwide vote on 12 December 1993) (considering amendments, introduced by the RF Laws on amendments to the RF Constitution of 30 December 2008 No. 6-FCL, of 30 December 2008 No. 7-FCL, of 5 February 2014 No. 2-FCL, of 21 July 2014 No. 11-FCL), Legislation Bulletin of the Russian Federation, 2014, No. 31, Art. 4398].

43 The term "international community" began to be used after the adoption of the U.N. Charter. Thus, U.S. President H. Truman in 1946 declared: "Progress in science, communications, technology united the world into one community, where economic and political health of each member directly depends on economic and political health of every other member." *Cited by Community, Diversity and New World Order: Essays in Honor of Inis L. Claude, Jr.* 10 (1994).

44 *See Лукашук И.И.* Глобализация, государство, право, XXI век [Igor I. Lukashuk, *Globalisation, State, Law, 21st Century*] 57–61 (2000).

45 Thus, only humanitarian interference is considered an exception, when a state, to protect the rights and property of its citizens (sometimes, national and other minorities) who are in the territory of another state, may use force, including initiating military action. For more detail please refer to *Гроций Г.* О праве войны и мира. Три книги, в которых объясняются естественное право и право народов, а также принципы публичного права [Hugo Grotius, *On the Law of War and Peace. Three Books That Explain Natural Law and Law of People, and the Principles of Public Law*] 562–63 (1956); *Карташкин В.А.* Актуальные проблемы теории и практики международного гуманитарного права // Вестник МГУ. Серия «Право». 2000. № 3. С. 112 [Vladimir A. Kartashkin, *Relevant Problems in the Theory and Practice of International Humanitarian Law*, 3 Bulletin of Moscow State University. Series "Law" 112 (2000)]; *Карташкин В.А.* Международная безопасность и права человека [Vladimir A. Kartashkin, *International Security and Human Rights*] 61 (1988); *Лукашук И.И.* Военная доктрина правового государства // Международная жизнь. 1994. № 3. С. 88 [Igor I. Lukashuk, *Military Doctrine of a Law-Governed State*, 3 International Life 88 (1994)]; *Шамсон Р.Т.* Права человека и внутренняя компетенция государства // Московский журнал международного права. 2003. № 2. С. 77 [Riiad T. Shamson, *Human Rights and Domestic Jurisdiction of a State*, 2 Moscow Journal of International Law 77 (2003)]; *Черниченко С.В.* Теория международного права. Т. 2 [Stanislav V. Chernichenko, 2 *Theory of International Law*] 449–76 (1999); Права человека [*Human Rights*] 459–61 (Elena A. Lukasheva ed., 2003); Vladimir Kartashkin, *Common Global Home* in *Human Rights for the 21st Century, Foundation for Responsible Hope: A US-Post Soviet Dialogue* 223 (Peter Juviler & Bertram Gross eds., 2000); Vladimir Kartashkin, *Human Rights and Humanitarian Intervention* in *Law and Force in the New International Order* 202 (Lori Fisler Damrosch & David J. Scheffer eds., 1991); Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention* in *Id.* at 185; Ian Brownlie, *International Law and the Use of Force by States* 339–40 (1963); *Id.* at 113–142; Kalypso Nicolaïdis, *Germany as Europe: How the Constitutional Court Unwittingly Embraced EU Demoicracy: A Comment on Franz Mayer*, 9(3-4) Int'l J. Const. L. 786 (2011).

as a gross violation of sovereignty.[46] However, in the conditions of globalisation there is a need to observe the processes of changing the attitude towards the "sovereignty" category both in national constitutional law and in international public law. The changes concern the personal legal status institution and, mostly, human rights.[47] It should be rightly noted that,

> In the XXI century, defence of population and respect for human rights are the principal components of sovereignty and statesmanship, and, hence, sovereignty implies compliance with the obligations towards its own people.[48]

This idea is enshrined in international legal acts.[49]

2.2. Providing a Decent Life as a Principal Duty of the Modern Social State

Radical changes occurring in Russia over the past decade have increasingly concentrated public attention on the issue of priority of common human values, involving, first, undeniable human rights and civil rights and freedoms.

The social characteristic of a state[50] was first reflected in the constitutions of a number of Western European countries (Italy, France, the Federal Republic of Germany) which were adopted after II World War.

Today, the idea of the social state, based on socially oriented politics, economics and law of the modern state, has become widespread and is enshrined in a constitution, and is one of the most essential characteristics of a democratic society.

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[46] For more detail please refer to *Волкодав В.Я.* Соотношение прав человека и суверенитета государства (2000) [V.Ia. Volkodav, *Relationship Between Human Rights and State Sovereignty* (2000)] (Jan. 5, 2021), available at http://www.mstu.edu.ru/science/conferences/11ntk/materials/section10/section10_6.html.

[47] For more detail please refer to *Васильева Т.А.* Концепция суверенитета в условиях глобализации и европейской интеграции // Конституционное и муниципальное право. 2016. № 2. С. 7–9 [Tatiana A. Vasilieva, *A Concept of Sovereignty in the Conditions of Globalisation and European Integration*, 2 Constitutional and Municipal Law 7 (2016)]; Eric Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, 23(23) Quinnipiac L. Rev. 23 (2004).

[48] Report of the Secretary-General "Undertaking a Duty to Protect," United Nations General Assembly, 63rd Session (Jan. 5, 2021), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/206/12/PDF/N0920612.pdf.

[49] The concept of "responsibility to protect" was first formulated in clauses 138–140 of the Final document of the World Summit dated 2005 and approved in clause 4 of Resolution 1674 (2006) of the U.N. Security Council.

[50] The concept "social state" came into common use after 1949: it is during that period that the term "sozialer Rechtsstaat" was included in the General Law of the Federal Republic of Germany, which is translated word-for-word from German as "social law-governed state." The word combinations "welfare state" and "the Welfare State" (translation of the English term) have approximately the same meaning. *Лепихов М.И.* Социальное государство и правовое регулирование социальной защиты населения // Электронная версия журнала «Право и жизнь». 2000. № 31 [Mikhail I. Lepikhov, *Social State and Legal Regulation of Social Protection of the Population*, 31 Online version of "Law and Life" (2000)].

Along with this, considerable efforts are required from the state and community to implement in practical ways the ideas and principles of the modern state enshrined in the constitution.

It may be inferred from the legal literature that the social state is a state that focuses on social fairness, wealth and the social security of its citizens. It is intended to create conditions in the country that ensure a decent life for everyone.

This definition implies that the role and the value of a state in the area of exercising and ensuring social human rights are rather high. Here, it is about the purpose of a social state, which is, actually, a programme for ensuring and constantly improving a satisfactory level of the social status of a person and a citizen. The major part of the programme will contain the directions and principles of the corresponding economic and social policy of the state, which imply the system of constitutional guarantees and freedoms of an individual and rigorous fulfilment of the respective obligations of the state towards the people. Based on this, the modern social state will not only form the system of these guarantees, but also take on the role of the main guarantor of its declared constitutional rights and freedoms. Here, the question arises as to whether these can become the foundation for exercising major human rights when an individual applies to a court with a complaint to the state authorities.[51]

In its Constitution, Russia, as a social state, will first declare a long list of social civil rights, including the right to protect family, motherhood and childhood (Art. 38); old-age welfare, provision in case of disease, physical disability, loss of the breadwinner, to raise children, and the rights in other cases provided for by the law (pt. 1 of Art. 39); the right to housing (Art. 40); the right to health protection and medical assistance (Art. 41); and the right to education (Art. 43) and other social support guarantees.

However, the constitutional consolidation of social human rights and civil rights is separate from their implementation. To put social rights into practice, it is necessary to create economic, political, social and other conditions for their implementation. Here,

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[51] There are such social guarantees the implementation of which enables everyone to exercise and defend their rights and freedoms. In particular, this is a potential free judicial defence for persons who have no sufficient means of living. This conclusion is confirmed by the decision made by the European Court of Human Rights (*Airey v. Ireland*, Judgment of 9 October 1979) "On the case of husband's beating." Thus, Ioanna Airey came from a very modest family. She did not share a joint household with her husband at the time he was convicted of violence against her. However, since the fact that the two were married suggested that they should share a joint household, Mrs. Airey could not prevent her husband from coming back. Her efforts to register by a court order the fact of separate residences did not produce any positive results, since the application for divorce could have been submitted only to the Superior Court of Dublin, and with no lawyer's support she would not succeed. In this case, the Court adhered to the position that, according to Article 6 of the European Convention on Human Rights, the state was obliged not only to provide for the potential judicial defence of Mrs. Airey's rights, but to help in eliminating the reasons (poverty, in this case) that hampered her in exercising this right. Thus, Ireland was recognised as the country infringing the Convention for failure to effectively protect in court a person with no sufficient means of living. For more detail please refer to Европейский суд по правам человека: Избранные решения: в 2 т. Т. 1 [1 *European Court of Human Rights: Selected Cases*] 271–87 (Vladimir A. Tumanov ed., 2001).

the obligation of a social state to create economic prerequisites is an indispensable condition for implementing any human rights and civil rights.[52] At the same time, social human rights differ from the civil (personal) and political rights in terms of the role and value of a state, when it comes to their assurance and protection in a general sense. Personal and political human rights are not awarded by a state; they are given to an individual by birth. The state ensures their implementation and refrains from interference.[53]

Social rights have a different nature. Their concept and practical implementation throughout the entire system of human rights are more vulnerable and require the permanent and goal-oriented concern of the state. Therefore, the attribute "social state" enshrined in the Constitution of the Russian Federation (Art. 7) is not a formal norm, it implies a real determination to creating respective structures, which are based on the law, that are aimed at providing a decent life for each citizen. Hence, to put the norms, enshrined in the Constitution, into practice, Russia is trying to properly regulate its activity and gradually transition the satisfaction of economic and social needs of its citizens on to a legal platform. This is being implemented by increasing minimum wages and pensions, carrying out federal programmes and projects for overcoming poverty, increasing the national birth rate, and other measures.

Over the last few years, legislation has actively been formed which regulates complex and various issues of the social protection of multiple population groups. Yet, there is no harmony between the requirements of the norms of the adopted legal acts and the true situation of the people, although there is a stable tendency for effectively solving many social and economic problems and fulfilling the social functions of the state.

In spite of the enormous efforts of the state to ensure implementation of the social and economic rights of the individual, there are still many unemployed people[54]

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[52] *See Захаров А.В.* Влияние глобализации на функции современного государства // Юридический мир. 2016. № 11. С. 46–48 [Alexander V. Zakharov, *Impact of Globalisation on the Functions of a Modern State*, 11 Juridical World 46 (2016)]; Lebedev 2003, at 16; *Путило Н.В.* Социальные права граждан и законодательство // Журнал российского права. 1998. № 8. С. 124–125 [Natalia V. Putilo, *Social Rights of Citizens and Laws*, 8 Russian Law Journal 124 (1998)]; *Казанцев В.* Международный стандарт: труд гарантия достойного существования // Российская юстиция. 2000. № 3. С. 35–37 [V. Kazantsev, *International Standard: Work – a Guarantee of Decent Life*, 3 Russian Justice 35 (2000)].

[53] For more detail please refer to *Иваненко В.А.* Социальные права человека и их закрепление в конституциях государств – участников Содружества независимых государств: автореф. дис. ... докт. юрид. наук [V.A. Ivanenko, *Social Human Rights and Their Consolidation in the Constitutions of States – CIS Participants: Thesis*] 12 (2000).

[54] Thus, based on the results of the study performed in January 2019, the size of the workforce in Russia was 74.9 million people, or 51% of the total population of the country, including 71.2 million people who were involved in the economy, and 3.7 million people with no occupation, but who were actively looking for work (according to the methodology of the International Labour Organization, they are classified as unemployed). In 2018, out of the total workforce, there were 31.9 million, or 45.8%, regular employees (not taking into account part-time workers) who were not self-employed entrepreneurs. On conditions of spare-time work and with civil law contracts, another 1.3 million people were involved in

and, as a result, many people without means. While in June 2008 the number of Russian citizens with unemployed status was 1,331,500,[55] in June 2018 this number was 3,543,000.[56]

At the same time, poverty in Russia has various specific features: attributes due to territory, age and gender, seasons, number of family members, level of education, availability of more vulnerable groups, and other circumstances. In particular, as per the data from the Federal Labour and Employment Agency, the number of unemployed people in Russia registered in the state institutions of the Agency in 2017 was 776.0thsd.: the number of unemployed women was 35034thsd.; for men the number was 37108thsd.[57]

It should not go unnoticed that there are concerns about the fact that, compared to 2000, the number of unemployed people with higher education increased by more than 7% (from 13.3% to 20.6%).[58]

Simultaneously, by the amount of state-provided funding for education Russia has considerably reduced the gap with countries with a higher standard of living. Thus, according to the data of the Federal Treasury, in 2017 the expenditures for education amounted to 17.1% (in 2007, 23.6%) of all the expenditures of the Russian Federation's consolidated budget for social and cultural events for that year. Furthermore, in 2017 the expenditures for applied research in the area of national economics in Russia amounted to 0.41% of GDP (0.2 % in 2007[59]). For comparison, it should be noted that as recently as 2000, the worldwide average GDP provided to education was 3.4% (0.54% in 2007); for countries with low and average standards

work in these organisations (equivalent to full employment). The number of working positions, replaced by payroll workers, part-time workers or persons who performed work under civil legal agreements in organisations (with no self-employed entrepreneurs), in 2018 amounted to 33.2 million, and this was more than in 2017 by 459,000, or 1.4%. In 2018, the specific weight of working positions of external part-workers in the total number of the replaced working positions in organisations was 1.6%; of the people who worked under civil law contracts it was 2.5%. *See* Официальный сайт Федеральной службы государственной статистики [Official website of the Federal State Statistics Service of the Russian Federation] (Jan. 5, 2021), available at http://www.gks.ru/wps/wcm/connect/rosstat_main/rosstat/ru/statistics/wages/labour_force/#.

55 *See* Официальный сайт Федеральной службы государственной статистики Российской Федерации [Official website of the Federal State Statistics Service of the Russian Federation] (Jan. 5, 2021), available at http://www.gks.ru/scripts/db_inet/dbinet.cgi.

56 *See* Официальный сайт Федеральной службы государственной статистики Российской Федерации [Official website of the Federal State Statistics Service of the Russian Federation] (Jan. 5, 2021), available at http://www.gks.ru/bgd/free/B04_03/IssWWW.exe/Stg/d01/165.htm.

57 *See* Официальный сайт Федеральной службы государственной статистики Российской Федерации [Official website of the Federal State Statistics Service of the Russian Federation] (Jan. 5, 2021), available at http://www.gks.ru/bgd/regl/b18_13/Main.htm.

58 *Id.*

59 *See* Официальный сайт Федеральной службы государственной статистики Российской Федерации [Official website of the Federal State Statistics Service of the Russian Federation] (Jan. 5, 2021), available at http://www.gks.ru/bgd/regl/b08_11/IssWWW.exe/Stg/d03/23-01.htm.

of living 3.0% (0.47% in 2007); for the countries of Europe and Central Asia 5.0% (0.92% in 2007); and for developed countries 5.0 (0.91% in 2007).[60]

At the same time, over the past several years social and demographic parameters of Russia show that the number of people born in the country,[61] the students of general education institutions,[62] the number of hospital beds[63] and the number of doctors[64] have all increased.

In addition to all of the issues described, there are others in the sphere of Russian Federation social policy which, in the conditions of intense competition for work, resources, material wealth and other assets, need to be urgently resolved. It follows from the constitutional obligation of the Russian state (Art. 7) that the state should provide the individual with a decent life and freedom for development.

Conclusion

Intense globalisation processes make constitutional rights ever more politicised. States are doing everything possible to preserve their social, cultural and spiritual identities, their ideological independence, and to protect their national-sovereign rights and interests.

Countries with different levels of economic development and different historical traditions, cultural origins and legal systems have different concepts on human rights, freedoms, duties and guarantees and implement them in practice in different ways. All the same, human rights and freedoms as an essential characteristic of the modern world cannot be under the power of undemocratic regimes. Equal attention must

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60 *See Higher Education in Developing Countries: Peril and Promise* 119, 123 (2000).

61 Hence, it should be noted that in recent years in the Russian Federation there has been a tendency towards an increase in the number of births. The number of children born in 2000 was 1,266,800, while in 2017 the number was 1,690,307. The increase over this period was 423,507. Unfortunately, there was no natural increase; on the contrary, there was a natural loss (–0.9). *See* Официальный сайт Федеральной службы государственной статистики Российской Федерации [Official website of the Federal State Statistics Service of the Russian Federation] (Jan. 5, 2021), available at http://www.gks.ru/bgd/regl/b18_13/Main.htm.

62 Thus, as per the data of the Federal State Statistics Service, in 2017 the number of students at full-time general educational institutions in the Russian Federation was 15,705,900.

63 From 1990 onwards, the number of hospital beds has constantly decreased. In particular, in 1995 the number of hospital beds in Russia was 1,855,500, while in 2007 the number was 1,522,100; (Jan. 5, 2021), available at http://www.gks.ru/free_doc/2008/zdrav/82.htm. In 2017 the number of hospital beds was 1,182,700. *See* Официальный сайт Федеральной службы государственной статистики Российской Федерации [Official website of the Federal State Statistics Service of the Russian Federation] (Jan. 5, 2021), available at http://www.gks.ru/bgd/regl/b18_13/Main.htm.

64 Thus, the number of doctors in Russia in all specialities in 2000 was 680,200; in 2005 – 690,300; in 2006 – 702,200; in 2007 – 707,300; in 2017 – 697,100. Availability of doctors in Russia per 10,000 persons in 2007 was 49.8 (in 2017 – 47.5); availability of nursing staff per 10,000 persons in 2007 – 108.6 (in 2017 – 103.8). *See Id.*

be given to rights and freedoms, on the one hand, and to duties and responsibilities, on the other. This is a balanced and effective approach to holding a cross-cultural global dialogue. The moral power of the legal protection of conscience implies its integrated appeal to respect personal dignity, rights and freedoms as opposed to the authoritative power of a state.

The rights, freedoms and duties of a person and a citizen serve as an indispensable and essential attribute of the modern democratic state governed by the rule of law. Considering the essence of the mission of the modern constitutional state in terms of common human values, it may be supposed that legal personal status acquires its own and independent legal meaning and potential, namely it becomes a foundation and a criterion for the normal functioning of a state. In other words, human rights and civil rights and freedoms constitute the basis and objective of the existence of a state governed by the rule of law. In terms of protecting common human values, such a state may be characterised as the embodiment of the state authority based on the faith and trust of the citizens.

In the complex conditions of the contemporary globalisation processes, for the purposes of a social state it is necessary to create a stable and developing economy, design effective social programmes, organise their continuous financing (through, in particular, promoting charity, overcoming poverty, developing education, science and culture), provide for reasonable state, regional and local budgets, and a tax system, take an active part in the process of pricing, approach each problem in terms of law and morals,[65] and cultivate a proper attitude towards globalisation and other changes that are occurring in the international community.

In the conditions of modern globalisation in Russia, the defence of human rights and civil rights and freedoms is a direction that requires vital and urgent response, since the state, which proclaims itself as being democratic, governed by the rule of law and social, must provide a decent life for individual persons, their free and continuous development, personal inviolability, and the supremacy of law and defence of human rights.

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[65] The capabilities of a state in undertaking social reforms are limited. Some social problems are rather too complex to be solved through the law, and others are rather subtle and intangible, while others still, in most cases, depend on certain moral reasons. *Новгородцев П.И.* Кризис современного правосознания // Антология мировой правовой мысли. Т. V: Россия, конец XIX–XX в. [Pavel I. Novgorodtsev, *Crisis in the Modern Legal Consciousness* in 5 *Anthology of the World Legal Thought*] 341 (1999).

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REGULATION OF ARTIFICIAL INTELLIGENCE IN BRICS AND THE EUROPEAN UNION

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Global digitization and the emergence of Artificial Intelligence-based technologies pose challenges for all countries. The BRICS and European Union countries are no exception. BRICS as well as the European Union seek to strengthen their positions as leading actors on the world stage. At the present time, an essential means of doing so is for BRICS and the EU to implement smart policy and create suitable conditions for the development of digital technologies, including AI. For this reason, one of the most important tasks for BRICS and the EU is to develop an adequate approach to the regulation of AI-based technologies. This research paper is an analysis of the current approaches to the regulation of AI at the BRICS group level, in each of the BRICS countries, and in the European Union. The analysis is based on the application of comparative and formal juridical analysis of the legislation of the selected countries on AI and other digital technologies. The results of the analysis lead the authors to conclude that it is necessary to design a general approach to the regulation of these technologies for the BRICS countries similar to the approach chosen in the EU (the trustworthy approach) and to upgrade this legislation to achieve positive effects from digital transformation. The authors offer several suggestions for optimization of the provisions of the legislation, including designing a model legal act in the sphere of AI.

Keywords: BRICS; EU; artificial intelligence; AI; regulation; innovations; digital economy; digitization; digital technologies.

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Introduction

New issues and new mechanisms are often first described by authors in the literary field of fiction. For example, Polish writer-futurologist S. Lem mentioned and analyzed the phenomenon of artificial intelligence[1] in the future. In turn, the beginning of scientific work in the field of artificial intelligence is widely recognized as A. Turing's 1950 article "Computing Machinery and Intelligence," in which the author considers the now-famous question, Can machines think?[2]

Today, lawyers, like practitioners in many other fields, pose similar questions. They ponder the future of the legal profession, the use of artificial intelligence in the sphere of various services related to law as well as the use of artificial intelligence in various areas of everyday life (probably the most popular example is the use of autonomous

[1] Polityka Rozwoju Sztucznej Inteligencji w Polsce na lata 2019–2027: godna zaufania sztuczna inteligencja autonomia i konkurencja: projekt dla konsultacji społecznych, Rzeczpospolita Polska, Warszawa, 20 sierpień 2019 (Dec. 23, 2020), available at https://www.gov.pl/attachment/0aa51cd5-b934-4bcb-8660-bfecb20ea2a9.

[2] Alan M. Turing, *Computing Machinery and Intelligence*, 59(236) Mind 433 (1950).

machines).[3] What is common to their thinking is that they try to find analogy in new research areas and create completely new legal institutions. A principal example is the discussion about the creation of a new digital legal personality for the needs of emerging intelligent robots and artificial intelligence.[4] In fact, old questions in the field of law are taking on a new dimension. By highlighting certain distinctive features of legal research, it can be easily noticed that many studies focus on the ethical issues and the rationale for ensuring legal certainty in the area of digital technologies.[5] This basically confirms the lawyer's position that the use of artificial intelligence should be regulated. The necessity for the legal regulation of digital technologies does not raise any doubts, and this is the case in many countries in different spheres.[6]

Attention should be paid to the characteristic feature of research in the field of artificial intelligence. Here scholars mostly use a predictive method of scientific research (at least right now, at the beginning of regulation development). Forecasting the use of artificial intelligence and the behavior of various entities in legal terms may seem too unconventional. Not without significance for the issue of artificial intelligence are various models (simulations) of the behavior of entities of legal relations, which may, on the one hand, form the basis for scientific research, and, on the other hand, provide the opportunity to develop appropriate institutions and mechanisms of tax law in a timely manner. Ever careful in scientific research, accusations could arise that these models (simulations) in law and the perception of the future world are merely expressions of the imagination of authors, going beyond the area of futurology and into the law as a scientific field (e.g. it could be argued that the research is closer to fantasy than to legal science). It could also be noted that in legal science we rarely use the concept of futurology (as a science), but we easily relate to certain phenomena in law by making various evaluations about what awaits us in the future.[7] For example,

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[3] Evgenii Nikitin & Mensah Cocou Marius, *Unified Digital Law Enforcement Environment – Necessity and Prospects for Creation in the "BRICS Countries,"* 7(2) BRICS L.J. 66 (2020); Galina Rusman & Elizaveta Popova, *Development of the Software for Examination of the Crime Scene by Using Virtual Reality, Based on Spherical Panoramic Shot and 3D-Scanning* in *2020 Global Smart Industry Conference (GloSIC)* 297 (2020); Elena Ostanina & Elena Titova, *The Protection of Consumer Rights in the Digital Economy Conditions – the Experience of the BRICS Countries*, 7(2) BRICS L.J. 118 (2020).

[4] *Legal Tech and the New Sharing Economy* 53 (Marcelo C. Compagnucci et al. eds., 2020).

[5] Alberto Elisavetsky & María V. Marún, *La tecnología aplicada a la resolución de conflictos. Su comprensión para la eficiencia de las ODR y para su proyección en Latinoamérica*, 3(2) Revista Brasileira de Alternative Dispute Resolution 51 (2020).

[6] Daniel B. Ferreira & Euclides A. Filho, *Anulatória de sentença arbitral: uma análise doutrinária e empírica da jurisprudência dos tribunais dos estados de Santa Catarina, Rio de Janeiro e São Paulo entre 2015 e 2019*, 3(2) Revista Brasileira de Alternative Dispute Resolution 195 (2020); Alexei Minbaleev & Ksenia Nikolskaia, *New Perspectives on Ethics and the Laws of Artificial Intelligence in the Investigation of Incidents Related to DDoS Attacks* in *2020 International Multi-Conference on Industrial Engineering and Modern Technologies (FarEastCon)* (2020).

[7] Suzana Kraljić, *New Family Code and the Dejudicialization of Divorce in Slovenia*, 15 Balkan Social Science Review 158 (2020).

we can easily imagine a discussion about what the various future legal consequences will be if today we do not pass a certain law.[8]

The members of the BRICS group are well known all over the world as the fastest–growing major countries.[9] In the view of many experts, the BRICS countries are the fastest growing emerging markets in the world as well.[10] According to a report of the European Parliament's Committee on Development, the role of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa (BRICS) as emerging protagonists in international development cooperation is significantly and rapidly changing. Over the last decade, BRICS have increased their financial as well as technical assistance and established distinct ways and means of economic cooperation.[11] Figures show that all five BRICS members combined nominal GDP of US$18.6 trillion (about 23.2% of the gross world product), combined GDP of around US$40.55 trillion (32% of the world's GDP) and an estimated US$4.46 trillion in combined foreign reserves. It is anticipated that the total volume of the economies of the BRICS countries will exceed that of the G7 countries by 2050.[12]

For further intensive development of the BRICS member countries, and to enhance their potential to hold a leading position among the other countries in the world, they should stimulate and support innovations and innovation activity within their borders. Moreover, moving in this direction is extremely important because at the present time the modern world is undergoing the process of global digitization. Nicholas Negroponte metaphorically explained that a digitization process deals with shifting from processing atoms to processing bits.[13]

In the view of a number of authors, the general factor of production in the digital era has become information and communication technologies.[14] The artificial intelligence-

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[8] John D. Morley & Roberta Romano, *The Future of Financial Regulation*, Yale Law & Economics Research Paper No. 386 (2009) (Dec. 23, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415144; Jair Gevaerd, *Internationality and Commerciality in the UNCITRAL Model Law: A Functional and Integrative Analysis*, 1(2) Revista Brasileira de Alternative Dispute Resolution 19, 20 (2019); Elizaveta Gromova & Tjaša Ivanc, *Regulatory Sandboxes (Experimental Legal Regimes) for Digital Innovations in BRICS*, 7(2) BRICS L.J. 10, 12 (2020).

[9] Comparative Analysis of the BRICS, Mizuho Research Institute Ltd., Commission of the Economic and Social Research Institute (2005) (Dec. 23, 2020), available at http://www.esri.go.jp/jp/prj/hou/hou016/hou16a-2-1.pdf.

[10] Adriana B. Deorsola et al., *Intellectual Property and Trademark Legal Framework in BRICS Countries: A Comparative Study*, 49 World Pat. Inf. 1 (2017).

[11] *See, e.g.*, Pedro Morazán et al., *The Role of BRICS in the Developing World*, European Parliament's Committee on Development (April 2012), at 3 (Dec. 23, 2020), available at https://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_9_politikalar/1_9_8_dis_politika/The_role_of_BRICS_in_the_developing_world.pdf.

[12] *Коротков С.А., Кульков И.В.* Развитие БРИКС // ЮНИДО в России. 2013. № 11. С. 54 [Sergei A. Korotkov & Igor V. Kulkov, *Development of BRICS*, 11 UNIDO in Russia Bulletin 54 (2013)].

[13] Samira B. Hojeghan & Alireza N. Esfangareh, *Digital Economy and Tourism Impacts, Influences and Challenges*, 19 Procedia Soc. Behav. Sci. 308 (2011).

[14] Tjaša Ivanc, *Theoretical Background of Using Information Technology in Evidence Taking* in *Dimensions of Evidence in European Civil Procedure* 265 (Vesna Rijavec et al. eds., 2016).

based technologies (hereinafter AI-based technologies) are one of the trend areas covered by all of the developed countries in the world. Thus, more than thirty countries have developed national strategies of AI development (among others, Canada, Singapore, China, Kenya, Denmark and France).

Modern achievements in the development of AI-based technologies have opened new opportunities for organizational and institutional design in business and other spheres of social and economic activity. It is widely acknowledged that AI-based technologies have a crucial role in increasing innovation and productivity, improving standards of living and enhancing competitiveness and economic and societal modernization across the globe.[15] Thus, for example, China "has set a national goal of investing US$150 billion in AI and becoming the global leader in this area by 2030."[16]

A national system of innovation can only be judged healthy if the knowledge, technologies, products and processes produced by the national system of science, engineering and technology have been converted into increased wealth, by industry and business, and into an improved quality of life for all members of society.[17]

That is why the creation of an adequate legal approach to the regulation of AI-based technologies in the digital era by the BRICS member countries plays a significant role in their further development. And for that reason, a comparative analysis of the BRICS legislation and the EU legislation on AI-based technologies is important.

Several research papers and overviews dedicated to the analysis of the regulation of the BRICS members' digital technologies and innovation activity have appeared in recent years. These reviews vary considerably in objective, scope and focus and provide useful insight into the interaction between political change and the science, technology and innovation system. Some of them are dedicated to the data protection regime of one or two members of the BRICS group;[18] others investigate the role of the use of AI in particular spheres, such as taxation, for instance.

Yet, there are no research papers devoted to an analysis of the regulation of AI in the BRICS members in the face of the new digital reality.

The aim of this research paper is to carry out a comparative analysis of the regulations and actions taken in the field of AI regulation by BRICS and the European

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15 Galiya Berdykulova et al., *The Emerging Digital Economy: Case of Kazakhstan*, 109 Procedia Soc. Behav. Sci. 1287 (2014).

16 Darrell M. West & John R. Allen, *How Artificial Intelligence Is Transforming the World*, Brookings, 24 April 2018 (Dec. 23, 2020), available at https://www.brookings.edu/research/how-artificial-intelligence-is-transforming-the-world/.

17 Mark Shugurov, *The TRIPS Agreement, International Technology Transfer and Development: Some Lessons from Strengthening IPR Protection*, 3(1) BRICS L.J. 120 (2016); Department of Arts, Culture, Science and Technology of South Africa, White Paper on Science and Technology: Preparing for the 21st Century (1996) (Dec. 23, 2020), available at https://www.gov.za/sites/default/files/gcis_document/201409/sciencetechnologywhitepaper.pdf.

18 Hendrik C. Marais & Magdal Pienaar, *The Evolution of the South African Science, Technology and Innovation System 1994–2009: An Exploration*, 2(3) African J. Sci. Technol. Innov. Dev. 82 (2010).

Union. The possible similarities and differences between their normative frameworks for the development of effective regulation are investigated.

1. Regulation of Artificial Intelligence and other Digital Technologies at the BRICS Group Level

It is indeed well known that the global digitization process affects and changes different spheres of social life. It is noteworthy that the legislation on digital technologies of the BRICS members forms the premise for regulation of such innovations as, among others, artificial intelligence, the Internet of Things, blockchain technologies, industrial robotics, cloud technologies and high-performance computing.

BRICS have consistently passed legal acts in which the key aspects of digitization were fixed, taking into account the fact that these innovations present the future of the further development of the modern world. These Acts establish the general direction of the development of innovations and the digital economy.

One of the most important legal acts of the BRICS group in these areas is the Memorandum of Understanding on Cooperation in Science, Technology and Innovation between the Governments of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa, approved in 2015 (hereinafter the Memorandum of Understanding).[19]

Pursuant to Article 2 of the Memorandum of Understanding, its main objectives are:

• to establish a strategic framework for cooperation in science, technology and innovation among the BRICS member countries;

• to address common global and regional social and economic challenges in the BRICS member countries utilizing shared experiences and complementarities in science, technology and innovation;

• to co-generate new knowledge and innovative products, services and processes in the BRICS member countries utilizing appropriate funding and investment instruments; and

• to promote joint BRICS science, technology and innovation partnerships with other strategic actors in the developing world.

Among the advantages of this Act could be mentioned the fact that the Memorandum of Understanding defines the key areas of cooperation between the members of BRICS, including: exchange of information on policies and programs and promotion of innovation and technology transfer; high performance computing; basic research; space research and exploration, aeronautics, astronomy and earth

[19] Memorandum of Understanding on Cooperation in Science, Technology and Innovation between the Governments of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa (Dec. 23, 2020), available at http://www.brics.utoronto.ca/docs/BRICS%20STI%20MoU%20ENGLISH.pdf.

observation; medicine and biotechnology; high-tech zones/science parks and incubators; technology transfer; information and communication technology; geospatial technologies and their applications (Art. 3).

In the event of achieving these goals the Memorandum of Understanding sets the modalities of cooperation and sub-agreements arising from them between the parties in the fields of science, technology and innovation: short-term exchange of scientists, researchers, technical experts and scholars; dedicated training programs to support human capital development in science, technology and innovation; organization of science, technology and innovation workshops, seminars and conferences in areas of mutual interest; exchange of science, technology and innovation information; formulation and implementation of collaborative research and development programs and projects; establishment of joint funding mechanisms to support BRICS research programs and large-scale research infrastructure projects; facilitated access to science and technology infrastructure among BRICS member countries; announcement of simultaneous calls for proposals in BRICS member countries; and cooperation of national science and engineering academies and research agencies (Art. 4).

Another important legal act is the Strategy for BRICS Economic Partnership, approved in 2015.[20] According to this Act, the Strategy contributes to increasing the economic growth and competitiveness of the BRICS economies in the global arena. One of the main areas of BRICS cooperation relates to the digital innovative economy.

The purposes of the Strategy are to consolidate efforts in order to ensure a better quality of growth by fostering innovative economic development based on advanced technologies and skills development with a view to building knowledge economies; to promote a peaceful, secure, open, trusted and cooperative digital and internet space; to consider incentives to attract investment and production in the BRICS countries by global IT manufacturers; and to address human resource and technology gaps through a system of international scientific and technological cooperation.

On the one hand, the Strategy highlights the dominant role of information and communications technologies, in particular AI, the Internet of Things, etc., which can be powerful tools to provide instruments to foster sustainable economic progress and social inclusion.

On the other hand, the Strategy does not underestimate the potential consequences of the digital economy, which is why it pays considerable attention to questions of the security of digital technologies and data protection. To that end, BRICS strengthen: cooperation and promote joint activities and initiatives to address

[20] The Strategy for BRICS Economic Partnership, released at the Ufa Summit, 9 July 2015 (Dec. 23, 2020), available at http://www.brics.utoronto.ca/docs/150709-partnership-strategy-en.html.

common concerns in the field of information and communications technologies; cooperation of BRICS on emergency response to information security issues; cooperation within BRICS and in other relevant international fora on countering the use of information and communications technologies for criminal and terrorist purposes; promotion of innovative telecommunications equipment, development and introduction of new standards and technologies of communication to promote information and the digital society and to resist cyber threats; development of cooperation to find new ways of reducing voice, internet and broadband costs; and exchange of information and expertise, to contribute to cost reduction including policy and regulatory interventions and implementation.

As provided by the Strategy, in the event of achieving these goals the BRICS countries should establish a working group on information and communications technologies cooperation to consider, among other matters, ways and measures to promote information and communications technologies-related issues and enhance regular interactions at the ministerial and other official levels. BRICS should also offer training programs to support human capital development in information technology and digital innovations, and exchange of expertise on information society policies and programs, for the equitable distribution of the benefits of the new technologies and services.

The Goa Declaration at the VIII BRICS Summit, held on 16 October 2016, similar to the Strategy, also encourages the digitization process and seeks to make it safer.

According to this important Act, the BRICS members will cooperate to develop the digital economy and its key digital technologies, including AI. Cooperation on the digital economy aims to: (a) reinforce the security of adopting digital technologies and to fight against information crime and terrorism; (b) bridge the gap in digital technologies between developed and developing countries; and (c) share knowledge and experience of digital technologies in the field of RegTech, FinTech and digital products.[21]

The final important legal act to note is the Digital Economic Development Initiative, approved by the Business Council BRICS members at the BRICS Xiamen Summit 2018.

In the Council members' opinion, AI, high performance computing, blockchain technologies and cloud technologies are the "breakthrough technologies." Dr. I. Surve, Head of the Business Council of BRICS, said it was most promising that the Fourth Industrial Revolution is an unprecedented opportunity for the BRICS countries to embrace and fully participate in the metamorphosis of technology. He also endorsed the proposal of setting up a working group on the digital economy. At the end of September 2018, the Skills Development Working Group of the BRICS Business Council hosted the second BRICS Skills Competition in the Republic of South Africa, with the focus on skills required in the future. Areas of particular interest and discussion

[21] Goa Declaration, VIII BRICS Summit, Goa, India, 16 October 2016 (Dec. 23, 2020), available at http://www.brics.utoronto.ca/docs/161016-goa.html.

included Cyber Security, the Internet of Things, Data Analytics, Industrial Robotics and Intelligent Manufacturing.[22]

In 2019, BRICS decided to create a joint alliance of its member countries for the development of technologies based on AI. Its creation will allow ensuring synergy in AI development through the introduction of common standards by BRICS members, as well as through the formation of the competent centers.

2. Regulation of Artificial Intelligence in the Russian Federation

As an active participant in the global community, the Russian Federation faces the same difficulties in searching for solutions to the efficient regulation of artificial intelligence. At the present time, Russia is entering into the process of the creation of the adequate regulation of AI. For example, one of Russia's enterprises has developed and is actively implementing project "Botkin.AI," which is a system based on AI and capable of detecting lung cancer in the early stages with an accuracy of 95 percent.[23]

Meanwhile, the system of authoritative bodies is also forming. A new subcommittee on AI was established in the structure of the governmental commission on digital development, in respect to the use of digital technologies to improve quality of life and the business environment. The subcommittee on AI is a working body intended to implement the National Strategy on AI.

The regulation of AI can be conditionally subdivided into three groups. These groups are: legal regulation, technical regulation, and regulations on mechanisms and tools for attracting investments in the creation of AI-based technologies.

2.1. Legal Regulation of AI-based Technologies

Legal regulation consists of several legal acts devoted to general questions of the regulation of digital technologies regulation and the regulation of AI-based technologies.

Firstly, the Strategy of the Development of Information Society in the Russian Federation 2017–2030 was approved by the Decree of the President of the Russian Federation of 9 May 2017 No. 203.[24] This Act defines the purposes, tasks and measures of the national policy in the sphere of application of information and communications

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[22] BRICS to Prioritise Digital Economy, IOL, 4 April 2018 (Dec. 23, 2020), available at https://www.iol.co.za/business-report/economy/brics-to-prioritise-digital-economy-surve-14231613.

[23] Medical image analysis and processing platform with artificial intelligence technology (Dec. 23, 2020), available at https://botkin.ai/.

[24] Указ Президента Российской Федерации от 9 мая 2017 г. № 203 «О Стратегии развития информационного общества в Российской Федерации на 2017–2030 годы» // СПС «КонсультантПлюс» [Strategy of the Development of Information Society in Russian Federation 2017–2030, approved by the Decree of the President of the Russian Federation of 9 May 2017 No. 203, SPS "ConsultantPlus"] (Dec. 23, 2020), available at http://www.consultant.ru/document/cons_doc_LAW_216363/.

technologies, aimed at development of the information society, the national digital economy system, ensuring national interests and implementing strategic national priorities. It emphasizes that the technology of AI has become a part of modern managerial systems in all sectors of the economy and government administration.

Secondly, the Federal Program "Digital Economy" was approved by the Decree of the Government of the Russian Federation of 28 July 2017 No. 1632-p.[25] This Federal Program is aimed at the creation of the necessary conditions for the development of the digital economy in Russia. The main goal of the Program is the formation of a new regulatory environment providing an enabling legal regime for the emergence and development of modern technologies, as well as for economic activity related to their use.

The Program also defines "breakthrough technologies" of the digital economy. These are AI, Big Data, neurotechnology, distributed registry systems, quantum technologies, industrial internet, components of robotics and sensorics, wireless technology, and technology of virtual and augmented realities.

Additionally, there are two legal acts devoted directly to the regulation of AI. Thus, the "road map" of the development of breakthrough technologies "Neurotechnology and AI" was approved on 7 October 2020.[26] This Act primarily contains selection criteria for projects in the sphere of the creation and implementation of AI-based technologies as well as support measures for such projects. These measures are: targeted support of leading research centers; support for small and medium-sized businesses; support of Russian companies-leaders in AI-based technologies commercialization; and support for industrial development.

The second of these Acts is the National Strategy for the Development of Artificial Intelligence for the period until 2030, which was approved by the Decree of the President of Russia of 10 October 2019 No. 490 "On the Development of Artificial Intelligence in the Russian Federation,"[27] in order to ensure the accelerated development of AI in Russia, conduct scientific research in the field of AI, increase the availability of information and computing resources for users and improve training in this area.

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[25] Распоряжение Правительства Российской Федерации от 28 июля 2017 г. № 1632-р «Об утверждении Федеральной программы «Цифровая экономика»» // СПС «КонсультантПлюс» [Order of the Government of the Russian Federation No. 1632-r 28 July 2017. On Approval of the Federal Program "Digital economy," SPS "ConsultantPlus"] (Dec. 23, 2020), available at http://www.consultant.ru/document/cons_doc_LAW_221756/.

[26] Дорожная карта развития «сквозной» цифровой технологии «Нейротехнологии и искусственный интеллект» от 7 октября 2019 г. // Министерство цифрового развития, связи и массовых коммуникаций Российской Федерации [The "Road Map" of the Development of Breakthrough Technologies "Neurotechnology and AI," approved on 7 October 2019, Ministry of Digital Development, Communications and Mass Media of the Russian Federation] (Dec. 23, 2020), available at https://digital.gov.ru/ru/documents/6658/.

[27] Указ Президента Российской Федерации от 10 октября 2019 г. № 490 «О развитии искусственного интеллекта в Российской Федерации» // СПС «КонсультантПлюс» [Decree of the President of the Russian Federation No. 490 of 10 October 2019. On the Development of Artificial Intelligence in the Russian Federation, SPS "ConsultantPlus"] (Dec. 23, 2020), available at http://www.consultant.ru/document/cons_doc_LAW_335184/.

The National Strategy defines AI as a complex of technological solutions, which allows simulating the cognitive functions of a person (including self-learning and the search for solutions without a predetermined algorithm) and obtaining, when performing specific tasks, results comparable, at least, to the results of human intellectual activity. The complex of technological solutions includes information and communication infrastructure, software (including the use of machine learning methods), processes and services for data processing and the search for solutions.

Obviously, such development of AI is impossible without state support of entrepreneurs investing their money in AI. That is why one of the most important provisions of the National Strategy is the set of necessary measures for the development of AI in Russia. They aim at: creating new high-performance jobs and increasing the employment rate; ensuring a competitive level of material remuneration for specialists in the field of AI, creating favorable conditions for their work, including remote work; providing the necessary conditions for attracting, including from foreign countries, the best specialists in the field of AI; supporting the export of Russian products (services) created (provided) with the use of AI and their promotion on the world market; creating incentives to attract private investment in the development of corporate science, research and development in the field of AI; and the formation of an integrated security system for the creation, development, introduction and use of AI technologies.

2.2. Technical Regulation in the Sphere of Artificial Intelligence: Standardization of AI-based Technologies

Scientists have predicted that the development of AI will have far-reaching implications for public administration, national security and socio-economic stability worldwide. That is why modern states have the goal of developing common policy directions in the field of AI, recommendations on minimizing risks, and ensuring the safe and controlled creation and application of this technology.[28] This is due not just to the potential benefits that the use of AI promises. The main reason lies in its hidden threats. Being, in fact, a destructive technology, AI can be dangerous. The lack of adequate, 'smart' legal regulation of this technology, of approved and controlled requirements for its safety, may threaten the well-being of society.

In this regard, the creation of standards in the field of digital technologies and the incorporation of technical aspects of the functioning of these technologies into such standards becomes an essential part of international and national policy. Standardization in the field of AI allows developing a universal terminology related to this technology; as well as ensuring the safe application of technologies based on AI. Moreover, standardization increases the level of interoperability of AI with other digital

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[28] Vernor Vinge, *The Coming Technological Singularity: How to Survive in the Post-Human Era* in *Proceedings of the Vision 21: Interdisciplinary Science and Engineering in the Era of Cyberspace* 11 (1993).

technologies, which, in turn, has a positive impact on the development of scientific and technological progress. At the same time, the development and adoption of "bad quality" standards can hinder the development of AI-based technologies.

The necessity of standardization in this field predetermined the creation in Russia of a Technical Committee on standardization of AI. Its main task is to increase the efficiency of work on the development of the domestic normative and technical bases in the field of AI. One of the strategically important directions of the Committee's work is participation in the international standardization process on behalf of the Russian Federation, including consideration of the issues of the application of international standards in the sphere of AI at the national level.

This is important because the participation of the Russian Committee in international standardization will contribute more to the national interest than the general accession to the International Standard developed without the participation of representatives of the country. As experts have noted, the necessity of transitioning from passive assimilation of foreign experience to active building of domestic arrangements in the sphere of standardization that should considerably strengthen the position of Russia in the field of high technologies is obvious. In this regard, we can positively assess the initiative of the Russian Federation on the synchronous development of terminological standards in the field of AI "Artificial Intelligence. Concepts and Terminology" in the Russian language.

2.3. Mechanisms and Tools to Attract Investments in the Creation of AI-based Technologies

There is big lag in the development of digital and other information technologies in Russia in comparison to developed countries. According to the data of the Federal Program "Digital Economy," the Russian Federation ranks 41st in readiness for the digital economy, showing a significant distance from the higher rankings of dozens of leading countries such as Singapore, Finland, Sweden, Norway, the United States of America, the Netherlands, Switzerland, Great Britain, Luxembourg and Japan. From the point of view of economic and innovative results of using digital technologies Russia ranks 38th, far behind leading countries such as Finland, Switzerland, Sweden, Israel, Singapore, the Netherlands, the United States of America, Norway, Luxembourg and Germany.

In the view of many experts in the field, such a significant lag in the development of the digital economy is explained by the gaps in the regulatory framework for the digital economy and an insufficiently favorable environment for doing business and stimulating innovation, and, as a result, a low level of digital technologies by business structures.[29]

That is why the main task of the government is to create the possibility to purposefully effectuate innovation. This, in its turn, requires establishing the appropriate

[29] Order of the Government of the Russian Federation No. 1632-r, *supra* note 25.

and adequate legal basis for the tools and mechanisms which allows attracting investments and innovators.

2.3.1. Public-Private Partnership in the Sphere of the Creation of AI-based Technologies

To the extent mentioned in the Strategy for BRICS Economic Partnership, the BRICS members should develop public-private partnerships as a mechanism for attracting additional resources; and for combining the capabilities of the public and private sectors in the BRICS countries on implementing technologically advanced projects, including infrastructure projects.[30]

Public-private partnership is well known all over the world as one of the most effective tools for modernizing the national economy. In the conditions of budget deficits, as well as the ongoing worldwide financial and economic crisis, the state must turn to the private sector to find additional sources of financing. The "private sector," in its turn, is given access to those areas of production of goods, works and services that have traditionally been considered a monopoly of the state. In addition, representatives of the private sector are also provided with preferential terms for obtaining loans and other measures of state support.

The implementation of innovative projects can no longer be completely linked to governmental budgetary financing, whose opportunities have recently declined markedly. Now its implementation largely depends on attracting business representatives to such projects.

One of the key areas for the development of the digital economy is the creation and development of "breakthrough" technologies, such as AI, industrial robotics, etc. In this regard, considerable attention is focused on the creation of these and similar technologies.

For example, the modernization of machine building, especially the development of its innovative direction, AI and industrial robotics, is urgently required today.

There are many programs in which the creation of AI and industrial robotics is based on public-private partnership. For example, in the European Union, over the past two years research in the field of AI and robotics has received significant funding under the Program "Horizon 2020." Another European program for the development of industrial robotics SPARC combines the strategic efforts of more than 180 private companies and member states of the European Union to strengthen the global market of robotics in Europe. Under SPARC, over a seven-year period the total investments in robotics from EU Member States will amount to €700 million, and €2.1 billion from the private sector.

In order to implement public-private partnership in the field of AI and industrial robotics effectively, it is necessary to create adequate legislation, which takes into account both the peculiarities of public-private partnership and innovation activity

[30] The Strategy for BRICS Economic Partnership, *supra* note 20.

in the development of such technologies.[31] In Russia, the current legislation on public-private partnership is represented by the Federal Law "On Public-Private, Municipal-Private Partnership and Amendments to the Legislative Acts of the Russian Federation" (hereinafter the Law on Public-Private Partnership), as well as a number of regional acts on public-private partnership. In addition, federal laws on certain legal forms of public-private partnerships are: Federal law "On Concession Agreements," "On Production Sharing Agreements" and "On Special Economic Zones in the Russian Federation."

According to the provisions of the Law on Public-Private Partnership, objects of information technologies can be created under the agreement on public-private partnership. This can be assessed as positive and progressive, because it allows the creation of the objects of information technologies. In comparison, other countries' legislation on public-private partnership includes regulations that give public and private partners the ability to create objects of intellectual activity.

For example, the law on public-private partnership of the Republic of Kazakhstan contains a range of forms of partnership in the sphere of developing innovation. As mentioned earlier, the legislation of the European Union and its Member States also allows creating innovations by using contractual forms of public-private partnership.[32] Moreover, it is recognized that in the legislation of the members of the United Nations the term 'innovative public-private partnership' is applied frequently.[33]

At the same time, analysis of the current legislation on public-private partnership in Russia reveals several disadvantages. It is puzzling that the legislator decided to allow the creation of objects of information technologies but not the innovations as well. The point is that the "breakthrough" technologies are not all objects of information technologies. Here, it bears repeating in full what was mentioned earlier (in Sec. 2.1 above), that the National Strategy for the Development of Artificial Intelligence for the period until 2030 defines AI as a complex of technological solutions, which allows

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[31] *Громова Е.А.* Государственно-частное партнерство в цифровую эру: поиск оптимальной правовой формы // Юрист. 2018. № 10. С. 34–37 [Elizaveta A. Gromova, *Public-Private Partnership in the New Digital Era: Searching for Optimal Legal Form*, 10 Lawyer 34 (2018)]; *Громова Е.А.* Правовое регулирование государственно-частного партнерства в сфере создания робототехники // Сборник статей Международного научно-методического семинара «Правовое регулирование интеллектуальной собственности и инновационной деятельности» [Elizaveta A. Gromova, *Legal Regulation of Public-Private Partnership in the Field of Robotics Creation* in *Collection of Articles of the International Scientific and Methodological Seminar "Legal Regulation of Intellectual Property and Innovation Activity"*] 210 (O.V. Sushkova ed., 2018).

[32] Summary report on the public consultation on the contractual PPP on cybersecurity and Staff Working Document, European Commission, 5 July 2016 (Dec. 23, 2020), available at https://ec.europa.eu/digital-single-market/en/news/summary-report-public-consultation-contractual-ppp-cybersecurity-and-staff-working-document.

[33] United Nations, E-Government Survey 2018: Gearing E-Government to Support Transformation Towards Sustainable and Resilient Societies (Dec. 23, 2020), available at https://publicadministration.un.org/egovkb/Portals/egovkb/Documents/un/2018-Survey/E-Government%20Survey%202018_FINAL%20for%20web.pdf.

simulating the cognitive functions of a person (including self-learning and search for solutions without a predetermined algorithm) and obtaining, when performing specific tasks, results comparable, at least, to the results of human intellectual activity. The complex of technological solutions includes information and communication infrastructure, software (including the use of machine learning methods), processes and services for data processing and the search for solutions. It is not, however, the equivalent of information technology. Moreover, such technologies as components of robotics or new industrial technologies mentioned in the Program "Digital Economy" cannot be recognized as objects of information technologies.

The solution to the problem is to allow the creation of different results of innovation activity and digital technologies by using public-private partnership.

Another possible way of solving this problem is to add to the Law on Public-Private Partnership a provision that will expand the list of forms of public-private partnership. The traditional forms of public-private partnership (many of which are recognized by international and foreign domestic legislation) are the production sharing agreement, the concession agreement, the agreement on the implementation of entrepreneurial activities in the boundaries of the special economic zones, free economic zone of the Republic of Crimea and the federal city of Sevastopol[34] etc.), as well as joint ventures and venture funds. It is puzzling why the legislator did not list these forms of partnership in the Law on Public-Private Partnership.

It seems that the most suitable form for public-private partnership in the innovation sphere, including the creation of "breakthrough" technologies, is an agreement on the implementation of technical and innovative activities. These agreements operate within the boundaries of special economic zones of innovative and industrial types between residents (an individual entrepreneur or a legal entity) and the state (represented by the authoritative body and management company). Under this agreement, the resident must invest in capital construction projects, as well as technical and innovation activities. At the same time, this form of public-private partnership is not "universal." The problem is that this agreement operates only within the boundaries of the special economic zone. This means that if someone would like to create AI-based technologies then that person must become a resident of the special economic zone. This, in turn, obliges the private partner to conduct the activity only within the boundaries of this zone.

3. Regulation of Artificial Intelligence in China, Brazil, India and South Africa

All of the analyzed countries – China, Brazil, India and South Africa – have varying degrees of advancement in work related to legal regulations in the field of artificial

[34] Elizaveta Gromova, *The Free Economic Zone of the Republic of Crimea and the Federal City of Sevastopol*, 6(3) Russian L.J. 79 (2018).

intelligence. There are many reasons for this, and they are not, in principle, reasons related to the creation of law in a given country. Knowledge will always be the key to the development of new technologies. For example, in 2019 India introduced the subject "artificial intelligence" into the curriculum of its schools, an event which was picked up and reported by the media around the world.[35] It should be expected in the future that such activities will also have an impact on creating law in this country.

A characteristic feature of the countries under study is that the first measures at the government level were undertaken relatively recently. The period of the end of 2017 and the start of 2018 was crucial in this area, when the first policies and reports in the field of artificial intelligence were created and special funds for research, education and training were involved. Little time has passed, which is why a common feature of all of the BRICS countries is that none of them has special legal regulations in the field of AI. Yet, we can cite only a small number of examples of individual countries in which legislative initiatives are emerging; and this may result in the development of new legal regulations at the end of 2020 or early 2021.[36] At the moment, the interest of countries in addressing the issues relating to AI is also compounded by the achievements of other countries[37] and international organizations. National agencies in their reports indicate that in legal regulations and activities they will consider, for example, Organisation for Economic Co-operation and Development (OECD) principles in the field of AI. This also applies to declarations from some BRICS countries (e.g. the AI policies of Brazil). Brazil clearly indicates that it implements OECD recommendations. On the other hand, it can also be concluded from the actions of other countries that they are in line with the OECD strategy in this area.

OECD establishes five complementary value-based principles for the responsible stewardship of trustworthy AI:

1. AI should benefit people and the planet by driving inclusive growth, sustainable development and well-being.

2. AI systems should be designed in a way that respects the rule of law, human rights, democratic values and diversity, and they should include appropriate safeguards – e.g., enabling human intervention where necessary – to ensure a fair and just society.

3. There should be transparency and responsible disclosure around AI systems to ensure that people understand AI-based outcomes and can challenge them.

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[35] Indian schools have long way to go in using AI for better education: Microsoft representative, India Today, 2 October 2019 (Dec. 23, 2020), available at https://www.indiatoday.in/education-today/news/story/indian-schools-have-long-way-to-go-in-using-ai-for-better-education-microsoft-representative-1605447-2019-10-02.

[36] *See, e.g.*, Brazil's Congress to step in in the AI regulation debate, The Brazilian Report, 13 March 2020 (Dec. 23, 2020), available at https://brazilian.report/tech/2020/03/13/ai-congress-regulation-brazil-tech-tax/.

[37] *E.g.* the fact that the U.A.E. appointed a new Minister for Artificial Intelligence could be seen as inspiration for others to follow. Wesley Diphoko, *OPINION: Wanted – Ministry of Artificial Intelligence*, IOL, 17 May 2019 (Dec. 23, 2020), available at https://www.iol.co.za/business-report/opinion/opinion-wanted-ministry-of-artificial-intelligence-23399016.

4. AI systems must function in a robust, secure and safe way throughout their life cycles, and potential risks should be continually assessed and managed.

5. Organizations and individuals developing, deploying or operating AI systems should be held accountable for their proper functioning in line with the above principles.

OECD also provides five recommendations to governments:

1. Facilitate public and private investment in research & development (R&D) to spur innovation in trustworthy AI.

2. Foster accessible AI ecosystems with digital infrastructure and technologies and mechanisms to share data and knowledge.

3. Ensure a policy environment that will open the way to deployment of trustworthy AI systems.

4. Empower people with the skills for AI and support workers for a fair transition.

5. Cooperate across borders and sectors to progress on responsible stewardship of trustworthy AI.[38]

China entered the race for leadership in the field of artificial intelligence in July 2017, when China's State Council released the Next Generation Artificial Intelligence Development Plan (Development Plan).[39] In addition to general issues relating to AI development, the Development Plan contains specific guidelines for legal regulations. In the part devoted to legal regulations, the authors of the plan emphasize the need to:

• strengthen research on legal, ethical, and social issues related to AI, and establish laws, regulations and ethical frameworks to ensure the healthy development of AI;

• conduct research on legal issues such as civil and criminal responsibility confirmation, protection of privacy and property, and information security utilization related to AI applications;

• establish a traceability and accountability system and clarify the main body of AI and related rights, obligations and responsibilities;

• focus on autonomous driving, service robots and other application subsectors with a comparatively good usage foundation, and speed up the study and development of relevant safety management laws and regulations, to lay a legal foundation for the rapid application of new technology;

• launch research on AI behavioral science and ethics and other issues including establishing an ethical and moral multi-level judgment structure and human-computer collaboration ethical framework; and

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[38] *See more* in OECD Council Recommendation on Artificial Intelligence (Dec. 23, 2020), available at https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449. It should be noted that in June 2019, the G20 adopted human-centered AI Principles that draw upon the OECD AI Principles. *See* G20 Ministerial Statement on Trade and Digital Economy (Dec. 23, 2020), available at https://www.mofa.go.jp/files/000486596.pdf.

[39] Graham Webster et al., *China's "New Generation Artificial Intelligence Development Plan,"* New America, 1 August 2017 (Dec. 23, 2020), available at https://www.newamerica.org/cybersecurity-initiative/digichina/blog/full-translation-chinas-new-generation-artificial-intelligence-development-plan-2017/.

• develop an ethical code of conduct and R&D design for AI products, strengthen the assessment of the potential hazards and benefits of AI, and build solutions for emergencies in complex AI scenarios.

China will actively participate in global governance of AI, strengthen the study of major international common problems, such as robot alienation and safety supervision, deepen international cooperation on AI laws and regulations, international rules and so on, and jointly cope with global challenges. To implement the Development Plan, another action plan was issued by China's Ministry of Industry and Information Technology (MIIT) – the Three-Year Action Plan for Promoting Development of a New Generation Artificial Intelligence Industry. Its focus was on the following seven fields in the three-year period 2018–2020:

1. Intelligent network vehicles;
2. Intelligent service robots;
3. Intelligent unmanned aerial vehicles;
4. Medical imaging diagnosis systems;
5. Video image identification systems;
6. Intelligent voice interactive systems;
7. Intelligent translation systems.[40]

When considering the issue of legal regulations (strict meaning – not policies, plans and reports), one should mention above all the area of autonomous cars. In 2018, the Ministry of Public Security and the Ministry of Transport jointly issued a set of trial rules that pave the way for road testing of autonomous vehicles in China. The National Rules took effect on 1 May 2018 and contain requirements for test vehicles and test drivers. Local authorities at the provincial level are to formulate implementation rules applicable in their own areas.[41]

The use of artificial intelligence is also the subject of government-level work in Brazil. Brazil's Ministry of Science, Technology, Innovations and Communications published a Brazilian Strategy for Digital Transformation in March 2018. The strategy includes several provisions regarding AI. According to the Strategy, digital technologies have appeared as a new vital center of modern economies, and leading countries have positioned themselves strategically on this issue. On the international stage, countries seek to leverage their core competencies and advantages while filling important gaps in order to maximize the benefits of the digital economy. According to their strengths, some countries seek leadership in specific and promising sectors, such as robotics, AI, high-precision manufacturing or financial digital innovations, while

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[40] Ministry of Industry and Information Technology (MIIT), Three-Year Action Plan for Promoting Development of a New Generation Artificial Intelligence Industry (2018–2020), 12 December 2017 (Dec. 23, 2020), available at https://www.newamerica.org/cybersecurity-initiative/digichina/blog/translation-chinese-government-outlines-ai-ambitions-through-2020/.

[41] *See more* in Regulation of Artificial Intelligence: East/South Asia and the Pacific, Library of Congress (Dec. 23, 2020), available at https://www.loc.gov/law/help/artificial-intelligence/asia-pacific.php#_ftn41.

others tune their regulatory framework so that the market can seize the full potential of digital technologies. Priorities for digitization initiatives include strengthening competitiveness in digital business, digitization of public services, creation of skilled jobs in the new economy, and better and more advanced education for the population. Additionally, the Strategy postulates that areas related to AI should be covered by legal regulations, so as to provide legal certainty in this area.[42]

In 2018, the members of the Task Force on Artificial Intelligence for India's Economic Transformation, constituted by the Ministry of Commerce and Industry, Government of India, prepared a report on artificial intelligence. The authors of the report identified ten important domains of relevance to India, including Manufacturing, FinTech, Healthcare, Agriculture/Food processing, Education, Retail/Customer Engagement, Aid for Differently Abled/Accessibility Technology, Environment, National Security and Public Utility Services. This report elaborates on specific challenges in the adoption of AI-based systems and processes in the identified domains of relevance to India with examples, both national and international, illustrating the benefits of AI to society. Key enablers necessary for development and deployment of AI-based technologies as well as ethical and social safety issues to ensure responsible use of AI are discussed. One section is dedicated to AI and its impact on employment in the global and Indian contexts. The report concludes with a set of specific recommendations addressed to the Government of India. While the authors of the report indicate that it also includes areas related to law (legal and regulatory issues), nevertheless we will not find any specific recommendations for legal regulations in the report.[43]

In the area of politics and discussions indicating the need for regulations on artificial intelligence, further initiatives should be mentioned which were taken at various levels in India, in particular: NITI Aayog Discussion Paper on a National AI Strategy,[44] Ministry of Electronics and Information Technology,[45] AI and Defense.[46] It should be noted that all the mentioned studies are only reports. They are not legal regulations. The status of legal regulations in respect of artificial intelligence may be summarized by saying that India currently does not have a comprehensive legal framework for AI.

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42 *See more* in Brazilian Strategy for Digital Transformation (Dec. 23, 2020), available at http://www.mctic.gov.br/mctic/export/sites/institucional/sessaoPublica/arquivos/digitalstrategy.pdf.

43 Report of the Artificial Intelligence Task Force (Dec. 23, 2020), available at https://dipp.gov.in/sites/default/files/Report_of_Task_Force_on_ArtificialIntelligence_20March2018_2.pdf.

44 NITI Aayog Discussion Paper on the National Strategy for Artificial Intelligence (June 2018) (Dec. 23, 2020), available at https://niti.gov.in/writereaddata/files/document_publication/NationalStrategy-for-AI-Discussion-Paper.pdf.

45 Ministry of Electronics & Information Technology, Office Memorandum, 7 February 2018 (Dec. 23, 2020), available at https://meity.gov.in/writereaddata/files/constitution_of_four_committees_on_artificial_intelligence.pdf.

46 Government of India, Ministry of Defence, AI Task Force Hands over Final Report to RM, 30 June 2018 (Dec. 23, 2020), available at https://pib.gov.in/newsite/PrintRelease.aspx?relid=180322.

In South Africa, the consensus admits that they are delaying work and activities on the use of artificial intelligence. Consequently, there are no legal regulations presently in effect in the area of AI. Nonetheless, one particular activity undertaken should be mentioned: in 2019, the President appointed the Commission on the Fourth Industrial Revolution (4IR), consisting of thirty members sourced from academia, business and other sectors in society.[47] The achievements of the Commission are the elaboration of eight reports on the application of new technologies, and digitization of the country.

In light of the foregoing, we propose that BRICS develop a cooperative approach in the sphere of working out and implementing a policy in the area of artificial intelligence. Additionally, we propose that BRICS undertake to design a model legal act on AI for use by each of the BRICS member countries.

We further propose that BRICS determine the authorized bodies, organizations and associations that will participate in a working group, to be established by BRICS, for the development of general recommendations on creating and using AI-based technologies in the BRICS member countries. Noteworthy in this regard is the importance of considering the opinions of not only regulators, but also entrepreneurs and consumers. Representatives of each of the interested sectors should be included in the working group.

4. Regulation of Artificial Intelligence in the European Union

Artificial intelligence has undoubtedly the potential to transform the European Union for the better. AI represents a great opportunity to support the mitigation of pressing challenges facing the EU, challenges such as an ageing population and growing social inequality. AI can be used to predict changes occurring in matters relating to the environment and climate change. AI has great potential to reduce human impact on the environment and enable the efficient and effective use of energy and natural resources, thereby enhancing decarbonization efforts and reducing the environmental footprint, for a greener society. These modern technologies are already being used to render medical treatment smarter and more targeted, and to help in preventing life-threatening diseases.[48] AI and robotics are proving to be valuable tools to assist caregivers, support elderly care and monitor patients' conditions on a real time basis, thus saving lives. AI has the potential to be a great tool to fight educational inequalities and create personalized and adaptable education programs that can help people to acquire new qualifications, skills and competences, according

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[47] Presidential Commission on Fourth Industrial Revolution: Members and Terms of Reference, 9 April 2009 (Dec. 23, 2020), available at https://www.gov.za/sites/default/files/gcis_document/201904/42388gen209.pdf.

[48] William W. Stead, *Clinical Implications and Challenges of Artificial Intelligence and Deep Learning*, 320(11) JAMA 1107 (2018).

to individual ability to learn. Artificial intelligence already has an important impact on the EU economy and GDP growth.[49] In addition, AI is being used to improve financial risk management and provide the tools to manufacture, with less waste, products tailored to our needs. Moreover, AI helps to detect fraud and cybersecurity threats and enables law enforcement agencies to fight crime more efficiently.

Yet, as with any new technology, the use of AI brings risks. The citizens of the European Union fear being left powerless in defending their rights and safety when facing the information asymmetries of algorithmic decision-making. Entrepreneurs are concerned by legal uncertainty within the European Single Market. Artificial Intelligence has the potential to do both material harm – for instance in relation to the safety and health of individuals, including loss of life and damage to property – and immaterial harm – such as loss of privacy, limitations on the right to freedom of expression, human rights,[50] dignity and discrimination[51] – and can relate to a wide variety of risks.[52]

A common European approach to AI is to reach sufficient scale and avoid the fragmentation of the European Single Market. It is imperative to create more synergies and networks between the multiple European research centers and to align their efforts to improve excellence, develop the best technology and use to the utmost the opportunities offered by AI. Europe wants to lead the way in artificial intelligence based on ethics and shared European values, so citizens and businesses can fully trust the technologies they are using. However, the use of AI systems does not stop at national borders, and neither does their impact. Global solutions are therefore required for the global opportunities and challenges that AI systems bring forth. This can be achieved by cooperation among all of the players engaged in the use of those technologies – states, international organizations and corporations – and will likely have profound implications for international regulations.[53]

4.1. European Strategy on Artificial Intelligence

Artificial Intelligence has sparked wide debate about the principles and values that should guide its development and use. It thus became necessary to develop the right

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[49] McKinsey & Company, Shaping the Digital Transformation in Europe, European Commission Working Paper: Economical Potential (February 2020) (Dec. 23, 2020), available at https://ec.europa.eu/digital-single-market/en/news/shaping-digital-transformation-europe-working-paper-economic-potential.

[50] Filippo Raso et al., *Artificial Intelligence & Human Rights: Opportunities & Risks*, Berkman Klein Center Research Publication No. 2018-6 (2018) (Dec. 23, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3259344.

[51] James Zou & Londa Schiebinger, *AI Can Be Sexist and Racist – It's Time to Make It Fair*, 559(7714) Nature 324 (2018).

[52] Peter J. Bentley et al., *Should We Fear Artificial Intelligence? In-Depth Analysis*, European Union (March 2018) (Dec. 23, 2020), available at https://www.europarl.europa.eu/RegData/etudes/IDAN/2018/614547/EPRS_IDA(2018)614547_EN.pdf.

[53] Thomas Burri, *International Law and Artificial Intelligence*, 60(1) Ger. Yearb. Int'l L. 91 (2019).

ethical foundations on which the regulatory system would be based.[54] Whereas AI ethics was once a field of study for sci-fi loving philosophers, it has now become mainstream, occupying the mind of the public at large as well as the minds of regulators.[55]

In April 2018, following an invitation by the European Council to put forward a European approach to AI, the European Commission presented its strategy for AI in the Commission Communication "Artificial Intelligence for Europe."[56] The strategy places people at the center of the development of technologies. It is a three-pronged approach to boost European technological and industrial capacity and AI uptake across the economy, prepare for socio-economic changes and ensure an appropriate ethical and legal framework. The strategy emphasizes the need for coordination with Member States, to leverage synergy effects and maximize the impact of individual actions undertaken by Member States. This resulted in the adoption of a coordinated plan on AI, to create synergies, pool data and increase joint investments.[57] The aim is to foster cross-border cooperation and mobilize all of the players to increase public and private investments over the coming decade.

In March 2018, the European Group on Ethics in Science and New Technologies (EGE) proposed a set of principles based on the fundamental values laid down in the EU Treaties and Charter of Fundamental Rights of the European Union. Four ethical principles should be distinguished, rooted in fundamental rights, which must be respected to ensure that AI systems are developed, deployed and used in a trustworthy manner:[58]

1. Respect for human autonomy, associated with the right to human dignity and liberty. AI systems should not unjustifiably subordinate, coerce, deceive, manipulate, condition or herd humans. They should be designed to augment, complement and empower human cognitive, social and cultural skills.

2. Prevention of harm and protection of physical or mental integrity. Attention must be paid to situations where AI can cause or exacerbate adverse impacts due to asymmetries of power or information (i.e. between employers and employees, businesses and consumers or governments and citizens).

3. Fairness, the rights to non-discrimination, solidarity and justice. This implies a commitment to ensuring equal and just distribution of both benefits and costs and ensuring that individuals and groups are free from unfair bias, discrimination,

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54 Anna Jobin et al., *The Global Landscape of AI Ethics Guidelines*, 1(9) Nat. Mach. Intell. 389 (2019).

55 Nathalie A. Smuha, *The EU Approach to Ethics Guidelines for Trustworthy Artificial Intelligence*, 20(4) Comput. L. Rev. Int'l 97 (2019).

56 COM (2018)237 final, Brussels.

57 COM (2018)795 final, Brussels.

58 European Group on Ethics in Science and New Technologies, European Commission, Statement on Artificial Intelligence, Robotics and "Autonomous" Systems (March 2018) (Dec. 23, 2020), available at https://ec.europa.eu/research/ege/pdf/ege_ai_statement_2018.pdf.

and stigmatization.[59] This entails the possibility of effective redress against decisions made by AI systems and by the humans operating them.

4. Explicability and responsibility, crucial for building and maintaining users' trust in AI systems. This means that processes need to be transparent, the capabilities and purpose of AI systems openly communicated and decisions explainable to the affected people.

In June 2018, the High-Level Expert Group on Artificial Intelligence (AI HLEG) was established. Its general objective is to support the implementation of the European Strategy on Artificial Intelligence. This includes the elaboration of recommendations on future-related policy development and on ethical, legal and societal issues related to AI, including socio-economic challenges. On 8 April 2019, the AI HLEG published its Ethics Guidelines for Trustworthy AI.[60] According to the Guidelines, trustworthy AI has three main components:

1. It should be lawful, ensuring compliance with all applicable laws and regulations.

2. It should be ethical, ensuring adherence to ethical principles and values.

3. It should be robust, both from a technical and from a social perspective to ensure that, even with good intentions, AI systems do not cause any unintentional harm.

The Guidelines also identify key requirements for trustworthy AI:

• Human agency and oversight – the overall well-being of the user should be central to the system's functionality. Human oversight helps ensure that an AI system does not undermine human autonomy or cause other adverse effects;

• Technical robustness and safety – trustworthy AI requires algorithms to be secure, reliable and robust enough to deal with possible errors or inconsistencies during all stages of the AI system's life cycle, and to adequately cope with erroneous outcomes;

• Privacy and data governance – privacy and data protection must be guaranteed at all life cycle phases of the AI systems;

• Transparency – the traceability of AI systems should be ensured. It is important to log and document the decisions made by the systems and the entire process, including a description of data gathering and labelling, and a description of the algorithm used that yielded the decisions;

• Diversity, non-discrimination and fairness – data sets used by AI systems may suffer from the inclusion of biases, incompleteness and bad governance models. The continuation of such biases could lead to discrimination;

• Societal and environmental well-being. The impact of AI systems should be considered not only from an individual perspective, but also from the perspective

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[59] Raphaele Xenidis & Linda Senden, *EU Non-Discrimination Law in the Era of Artificial Intelligence: Mapping the Challenges of Algorithmic Discrimination* in *General Principles of EU Law and the EU Digital Order* 151 (Ulf Bernitz et al. eds., 2020).

[60] Ethics Guidelines for Trustworthy AI, European Commission, 8 April 2019 (Dec. 23, 2020), available at https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai.

of society as a whole. The use of AI systems should be given careful consideration particularly in situations relating to the democratic process, including opinion-formation, political decision-making or electoral contexts and social impact;

• Accountability – mechanisms should be put in place to ensure responsibility, auditability and accountability for AI systems and their outcomes, before and after their implementation.

On 8 April 2019, the European Commission launched the "Communication on Building Trust in Human-Centric Artificial Intelligence."[61] Ensuring that European values are at the heart of creating the right environment of trust for the successful development and use of AI, the Commission not only stated its support for the key requirements mentioned above, but also encouraged all stakeholders to implement them when developing, deploying or using AI systems.

On 19 February 2020, the European Commission published "White Paper on Artificial Intelligence,"[62] aiming to foster a European ecosystem of excellence and an ecosystem of trust. The White Paper presented the policy framework setting out measures to align efforts at the European, national and regional levels. The objective of the framework is to mobilize resources to achieve the "ecosystem of excellence" along the entire value chain, starting in research and innovation. It should create the right incentives to accelerate the adoption of solutions based on AI. Small and medium-sized enterprises are included, due to the partnership between the private and the public sectors. The White Paper also presented the key elements of a future regulatory framework for AI in Europe that would create an "ecosystem of trust." It is a policy objective to give citizens the confidence to take up applications, and to give companies and public organizations the legal certainty to innovate using AI. Regulations must ensure compliance with EU rules, especially those protecting fundamental rights and consumers rights.

4.2. Regulatory Challenges in the European Union

The Communications, Guidelines and White Paper mentioned above are instances of what is termed non-legislative policy instruments, or soft law.[63] They are non-binding and as such do not create any legal obligations. However, many existing provisions of EU law already reflect their key requirements, for example in safety, personal data protection, privacy and environmental protection rules. Although enforcement of ethical principles may involve the loss of reputation in the case of misconduct or restrictions on membership in certain professional bodies, there is,

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61 COM (2019)168 final, Brussels.

62 COM (2020)65 final, Brussels.

63 Lorne Sossin & Charles W. Smith, *Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government*, 40(3) Alberta L. Rev. 867 (2003).

however, a lack of mechanisms to reinforce their own normative claims and thus, in many cases, no significant influence over decision-making occurs.[64]

A growing number of legally binding rules at the European, national and international levels already apply or are relevant to the development, deployment and use of AI systems today. Legal sources include EU primary law (the Treaties of the European Union and its Charter of Fundamental Rights), EU secondary law (such as the General Data Protection Regulation, the Product Liability Directive, the Directive on Security of Network and Information Systems, the Regulation on the Free Flow of Non-Personal Data, anti-discrimination Directives, consumer law and Safety and Health at Work Directives), the U.N. Human Rights treaties and the Council of Europe conventions (such as the European Convention on Human Rights), and numerous EU Member State laws. Besides horizontally applicable rules, domain-specific rules exist that apply to particular AI applications (e.g. the Medical Device Regulation in the healthcare sector).

Nonetheless, certain updates to that framework may be necessary to reflect the digital transformation and the use of AI. It is important to assess whether EU legislation can be enforced adequately to address the risks created by AI systems, or whether adjustments are needed to specific legal instruments, because the use of AI in products and services can give rise to risks that EU legislation currently does not explicitly address.

The regulatory regime must primarily define what exactly it is that the regime regulates and define the meaning of artificial intelligence. Unfortunately, there does not yet appear to be any widely accepted definition of artificial intelligence, neither in legal acts nor in doctrine, even among experts in the field.[65] There are actually some definitions,[66] but the difficulty in defining artificial intelligence lies not in the concept of artificiality but in the conceptual ambiguity of intelligence. It is possible that with the development of AI and robotics, it will become necessary to adopt separate regulations devoted especially to them.[67]

Currently, AI is of interest in the aspect of cybersecurity and personal data protection. Over the past several years, the cybersecurity regulatory landscape in the European Union has undergone unprecedented change. Cybersecurity laws and regulations have replaced preexisting general risk management and business

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64 Thilo Hagendorff, *The Ethics of AI Ethics: An Evaluation of Guidelines*, 30(1) Minds and Machines 99 (2020).

65 Matthew U. Scherer, *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies*, 29(2) Harv. J.L. & Tech. 353 (2016).

66 COM (2018)237 final, p. 1: "Artificial intelligence (AI) refers to systems that display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals. AI-based systems can be purely software-based, acting in the virtual world (e.g. voice assistants, image analysis software, search engines, speech and face recognition systems) or AI can be embedded in hardware devices (e.g. advanced robots, autonomous cars, drones or Internet of Things applications)."

67 Joanna D. Caytas, *European Perspectives on an Emergent Law of Robotics*, 12 Colum. J. Eur. L. 12 (2017).

continuity rules.[68] One of the key EU documents in this field is the Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace (EUCSS).[69] This document states that the same norms, principles and values, such as fundamental rights, democracy and the rule of law , which are protected in the reality of daily life need to be protected as well in cyberspace, from incidents, malicious activities and misuse.

The first horizontal legislation undertaken at the EU level for the protection of network and information systems across the Union is Directive 2016/1148 (the NIS Directive).[70] The Directive has three main aims: increasing capabilities of the Member States, increasing EU-wide cooperation and risk management and reporting. The Directive affects two categories of undertakings, under an admittedly differentiated approach in terms of obligations placed upon each one of them: operators of essential services and digital service providers. Each Member State must adopt a national framework in order to be in compliance with the Directive. The national framework includes the national strategy on the security of network and information systems and the designation of the authorities that will be responsible for the monitoring of the implementation of the Directive.

In terms of institutions, the European Agency for Network and Information Security (ENISA) is the most advanced European body established for dealing with cybersecurity matters. ENISA is responsible for facilitating and coordinating the exchange of information, best practices and knowledge in the field of information security and plays a key role in the implementation of the NIS Directive. Furthermore, it serves as the access point or hub for EU Member States and other bodies. Working with states and other stakeholders, ENISA also serves to develop advice and recommendations on good practices in the field of information security and assists Member States with their own national cybersecurity strategies.

The General Data Protection Regulation,[71] which became applicable on 25 May 2018, is aimed at protecting individuals with regard to the processing of their personal data. The most immediate connection between the use of AI and the protection of privacy concerns the large-scale accumulation of data of the most varied nature in an extremely restricted space. Neural systems and their ability to "learn" from the

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68 Charlotte A. Tschider, *Deus ex Machina: Regulating Cybersecurity and Artificial Intelligence for Patients of the Future*, 5(1) Savannah L. Rev. 177 (2018).

69 EU Cybersecurity Strategy: An Open, Safe and Secure Cyberspace, 7 February 2013 (Dec. 23, 2020), available at www.enisa.europa.eu.

70 Directive 2016/1148 of the European Parliament and the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union (Dec. 23, 2020), available at www.enisa.europa.eu.

71 Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Dec. 23, 2020), available at www.enisa.europa.eu.

experience accumulated in the reference databases play a central role in research in the field of artificial intelligence. The use of software capable of self-learning has severely reduced the amount of time required for information searching and data processing. Due to this fact, the person to whom these data refer, and whose sphere of confidentiality is at constant risk of breach, loses control of the data, since the person cannot be constantly informed of the passages that the said collection undergoes. Directive GDPR explicitly establishes the individual right of the data subject not to be subjected to a decision based solely on automated processing, including profiling, but there is much discussion of profound social and economic significance over the "right to explanation."[72]

Conclusion

As digital technologies become more and more important and part of every aspect of the lives of the citizens of BRICS and the European Union, people should be able to have trust in them. AI systems need to be human-centric, resting on a commitment to their use in the service of humanity and the common good, with the main goal of improving human welfare and freedom. A cooperative and trustworthy approach is key to enabling "responsible competitiveness," by providing the foundation upon which all those affected by AI systems can place their trust that their design, development and use are lawful, ethical and robust. Trust is a sine qua non prerequisite to ensure a human-centric approach to AI. It is not an end, but rather a means, a tool, which must serve people with the aim of increasing the well-being of people. Human beings should always know whether they are directly interacting with another human being or a machine.

Another aspect of trust is security in cyberspace, which is becoming an increasingly important cross-border area of existence for people of many different countries. It needs both state and in the case of the EU also pan-European regulations, to ensure the appropriate level of safety. Additionally, it is important to provide people with the "right to explanation" in a form that will fulfill citizen's rights, and which do not unduly restrict technological development, making the economies of the BRICS group and the European Union competitive on a global scale.

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[72] Roland Vogl et al. *Rethinking Explainable Machines: The GDPR's "Right to Explanation" Debate and the Rise of Algorithmic Audits in Enterprise*, 34(1) Berkeley Tech. L.J. 143 (2019).

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EMERGING TRENDS IN CROSS-BORDER MERGERS AND THEIR TAX IMPLICATIONS IN INDIA: A CRITICAL APPRAISAL

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The Indian economy has seen steady and sustainable growth over the past decade, even though other countries have been cash-strapped and suffering from stagnation. Most of this development is due to the inflow of foreign direct investment (FDI) into India through cross-border mergers and acquisitions (M&A) and the unparalleled rise in the size and number of cross-border M&A in India with a favourable market climate for such trade. As a business strategy, cross-border M&As in India are rife with many legal complexities and issues. This paper documents the steady growth of cross-border M&A activity in India over the years and presents a comprehensive depiction of cross-border M&As, what the applicable laws are, what the legal issues and complexities involved are, and finally how they can be offset. The paper highlights the tax implications and issues involved in a cross-border M&A and how far the Income Tax Act, 1961 is attuned with the corporate laws in force to promote cross-border M&As in India. The paper concludes with a broader observation that cross-border M&As bring massive economic benefits and global stature to a growing economic superpower like India. For this reason, the business and legal environment should be made more conducive to cross-border M&A activity.

Keywords: cross-border mergers and acquisitions; M&A waves; FDI; Income Tax Act, 1961; anti-trust; corporate restructuring strategy; merger control.

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Table of Contents

Introduction

> *A merger between two giants in a declining industry is like the financial version of a couple having a baby to save a marriage.*[1]
>
> *Adam Davidson*[2]

On the global level, India is one of the fastest-growing economies, right behind the United States and China. India's economic transformation and immense market potential have attracted significant interest in the Indian economy.[3] India is among the top global investment destinations and ranked 12th in foreign direct investment (FDI) inflows in 2018, with a 20% growth in FDI inflows, which amounted to USD42 billion in 2018, and USD51 billion in 2019.[4]

The Indian economy has shown promising evidence of increasing depth and maturity, with an estimated real annual gross domestic product (GDP) growth rate of 8.8% in 2021,[5] owing to a strong capital market and market-friendly and competitive, regulatory reforms. In 2018, India recorded her highest ever half-yearly Mergers and Amalgamations (M&As) deal figures of USD75 billion comprising 638 transactions, including ten deals in the billion-dollar category, and around 52 deals having an

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1 Adam Davidson, *How Dead Is the Book Business?*, New York Times, 13 November 2012 (Jan. 02, 2021), available at https://www.nytimes.com/2012/11/18/magazine/penguin-random-house-merger.html.

2 Adam Davidson is a renowned American journalist and social commentator.

3 Afra Afsharipour, *Rising Multinationals: Law and the Evolution of Outbound Acquisitions by Indian Companies*, 44(3) UC Davis L. Rev. 1029, 1030 (2011).

4 UNCTAD, World Investment Report 2020: International Production Beyond the Pandemic (2020), at 5, 10 (Jan. 02, 2021), available at https://unctad.org/webflyer/world-investment-report-2020.

5 Real GDP Growth, IMF DataMapper, India, International Monetary Fund (October 2020) (Jan. 02, 2021), available at https://www.imf.org/en/Countries/IND; Sridhar Ramasubramanian, *Expert Speak on the Overall Economic Outlook*, 16(4) GTILLP 1, 25 (2018).

estimated value above USD100 million each, which together contributed 93% of the total deal value.[6] The year 2018 witnessed 235 M&A transactions amounting to USD65.5 billion, along with the highest cross-border M&A deal value since 2011 at USD25 million, a monumental increase of 5.8 times the total value in 2017.[7] The following year 2019 witnessed an aggregate deal value of USD67 billion, and despite a fall of 34.4% from 2018, the year ended as second best in terms of deal volume and value.[8]

The extraordinary events of 2020 brought on by the outbreak of COVID-19 were experienced in countries the world over, and India was no different in this respect. Yet, while wrestling with the pandemic, state-wide lockdowns, an economic slump, geopolitical tensions, and massive uncertainty, India still managed to better its 2019 performance by 7%, and the total deal value was recorded at an unprecedented USD80 billion across 1,268 transactions during the year.[9]

Mergers and acquisitions are the essential precursors to globalization.[10] They promote geographical expansion, exploration,[11] and utilization of their core competencies in an expeditious, efficient, and economical manner.[12] Over the years, the juggernaut of cross-border mergers has rolled on and gathered unprecedented momentum, gaining prominence relative to worldwide mergers.[13] Many countries[14] have specific tax rules which grant tax benefits involving mergers, and acquisitions transactions, by allowing tax deferral otherwise imposed on the owners of some of the participating parties upon completion of a deal.[15] Once mergers and acquisitions transactions go beyond the national borders, countries are reluctant to provide tax incentives to attract investment and achieve economic growth, as, in such cases,

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6 Ramasubramanian 2018, at 8.

7 Anuj Chande, *Setting New Records for Indian M&A*, Grant Thornton UK LLP, 2 August 2018 (Jan. 02, 2021), available at https://www.grantthornton.co.uk/insights/2018-setting-new-records-for-indian-ma.

8 Harsh Pais et al., *M&A Report 2020: India*, International Financial Law Review, 25 March 2020 (Jan. 02, 2021), available at https://www.iflr.com/article/b1lmx6b3qynryg/mampa-report-2020-india; UNCTAD (2020), *supra* note 4, at 5, 10.

9 Swaraj S. Dhanjal, *India clocks $80 bn of M&A activity, PE deals in '20: report*, LiveMint, 24 December 2020 (Jan. 02, 2021), available at https://www.livemint.com/companies/news/india-clocks-80-bn-of-m-a-activity-pe-deals-in-20-report-11608775915889.html.

10 Pehr-Johan Norbäck & Lars Persson, *Globalization and Profitability of Cross-Border Mergers and Acquisitions*, 35(2) Econ. Theory 241, 263 (2008).

11 James G. March, *Exploration and Exploitation in Organizational Learning*, 2(1) Organ. Sci. 71, 82 (1991).

12 Joseph A. Clougherty et al., *Cross-Border Mergers and Domestic-Firm Wages: Integrating "Spillover Effects" and "Bargaining Effects,"* 45(4) J. Int. Bus. Stud. 450, 459 (2014).

13 Robert L. Conn, *International Mergers: Review of Literature and Clinical Projects*, 29 JFEd 1, 19 (2003).

14 To encourage trade and investment, countries such as the UK, USA, Singapore, Cyprus, Mauritius, Russia, etc., give way to tax grant benefits through DTAA (Double Taxation Avoidance Agreements).

15 Merle Erickson, *The Effect of Taxes on the Structure of Corporate Acquisitions*, 36(2) J. Account. Res. 279, 281–82 (1998).

relief from taxation practically implies tax exemption, super deductions, tax holidays, and immunity.[16]

Cross-border mergers are more complex and imbued with surprises and other pitfalls since there are multiple jurisdictions involved in the transaction.[17] The total range of concerns has expanded as the speed and volume of international deals have increased.[18] Domestic mergers and acquisitions are, generally, socially desirable transactions, as less risk is involved in comparison to cross-border M&As.[19] Companies in many countries[20] enjoy tax deferrals to the extent to which they use stock to compensate target corporations or their shareholders.[21] Tax laws should promote cross-border mergers and acquisitions to attract foreign investors and establish a pro-investment climate.[22]

Mergers and acquisitions are intricate, have multifarious dimensions, and are attracted and governed by various laws and regulations simultaneously depending on the stakeholders and tax regimes involved.[23] Further, given the cut-throat competition in the world market and pressure on top-line and bottom-line growth,[24] Indian companies look at mergers and acquisitions as vehicles for change, significant growth, and a critical business strategy tool.[25]

Income generated overseas is repatriated to an Indian company in interest, royalties, service or management or technical fees, dividends, and capital gains.[26] When such income is repatriated to the Indian company by Indian Holding Companies[27] or to

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16 Ralph Sonenshine & Kara Reynolds, *Determinants of Cross-Border Merger Premia*, 150(1) Rev. World Econ. 173, 187–88 (2014).

17 Sydney Finkelstein, *Cross-Border Mergers and Acquisitions*, FTMGB (1999) (Jan. 02, 2021), available at http://mba.tuck.dartmouth.edu/pages/faculty/syd.finkelstein/articles/cross_border.pdf.

18 Frank Stähler, *Partial Ownership and Cross-Border Mergers*, 11(3) J. Econ. 209, 212 (2014).

19 Petri Böckerman & Eero Lehto, *Geography of Domestic Mergers and Acquisitions (M&As): Evidence from Matched Firm-Level Data*, 40(8) Reg. Stud. 847, 852 (2006).

20 Barendra K. Bhoi, *Mergers and Acquisitions: An Indian Experience*, 21(1) RBI Occasional Papers 133, 160–61 (2000).

21 Alan J. Auerbach & David Reishus, *The Impact of Taxation on Mergers and Acquisitions* in *Mergers and Acquisitions* 69, 73–74 (Alan J. Auerbach ed., 1988).

22 Carla Hayn, *Tax Attributes as Determinants of Shareholder Gains in Corporate Acquisitions*, 23(1) J. Financ. Econ. 121, 130 (1989).

23 Emanuel Gomes et al., *Critical Success Factors Through the Mergers and Acquisitions Process: Revealing Pre- and Post-M&A Connections for Improved Performance*, 55(1) Thunderbird Int. Bus. Rev. 13, 17 (2013).

24 John A. Pearce & Fred David, *Corporate Mission Statements: The Bottom Line*, 1(2) Academy of Management Executive 109, 113 (1987).

25 Manish Agarwal & Aditya Bhattacharjea, *Mergers in India: A Response to Regulatory Shocks*, 42(3) Emerg. Mark. Finance Trade 46, 62–63 (2006).

26 Edward D. Kleinbard, *Stateless Income*, 11 Fla. Tax Rev. 699, 774 (2011).

27 "Holding Company to one or more other companies means a company of which such companies are subsidiary companies ..." Sec. 2(46) of the Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).

Indian Holding Companies by the target company it would attract double taxation.[28] The liability is then off-settled by tax treaties,[29] which decide the taxing rights between the two countries. An ideal situation for an Indian Holding Company would be one with a low/nil withholding tax on receipts, on income streams, and subsequent re-distribution as passive income.[30] Some jurisdictions[31] have relatively favourable tax treaties with India, e.g. the Indo-Mauritius, Indo-Singapore, Indo-Cyprus Double Taxation Avoidance Agreements (DTAAs), where repatriation of income back to India may be observed.[32]

Given the essential role that mergers and acquisitions play in the globalization process, the Indian corporate environment has radically altered and aligned itself with the economic policy changes and the introduction of new institutional mechanisms.[33] The modern industrial policy changes of 1991 ushered in the era of free trade in the economy.[34] The past two decades reflect India's substantial rise in mergers and acquisitions activity in almost all sectors of the economy.[35] Indian industries underwent structural changes in the post-liberalization period when mergers and acquisitions were considered vital cogs of the corporate restructuring process, and of redirecting capital flows towards efficient management. In a way, corporate restructuring became imperative to the new economic paradigm.[36]

1. Mergers and Cross-Border Mergers Differentiated

Whereas a "merger" is the "amalgam of two or more corporate entities into one, leading to accumulation of assets & liabilities of the distinct entities, and the organization

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[28] "Double taxation is a situation where two or more taxes are paid for the same transaction/income which arises due to the overlap between tax laws and jurisdictions of two countries." George O. May, *Double Taxation*, 5(1) Foreign Aff. 69, 79 (1926).

[29] These are country-specific Double Taxation Avoidance Agreements (DTAA). Benjamin F. Siggelkow, *Tax Competition and Double Tax Treaties with Mergers and Acquisitions*, MPRA Paper No. 49371 (2013), at 3–4 (Jan. 02, 2021), available at https://mpra.ub.uni-muenchen.de/49371/1/MPRA_paper_49371.pdf.

[30] Monica Singhania & Venugopal Dastaru, *Taxation of Cross Borders Mergers & Acquisitions: Vodafone Hutch Deal*, IITCOE (2015) (Jan. 02, 2021), available at https://iitcoe.in/ITS/topics/Regulation/TaxationofCrossBordersMergersAcquisitionsVodafoneHutchDeal.pdf.

[31] E.g. Mauritius, Cyprus, Singapore, and the Netherlands.

[32] DIPP, Quarterly Fact Sheet on FDI (March 2020) (Jan. 02, 2021), available at https://dipp.gov.in/sites/default/files/FDI_Factsheet_March20_28May_2020.pdf.

[33] Viral U. Pandya, *Mergers and Acquisitions Trends – The Indian Experience*, 9(1) Int. J. Bus. Adm. 44, 46 (2018).

[34] For Industrial Policy Changes of 1991 in India and its effects, *see* Montek S. Ahluwalia, *Economic Reforms in India Since 1991: Has Gradualism Worked?*, 16(3) J. Econ. Perspect. 67, 82–83 (2002).

[35] Avin Tiwari et al., *Cross Border M&A's in ASEAN and India: A Comparative Critique*, 11(2) J. Adv. Res. Law Econ. 619, 626 (2020); P.L. Beena, *Trends and Perspectives on Corporate Mergers in Contemporary India*, 43(39) Econ. Polit. Wkly 48, 54–55 (2008).

[36] Pandya 2018, at 48.

of such entity into one business";[37] a "cross-border merger"[38] means "any merger, arrangement or amalgamation between an Indian company and foreign company by Companies (Compromises, Arrangements, and Amalgamation) Rules, 2016[39] notified under the Companies Act, 2013."[40] Reversing the earlier prohibition, which was imposed by the 1956 Companies Act on mergers of Indian companies with foreign companies, the 2013 Act permits the merger of an Indian company with a foreign company (incorporated in foreign jurisdictions notified by the Central Government), provided prior approval of the Reserve Bank of India is obtained.[41] Under the new cross-border mergers regime, inbound[42] and outbound mergers[43] are permitted. While an inbound merger refers to a cross-border merger where the resultant company is an Indian company, an outbound merger refers to cross-border mergers where the resultant company is a foreign company.[44]

Thus, a "cross-border merger" is an activity wherein a large foreign corporation purchases a controlling interest in a small local corporation. The company so acquired ceases to exist and is integrated into the acquiring corporation as a subsidiary.[45] It is "an activity where an enterprise from one country purchases the entire asset or controlling interest of an enterprise in another country."[46]

Related to the wider reach of this concept, in 2001 Faulkner argued that there has been a growing interest in cross-border mergers and acquisitions since the 1990s, thus raising additional challenges to ethnic, linguistic, and institutional diversity.[47] He further argued that post-merger integration could be problematic in cross-border mergers from the perspective of value addition mainly because they have to integrate their operations in different countries.[48] Thus, internationalization

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[37] To be understood as a means of corporate restructuring under Secs. 230–240 of the Companies Act, 2013.

[38] Sec. 2(iii) of the Foreign Exchange Management (Cross-Border Merger) Regulations, 2018.

[39] MCA, The Companies (Compromises, Arrangements, and Amalgamation) Rules (2016) (Jan. 02, 2021), available at http://www.mca.gov.in/Ministry/pdf/compromisesrules2016_15122016.pdf.

[40] Official Gazette of India, Notification No. G.S.R. 1134(E), effective from 15/12/2016.

[41] RBI, Foreign Exchange Management (Cross-Border Merger) Regulations, 2018, Notification No. FEMA. 389/2018-RB (2018) (Jan. 02, 2021), available at https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11235&Mode=0.

[42] *Id.* Sec. 2(v).

[43] *Id.* Sec. 2(viii).

[44] *Id.* Sec. 2(iv).

[45] Carla L. Koen, *Comparative International Management* 111–17 (2005).

[46] Zhanwen Zhu & Haifeng Huang, *The Cultural Integration in the Process of Cross-Border Mergers and Acquisitions*, 3(2) Int. Manag. Rev. 40, 41 (2007).

[47] Noelia-Sarah Reynolds & Satu Teerikangas, *The International Experience in Domestic Mergers – Are Purely Domestic M&A a Myth?*, 25(1) Int. Bus. Rev. 1, 2 (2016).

[48] John Child et al., *The Management of International Acquisitions* 251–52 (2003).

theory predicts a positive return from cross-border acquisitions because of gains from geographic diversification and synergies.[49]

1.1. Strategic Motivations and Determinants of Cross-Border Mergers and Acquisitions

Cross-border M&As provide an additional set of factors that affect the likelihood that two firms decide to merge.[50] The main reasons and motives for domestic mergers as well as cross-border mergers can be found in (i) Neoclassical profit-maximization theory,[51] which includes efficiency, strategy, and shareholder value as its core value; (ii) Principal-agent theory,[52] which is based upon managerial efficiency and considerations; (iii) Internationalization theory in the OLI eclectic paradigm,[53] which is based upon ownership, location advantages, and internalization of a firm; and (iv) Comparative ownership advantage theory,[54] which is based upon five characteristics[55] of accelerated internalization. These theories explain the basis and reasons for corporate mergers.[56] In simple terms, mergers are corporate strategies aimed at market access,[57] diversification,[58] expansion,[59] risk-reduction,[60] and creation of a sustainable competitive advantage[61] for

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[49] Leonard Waverman, *Corporate Globalization Through Mergers & Acquisitions* 197–98 (1991).

[50] Isil Erel et al., *Determinants of Cross-Border Mergers and Acquisitions*, 67(3) J. Finance 1045 (2012).

[51] J. Peter Neary, *Cross-Border Mergers as Instruments of Comparative Advantage*, 74(4) Rev. Econ. Stud. 1229, 1250 (2007).

[52] Bernd Wübben, *German Mergers & Acquisitions in the USA* 290–99 (2007).

[53] John H. Dunning, *The Eclectic Paradigm of International Production: A Restatement and Some Possible Extensions*, 19(1) J. Int. Bus. Stud. 1, 30 (1988).

[54] Sunny Li Sun et al., *A Comparative Ownership Advantage Framework for Cross-Border M&As: The Rise of Indian and Chinese MNEs*, 47(1) J. World Bus. 4, 15 (2012).

[55] Industrial factor endowments; dynamic learning; value creation; reconfiguration of the value chain; and institutional facilitation and constraints.

[56] Michael Firth, *Takeovers, Shareholder Returns, and the Theory of the Firm*, 94(2) Q.J. Econ. 235, 237–38 (1980).

[57] Peter J. Buckley et al., *Host–Home Country Linkages and Host–Home Country Specific Advantages as Determinants of Foreign Acquisitions by Indian Firms*, 21(5) Int. Bus. Rev. 878, 888–89 (2012).

[58] Randall Morck & Bernard Yeung, *Why Firms Diversify: Internalization Versus Agency Behavior*, ResearchGate (March 1998) (Jan. 02, 2021), available at https://www.researchgate.net/publication/228253193_Why_Firms_Diversify_Internalization_Versus_Agency_Behaviour; *Intangible Assets: Values, Measures, and Risks* 390, 397 (John R.M. Hand & Baruch Lev eds., 2003).

[59] Katsuhiko Shimizu et al., *Theoretical Foundations of Cross-Border Mergers and Acquisitions: A Review of Current Research and Recommendations for the Future*, 10(3) J. Int. Manag. 307, 347–48 (2004).

[60] Yakov Amihud & Baruch Lev, *Risk Reduction as a Managerial Motive for Conglomerate Mergers*, 12(2) Bell J. Econ. 605, 607 (1981).

[61] Kotapati S. Reddy, *Extant Reviews on Entry-Mode/Internationalization, Mergers & Acquisitions, and Diversification: Understanding Theories and Establishing Interdisciplinary Research*, 16(4) Pac. Sci. Rev. 250, 270 (2014).

the company.[62] There are four key independent yet inter-dependent motives for M&As, namely strategic, market, economic, and personal.[63] Thus, both domestic M&As and cross-border M&As are important strategic decisions[64] for maximizing a company's growth.[65]

Additionally, synergistic operational advantages are among the most significant purposes that mergers and acquisitions intend to achieve.[66] The combined effect of two corporate entities compared to separate effects is always more beneficial since it reduces expenses relating to production, administration, and sales.[67] It utilizes the optimum capacities and factors of production.[68] Other benefits of integration are reduced competition, cost savings by reducing overhead, capturing a larger market share, and pooling technical or financial resources.[69] A company mired with financial constraints can also opt for a merger.[70] Per-unit cost will fall when output increases is noted as a reason for mergers and acquisitions. As a result of the scale effect,[71] products can be offered at a more competitive price in the market.[72]

Strengthening their financial position and revival of sick companies,[73] the advantage of brand-equity,[74] diversification, competitive advantage, and sustaining growth are some of the other reasons for which companies go for mergers.[75]

In addition to these factors, the geography, quality of accounting disclosure, and bilateral trade increase the likelihood of cross-border mergers between two

62 J. Myles Shaver, *A Paradox of Synergy: Contagion and Capacity Effects in Mergers and Acquisitions*, 31(4) Acad. Manag. Rev. 962, 963–65 (2006).

63 H.D. Hopkins et al., *Cross-Border Mergers and Acquisitions: Global and Regional Perspectives*, 5(3) J. Int. Manag. 207, 232–33 (1999).

64 Elazar Berkovitch & M.P. Narayanan, *Motives for Takeovers: An Empirical Investigation*, 28(3) J. Financ. Quant. Anal. 347, 350 (1993).

65 Neary 2007, at 1231.

66 Jyrki Ali-Yrkkö, *Mergers and Acquisitions: Reason and Results*, ETLA Discussion Papers, No. 792, Research Institute of the Finnish Economy (ETLA) (2002) (Jan. 02, 2021), available at https://www.econstor.eu/bitstream/10419/63797/1/344861414.pdf.

67 Wübben 2007, at 299.

68 Amihud & Lev 1981, at 607.

69 Erel et al. 2012, at 1050.

70 Friedrich Trautwein, *Merger Motives and Merger Prescriptions*, 11(4) Strateg. Manag. J. 283, 294 (1990).

71 Barney Warf, *Mergers and Acquisitions in the Telecommunications Industry*, 34(3) Growth Change 321, 340 (2003).

72 George J. Benston, *Economies of Scale of Financial Institutions*, 4(2) J. Money Credit Bank. 312, 339 (1972).

73 Sec. 3(1) O of the Sick Industrial Companies (Special Provisions) Act, 1985, (SICA) Act No. 1, Acts of Parliament, 1986 (India).

74 R.K. Srivastava, *The Role of Brand Equity on Mergers and Acquisition in the Pharmaceutical Industry: When Do Firms Learn from Their Merger and Acquisition Experience?*, 5(3) J. Strateg. Manag. 266, 282 (2012).

75 Alexander Roberts et al., *Mergers & Acquisitions* 4–5 (2003).

countries.[76] Cross-border mergers can create market power since it is legal for post-merger combined firms to charge profit-maximizing prices themselves, but not for pre-merger separate firms to collude to do so collectively.[77] Similarly, mergers can also have tax advantages if they allow one firm to utilize tax shields that another firm possesses.[78] Such benefits accrue in the form of tax credits, carry forward and set-off of losses,[79] foreign exchange arbitrage gains,[80] etc. Tax efficiency in M&As is another tangible form of financial synergy.[81] However, these synergies are unrelated to the "cost of capital" improvements and other tax benefits.[82] One of the main benefits is that profits or tax losses may be transferred within the combined company to benefit from the differential tax regimes.[83] Moreover, the merged company's net operating losses may be used to shelter the income of the more profitable company before the merger.[84] Thus, often profit-making firms acquire firms making losses for this purpose.[85] After the economic liberalization, it has been noticed that the largest share of foreign direct investment (FDI) takes the shape of cross-border mergers and acquisitions because low-cost firms find it profitable to merge with high-cost firms, since the monetary union would enhance goods competition across countries through a reduction in the trade cost, elimination of exchange rate risk, and improved price transparency.[86]

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76 Erel et al. 2012, at 1045.

77 *Id.*

78 Merle M. Erickson & Shiing-wu Wang, *Tax Benefits as a Source of Merger Premiums in Acquisitions of Private Corporations*, 82(2) Account. Rev. 359, 382 (2007).

79 Sec. 72A of the Income Tax Act, Act No. 43, Acts of Parliament, 1961 (India).

80 Robert G. Hansen, *A Theory for the Choice of Exchange Medium in Mergers and Acquisitions*, 60(1) J. Bus. 75, 90 (1987).

81 Hayn 1989, at 152.

82 Sergey Lebedev et al., *Mergers and Acquisitions in and out of Emerging Economies*, 50 J. World Bus. 651, 659–60 (2015).

83 Duncan Angwin, *In Search of Growth*: *Choosing Between Organic, M&A, and Strategic Alliance Strategies* in *The M&A Collection Themes in Best Practice: Themes in Best Practice* 19, 21–22 (Scott Moeller ed., 2014). However, such trade practices may not be possible in the post-BEPS world, where there is tight scrutiny and regulation of such transactions; still, the existence of transfer pricing in some form or other cannot be denied.

84 PWC, Mergers and Acquisitions: The Evolving Indian Landscape (2017) (Jan. 02, 2021), available at https://www.pwc.in/assets/pdfs/trs/mergers-and-acquisitions-tax/mergers-and-acquisitions-the-evolving-indian-landscape.pdf.

85 *Id.* at 11–12.

86 Nicolas Coeurdacier et al., *Cross-Border Mergers and Acquisitions and European Integration*, 24(57) Econ. Policy 55, 56–58 (2009).

2. Mergers and Acquisitions in India: The Legal Landscape

The word "merger" is not defined under either the Companies Act, 2013 or the Income Tax Act, 1961. However, in academic parlance, the words merger/acquisitions and amalgamations are used very loosely and synonymously. Under the Income Tax Act, 1961, the words "amalgamation" and "demerger" find explicit mention. Under the Income Tax Act, 1961, "amalgamation" means the merger of one or more companies with another company to form one company in such a manner that the conditions mentioned in the Act are satisfied.[87] Similarly, a "demerger" is defined as the transfer of one or more undertakings to any resulting company under a scheme of corporate arrangement described in Sections 230 to 240 of the Companies Act, 2013 in such a manner that it conforms to the conditions mentioned therein.[88] Despite being a voluminous piece of legislation, the Companies Act, 2013[89] fails to accommodate terms such as "merger" or "amalgamation." However, Sections 230 to 240 of the Companies Act, 2013 provide for the different means of corporate restructuring which involves both mergers and acquisitions.[90] Thus, the Companies Act, 2013 did not strictly define the term "merger" or "amalgamation," but brought the concept under the broader ambit of corporate restructuring.[91]

Similarly, under the mandatory accounting standard 14 (AS-14),[92] "amalgamation" means an amalgamation under the Companies Act, 1956, or any other statute applicable to corporations. The standard provides for "two methods of amalgamation," one of them being a merger and the other being an acquisition.[93]

2.1. Cross-Border Mergers and Acquisitions in India: The Legal Framework

In India, a plethora of laws affect and regulate cross-border mergers and acquisitions. Chief among them are (i) the Companies Act, 2013;[94] (ii) SEBI (Security and Exchange Board of India) Substantial Acquisition of Shares & Takeovers

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87 Sec. 2(1B) of the Income Tax Act, 1961.

88 *Id.* Sec. 2(19AA).

89 Sec. 2 of the of the Companies Act, 2013.

90 Ch. XV, Compromises, Arrangements & Amalgamations, Secs. 230–240 of the Companies Act, 2013.

91 "A merger, therefore, is a combination or fusion of two or more entities into one, the desired effect of which is the accumulation of assets and liabilities of the distinct entities, and organization of such entity into one business": to be understood as a means of corporate restructuring under Secs. 230–240 of the Companies Act, 2013.

92 Accounting Standard (AS 14) of the Institute of Chartered Accountants of India, New Delhi (2016) (Jan. 02, 2021), available at https://resource.cdn.icai.org/46922asb36718-as14.pdf.

93 *Id*.

94 Companies Act, 2013.

Regulations 2011[95] and the Amendment Act, 2017;[96] (iii) Competition Act, 2002;[97] (iv) Insolvency and Bankruptcy Code, 2016;[98] (v) Income Tax Act, 1961;[99] (vi) Transfer of Property Act, 1882;[100] (vii) Indian Stamp Act, 1899;[101] (viii) Foreign Exchange Management Act, 1999 (FEMA);[102] and other allied laws as may be applicable based on the merger structure.[103]

The provisions relating to "mergers" and "acquisitions" are covered under Sections 234 to 240 of the Companies Act, 2013.[104] Section 234[105] contains provisions for the cross-border mergers of Indian and foreign companies. Further, Companies (Compromises, Arrangements, and Amalgamation) Rules, 2016,[106] as amended by the Companies (Compromises, Arrangements, and Amalgamation) Amendment Rules, 2017 (Co. Rules),[107] were issued. It is worth taking note that after the incorporation of the 2017 Rules a foreign company is allowed to merge with a company registered under the Companies Act, 2013, or vice-versa, only with the prior approval of the Reserve Bank of India (RBI). The RBI issued draft regulations relating to cross-border mergers for comments from the public[108] and then issued the Foreign Exchange Management (Cross-Border Merger) Regulations, 2018,[109] which was to be effective from the date of notification in the official gazette.[110]

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95 SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, as amended up to 14 August 2017 (Jan. 02, 2021), available at https://www.sebi.gov.in/legal/regulations/sep-2011/sebi-substantial-acquisition-of-shares-and-takeovers-regulations-2011-as-amended-upto-august-14-2017-_35784.html.

96 *Id.*

97 Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).

98 Insolvency and Bankruptcy Code, No. 31, Acts of Parliament, 2016 (India).

99 Income Tax Act, No. 43, Acts of Parliament, 1961 (India).

100 Transfer of Property Act, No. 4, Acts of Parliament, 1882 (India).

101 Indian Stamp Act, No. 2, Acts of Parliament, 1899 (India).

102 Foreign Exchange Management Act, No. 42, Acts of Parliament, 1999 (India).

103 Tiwari et al. 2020, at 627.

104 Secs. 234–240 of the Companies Act, 2013.

105 *Id.* Sec. 234.

106 MCA, The Gazette of India, Notification No. G.S.R. 1134 (E) (2016) (Jan. 02, 2021), available at http://www.mca.gov.in/Ministry/pdf/compromisesrules2016_15122016.pdf.

107 MCA, The Gazette of India, Notification No. G.S.R. 368 (E) (2017) (Jan. 02, 2021), available at http://www.mca.gov.in/Ministry/pdf/CompaniesCompromises_14042017.pdf.

108 Ajit Prasad, *Press Release No. 2016-2017/2909* (2017) (Jan. 02, 2021), available at https://taxguru.in/rbi/draft-foreign-exchange-management-cross-border-merger-regulations-2017.html.

109 Foreign Exchange Management (Cross-Border Merger) Regulations, 2018, s*upra* note 41.

110 Foreign Exchange Management (Cross-Border Merger) Regulations, 2018 were notified *vide* Notification No. FEMA 389/2018-RB, and published in the official gazette on 20 March 2018.

SEBI regulates M&A transactions concerning the entities listed on the recognized stock exchanges[111] of India, and, in addition to the Companies Act, 2013, the listed public companies must comply with the applicable SEBI rules and listing regulations. The SEBI Regulations 2011 regulate both the direct and the indirect acquisition of shares, voting rights, and control in the listed companies that are traded on the stock market.[112] Under the SEBI Takeover Code,[113] if the acquisition of shares of a listed company[114] exceeds 25 per cent by an acquirer,[115] that would trigger the open offer threshold for the public shareholders.[116] Prior approval of the appropriate stock exchanges and SEBI[117] is required for all cases of mergers or demergers involving a listed company before approaching the National Company Law Tribunal.[118]

Concerning the competition regulations, the prior approval of the Competition Commission of India (CCI)[119] is required for all acquisitions[120] exceeding the permissible financial thresholds and which are not within a common group.[121] CCI evaluates an acquisition as to whether the said acquisition would lead to a dominant market position, or not, mainly to avoid unfair and anti-competitive practices[122] in the concerned sector.

Under stamp duty regulations, there is a provision for stamp duty on any issue or transfer of shares at a nominal rate of 0.25 per cent.[123] However, no stamp duty

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111 List of Stock Exchanges, SEBI (2020) (Jan. 02, 2021), available at https://www.sebi.gov.in/stock-exchanges.html; SEBI gives recognition and regulates the functioning of stock exchanges in India.

112 K.S. Reddy, *Institutional Laws, and Mergers and Acquisitions in India: A Review/Recommendation*, MPRA Paper 63410, University Library of Munich, Germany (2015), at 1, 5–6 (Jan. 02, 2021), available at https://mpra.ub.uni-muenchen.de/63410/1/MPRA_paper_63410.pdf.

113 SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (last amended on 6 March 2017) (Jan. 02, 2021), available at https://www.sebi.gov.in/legal/regulations/apr-2017/sebi-substantial-acquisition-of-shares-and-takeovers-regulations-2011-last-amended-on-march-6-2017-_34693.html.

114 *Id.* Sec. 2(1)(b).

115 *Id.* Sec. 2(1)(a).

116 *Id.* Sec. 3(1).

117 *Id.* Sec. 28.

118 Karan Talwar & Nivedita Saxena, *Anti-Acquirer and Pro-Shareholder? An Analysis of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011*, 5(1) NUJS L. Rev. 129, 140–41 (2012).

119 Competition Commission of India is the statutory and regulatory body responsible for enforcing the Competition Act, 2002, ensuring fair trade practices across the Indian Territory, and preventing activities that negatively affect India's competition.

120 Sec. 2(a) of the Competition Act, 2002.

121 *Id.* Sec. 6.

122 *Id.* Secs. 2–5.

123 Sec. 3(a) read with Art. 62, Schedule I of the Indian Stamp Act, 1899.

will be leviable in case of any transfer or issue in a dematerialized form.[124] Further, the conveyance[125] of business under a valid business transfer agreement in case of a slump sale is subject to stamp duty at the same rate levied on the conveyance of assets.[126] A scheme of merger or demerger attracts stamp duty at a concessional rate in comparison to the conveyance of assets. However, the exact rates leviable depend upon the specific heads or entries under respective state laws for stamp duty.[127] All transfers, issues, sale, or purchase of equity shares involving residents and non-residents are allowed under RBI pricing guidelines and permissible sectoral caps. However, mergers or demergers involving any issuance of shares to non-resident shareholders of the transferor company are not subject to prior RBI/government approval.[128] Issuances of any other instrument than equity shares/compulsorily convertible preference shares/compulsorily convertible debentures to the non-resident in the form of debt are subject to prior RBI approval.[129]

3. Tax Implications in Cross-Border Mergers and Acquisitions in India

Tax is a significant business cost to be considered while taking any business decision, particularly when competing with other global players.[130] The new Direct Tax Code,[131] which will replace[132] the current Income Tax Act, 1961, seeks to stress transparency and taxpayer friendliness.[133] Under the Income Tax Act, 1961, capital gains tax would be

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124 Sec. 8(a) of the Competition Act, 2002.

125 *Id.* Sec. 3(10).

126 Gaurav Shukla & Swapneshwar Goutam, *Concept of Slump Sale & Taxation Issues in India*, 3(1) Madras L.J. 75, 76 (2009).

127 Schedule I of the Indian Stamp Act, 1899.

128 Saurav Agarwala & Navaneet Desai, *Tax, Antitrust and Cross Border Mergers: An Interdisciplinary Perspective*, 12 NUALS L.J. 5, 8 (2018).

129 RBI, Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017, Notification No. FEMA 20(R)/2017-RB (2017) (Jan. 02, 2021), available at https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11253&Mode=0.

130 NDA, Tax Issues in M&A Transactions (August 2020), at 21 (Jan. 02, 2021), available at https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Tax_Issues_in_M_A.pdf.

131 The Direct Tax Code 2013, which was expected to become operational from 1 April 2015, is still pending in parliament (Jan. 02, 2021), available at https://taxguru.in/wp-content/uploads/2014/04/DTC-2013-taxguru.in_.pdf.

132 The Finance Minister of India released DTC, 2013 for public discussion and suggestions on 1 April 2014.

133 The Direct Tax Code (DTC), 2013 is an attempt by the Government of India (GOI) to simplify India's direct tax laws. DTC will revise, consolidate, and simplify the structure of India's direct tax laws into a single legislation. The DTC, when implemented, will replace the Income Tax Act, 1961 (ITA), and other direct tax legislation, such as the Wealth Tax Act, 1957. However, it is still pending in parliament because the Government wants to leave no stone unturned in the simplification of the tax regime and it is considering the reccomendations of the CBDT Task Force Committee Report, 2019 on DTC.

levied on such transactions as when capital assets are transferred.[134] From the definition of "transfer," it is clear that if the merger, amalgamation, demerger, or any form of corporate restructuring results in the transfer of a capital asset, it will lead to a taxable event. As far as mergers and acquisitions are concerned, the provisions of the Income Tax Act, 1961 concerning "amalgamation,"[135] "demerger,"[136] "securities transaction tax" (STT),[137] "capital gains,"[138] "slump sale,"[139] "set off and carry forward of losses,"[140] etc., need to be examined intricately to establish legitimate safeguards. In the Income Tax Act, 1961, the transfer of any capital asset is generally subject to capital gains tax in India.[141] However, where a foreign company is holding shares of Indian companies, then, with amalgamation or demerger of that foreign company with another foreign company, the transfer of shares would be exempted from capital gains tax provided it follows certain conditions[142] under the Income Tax Act, 1961.[143]

Nevertheless, there might be situations wherein the parties enter into a non-compete agreement, and a non-compete right is transferred.[144] Where a foreign company transfers its shares to another company and the value of the shares is derived mainly from the assets based in India, then capital gains so derived on the transfer are subject to income tax in India.[145] Furthermore, under the Indian tax law, specific depreciation[146] rates for tangible assets and intangible assets, such as know-how, patents, copyrights, trademarks, licenses, franchises, or any similar business or commercial rights, are allowed. Therefore, when there is an excess of consideration over the value of the assets, depreciation allowance may be available.[147] However, the situation is ambiguous for expenditure incurred on the acquisition of a non-

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134 Secs. 47–54 of the Income Tax Act, 1961.

135 *Id.* Sec. 2(1B).

136 *Id.* Sec. 2(19AA).

137 *Id.* Secs. 96–105.

138 *Id.* Secs. 47–54.

139 *Id.* Sec. 50(B); Shukla & Goutam 2009, at 76.

140 Secs. 71–79 of the Income Tax Act, 1961.

141 *Id.* Sec. 47(vi).

142 *Id.* Sec. 47(iv)–(vii).

143 *Id.* Sec. 47.

144 Shivam Bhardwaj & Samyak Sibasish, *Treatment of a Non-Compete Clause in M&A: Finally Clarifying the Indian Position?*, 7(3-4) NUJS L. Rev. 263, 264 (2014).

145 KPMG, Taxation of Cross-Border Mergers & Acquisitions – India (2014) (Jan. 02, 2021), available at https://home.kpmg.com/content/dam/kpmg/pdf/2014/05/india-2014.pdf.

146 Secs. 32, 72, 72A, 72AA of the Income Tax Act, 1961.

147 KPMG (2014), *supra* note 145.

compete right. Whether non-compete rights can be treated as capital assets eligible for depreciation or as capital assets not eligible for depreciation remains a grey area.[148]

Though certain mergers enjoy tax-neutrality under Indian tax law, the provisions for mergers and acquisitions are extremely complicated, and the tax system is certainly not neutral.[149] In an inbound merger, a foreign company merges with an Indian company and the amalgamated entity is an Indian company.[150] Amalgamation enjoys tax-neutrality, and both the amalgamating company and the shareholders of the amalgamating company are tax-exempt.[151] The amalgamated company should be an Indian company,[152] and the amalgamation should be under Section 2(1B).[153]

> In an amalgamation, all the properties, assets, and liabilities of the merging companies immediately before the amalgamation should become the properties, assets, and liabilities of the amalgamated company, and further, 75% shareholders of the amalgamating companies shall remain the shareholders of the amalgamated company.[154]

Further, to achieve the aim of tax-neutrality for the amalgamating company shareholders, the entire consideration should be in the form of shares in the amalgamated company.

Similarly, an outbound merger[155] is one

> where an Indian company decides to merge with a foreign company, and where the amalgamated entity is a foreign company.[156] The transfer of capital assets through amalgamation by the amalgamating company to the amalgamated company will lead to the imposition of capital gains tax under the IT Act, and if the amalgamated company is an Indian Company, it will be exempted from tax implications.[157]

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148 NDA, Tax Issues in M&A Transactions (August 2016), at 38 (Jan. 02, 2021), available at https://pdf4pro.com/view/tax-issues-in-m-amp-a-transactions-nishith-desai-2548ec.html.

149 Kusum, *Tax implications on merger and acquisition process*, 3(5) Int. J. Bus. Manag. Soc. Sci. Res. 62, 63 (2014).

150 Sec. 2(v) of the Foreign Exchange Management (Cross-Border Merger) Regulations, 2018.

151 NDA (2016), *supra* note 148.

152 Sec. 2(20) of the Companies Act, 2013.

153 Sec. 2(1B) of the Income Tax Act, 1961.

154 *Id*.

155 Sec. 2(v) of the Foreign Exchange Management (Cross-Border Merger) Regulations, 2018.

156 *Id.* Sec. 2(iv).

157 NDA (2016), *supra* note 148.

However, this exemption is not available in the case where the resultant company is a foreign one, thus leading to a tax burden in the hands of the profit-making acquirer foreign company.[158]

Therefore, the notification of "cross-border mergers under the 2013 Act,"[159] and the introduction of Cross-Border Regulations, 2018,[160] necessitate adequate corresponding changes in the Income Tax Act[161] to establish a favourable legal environment for the promotion of cross-border mergers and acquisitions in India.

Table 1: Key tax provisions in India and their congruity concerning cross-border M&As

Tax Provisions under Income Tax Act, 1961	**Merits/Demerits & Impact on Cross-Border M&As**	**How it can be made more lucrative**
Tax Neutral Merger, s. 2(1B)	Foreign investors and companies will hugely benefit from tax neutrality, and they will derive a better return on investment due to the tax exemptions provided	Similar tax neutrality for Indian investors making foreign investments will go a long way in promoting more cross-border M&As
Tax Neutral Demerger, s. 2(19AA)	Provides for tax neutrality for all the assets and liabilities acquired by way of the demerger	Easing off the shareholding requirements of 75% and conditions under s. 72A(5) will boost more demergers to and from India
Slump Sale, s. 2(42C)	The tax incentives, exemptions, and benefits of an existing business can be transferred to the new owner efficiently	Provisions should be harmoniously read with s.50 B to maximize the tax benefits from a slump sale
Transfer, s. 47	No tax exemptions in the case of outbound mergers may deter the proliferation of cross-border M&A growth in India	Both inbound & outbound mergers should be treated at par with respect to tax levy, and similar exemptions should be provided for both
Carry Forward & Set-off of accumulated losses & depreciation, s. 72A	It provides for the carry forward and set off of accumulated losses and depreciation in case of qualifying merger/demerger, thus giving more flexibility to investors in making an informed decision regarding M&As	Provisions relaxing the 49% shareholding criteria, and allowance of unabsorbed depreciation, will positively maximize the tax benefits, thus promoting more cross-border M&A activity

158 Kusum 2014, at 73.

159 Secs. 234–240 of the Companies Act, 2013, notified with effect from 13 April 2017.

160 Foreign Exchange Management (Cross-Border Merger) Regulations, 2018.

161 Income Tax Act, 1961.

Capital Gains Tax for unqualified M&As, s. 50C, 50CA, and 56(2)(x)	For all unqualified M&As, capital gains tax will be chargeable, which may deter foreign investors from investing in India, as the norms are still stringent in comparison to other economies	More sectors should be opened up and liberalized so that more transactions can benefit from tax exemptions, which will be an added incentive for investing and hence result in more cross-border M&As in India
Withholding Tax Obligations, s. 195	Payment by a resident to any non-resident, or any passive income in the form of interest, royalties, dividends, etc., is chargeable as withholding tax, which could act as a deterrent to cross-border M&A activity	This tax cost can be substantially minimized if read with DTAAs provisions and applying the treaty benefits to the transaction, thus promoting more cross-border M&As

Conclusion

The increasing trends in cross-border M&As have been motivated by various strategic considerations which normally differ from purely domestic M&As. Compared to domestic M&As, companies engaging in cross-border M&As are facing unique risks, such as "liability of foreignness" and "double-layered acculturation." Due to their international nature, they face unique challenges, as different countries have different institutional, economic, regulatory, and cultural structures.[162]

Section 234 of the Companies Act, 2013[163] permits the integration of Indian markets within world trade wherein Indian companies are now able to participate in "outbound mergers" and acquisitions (M&As), with companies of specified jurisdictions,[164] which was previously prohibited by the Companies Act, 1956. This puts the spotlight on cross-border M&As.

Under the Income Tax Act, 1961 rules, a merger or amalgamation where the resulting entity is an Indian corporation is exempted from capital gains tax. However, where an Indian company merges with a foreign company, a similar exemption is not available, likely because such a deal was not previously allowed. Another potential tax issue for outbound mergers is that operations of the resulting foreign company in India, through a branch or otherwise, could amount to the company having a "permanent establishment" under Indian tax laws and thus attracting 26 per cent corporate tax[165] on account of operations in India.

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[162] Robert House et al., *Understanding Cultures and Implicit Leadership Theories Across the Globe: An Introduction to Project GLOBE*, 37(1) J. World Bus. 3, 7–8 (2002).

[163] Secs. 234–240 of the Companies Act, 2013, notified on 13 April 2017.

[164] The term "specified jurisdictions" means and includes jurisdictions specified in Rule 25A(2)(a), and Annexure B to the Companies (Compromises, Arrangements, and Amalgamation) Rules, 2016.

[165] Corporate Tax @22% exclusive of Surcharge (2%–5%) & Health and Education Cess 4% (Introduced from Finance Year, 2019). Therefore, the effective corporate tax rate plus surcharge plus cess would be between 25% and 26%.

Unless the present tax regime affecting cross-border mergers is amended and harmonized with all of the other corporate and allied laws, for the time being in force, the popularity of these provisions, despite the latest regulations, will fail to soar. The proposed Direct Tax Code seems to be a possible solution to such issues.[166] The business environment and the legal regime look to be in favour of cross-border mergers in India, as the Direct Tax Code,[167] which emphasizes lowering the corporate tax rate to boost the competitiveness of India's business environment, is likely to promote cross-border M&As in India by making taxing provisions more certain, competitive, and comprehensive. The recent changes in FDI policy and tax reforms therein, including reduction of the corporate tax rate, concessional tax rates for power and infrastructure companies,[168] tax holiday schemes for investors, and the abolition of dividend distribution tax, will go a long way in making India Inc. a favourite among foreign investors and create favourable opportunities for more cross-border M&As in India.[169]

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166 The New Direct Taxes Code Must Not Die, The Economic Times, 16 September 2018 (Jan. 02, 2021), available at https://economictimes.indiatimes.com/blogs/et-editorials/the-new-direct-taxes-code-must-not-die/.

167 Proposed legislation to replace the Income Tax Act, 1961; presently pending in parliament and most likely to be implemented soon. Shrimi Choudhary, *'Too Radical': Centre Likely to Implement Direct Tax Code in Parts*, Business Standard, 4 February 2020 (Jan. 02, 2021), available at https://www.business-standard.com/budget/article/too-radical-centre-likely-to-implement-direct-tax-code-in-parts-120020400029_1.html.

168 *See also* Gaurav Shukla & Akanksha Garg, *Deductions; Profit and Gains Derived from Industrial Undertaking Held by Companies*, 180(1) TAXMAN 172 (2009).

169 DIPP, Review of Foreign Direct Investment (FDI) Policy on Various Sectors, Press Note No. 4 (2019 Series) (2020) (Jan. 02, 2021), available at https://dipp.gov.in/sites/default/files/pn4_2019.pdf; DIPP, Review of Foreign Direct Investment (FDI) Policy for Curbing Opportunistic Takeovers/Acquisitions of Indian Companies Due to the Current COVID-19 Pandemic, Press Note No. 3 (2020 Series) (2020) (Jan. 02, 2021), available at https://dipp.gov.in/sites/default/files/pn3_2020.pdf.

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PROSPECTS OF INTERNATIONAL LEGAL COOPERATION OF STATES UNDER U.N. AUSPICES IN DEVELOPING A TREATY ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS

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The present article is a review of the prospective adoption of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations (TNCs) and other business enterprises presently being developed under U.N. auspices, aiming for legal control of TNCs' business functioning. The necessity for international legal control of their business' functioning with respect to human rights cannot be underestimated as their influence has grown since striving for dominance in world commodity markets and in leading sectors of the global economy. However, quite a number of scholars question the fact that TNCs are not presently recognized as legal personalities rendering the immediate application of international law principles to their business activities all but practically impossible. At the same time, the majority of so called "soft law" principles developed in the U.N. framework in the past fifty years are nothing more than recommendations to TNCs, thus, emphasizing the urgency of developing a legally binding instrument which primarily governs transnational corporations with respect to human rights. Nevertheless, the prospective adoption of a future treaty, currently being developed by the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, does not look highly promising due to a number of fundamental flaws and inconsistencies analyzed below.

Keywords: transnational corporations; legal personality of TNCs; human rights violations; Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework; Open-ended Intergovernmental Working

Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights; legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.

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Introduction

An adherent of a complex study of modern globalization, U. Beck, singles out transnational corporations as a key feature of the present-day transnational scene.[1] There is no doubt that TNCs, with their significant concentration of highly efficient research and industrial potential, substantial economic, managerial, technological, labor and intellectual resources, may at present compete with a number of states and even, to a certain extent, subject such a state's economy to their own political or

[1] *See* Ulrich Beck, *What Is Globalization?* (2000).

business interests. The growing role of TNCs in world economy in the past decades may be shown by the fact that transnational corporations, having controlled over 50% of the world industrial output and 60% of international commodity flow since the 1950s[2], are deemed to be the main operators of the intensifying process of economic globalization. Though in the situation of the COVID-19 pandemic, pursuant to the latest UNCTAD data, 5000 leading TNCs predict a decrease in their profit estimates by up to 30% for 2020,[3] transnational corporations remain among the most important world economy actors directly affecting both the international markets and the several states' economies.

1. The International Legal Framework for TNCs

It should be mentioned that both the definition of a "transnational corporation" and its international legal status has been the subject of discussion in the jurisprudence of international law for quite a number of years. This is not only the result of a wide variety of approaches to interpretating their legal nature but also the absence of a uniform definition of the concept of a TNC in international law. Modern international law science entertains two principal approaches to the issue of a TNC's international personality. The majority of scholars, including I. Brownlie,[4] A. Cassese[5] and M. Shaw,[6] deny the TNCs a right to international personality, since "personality in international law necessitates the consideration of the interrelationship between rights and duties afforded under the international system and capacity to enforce claims."[7] Russian scholar I. Lukashuk viewed awarding a corporation legal personality as basically impractical.[8] G. Velyaminov treats awarding legal personality to TNCs as a "grave mistake since it opens the way to dissolution of the very concept and nature of international law."[9]

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[2] *See Родионова И.А., Шувалова О.В*. Мировая промышленность, международное производство и прямые иностранные инвестиции // Фундаментальные исследования. 2017. № 9(12). С. 1988–1992 [Irina A. Rodionova & Olga V. Shuvalova, *World Industry, International Production and Foreign Direct Investments*, 9(12) Fundamental Research 1988 (2014)].

[3] U.N. Conference on Trade and Development (UNCTAD), Transnational Corporations: Investment and Development, 2020, vol. 27, no. 1 (Jan. 8, 2021), available at https://unctad.org/en/PublicationsLibrary/diaeia2020d1_en.pdf.

[4] *See* Ian Brownlie, *Principles of Public International Law* (2nd ed. 2008).

[5] *See* Antonio Cassese, *International Law* (2nd ed. 2005).

[6] *See* Malcolm Shaw, *International Law* (8th ed. 2017).

[7] *Id.* at 155.

[8] *See Лукашук И.И.* Международное право. Общая часть: учебник [Igor I. Lukashuk, *International Law. General Part: Textbook*] (2005).

[9] *See Вельяминов Г.М.* Международное экономическое право и процесс [George M. Velyaminov, *International Economic Law and Process*] 389 (2004).

Advocates of the other approach headed by P. Dupuy,[10] W. Friedmann,[11] and K. Ponte[12] award TNCs with limited (functional) international personality, since in a special situation, in a limited scope and for a particular purpose a TNC may have rights, duties and file international claims under an international treaty or contract.

Under international law the issue of the TNCs' international personality was first raised in the 1960s due to the necessity of solving problems caused by nationalization and permanent sovereignty of newly independent states over their natural resources. The demand for an enhanced control of TNCs' activities followed "the vindication of a 'New International Economic Order' in the early 1970s, which the recently decolonized States pushed forward during that period."[13]

Thereon, the urgency of international law's control of TNCs was confirmed in the Draft Code of Conduct on Transnational Corporations (hereinafter the draft code of conduct), developed by the ECOSOC subsidiary – the United Nations Commission on Transnational Corporations. Initially, the necessity of such a code was pointed out by the U.N. in 1972, with the issue of the TNCs being raised at the General Assembly XXVII session.[14] The final stage of negotiations came to an end, but only 18 years later, with the draft Code absorbing the whole variety of ideas and proposals made during the discussions presented on 12 June 1990.[15]

It is worth mentioning that by the time of the draft's completion, the prospect of its adoption was much less favorable than a decade before due to a lack of unity concerning a few of its key provisions and a growing concern among states regarding a decrease in the rate of investment into the developing countries' economies. As a result, in 1992, the chairman of the XLVI session of the General Assembly declared that the Code's adoption remained in favor of a new approach to the issue of foreign investment, thus, as an observer at this body remarked "quietly burying the Code."[16]

It should be mentioned that the draft Code consolidates the definition of the concept of "transnational corporation" resulting from multiple discussions. In particular, Item 1(a) of the draft Code states that:

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[10] *See* Pierre-Marie Dupuy, *L'unité de l'ordre juridique international: cours général de droit international public* (2002).

[11] *See* Wolfgang Friedmann, *General Course in Public International Law* (1969).

[12] *See* Karen G. Ponte, *Formulating Customary International Law: An Examination of the WHO International Code of Marketing of Breastmilk Substitutes*, 5(2) B.C. Int'l & Comp. L. Rev. 377 (1982).

[13] *See* Olivier De Schutter, *Transnational Corporations and Human Rights* 2 (12th ed. 2006).

[14] U.N. General Assembly, Special measures in favour of the least developed among the developing: resolution adopted by the General Assembly, A/RES/3036 (XXVII), 19 December 1972 (Jan. 8, 2021), available at https://www.business-humanrights.org/ru/node/178108; https://daccess-ods.un.org/TMP/1722154.02126312.html.

[15] U.N. Economic and Social Council (ECOSOC), Draft Code of Conduct on Transnational Corporations, 12 June 1990, E/1990/94.

[16] Sandrine Tesner & George Kell, *The United Nations and Business: A Partnership Recovered* 46 (2000).

1. (a) [The term "transnational corporations" as used in this Code means an enterprise, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centers, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others.]

[The term "transnational corporation" as used in this Code means an enterprise whether of public, private or of mixed ownership, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centers, in which the entities are so linked, by ownership or otherwise, that one or more of them [may be able to] exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others.]

(b) The term "entities" in the Code refers to both parent entities – that is, entities which are the main source of influence over others – and other entities, unless otherwise specified in the Code.

(c) The term "transnational corporation" in the Code refers to the enterprise as a whole or its various entities.

It should be noted that the draft code of conduct has consolidated a broad approach to the concept of transnational corporations including both major corporations enveloping several world regions and smaller companies busy, for example, in a couple of countries. Besides, pursuant to Item 1(c) of the draft code the term "transnational corporation" may be applied both to an enterprise as a whole and to its several divisions. The latter seems reasonable since the law should control not just a TNC as a whole but its single divisions, as well. However, most scholars treat the draft code of conduct with reserve. The majority of critics point out that the Code in fact makes a TNC a subject of public international law through consolidating its rights and obligations towards a state in international law. According to this approach, awarding a TNC with international law personality shall immediately contradict some major international law principles. Thus L. Lialikova points out that:

the role played by TNCs in international relations thanks to their economic power may not entitle them to an international personality or give rise to treating them as recognized international law subjects. While acknowledging the necessity of development of the legal aspect of a TNC functioning, one may not avoid the universally recognized rules and principles of international

> law, primarily the principle of respect of state sovereignty and noninterference into a state's domestic affairs.[17]

A similar TNC definition may be found in the OECD Guidelines for Multinational Enterprises (hereinafter the OECD Guidelines), supplementing the OECD Declaration on International Investment and Multinational Enterprises. These principles were substantially extended in the 2011 revised version, including a new human rights chapter, as well as labor and industrial relationship provisions following the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted by the Governing Body of the International Labor Organization. Though Section I(4) of the 2011 update of the OECD Guidelines states that "a precise definition of multinational enterprises is not required for the purposes of the Guidelines,"[18] that is probably due to a difficulty of finding an interstate consensus on the issue; the authors, however, to avoid doubt, included the provision reading that multinational enterprises usually comprise:

> companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed[19].

Having analyzed the Guiding Principles, one cannot help noticing the aforementioned TNC features' similarity to those listed in the draft Code of Conduct on Transnational Corporations.

The next international advisory instrument is the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy adopted in 1977 by the Governing Body of the International Labor Office. Item 6 of this instrument reads that "to serve its purpose this Declaration does not require a precise legal definition of multinational enterprises."[20] However, the Item continues that multinational enterprises include:

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[17] *Ляликова Л.А.* Транснациональные корпорации и проблема определения их национальности // Советский ежегодник международного права. 1982. С. 268–269 [Larisa A. Lialikova, *Transnational Corporations and the Problem of Determining Their Nationality*, Soviet Yearbook of International Law 256, 268–269 (1982)].

[18] Organization for Economic Co-operation and Development, OECD Guidelines for Multinational Enterprises (2011) (Jan. 8, 2021), available at http://dx.doi.org/10.1787/9789264115415-en.

[19] *Id.* at 17.

[20] International Labour Organization (ILO), Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at

> enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based. The degree of autonomy of entities within multinational enterprises in relation to each other varies widely from one such enterprise to another, depending on the nature of the links between such entities and their fields of activity and having regard to the great diversity in the form of ownership, in the size, in the nature and location of the operations of the enterprises concerned. Unless otherwise specified, the term "multinational enterprise" is used in this Declaration to designate the various entities (parent companies or local entities or both or the organization as a whole) according to the distribution of responsibilities among them, in the expectation that they will cooperate and provide assistance to one another as necessary to facilitate observance of the principles laid down in the Declaration.[21]

Hence this TNC definition, somewhat similar to the aforementioned ones, is also based on a rather loose definition approach.

At the beginning of the 21st century, on 26 August 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights at the 55th session of the Human Rights Commission considered the Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (hereinafter the draft norms).[22]

The distinctive feature of the draft norms on corporation responsibilities was that the responsibility to protect human rights imposed on a TNC did not at the same time relieve the state of the responsibility to secure such norms. Thus, Section A "General Obligations" states that the principal obligation to promote, guarantee implementation, respect and protection of human rights, including by transnational corporations, is with the states, while the instrument's preamble states that:

> transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.[23]

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its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions (5th ed. 2017) (Jan. 8, 2021), available at https://www.ilo.org/wcmsp5/groups/public/publication/wcms_094386.pdf.

21 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, *supra* note 20, para. 6.

22 U.N. Sub-commission on the Promotion and Protection of Human Rights, Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights: draft Norms, submitted by the Working Group on the Working Methods and Activities of Transnational Corporations pursuant to resolution 2002/8, E/CN.4/Sub.2/2003/12, 30 May 2003 (Jan. 8, 2021), available at https://digitallibrary.un.org/record/498842.

23 *Id.* para. 1.

Thus, the draft norms did not aim to modify the scope of a state's responsibility for the promotion and protection of human rights, as provided for by Norm 19 stating that:

> Nothing in these Norms shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of States under national and international law, nor shall they be construed as diminishing, restricting, or adversely affecting more protective human rights norms, nor shall they be construed as diminishing, restricting, or adversely affecting other obligations or responsibilities of transnational corporations and other business enterprises in fields other than human rights.[24]

Another distinctive feature of the draft norms is their scope which is not restricted just to states and transnational corporations but also applies to other persons such as, for the purposes of the instrument, contractors, subcontractors, suppliers, or patent holders. In particular, a TNC in its business shall have its contractors or suppliers observe international standards of human rights and freedoms.

It is worth mentioning that, in spite of widespread support for the draft norms from nongovernmental human rights organizations, their further development and adoption prospects gave rise to a vigorous debate resulting in acute confrontation between the business community and the human rights groups. Moreover, this document was not supported by the governments.

As a result, the next step in the effort to establish international law control over transnational corporations and other enterprises in respect to human rights was marked by the Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework[25] (hereinafter the GPs) considered by the XVII session of the Human Rights Council.

The GPs for a first time consolidate various approaches to a TNC's duty to protect human rights in the course of business – clarifying the rules of corporate conduct that an enterprise is expected to observe. Besides, adoption of the GPs further accelerated the modification of corporate policies, since on their development the companies faced a higher standard of human rights protection in business due to the following factors. Firstly, share index compilers, such as the Dow Jones Sustainability Index or FTSE4Good demand more acute and transparent human rights information. Secondly, most major companies nowadays consider the risk of human rights violation on par with other risks, since the former may imply both a court's costs and reputational or interparty relations damage, as well as diminishing income and public criticism. Thus, risk management has become part of a company's attitude to human rights protection.

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[24] Draft Norms on the Responsibilities of Transnational Corporations, *supra* note 22, para. 19.

[25] U.N. Human Rights Council, Human rights and transnational corporations and other business enterprises: resolution adopted by Human Rights Council, A/HRC/RES/17/4, 6 July 2011 (Jan. 8, 2021), available at https://digitallibrary.un.org/record/775713?ln=ru.

However, both the GPs and the preceding advisory instruments share a considerable defect: they neither create new international law obligations for a TNC nor provide an effective remedy for victims of human rights violations.

Thus, within the whole term of the development and adoption of the aforementioned regulations concerning TNCs, the latter still have not been recognized as the subjects of international law since their legal status has not been defined yet in any of the legally binding sources of international law. As a result, nowadays, any direct regulation of transnational corporations' activities may be carried out exclusively pursuant to advisory instruments defining international standards of TNCs' functioning.

2. The Urgency and Practical Importance, from the Perspective of International Law, of State Cooperation Under U.N. Auspices in the Development and Adoption of a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises

In light of the foregoing, it is important to emphasize that in modern international law, "voluntary codes of behavior need to be given 'teeth' by being made enforceable in the event that they are breached."[26] Therefore, the absence of general international law control over TNC business activities heightens the need for a legal mechanism for ensuring TNCs' accountability for human rights violations. While "TNCs aggressively increase their pressure over the world community to initiate such legal rules for capital flow which shall be primarily to their own advantage,"[27] profit-making as a sole priority pursued by TNCs exporting their capital into, above all, developing countries, undermines international requirements for human rights protection: TNCs quite often use child labor,[28] discriminate against women[29] or use corrupt

[26] Alice De Jonge, *Transnational Corporations and International Law: Bringing TNCs Out of the Accountability Vacuum*, 7(1) Crit. Perspect. Int'l Bus. 66 (2011).

[27] *Лабин Д.К.* Международно-правовые аспекты регулирования иностранных инвестиций: дис. … канд. юрид. наук [Dmitry K. Labin, *International Legal Aspects of Foreign Investment Regulation: Thesis*] 15–16 (1999).

[28] According to Amnesty International's report for 2016, quite a few prominent global corporations, including Nestlé, Unilever and Colgate-Palmolive, use palm oil produced by children in dangerous conditions in their products. Preparing its report, Amnesty International followed the links of the aforementioned corporations with the palm oil manufacturer Wilmar, which used hard child labor at Indonesian factories. The report points out that the produce of the aforementioned corporations "is tarnished by outrageous human rights violations, since eight-year-olds work in dangerous conditions." *See* Amnesty International, The Great Palm Oil Scandal: Labour Abuses Behind Big Brand, ASA21/5184/2016, November 2016 (Jan. 8, 2021), available at https://www.amnesty.org.uk/files/the_great_palm_oil_scandal_lr.pdf.

[29] *See, e.g.*, U.N. Economic and Social Council (ECOSOC), Report of the Commission on Transnational Corporations on the Second Session 1–12 March 1976, 61st Session, E/5782; E/C.10/1, Annex 1 "List of Areas of Concern Regarding the Operations and Activities of Transnational Corporations" (Jan. 8, 2021), available at https://www.un.org/ecosoc/en/content/reports-ecosoc-general-assembly.

practices[30]. That is why the U.N. has initiated work on the development and adoption of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (hereinafter the legally binding instrument).

The importance of proper international legal cooperation under the U.N. has been called forth by the need for a more efficient state supervision and control of TNCs. This, in turn, is caused by the fact that nowadays the duty of protection and promotion of human rights provided for by international law is primarily the duty of a state and may only be applied to a private person, including a transnational corporation, indirectly, through a national legal system. Surely, a state, as the former Head of the U.N. International Court, R. Jennings, and the Institute of International Law member, A. Watts, point out, "may independently choose the manner of performing its international obligations under domestic law."[31]

It is important to highlight the fact that today multiple legal issues still arise in the course of a state carrying out its duty of supervising the promotion of human rights by a transnational corporation[32]. Among them, there is a legal lacunae in the regulation of TNCs' economic activities: states ignoring human rights violations committed by TNCs in their territory, as well as abetting the latter in such violations.

Besides, one of the most urgent issues is a lack of coordination in domestic policies, especially between the state agencies controlling the TNC's business functioning and the bodies responsible for the state's obligations to protect human rights. Pursuant to the Human Rights Council Resolution 26/22,[33] coordination should be achieved through, i.a., "developing a national action plan or other such framework."[34] Moreover, according to the Report of the Working Group on the Issue of Human Rights and

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[30] *See, e.g.*, *Филиппов В.Р.* Франсафрик и этика в международных отношениях // Вестник РУДН. Серия: Международные отношения. 2017. № 2. С. 402–415 [Vasily R. Filippov, *Françafrique and Ethics in International Relations*, 17(2) Vestnik RUDN. International Relations 402 (2017)].

[31] Robert Jennings & Arthur Watts, *Oppenheim's International Law* 82–83 (9th ed. 1996).

[32] The most pressing issues in the respective sphere have been thoroughly analyzed in the multiple reports of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises prepared by the U.N. Human Rights Council and the General Assembly, as well as in the reports of the U.N. Secretary General and the High Commissioner for Human Rights. These documents cite the most up-to-date information submitted by the U.N. bodies, specialized agencies, funds or programs: the U.N. Global Treaty of 2000, the World Bank group, the International Finance Corporation, the U.N. Development Program and the International Organization for Migration, as well as by transnational corporations and other business enterprises, national human rights organizations, native peoples' representatives, civil society organizations, and other regional or sub-regional international organizations.

[33] U.N. Human Rights Council, Human rights and transnational corporations and other business enterprises: resolution adopted by the Human Rights Council, A/HRC/RES/26/22, 15 July 2015 (Jan. 8, 2021), available at https://www.refworld.org/docid/5583d84f4.html.

[34] *Id.* at 2.

Transnational Corporations and other Business Enterprises "National Action Plans on Business and Human Rights" of 2014,[35] it is important that:

> any review of the status quo should extend not only to identifying existing policy, laws and regulations but also to assessing the effectiveness of a policy and the practicalities of enforcement within the legal, regulatory and adjudicative frameworks.[36]

National action plans are, as a rule, program strategies worked out by a state to prevent human rights abuse by enterprises, including a description of the state's achievements in the field of human rights promotion, as well as legal omissions to be rectified. It is worth mentioning that in order to assist a state in reaching the aforementioned goal, the Work Group had devised a Guidance on National Action Plans on Business and Human Rights,[37] introduced at the U.N. Forum on Business and Human Rights taking place on 14–16 November 2016.[38] Moreover, on the Human Rights Council's adoption of Resolution 26/22 in 2014, four countries had got down to the implementation of a national action plan (September 2013 – the United Kingdom of Great Britain and Northern Ireland, December 2013 – the Netherlands, March 2014 – Italy and in April 2014 – Denmark),[39] by 2019 the number of states having such plans had risen to 22 while in another 23 states the appropriate legal instruments are being developed.

However, despite a number of states developing national plans aimed at increasing efficiency in the implementation of human rights standards and eliminating their

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35 U.N. Human Rights Council, Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises "National Action Plans on Business and Human Rights," A/69/263, 5 August 2014 (Jan. 8, 2021), available at https://www.un.org/doc/GEN/N14/495/68/.pdf.

36 *Id.* at 8.

37 U.N. Office of the High Commissioner for Human Rights (OHCHR), Guidance on National Action Plans on Business and Human Rights (December 2014) (Jan. 8, 2021), available at https://www.ohchr.org//Business/UNWG20NAPGuidance.pdf.

38 The U.N. Forum is the world's largest annual gathering on business and human rights with more than 2,000 participants from government, business, community groups and civil society, law firms, investor organizations, U.N. bodies, national human rights institutions, trade unions, academia and the media. The U.N. Human Rights Council established the Forum in 2011 to serve as a global platform for stakeholders to "discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices." *See* U.N. Human Rights Council, Human rights and transnational corporations and other business enterprises: resolution adopted by the Human Rights Council, A/HRC/RES/17/4, 6 July 2011 (Jan. 8, 2021), available at https://www.un.org/doc/resolution/gen/G11/144/71/PDF/.pdf.

39 *See* U.N. Human Rights Council, Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/69/263, 5 August 2014 (Jan. 8, 2021), available at https://www.un.org/doc/UNDOC/GEN/N14/495/68/.pdf.

violation in the course of TNCs' business, quite a few countries still abstain from introducing such legal instruments.

Moreover, there exist the issues of a government being unable to adopt a law which conforms to the international human rights standards, or adopting an inconsistent law, or proving unable to obey such an instrument.

Still, one of the most controversial areas is the protection of working people's rights. Pursuant to the Global Rights Index, devised by the International Trade Union Confederation in 2018:

> Shrinking democratic space for working people and unchecked corporate influence are on the rise ... Decent work and democratic rights grew weaker in almost all countries, while inequality continued to grow.[40]

At the same time, though a few governments adopt the respective laws, such legal steps are seldom consistent.

It should also be pointed out that pursuant to the Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises for 2018, governments neither properly instruct transnational corporations concerning the importance of due care in their protection of human rights, nor properly insist on their reporting on the actual effort to promote human rights in the course of business.[41]

In sum, it should be mentioned that the development of a universal international instrument aimed at TNCs' human rights protection remains urgent for a number of reasons.

Firstly, the international legal initiatives aimed at the control of TNCs' business in view of human rights protection have not just failed to succeed, but, in fact, have shown both a lack of coordination and a lack of a uniform legal position of the states concerning the issue. As a result, modern international law lacks binding rules which govern transnational corporations' adherence to the international legal standards for human rights.

Secondly, the states' classical approach to the matter of legal control of a TNC's business' observance of human rights is based on the presumption of a private party being governed by the domestic law of the state where the transnational corporation carries out its business. Thus, within a particular state international law shall be applicable to an individual or an entity only when in line with- and to the extent of domestic law, including the requirement for observing international legal standards.

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[40] International Trade Union Confederation, Global Rights Index 2018, at 1 (Jan. 8, 2021), available at https://www.ituc-africa.org/IMG/pdf/ituc-global-rights-index-2018-en-final-2.pdf.

[41] U.N. Human Rights Council, Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/38/48, 2 May 2018 (Jan. 8, 2021), available at https://undocs.org/A/HRC/38/48.

Though nowadays it is the state that bears principal responsibility for a transnational corporation's observance of human rights, it is evident that there are multiple legal problems arising in the course of executing this responsibility, resulting in substantial limitations which inhibit the practice of human implementation in certain world regions.[42]

3. Developmental Stages of a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises

In the years 2005–2011, the Special Representative of the Secretary General on Human Rights and Transnational Corporations and other Business Enterprises and his work-group carried out research and multiple consultations concerning the issue of business and human rights. This work resulted in the Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework[43] (hereinafter the GPs) submitted to the 17th session of the Human Rights Council. The most significant shortcoming of the GPs, as we noted earlier, was that they did not create international legal obligations for TNCs. As a result, being approved by the Human Rights Council Resolution 17/4 on 6 July 2011, they were criticized by Ecuador, South Africa and a number of Latin American and African nongovernmental organizations as "a 'soft law' instrument, which increasingly is how governments make initial moves into highly complex and conflicted issues."[44]

Consequently, in 2014 Ecuador initiated adoption at the 26th session of the Human Rights Council of Resolution 26/9, authorizing the establishment of an Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights (hereinafter the OEIGWG), mandating the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (hereinafter the international legally binding instrument).[45] The preamble to this Resolution shifts the focus of responsibility from transnational corporations to states:

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[42] *Карташкин В.А.* Универсализация прав человека и традиционные ценности человечества // Современное право. 2012. № 8. С. 9 [Vladimir A. Kartashkin, *Universalization of Human Rights and Traditional Values of Mankind*, 8 Modern Law 9 (2012)].

[43] U.N. Human Rights Council, Human rights and transnational corporations and other business enterprises: resolution adopted by Human Rights Council, A/HRC/RES/17/4, 6 July 2011 (Jan. 8, 2021), available at https://undocs.org/A/HRC/17/4.

[44] John G. Ruggie, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights* (January 2015), at 4 (Jan. 8, 2021), available at https://ssrn.com/abstract=2554726.

[45] U.N. Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights: resolution adopted by Human Rights Council, A/HRC/RES/26/9, 14 June 2014 (Jan. 8, 2021), available at https://undocs.org/en/A/HRC/RES/26/9.

> the obligations and primary responsibility to promote and protect human rights and fundamental freedoms lie with the State, and [that] States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including transnational corporations.

The first two sessions of the OEIGWG (6–10 July 2015 and 24–28 October 2016) dealt with the analysis of the content, scope, nature and form of the future instrument, while the third session (23–27 October 2017) brought the instrument's development to a new stage, launching an article-by-article discussion of the document. A lot of delegations welcomed the document as being comprehensive, imposing obligations on transnational corporations and other business enterprises and contributing to victims' access to justice stating that:

> A legally binding instrument would benefit victims of business-related human rights abuse by ensuring that companies were held accountable and that victims had access to prompt, effective and adequate remedies. Additionally, several delegations considered that such an instrument could be beneficial to business since it would create a level playing field. Uniform rules across jurisdictions would create legal certainty that business would appreciate.[46]

Nevertheless, the Zero draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises[47] (hereinafter the Zero draft) was severely criticized both by private parties and a number of states. In particular, the Russian Federation, European Union and a number of Latin American states (Chile, Colombia, Honduras) submitted formal criticism of a number of this instrument's provisions.[48] Some states emphasized that discussions on the Zero draft were premature since the Guiding Principles had been unanimously endorsed six years ago, and more time was needed to implement them and that the process risked distracting attention away from such implementation. Apart from this, the treaty did not ensure specific protections for certain vulnerable populations, such as indigenous peoples. Given the disproportionate effect that

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[46] U.N. Human Rights Council, Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, A/HRC/37/67, 24 January 2018 (Jan. 8, 2021), available at https://undocs.org/en/A/HRC/37/67.

[47] OEIGWG chairmanship, Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, Zero Draft, 16 July 2018 (Jan. 8, 2021), available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.

[48] U.N. Human Rights Council, Submissions received following the call for comments and proposals on the draft legally binding instrument (Jan. 8, 2021), available at https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx.

human rights abuses had on women and girls, there was a call for a gendered approach to the treaty.

As for the private sector, the International Organization of Employers, the International Chamber of Commerce, the OECD Advisory Committee on Business and Industry, as well as BusinessEurope on 12 October 2018 submitted a joint response to the Zero draft, emphasizing that:

> The Zero Draft Treaty and the Draft Optional Protocol … do not provide a sound basis for a possible future standard on business and human rights. Both texts incorporate inconsistent provisions that would greatly undermine countries' development opportunities, and they would create a lopsided global governance system that would result in significant gaps in human rights protection. Taken as a whole, the legal regime that the Zero Draft Treaty and Draft Optional Protocol would create is legally imprecise; divergent from established standards and laws; incompatible with the aim of promoting inclusive economic growth and investment; at risk of enabling politically-motivated prosecutions; and – crucially – not capable of serving all victims of human rights abuses.[49]

After the discussion taking place at the fourth session (15–19 October 2018), it was decided to prepare the revised draft of the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (hereinafter the first revised draft), taking into account contributions by the states and the results of informal consultations. Following the fifth session (14–18 October 2019), this draft document was again severely criticized by a number of the OEIGWG member-states. In a year, ahead of the 6th session of the OEIGWG (26–30 October 2020), the Permanent Mission of Ecuador, on behalf of the Chairmanship of the OEIGWG, released a second revised draft of the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (hereinafter the second revised draft)[50] that should serve as the basis for the State-led direct substantive intergovernmental negotiations.

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[49] The Business and Human Rights Resource Centre, Business response to the Zero Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises ("Zero Draft Treaty") and the Draft Optional Protocol to the Legally Binding Instrument ("Draft Optional Protocol") (October 2018) (Jan. 8, 2021), available at https://www.business-humanrights.org/ru/node/178108.

[50] OEIGWG chairmanship, Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, Second Revised Draft, 6 October 2020 (Jan. 8, 2021), available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_ChairRapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf.

In our view, a few of the second revised draft provisions still require a major revision, subject to the formerly submitted opinions, criticism and proposals of the states.[51] It seems reasonable to analyze the prospects of the legally binding instrument's adoption on the strength of a review of those second draft articles, which have been substantially revised in the past five years in comparison to the zero and the first revised drafts, but still may be soundly criticized both by the business community and the OEIGWG member-states.

4. Review of the Second Revised Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises

It seems advisable to single out four key aspects of the second revised draft: provisions for the rights and protection of victims (Arts. 4, 5), violations prevention (Art. 6), access to justice (Arts. 7–11) and international cooperation (Arts. 12–15). However, to grasp the legal nature of the prospective treaty, one should primarily review its goals, scope and subject matter.

Though the preamble to the second revised draft emphasizes the duty of a business enterprise to respect all human rights, it is the state that has the primary obligation to respect, protect, fulfill and promote human rights and fundamental freedoms. In its last reading, the preamble has undergone major changes, thus, the list of population groups suffering from especial and disproportional human rights violations due to TNCs' business activities has become non-exhaustive allowing for further extension, such as, for example, the inclusion of internally displaced people. However, the term "vulnerable situation" has grown more obscure given the fact that many different instruments, produced by the ILO or adopted by the U.N. General Assembly, provide guidance on the concept of vulnerability.[52]

However, in spite of some delegations criticizing the preambular paragraph at the fifth session for recalling the nine core international human rights instruments of the U.N. and the eight fundamental Conventions of the ILO, this preambular provision remained unmodified. Such an approach does not seem quite proper since consolidation of the aforementioned instruments may deprive the prospective treaty of flexibility and create problems for the states failing to ratify any of the aforementioned documents.

Moreover, the preambular paragraph contains references to Resolutions of the Human Rights Council and the Commission on Human Rights, some of which are

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[51] U.N. Human Rights Council, Report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, A/HRC/43/55, 9 January 2020 (Jan. 8, 2021), available at https://undocs.org/A/HRC/43/55.

[52] *See* U.N. General Assembly, United Nations Global Plan of Action to Combat Trafficking in Persons, preambular paragraph 3, A/RES/64/293, 12 August 2010 (Jan. 8, 2021), available at https://undocs.org/en/A/RES/64/293.

procedural in nature and seem neither entirely appropriate for the human rights treaty preamble nor are contained in other human rights treaties.

It is evident that the scope of the second revised draft is more extensive than that of the Zero draft, since the former is legally applicable to "all business enterprises, including, *but not limited* to, transnational corporations and other business enterprises" (Art. 3(1)). This article of the second revised draft is inconsistent with the Council Resolution 26/9 providing that the OEIGWG's mandate:

> shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.[53]

It is worth noting that the amendments to Article 3(3) made the provisions governing the scope of the rights to be protected under the international legally binding instrument much less vague. In particular, the expression "all human rights" was changed to:

> all internationally recognized human rights and fundamental freedoms emanating from the Universal Declaration of Human Rights, any core international human rights treaty and fundamental ILO convention to which a state is a party, and customary international law.[54]

At the same time the definition of "human rights abuse" in Article 1(2) covering "any harm" to "any person" remains controversial and vague. No less vague seems to be the concept of "environmental rights," also defined in this paragraph, subject to the fact that "the universal human rights treaties do not refer to a specific right to a safe and healthy environment."[55]

4.1. Rights of Victims

Turning to the definition of the term "rights of victims," a key aspect of the second revised draft, one should point out that the very term "victim" provided for by Article 1(1) may give rise to a legal challenge. Thus, the proposed definition lacks determinative features justifying treatment of a person or a group of people as a "victim." At the same time, textual amendments concerning the removal of those

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[53] U.N. Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights: resolution adopted by Human Rights Council, Preamble.

[54] OEIGWG chairmanship, Second Revised Draft, Art. 3.

[55] *See* U.N. Human Rights Council, Report of the OHCHR on the Relationship Between Climate Change and Human Rights, A/HRC/10/61, 15 January 2009 (Jan. 8, 2021), available at https://undocs.org/en/A/HRC/10/61.

who 'have alleged to have suffered' harm from the definition of "victims" may be noted as positive changes in this article.

Nevertheless, the provisions of the article's updated version also need clarification for categories such as "emotional suffering," "substantial impairment of their human rights" or "harm in intervening to assist victims in distress or to prevent victimization."

It is worth mentioning that the definition of the term "rights of victims" is an almost exact copy of the definition of the term "victim" in Section (A) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power:

> 1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.
>
> 2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[56]

However, the definition of "victim" cited in Article 1 of the second revised draft does not include the reference to domestic law provided for in the aforementioned Declaration ("in violation of criminal laws operative within Member States"). This approach does not seem quite proper since it is often the rules of domestic law that justify treating as "victims" such parties as the immediate family members or dependents of the direct victim.

The vital aspect of the whole international legally binding instrument – the concept of "human rights abuse" provided for in Article 1(2) of the draft – also calls for re-interpretation.

> "Human rights abuse" shall mean any harm committed by a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including regarding environmental rights[57].

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[56] U.N. General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: resolution adopted by the General Assembly, A/RES/40/34, 29 November 1985 (Jan. 8, 2021), available at https://undocs.org/en/A/RES/40/34.

[57] OEIGWG chairmanship, Second Revised Draft, Art. 1.

This definition still seems unjustifiably broad, much broader than the respective provisions of the applicable international human rights instruments. In particular the excessive "blurriness" of the aforementioned provision may be shown by the fact that it may refer to "any harm" and to "any person." The omission of a clear distinction between "human rights abuse" and "violations," provided for in Article 1(2) of the first revised draft, does not seem justified. It seems that a separate definition is to be included for human rights violations in the final text of the international legally binding instrument, since Article 11 "Applicable Law," for instance, includes such a notion as "violations of human rights," not "human rights abuse."

In spite of substantial modification to Article 4 ("Rights of Victims"), it still needs a major revision due to noticeable inconsistencies and deficiencies. Thus, the draft of Article 4 provides for "gender responsive services," a concept unfamiliar to many domestic law systems. The lack of a clear definition of this concept is one of the numerous examples where a varying interpretation of the future international legally binding instrument is possible.

It should be pointed out that the previous reading of the Article did not deal exclusively with the victims' rights (mainly with their access to legal remedies) but with the state responsibilities as well, leading to a visible ambiguity of its title. Nevertheless, the 2020 reading of Article 4 repeats the rights already recognized and secured by international law with their promotion and protection undertaken by the states, thus making such a repetition excessive. For instance, Article 4(c) provides for access to justice and a fair public hearing provided for in multiple international instruments. Thus, the right to a fair, efficient and unhindered access to justice is implied by the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966 and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. Moreover, the existing international legal instruments secure requirements for a fair trial such as a tribunal's authority (Art. 2(2b), Art. 6(2) and Art. 8(3b) of the 1966 Covenant), its independence and impartiality (Art. 14(1) of the 1966 Covenant, Art. 10 of the 1948 Declaration, and Art. 6(1) of the 1950 Convention), a court established by law (Art. 14(1) of the 1966 Covenant) etc. At the same time, the aforementioned subparagraph also provides for "environmental remediation" and "ecological restoration." These measures are of an unclear nature and are not implementable in practice, since "most instruments containing legal obligations for restoration do not contain a clear definition or further clarification on how a State party might restore an ecosystem."[58]

On the whole, it may be noted that Article 4, along with some other provisions of the second revised draft, in fact launches a special privileged remedy against human rights abuse by a TNC or another enterprise. In particular, such a detailed article may endow victims of transnational corporations' violations with more extensive rights

[58] An Cliquet & Afshin Akhtar-Khavari, *Ecological Restoration and International Law* 2 (2019).

than the victims of a state's acts. There is no doubt that such an approach may lead to discrimination of victims through differentiation of abusers. Moreover, it is common knowledge that in numerous international fora the states try to resist attempts to split the system of human rights protection and uphold its integrity, while Article 4 of the international legally binding instrument in fact aims at the opposite. Therefore, it seems reasonable to agree with M. Ajevski:

> It seems in international human rights and international criminal law this presumptive unity [normative unity due to their allegiance to the Universal Declaration on Human Rights – *added by authors*] can not only be shattered from the "outside" – by another regime taken in its broadest sense – but, and probably more dangerously, from the "inside" by one of the sibling institutions.[59]

4.2. Prevention of Human Rights Violations

The second component of the revised draft devoted to prevention of human rights violations is not aimed at the outcome of a state's actions. Instead, it addresses the immediate conduct in taking measures of providing minimal standards of aiding enterprises in exercising due care in human rights protection. Though Article 6 provides for a wide variety of prevention measures a state might take to protect human rights, its excessive rigidity deprives the state of freedom to pick the most appropriate means of performing particular duty. It seems advisable to let a state independently select the form and manner of domestic prevention of human rights violations, committed by private parties in accordance with the particulars of its legal system, financial and administrative resources, as well as regional characteristics and legal tradition.

Besides, Article 5(1) fails to clearly define the meaning of "[the states] shall regulate effectively the activities of all business enterprises domiciled within their territory or jurisdiction, including those of a transnational character." This item seems redundant since a state shall anyway control transnational corporations within its territory and jurisdiction.

On the other hand, the reference in Article 6(3)(c) to meaningful consultations with individuals or communities whose human rights "can potentially be affected by the business activities" is not protective enough either, as it diverges, for example, from the accepted norms provided in the ILO Indigenous and Tribal Peoples Convention and the U.N. Declaration on the Rights of Indigenous Peoples. The standard should not be mere consultations but "free, prior and informed consent" as it is stated in Article 10 of the above-mentioned Declaration.[60] It should not be a stand-alone right but an expression of a broader set of human rights protections

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[59] *See* Marjan Ajevski, *Fragmentation in International Human Rights Law – Beyond Conflict of Laws*, 32(2) Nord. J. Hum. Rights 87, 92 (2014).

[60] U.N. General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (October 2007), Art. 10 (Jan. 8, 2021), available at https://undocs.org/A/RES/61/295.

that secure the rights of "women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas"[61] to control their lives, livelihoods, lands and other rights and freedoms.

4.3. Ensuring Access to Justice

The next crucial component of the second revised draft provides for the victims' access to justice. Thus, Article 8, which is devoted to the responsibility of legal entities and individuals, has been substantially modified as compared to the 2018 version. Now, it directly obligates a state to provide for "a comprehensive and adequate system of legal liability" in its domestic law without, however, any reference to the nature of such a system. Moreover, this Article's provisions for the criminal liability of an entity seem especially moot, since there is no criminal liability for an entity not only in Russian Federation law, but also in the law of Eastern European countries such as, Bulgaria, Hungary or Poland.[62] Thus, on implementation, it shall bar a number of states' accession to the prospective treaty.

At the same time Article 8(7) seems far too broad since it remains unclear to what extent liability would be placed on companies for failing to prevent harm committed by another legal or natural person with whom they have a business relationship. In its present reading Article 8(7):

> States Parties shall ensure that their domestic law provides for the liability of legal or natural or legal persons conducting business activities, including those of transnational character, for their failure to prevent another legal or natural person with whom it has a business relationship, from causing or contributing to human rights abuses, when the former legally or factually controls or supervises such person or the relevant activity that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses in the conduct of their business activities, including those of transnational character, or in their business relationships, but failed to put adequate measures to prevent the abuse.[63]

may seem to impose a disproportionate responsibility on a company for failure to prevent damage caused by a third party.

Nor are the procedural aspects of access to justice quite clear: Article 7(6), which provides for the reversal of the burden of proof, needs further clarification

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61 OEIGWG chairmanship, Second Revised Draft, Art. 6.

62 *See Наумов А.В.* Уголовная ответственность юридических лиц // Lex Russica. 2015. № 7. С. 57–63 [Anatoly V. Naumov, *Criminal Liability of Legal Entities*, 7 Lex Russica 57 (2015)].

63 OEIGWG chairmanship, Second Revised Draft, Art. 6.

of the circumstances making such a reversal proper, since in its present version the provision shall be at variance with the basic proper legal procedure principle.

It seems necessary to emphasize that the existing provisions of Article 9 ("Adjudicative Jurisdiction") have been extended by the inclusion of *forum necessitatis*:

> Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair trial is available and there is a sufficiently close connection to the State Party concerned.[64]

However, the aforementioned Article aimed at legal control of the issues of the state jurisdiction over human rights violations is silent as to a possible conflict of national jurisdictions over human rights violations, giving rise to exterritorial jurisdiction that may result in violation of the principle of state sovereignty and state equality. Moreover, justification of a court's jurisdiction by "a sufficiently close connection" may cause the risk of "forum shopping" by the victim. For instance, Laurence R. Helfer finds compelling arguments against permitting such a practice:

> Permitting more than one review body to entertain the same complaint at the same time is highly inefficient, wasting scarce judicial resources and needlessly duplicating proceedings. These concerns have become even more pressing in recent years as the tribunals' workloads have increased while their resources have remained stagnant. Nor are efficiency losses compensated for by the benefits of increased dialogue over human rights norms that successive petition cases can engender[65].

Article 10, avoiding the statute of limitations in respect of human rights violations that may be qualified as a crime under international law, fails to define crimes or offences that may be included under "all violations of international law which constitute the most serious crimes of concern to the international community as a whole." Within the theory of international law, a few scholars indeed recognize the TNCs' liability for a number of really serious crimes under international law.[66] This approach is based on *jus cogens* – peremptory norms of international common law recognized by the international community as a whole as unavoidable, which may be changed exclusively by another *jus cogens* norm of the same nature. The U.N. International Law Commission initially referred to *jus cogens* such provisions as the prohibition of aggressive war,

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64 OEIGWG chairmanship, Second Revised Draft, Art. 7(8).

65 Laurence R. Helfer, *Forum Shopping for Human Rights*, 148(2) U. Pa. L. Rev. 801 (1999).

66 *See* Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35(3) Vanderbilt J. Transant'l L. 801 (2002); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111(3) Yale L.J. 443 (2001).

genocide, slave trade and piracy. Thereon, the prohibition of racial discrimination, the principles of permanent sovereignty over natural resources and self-determination were included into the list.[67] On our part, it seems worth noting that the *jus cogens* discussion now in progress within the ILC framework deals exclusively with the states.[68] As a result, it remains unclear not only which human rights violations should be treated as the "most serious crimes rousing concern of the global community" but how a TNC may be held accountable for such an offence.

As to Article 10's (9 and 10) provisions for recognition and enforcement of judgments, one should mention the limited circumstances under which recognition and enforcement may be refused at the request of the defendant. For instance, the second revised draft fails to provide that when the judgment was obtained by fraud, it may cause refusal of recognition and enforcement. In general, to our mind, the aforementioned provisions of Article 10 should be revised, subject to the terms of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of 2 July 2019.

Certain attention should be paid to Article 11(2) Applicable Law providing for:

> all matters of substance regarding human rights law relevant to claims before the competent court may, upon the request of the victim of a business-related human rights abuse or its representatives, be governed by the law of another State where:
>
> a) the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) have occurred; or
>
> b) the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled.[69]

The victim of abuse's right to demand trial on the merits by a common law court of the other Party does not seem quite proper, for instance, in a criminal case. A court shall consider a criminal case and rule pursuant to domestic law where necessary, taking into account the applicable provisions of *lex loci delictus*. Therefore, it does not seem appropriate from a legal standpoint to allow victims to choose the applicable substantive law.

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[67] *See Синякин И.И., Скуратова А.Ю.* Нормы *jus cogens*: исторический аспект и современное значение для международного права // Вестник Пермского университета. Юридические науки. 2018. № 41. С. 526–545 [Ivan I. Sinyakin & Alexandra Iu. Skuratova, *Jus Cogens: The Historical Aspect and Contemporary Value for International Law*, 41 Perm University Herald. Juridical Sciences 526 (2018)].

[68] International Law Commission, Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, Seventy-first session (29 April–7 June and 8 July–9 August 2019), A/CN.4/727 (2019) (Jan. 8, 2021), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/024/33/PDF/N1902433.pdf.

[69] OEIGWG chairmanship, Second Revised Draft, Art. 11(2).

4.4. Establishing Institutional International Cooperation Mechanisms

The fourth aspect of the revised draft is focused on international cooperation in establishing institutional mechanisms as a key cooperation feature. Thus, a provision in Article 15 of the second revised draft for a special committee seems excessive as there already exists the U.N. Conference on Trade and Development (UNCTAD), which reviews, inter alia, various aspects of the TNCs' functioning, including human rights. Along with the UNCTAD, the issues of promotion and protection of human rights and freedoms, in regards to TNCs, as well, is dealt with by the special conventional U.N. bodies: the Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, etc. Moreover, the mandate of the proposed special committee may intersect with the authority of the Human Rights Council. As a result, a new body established under the prospective treaty may cause the risk of parallel functioning and split the effort of the international community in this area.

Besides, there is a serious concern as to the proposed Committee's scope of authority. Primarily, such functions as those provided for in Item 4:

> make general comments and normative recommendations on the understanding and implementation of the (Legally Binding Instrument) based on the examination of reports and information received from the State Parties and other stakeholders;
>
> consider and provide concluding observations and recommendations on reports submitted by State Parties as it may consider appropriate and forward these to the State Party concerned that may respond with any observations it chooses to the Committee. The Committee may, at its discretion, decide to include these suggestions and general recommendations in the report of the Committee together with comments, if any, from State Parties …[70]

look like an attempt to interfere with a state's authority to interpret and apply an international treaty. A certain concern may be caused by the possibility of the procedure of the Committee's consideration of a state's report being politicized due to a high level of independence and the proposed mechanism of its composition.

At the same time, the current version of the second revised draft does not endow the Committee with the authority to consider individual complaints which would have furthered the promotion of human rights and freedoms by TNCs. The authority should also afford the Committee the ability to investigate under the international legally binding instrument. In particular, the Committee could have the authority to acquire information and investigate complaints concerning repeated human rights violations by TNC businesses in the member-states. This authority might be optional,

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[70] OEIGWG chairmanship, Second Revised Draft, Art. 15(4).

i.e. the state ratifying or acceding the treaty may declare its non-recognition of this authority. At present, this practice is successfully implemented by the Committee against Torture: a body of ten independent experts monitoring the state-parties' adherence to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The issue of the International Fund for Victims to be established under Article 15 may also give rise to dispute. Thus, pursuant to Item 7:

> States Parties shall establish an International Fund for Victims covered under this (Legally Binding Instrument), to provide legal and financial aid to victims. This Fund shall be established at most after (X) years of the entry into force of this (Legally Binding Instrument). The Conference of Parties shall define and establish the relevant provisions for the functioning of the Fund.[71]

The draft fails to clarify both the procedure of the Fund's establishment and the scope of its functioning. Nor is it clear how this Fund should be managed and financed, nor who should be entitled to benefit on its account.

On the whole, it should be noted that though a provision for institutional mechanisms is necessary for the proper implementation of a legally binding instrument, it seems advisable to discuss its content on achievement of a better consensus on the substance of the document. It stands to reason to agree with the formal position of the International Commission of Jurists, stating that:

> Rather than entirely replicating the existing system, the new treaty on business and human rights could build on the best elements of that system but move beyond them and establish practices and mechanisms to strengthen the functions and enhance the effectiveness of the international system of treaty monitoring and supervision.[72]

Conclusion

In conclusion, it should be mentioned that in the framework of an international agenda, the development and adoption of an international legally binding instrument should undoubtedly further the efficiency of prevention and mitigation of the consequences of human rights abuse in the course of business. No less important should be the improvement of a victim's access to effective remedies and strengthening cooperation within the international community concerning the issue.

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[71] OEIGWG chairmanship, Second Revised Draft, Art. 15(7).

[72] International Commission of Jurists, Comments and recommendations on the Revised draft of an International Legally Binding Instrument on Business and Human Rights (February 2020), at 12.

Having analyzed several articles of the draft, the authors hereof managed to show the substantial modification of the second revised draft as compared to the initial version. The inclusion of provisions concerning human rights activists, indigenous peoples and gender issues may be counted as a positive amendment. Moreover, modification of terminology and certain conceptual definitions evidences a fuller coordination of the revised draft with the documents developed by the Human rights Council and the regional bodies; Sustainable Development Goals; OECD Guidelines for Multinational Enterprises and, mostly, the U.N. Guiding Principles on Business and Human Rights.

Nevertheless, it should be noted that major deficiencies and insufficient elaboration of many of the second revised draft articles substantially undermine the progressive character of its provisions. Thus, some definitions are strikingly vague (e.g. "re-victimization," "the most serious crimes of concern to the international community as a whole"); there is an evident dissonance between its conceptual structure and categories of international law (e.g. "unnecessary delay" or "comprehensive and adequate system of legal liability"); there is a duplication of international agreements already adopted under the U.N. auspices; and, a lack of dispositive norms that could involve state discretion in terms of prevention human rights violations or abuses. All these gaps and shortcomings prevent treating this second revised draft as a sufficiently elaborated instrument; they will also provide the ground for submissions following the call for additional textual suggestions on the revised draft legally binding instrument.

As to the probability of adoption of the international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, it should be mentioned that disagreements on the need to eliminate a number of this draft's provisions (in particular, review of the articles governing the scope of the prospective treaty, the volume and nature of the rights to be controlled, a state's liability and jurisdiction to apply the national institutional mechanisms, etc.) may lead to three possible alternatives: either, like the Draft Code of Conduct of TNCs, it shall never come to life, or in the course of the OEIGWG long-term effort, the draft instrument shall be fundamentally changed, including its aim and scope of application; or "an equivalent to the Migrant Workers Convention, which entered into force in 1990 but has not been ratified by a single migrant worker-receiving country"[73] shall be adopted.

There is no doubt that the international legally binding instrument shall make a positive contribution to further development and improvement of the international legal mechanism for the promotion and protection of human rights and freedoms. However, one should concur with the formal opinion of the Russian Federation declared as to the Zero draft in February 2018:

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[73] Ruggie 2015, at 4.

Though quite a few of its provisions are evidently based on good will and the theory of human rights, they are still somewhat far from reality and the context of their proposed implementation. An instrument efficient as guiding principles may not prove viable as an obligation.[74]

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[74] Comments and proposals of the Russian Federation on the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights No. LW/NS, 27 February 2018.

CONFERENCE REVIEW NOTES

INTERNATIONAL SEMINAR "LABOUR RELATIONS IN THE BRICS COUNTRIES IN THE CONDITIONS OF PRECARIZATION OF EMPLOYMENT"

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Introduction

The International Seminar "Labour Relations in the BRICS Countries in the Conditions of Precarization of Employment" took place in *Tyumen, Russia* on *20–22 February 2020*. The event was hosted jointly by the Department of Labour Law and Entrepreneurship of the University of Tyumen and the *BRICS Law Journal*.

The Seminar was attended by researchers from Brazil, South Africa, Germany and Russia. The academic event became a platform for constructive debates, discussion of topical issues and knowledge-sharing. The participants noted the importance of holding the Seminar as a basis for further long-term research cooperation.

1. Labour Relations in the BRICS Countries in the Conditions of Precarization: New Challenges

According to the International Labour Organization (ILO), more than 60% of the world's working population is engaged in informal employment and 93% of global

informal employment falls on emerging and developing countries.[1] The transformations taking place in the world under the influence of globalization and digitalization significantly change the nature and organization of labour. On the one hand, these trends are a challenge to the traditional labour market and social policies, which should become more flexible in the current conditions. On the other hand, given the high prevalence of informal employment, they require the formation of a legal framework to recognize the status of workers in the face of the emergence of new employment forms, as well as to provide guarantees of adequate protection for workers.

The executive editor of *BRICS Law Journal* Professor Elena Gladun, in her welcoming remarks to the participants at the Seminar, emphasized that as the country holding the chairmanship of the BRICS in 2020 Russia is intensifying discussions and implementation of agreements in the field of research cooperation. The agenda of the Seminar confirms that cooperation in research between the BRICS countries in the social and labour spheres as well as sustainability of the social security system and the future development of employment relations are crucial. Professor Gladun expressed the hope that the proposed discussion platform would allow participants not only to exchange views on related issues, but also to suggest possible solutions.

2. Summary of the International Seminar "Labour Relations in the BRICS Countries in the Conditions of Precarization of Employment"

Elena Machulskaya, Professor in the Labour Law Department at Lomonosov Moscow State University (Russia), a member of the Committee of Experts of the ILO, a 2011–2016 member of the European Committee of Social Rights and a member of the President's Committee of the Russian Federation on the Rights of Persons with Disabilities, opened the discussions with her presentation "Human-Centered Agenda for the Future of Work." Analysing the current situation of the labour market, Professor Machulskaya noted that factors such as non-standard employment, unemployment, underemployment, informal employment, the lack of broader social transformation, and job and income insecurity can be considered to be the primary constraints on the formalization of employment and labour relations. Moreover, the formalization of labour markets is a priority for the BRICS member states, which is something that was enshrined in the BRICS Labour and Employment Ministers Declaration on Quality Jobs and Inclusive Employment Policies.[2] At the same time, the constant and coordinated actions of governments, representatives of employers and workers are important for ensuring social justice, especially in the context of the ongoing changes in the world of work caused by technological innovations. The ILO Centenary Declaration

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[1] International Labour Office, *Women and Men in the Informal Economy: A Statistical Picture* 15 (3rd ed. 2018).

[2] BRICS Labor and Employment Ministers, Declaration on Quality Jobs and Inclusive Employment Policies (Jan. 2, 2021), available at http://en.brics2015.ru/load/870097.

on the Future of Work, adopted on 21 June 2019 in Geneva during the 108th Session of the International Labour Conference, directs states to increase investment in the development of human competences, labour market institutions, and decent and stable employment.[3] The ILO considers innovations related to social insurance coverage for certain categories of workers in the BRICS countries (employees of private employment agencies, temporary workers, self-employed workers) to be the most important. In China, the employment agency is required to inform the agency worker on the content of its agreement with the user firm, including such aspects as the period of the contract, the remuneration and social insurance premiums. In India, Worker Welfare Funds, managed by tripartite Worker Welfare Boards, provide workers with old-age pensions, employment injury protection as well as health insurance and maternity benefits for women. Social insurance in Brazil covers self-employed workers (employers; "own-account" workers) and micro-enterprise workers for one or more branch offices. They may be integrated into existing social security schemes or participate in a new separate scheme. Universal social protection for future work requires closing the gaps in coverage and adapting to new forms of employment in order to ensure the universality of the human right to social security. In particular, the measures pursued by the policy should be aimed at eliminating or reducing the thresholds in relation to the minimum earnings, working hours and the duration of employment; increasing system flexibility with respect to interrupted contribution periods; enhancing the portability of entitlements and ensuring effective minimum benefit levels in order to improve the coverage of non-standard and self-employed workers.

Paul Smit, Associate Professor of Labour Relations, School of Industrial Psychology and Human Resource Management at North-West University (South Africa), drew attention to the fact that the current legislation of South Africa does not provide a definition of employment or labour relations in his presentation entitled "Who Is an Employee? An Elusive Concept in South Africa." At the same time, the ILO Employment Relationship Recommendation, 2006, provides the obligation for member states to take into account the need to distinguish between wage workers and self-employed workers when implementing national policies.[4] Yet, South African labour legislation does not contain the necessary protection measures for self-employed individuals and independent contractors. Only employees can refer disputes of unfair dismissal or unfair labour practices to the Labour Court or the Commission for Conciliation,

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[3] International Labour Conference, ILO Centenary Declaration for the Future of Work, adopted by the Conference at its One Hundred and Eighth Session, Geneva, 21 June 2019 (Jan. 2, 2021), available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_711674.pdf.

[4] International Labour Organization, Employment Relationship Recommendation, 2006 (No. 198) (Jan. 2, 2021), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312535.

Mediation and Arbitration, which is the dispute resolution body in South Africa. Moreover, all fundamental labour rights enshrined in the Constitution of South Africa[5] and the Labour Relations Act, 1995 (LRA),[6] belong only to employees. In this connection, it is extremely important to determine the employment status of individuals. Therefore, different tests have been developed to determine the actual employment status of individuals: the control test, the organization test and the dominant impression test. South African legislators decided to consolidate a comprehensive definition of just who an employee is, taking into account the fact that none of these tests could be applied in a modern workplace. Thus, in accordance with Section 213 of the LRA, an employee in South Africa is:

- Any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration;
- Any other person who in any manner assists in carrying on or conducting the business of an employer, and the terms "employed" and "employment" have meanings corresponding to that of "employee."

However, even this definition led to different interpretations and was expanded in subsequent amendments to the LRA, as well as in the Basic Conditions of Employment Act 1997[7] and the Employment Equity Act 1998,[8] according to which a person is considered an employee subject to one or more of the following conditions:

- The manner in which the person works is subject to the control or direction of another person.
- 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 organization, the person forms part of that organization.
- 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.

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5 Constitution of the Republic of South Africa, sec. 23 (Jan. 2, 2021), available at https://www.gov.za/documents/constitution-republic-south-africa-1996.

6 Labour Relations Act, 1995 (Jan. 2, 2021), available at https://www.gov.za/sites/default/files/gcis_document/201409/act66-1995labourrelations.pdf.

7 Basic Conditions of Employment Act 1997, Republic of South Africa Government Gazette 1997, Vol. 390, No. 18491.

8 Employment Equity Act 1998, Republic of South Africa Government Gazette 1998, Vol. 400, No. 19370.

• The person is provided with the trade tools or work equipment by the other person.

• The person works for or renders services to one person.

Associate Professor Smit pointed out that South African labour law makes no distinction between full-time employees, part-time employees, casual workers, foreign workers, level of seniority, male/female, etc. Additionally, when it is established that someone is an employee, then rights on all protection mechanisms in terms of all labour legislation are conferred on that person, thereby ensuring equal protection for vulnerable workers.

Olga Chesalina, Senior Researcher at the Max Planck Institute for Social Law and Social Policy (Germany), spoke on the topic "Platform Work in Russia and in EU Countries: A Comparative Study." She noted that work via Internet platforms is seen as a non-standard form of employment, in which at least three entities participate: an Internet platform, a customer and an executor. From a legal point of view, it is important to distinguish two main types of digital platform work: crowdwork and work-on-demand via apps. Crowdwork is organized using Internet platforms where internal tasks are addressed to an indefinite number of organizations, as well as individuals, regardless of their territorial distance. Moreover, all work or its results are transmitted via information and telecommunications networks, including the Internet. Work-on-demand via apps involves the implementation of both traditional services – for example, transportation services, cleaning and courier work – and highly qualified services – for example, lawyer services offered to an indefinite number of individuals, limited geographically and performed in the "real world". The emergence of work on the basis of Internet platforms is, on the one hand, the quintessence of certain trends in the labour market: triangular labour relations; transfer of economic risks from the employer to the employee; fragmentation of labour; increase in the number of self-employed, non-standard labour relations and informal employment. On the other hand, the model of work via Internet platforms became possible only due to the development of information technologies. Moreover, platform providers have begun to use completely new algorithms for the algorithmic control/management of labour processes. In Senior Researcher Chesalina's opinion, in the case of working via platforms, the algorithmic control in conjunction with the organizational management of the platform providers has completely replaced the usual signs of independent labour and the disciplinary measures applied within the framework of the labour relationship, as well as the classic forms of encouragement. An analysis of the law enforcement practices of different countries indicates that work via Internet platforms is usually regarded as independent work. Moreover, a single judicial practice on this issue has not yet been developed. There are judicial decisions recognizing employees via online platforms as employees and judicial decisions recognizing such individuals as self-employed.

Summing up, Senior Researcher Chesalina emphasized that modern information technologies have not only contributed to the emergence of new atypical forms of employment and the spread of informal employment, but also complicated the distinction between labour relations and civil law due to the emergence of new ways of exercising employer powers (algorithmic control) and the distribution of employer responsibilities among several persons.

Mauro Maia Laruccia, Adjunct Professor at the Pontifical Catholic University of São Paulo and Business Faculty of Campos Salles Integrated Faculties (Brazil), and **Dalton Tria Cusciano**, Adjunct Professor at the Getulio Vargas Foundation and Business and Insurance School (Brazil), presented a study on "Labour Relations in the BRICS Countries in the Conditions of Precarization of Employment: Brazilian Case." In Brazil, the Consolidation of Labour Laws,[9] which has been in force since 1 May 1943 in accordance with Decree Law No. 5.452, is the main legislative act of labour law in the private sector and, together with the Constitution of Brazil,[10] lays down rules on a number of labour provisions, including labour contracts. Full-time employment without contract term limitations are registered by the employer in the employee Work and Social Security Card (CTPS) system, allowing the worker to do his job only using one's own resources, providing the service without the possibility to replace himself with another person. Considering that the labour contract is concluded personally, and the work should be provided continuously, in contrast to the casual work performed by non-staff employees, a characteristic feature of the labour contract is legal submission and one-sidedness, manifested in the payment received by the employee as a result of the work performed under the labour contract. The economic crisis of 2014–2017, accompanied by a sharp decline in 2015–2016 and an increase in unemployment to 12.1%, necessitated the updating of Brazilian labour law. Adjunct Professors Laruccia and Tria Cusciano explained that on 11 November 2019 the Brazilian government launched Green and Yellow Employment Contracts to create job vacancies for young people between 18 and 29 years old, without previous job registration in CTPS, but with some decrease in labour rights. In general, atypical labour contracts may be classified as fixed-term employment contracts, temporary contracts, daily employment, part-time work, intermittent employment contracts and labour contracts. In accordance with the Consolidation of Labour Laws, fixed-term employment contracts are only allowed for up to 2 years or for 45 days with the possibility to extend them once for an equal period of time, totalling 90 days for the probation employment period.[11] In case of early termination of the

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[9] Consolidação das Leis do Trabalho [CLT] [the Consolidation of Labour Laws] (Port.) (Jan. 2, 2021), available at http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm.

[10] Constitution of the Federative Republic of Brazil (Jan. 2, 2021), available at http://www.mpf.mp.br/atuacao-tematica/sci/normas-e-legislacao/legislacao/legislacao-em-ingles/constitution-of-the-federative-republic-of-brazil.

[11] CLT Art. 445.

contract for a fixed term without cause for dismissal, the employer is obliged to pay the employee half salary for the remaining period, and the employee will have the right to access unemployment insurance. Thus, as of November 2019, the ongoing reforms have created 1.124 million official jobs in Brazil.

Syed Ali Wasif, Professor of International Law at Tyumen State University (Russia), in his presentation "Norms on the Responsibilities of Transnational Corporations Regarding Human Rights," noted that the United Nations encourage states to develop, implement and improve National Action Plans (NAPs) as part of their commitment to disseminate and accomplish the Guiding Principles on Business in the Human Rights (UNGPs).[12] NAPs cover 41 issues, in particular, the rights of workers, equality and non-discrimination, freedom of association, forced labour and modern slavery, the rights of migrant workers and financial development institutions, among others. Presenting the results of the study of NAPs for individual states, Professor Ali Wasif stressed that the Belgian NAP contains a direct indication that,

> The action plan and basic mapping specifically concern the first and third pillars of United Nations Guiding Principles on Business and Human rights, namely: the obligation of the state to protect people when third parties, including companies, violate human rights and the need to ensure that victims of human rights violations have access effective remedies.[13]

By committing to implementing international human rights standards at all levels, Chile has adopted its NAP with the main goal of promoting a culture of respect for human rights in corporate activities aimed at preventing the negative consequences of human rights violations.[14] The process of implementing the USA's NAP on Responsible Business Conduct involves more than 15 institutions, including the Department of Commerce, Department of Homeland Security, Department of Defense, Department of Justice, Department of Labor, Department of State, Department of the Treasury, Department of Agriculture and others. The U.S. NAP lacks a basis for monitoring or reporting, although in the introduction to its NAP the U.S. government states that it is "another example of an open dialogue through which the U.S. government will continue to communicate, coordinate, and assess its actions."[15] Professor Ali Wasif

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[12] United Nations Human Rights Office of the High Commissioner, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011).

[13] Plan d'action national Entreprises et Droits de l'Homme, at 11 (Jan. 2, 2021), available at https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/11/begium-nap-french.pdf.

[14] National Action Plan on Business and Human Rights Chile, at 13 (Jan. 2, 2021), available at https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/11/national-action-plan-on-business-and-human-rights_.pdf.

[15] Responsible Business Conduct: First National Action Plan for the United States of America, 16 December 2016, at 6 (Jan. 2, 2021), available at https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/10/NAP-USA.pdf.

noted, however, that the NAP under the Executive Department or Agency section clearly indicates that the U.S. government agency is responsible for implementing each action item. Moreover, the NAP does not provide any structured framework, methodology or time frame for fulfilling the obligations undertaken, nor their monitoring and evaluation.

The second day of the Seminar was organized in the format of open lectures and public discussions.

Professor **Svetlana Golovina**, Head of the Labour Law Department at Ural State Law University (Russia), Honoured Lawyer of Russia, gave a presentation on the topic "Paradoxes of Litigation in Labour Disputes";

Paul Smit, Associate Professor of Labour Relations at the School of Industrial Psychology and Human Resource Management at North-West University (South Africa), devoted his lecture to "Labor Relations in South Africa in the Conditions of Precarization of Employment";

Professor **Elena Machulskaya** delivered a talk on "Nonstandard Employment Relations – New Challenges for Social Security";

Elena Sychenko, PhD, Associate Professor in the Labour and Social Law Department at Saint Petersburg State University (Russia), discussed the study "Protecting Employees from Psychological Harassment at Work";

Konstantin Dobromyslov, Associate Professor in the Labour and Social Policy Department at the Russian Presidential Academy of National Economy and Public Administration, gave a presentation on "Development of the Pension System in Russia."

Summing up the results of the Seminar, the participants noted that the issues examined during the collective discussions have clear relevance and importance for the agenda of the BRICS member states, and all of the participants expressed their general interest in expanding academic cooperation.

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