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

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BRICS COUNTRIES' ECONOMIC AND LEGAL COOPERATION THROUGH THE PRISM OF STRATEGIC PLANNING DOCUMENTS

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The purpose of this article is to identify the core trends in economic and legal cooperation among the BRICS countries through the prism of strategic documents and normative acts adopted to define national development benchmarks in certain economic sectors. The authors carried out an analysis of strategic and policy documents adopted by Brazil, Russia, India, China and South Africa with a view to developing certain sectors of the national economy. It is pointed out that international cooperation is now considered necessary to achieve sustainable economic growth. The relevance of the research topic is dictated by the need to determine and develop approaches to improve the legal fundamentals of economic cooperation among the BRICS countries, as well as to prepare proposals for their implementation. The analysis of national programs and development priorities of the economies of the BRICS member countries has shown that the programs of Russia and China are the most comprehensive. Brazil's development priorities, the socio-economic development policy of India and South Africa's national development plan are primarily aimed at overcoming the problems inherent in these countries. Among the main areas of interest for all of the BRICS countries are agriculture, digital economy, energy, environment, education and health, finances, labour and employment, infrastructure and transportation and trade. Cooperation among the BRICS countries is likely to develop mainly through the exchange of experiences and best practices, joint research and realization of specific economic projects supervised by executive authorities, central banks and other state

bodies. An important institution for economic interaction between the BRICS countries is the New Development Bank; other successful mechanisms of economic cooperation include the Contingent Reserve Arrangement, the Energy Research Cooperation Platform and the Partnership on New Industrial Revolution.

Keywords: BRICS; legal fundamentals; economic cooperation; program; strategy; global governance; SDGs.

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Introduction

International and regional cooperation is now considered one way to achieve economic growth. Efficient distribution of resources, complementarity in topical areas of industrial and technological cooperation, expansion of production networks and markets, all have a positive impact on the economy of each individual association member country. However, the implementation of policies aimed at building economic cooperation and convergence in a wide range of areas requires a balanced approach and a careful assessment of projected benefits and costs for countries. Today, some experience has already been accumulated in matters of legal regulation of relations of integration processes, and its analysis can undoubtedly be useful for improving the legal fundamentals of economic cooperation among the BRICS countries.

Thus, the relevance of the research topic is dictated by the need to develop approaches to improve the legal fundamentals of economic cooperation among the BRICS countries and to prepare proposals for their implementation.

Economic cooperation within the BRICS framework is mainly conducted in areas where there is a convergence of member countries' interests. This is explained by the fact that BRICS is not an institutionalized association founded on an international agreement with legally binding rules. At the legal level, these areas can be identified through an analysis of their strategic planning documents, and at the applied level, through declarations and other documents of summits and meetings of heads of states and representatives of relevant ministries and departments.

1. Analysis of Development Priorities of the Federative Republic of Brazil

Brazil is the largest country in Latin America with a population of 214.7 million people[1] (6th place in the world) and one of the world's leading economies (8th place in the world by GDP, $2.05 trillion[2]). Since 2000, the country's macroeconomic stability has been improving, resulting in significant GDP growth, which peaked at $2.46 trillion in 2014. In 2015–2016, due to a number of reasons, there was an economic downturn, from which the economy is gradually emerging. Some macroeconomic stability and a favourable external environment have helped to boost consumption by stabilizing employment and raising wages. Rising commodity prices had a positive impact on government revenues. Sustained economic growth as well as attractive interest rates has resulted in foreign investment inflows. At the same time, production growth is constrained by the devaluation of the real, which is artificially kept at a low level.[3]

Despite some economic progress, large disparities in income and gender inequality remain major challenges: in Brazil, 8.7% of individuals were below the poverty line in the middle of twentieth century's second decade;[4] half of the population accounts for 90% of incomes, while the other half earns 10%; men earn 50% more on average for their work than women, and many women do not have permanent jobs.[5] The unemployment rate among young Brazilians is twice as high as the national average. Social security, pensions and the guarantee of quality education for all segments of the population are all pressing issues.

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1 Brazil Population, Worldometer (Jan. 5, 2022), available at https://www.worldometers.info/world-population/brazil-population.

2 GDP (current US$) – Brazil, The World Bank (Jan. 5, 2022), available at https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=BR&view=chart.

3 Экономика Бразилии. Состояние экономики Бразилии и ее роль в мировом хозяйстве // Ereport.ru [Brazilian Economy. The State of the Brazilian Economy and its Role in the World Economy, Ereport.ru] (Jan. 5, 2022), available at http://www.ereport.ru/articles/weconomy/brazil.htm.

4 *Сун И.* Геополитические условия создания БРИКС // Sciences of Europe. 2018. № 29-2(29). С. 35–38 [Ifan Song, *Geopolitical Conditions for BRICS*, 29-2(29) Sciences of Europe 35 (2018)].

5 OECD, OECD Economic Surveys: Brazil – Overview (February 2018) (Jan. 5, 2022), available at https://www.oecd.org/eco/surveys/Brazil-2018-OECD-economic-survey-overview.pdf.

The main social and economic policies of Brazil have been formulated in the National Strategy for Economic and Social Development. The vision of the future for the years 2020–2031 aims to catalyze all dimensions of sustainable development, conceived as a path to prosperity. The document considers the macroeconomic scenario for the next twelve years and is organized into five sections: economic, institutional, infrastructure, environmental and social. They are also detailed in a number of policies and documents, including the four year multi-annual plans, and are presented in the United Nations study on sustainable development goals through 2030.[6] Based on these and other documents, the following main priorities for Brazil can be identified:

1. *Budget consolidation*, the objectives of which are to restructure public expenditure and change the tax system in order to increase the predictability of macroeconomic policy, ensure macroeconomic stability and curb the real growth of public expenditure and public debt. Its main directions are limiting federal government spending, consolidating sub national debt and rationalizing social programs.

2. *Promoting sustainable economic growth*. One of the main directions is to create conditions to stimulate investments. To accomplish this task, the conditions for the participation of foreign companies in the implementation of economic projects are being liberalized (for example, a more flexible system of oil and gas auctions is being introduced); an Investment Partnership Program has been adopted aimed at increasing the attractiveness of the private sector in the implementation of infrastructure projects and the legislative and regulatory framework for micro entrepreneurship and the activities of individual micro entrepreneurs are being improved. In addition, conditions are being created for the functioning and performance of small and medium-sized enterprises, including simplified procedures for their registration and payment of taxes.[7]

3. *Foreign trade facilitation*. The National Export Plan was adopted, providing for:

• ensuring access to markets (negotiating market opening agreements and removing trade barriers);

• trade promotion (increasing export potential of companies);

• introduction of a new registration system (new DRAWBACK), which increases the benefit of companies from export operations;

• facilitating the tax regime by changing the Special Customs Regime of Industrial Warehouse under Automated Control of Customs Board (RECOF);

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[6] Secretariat of Government of the Presidency of the Republic and the Ministry of Planning, Voluntary National Review on the Sustainable Development Goals – Brazil 2017 (Jan. 5, 2022), available at https://sustainabledevelopment.un.org/content/documents/15806Brazil_English.pdf.

[7] *Ревенко Н.С.* Приоритеты социально-экономического развития стран БРИКС: сравнительный анализ целей и задач // Горизонты экономики. 2019. № 5. С. 79–89 [Nikolai S. Revenko, *Priorities of Socio-Economic Development of the BRICS Countries: The Goals Comparative Analysis*, 5 Economy's Horizons 79–89 (2019)].

• reforming contributions to the Social Integration Program (PIS) and the Social Security Financing Facilitation (COFINS) program by simplifying loan calculations, increasing recovery rates, and reducing tax balances in export chains.

In addition, in order to facilitate import, export and customs transit, a single-window system for foreign trade has been created (the Single Portal program – Portal Único), integrating information flows and computerized systems involved in export-import transactions.

4. *Energy*. Brazil is a major oil producer, with the vast majority of its oil being produced offshore. The hydropower industry is at a high level: HPPs (hydro power plants) generate approximately 65% of the country's electricity.[8] Nuclear power is still not widely used: only 3% of electricity is generated by NPPs (nuclear power plants).[9]

The country's economic strategy provides for the availability of infrastructure and technological base for the extraction and processing of energy resources, as well as financial support for the development of the industry, domestic market and access to foreign markets.[10]

5. *Transport engineering*. In Brazil, the automotive and aviation industries are well developed. In terms of the number of cars produced, it takes 8th place in the world;[11] this result was achieved, inter alia by, introducing high customs duties on car imports. A distinguishing feature of the local automobile industry is the production of cars capable of running on ethanol.

Embraer, one of the leaders in the global short-haul aviation market, has become known for its commercial, military, corporate and agricultural aircraft. It claims, along with Canadian Bombardier, to be third after Airbus and Boeing in terms of aircraft production.

6. *Agriculture*. Since 1990, this economic sector has developed rapidly, resulting in a two-fold increase in agricultural production over the next two decades, including a three-fold increase in livestock production.[12] Today, 33% of the country's GDP is

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[8] Maximiliano Proaño, *Brazilian energy under Bolsonaro's government: Brazil above all?*, Energy Transition, 9 November 2018 (Jan. 5, 2022), available at https://energytransition.org/2018/11/brazilian-energy.

[9] Ekaterina A. Degtereva et al., *Influence of Innovations in the Education of the BRICS Countries on the Change in Their Positions in the Ranking of the Global Innovation Index*, 1 Rostov Scientific Journal 97 (2019).

[10] *Гордиенко Н.Н., Тульчеев В.В., Жевора С.В.* Причины возникновения ЕАЭС, БРИКС И ШОС и перспективы дальнейшего сотрудничества // Экономика сельского хозяйства России. 2019. № 1. С. 87–92 [Natalia N. Gordienko et al., *Causes of EEU, BRICS and SCO and Prospect of Further Cooperation*, 1 Agricultural Economics of Russia 87 (2019)].

[11] *Бойко С.М.* Проблематика международной информационной безопасности на площадках ШОС и БРИКС // Международная жизнь. 2019. № 1. С. 1–22 [Sergei M. Boiko, *Issues of International Information Security at the SCO and BRICS Sites*, 1 International Life 1 (2019)].

[12] *Усманова К.Н.* Рейтинговая система стран БРИКС и ее влияние на инвестиционную деятельность России // Международный журнал гуманитарных и естественных наук. 2019. Т. 2. № 1. С. 105–109 [K.N. Usmanova, *The Rating System of the BRICS Countries and its Impact on Investment Activities in Russia*, 2(1) International Journal of Humanities and Natural Sciences 105 (2019)].

generated in the agro-industrial sector. Brazil is a major exporter of products such as coffee and sugar.

7. *Brazil has recently focused on the digitalization of all spheres of life*. The Law 12965/14, Marco Civil da Internet 2014, establishes the rights and duties of business entities when using the Internet, as well as principles such as network neutrality and personal data protection. High-speed communication networks are being developed at an accelerated pace (National Broadband Connection Plan program).[13]

8. *Ecology*. Brazil is concerned about climate change and is calling for urgent action. It is planned to increase the share of renewable energy sources in the energy consumption structure to 45% by 2030, including at least 23% in energy supply (excluding hydropower). Efforts are focused primarily on the development of hydropower, including the construction of small HPPs. Thus, during the construction of the Belo Monti dam on the Shingu River (a tributary of the Amazon), 40,000 people were displaced and 1,500 square kilometers of land were flooded, which affected climate change in the region.[14]

9. *Social sector*. The main areas of social policy are poverty reduction, quality education for all segments of Brazilian society, gender equality while expanding opportunities for women, employment promotion and pension reform.

The Brazilian authorities have focused on reducing poverty, improving the sustainability of social security and protecting low-income households. The Brazilian National Social Security Program, Bolsa Família, was adopted in the early 2000s, providing for the following:

• families with low incomes receive cash grants to provide schooling for children aged 7 to 14,

• more than 30 subprograms on food supply (distribution of food baskets, organization of catering in schools and enterprises, monitoring of food quality and nutrition), private agriculture development (crediting and subsidizing farmers, insurance against crop failure and non-realization of products) and support for entrepreneurial activity of low-income people are being implemented,

• financial assistance is provided to the low-budget segments of the population (assistance in gasification of houses, payment of transport expenses of schoolchildren and protection of their health, assistance in employment).[15]

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[13] *Хейфец Б.А.* БРИКС: повестка для России на саммите – 2020 в Челябинске // Российский внешнеэкономический вестник. 2019. № 1. С. 63–74 [Boris A. Kheifets, *BRICS: Agenda for Russia at the Summit – 2020 in Chelyabinsk*, 1 Russian Foreign Economic Bulletin 63 (2019)].

[14] Beatriz Mattos & Maureen Santos, *Brazil: From Brazilian Comprehensive Growth Strategy to Sustainable Development Goals*, Heinrich Böll Foundation (May 2017) (Jan. 5, 2022), available at https://www.boell.de/sites/default/files/e-paper_international_politics_g20_from_brazilian_comprehensive_growth_strategy_to_sustainable_development_goals.pdf?dimension1=ds_g20_en.

[15] Бразильская национальная программа социального обеспечения Bolsa Familia («Семейный кошелек»): опыт реализации, социальные и политические последствия / Экспертный институт социальных исследований [Expert Institute for Social Research, Brazilian National Social Secu-

In October 2016, the Happy Children program was adopted with the aim of promoting the comprehensive development of children at an early age, taking into account their family and living conditions, strengthening family and social relations, providing care for foster children and assisting pregnant women. The goal is to reach 4 million children.[16]

Among the educational programs, PRONATEC should be highlighted, which is aimed at ensuring access to technical education and promoting employment in the context of economic, social and geographical heterogeneity. It includes in-service training of teachers (Profuncionario), organization of educational courses and distance learning centres (Rede e-Tec Brazil) and the opening and updating of regional technical schools (Brazil Professionalized). The SENAI National Industrial Training Service has also been successful in providing Brazilians with technical vocational training.[17]

In 2016, President M. Temer initiated social and pension reforms, which, inter alia, set the minimum retirement age for men at 65 and women at 62, and provided full retirement benefits, to which only those civil servants who entered the civil service before 2003 are currently entitled.

The current President of the country, J. Bolsonaro, agreed with that approach, stating that without it, Brazil would go bankrupt in 2022–2023.[18]

The modernization of Brazil's labor legislation, aimed at increasing labor market flexibility, is well under way. As a result, contracts concluded within the framework of collective agreements are legally binding and employee contributions to the social security and pension systems are increased, among other things.

2. Analysis of Development Priorities of the Republic of India

For decades, the development of the country's national economy was based on five-year plans. The last twelfth plan ended in 2017, and its target slogan was "Fast, comprehensive and sustainable growth of the country's economy," with an annual GDP growth target of 8%. However, Narendra Modi's government, which came

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rity Program Bolsa Familia (Family Wallet): Implementation Experience, Social and Political Implications, Expert Institute for Social Research] (Jan. 5, 2022), available at http://eisr.ru/upload/iblock/c10/c10cd39591a88aa6e77cea122ab9e537.pdf.

16 Secretariat of Government of the Presidency of the Republic and the Ministry of Planning, *supra* note 6.

17 *Ревенко Н.С.* Гуманизация сотрудничества в рамках БРИКС: образование, здравоохранение, культура // Горизонты экономики. 2018. № 4. С. 69–75 [Nikolai S. Revenko, *The Humanization of Cooperation Within the BRICS Framework: Education, Healthcare, Culture*, 4 Economy's Horizons 69 (2018)].

18 Болсонару обещал Бразилии крах без пенсионной реформы // NEWS.ru. 14 февраля 2019 г. [Bolsonaro Promised Brazil Collapse Without Pension Reform, NEWS.ru, 14 February 2019] (Jan. 5, 2022), available at https://news.ru/v-mire/bolsonaru-obeshal-bankrotstvo-brazilii-bez-pensionnoj-reformy/.

to power in 2014, decided not to make five-year plans. The Planning Commission was dissolved and the National Institution for Transforming India (NITI Aayog) was established in its place.

In November 2018, the Strategy for New India[19] was released, which purposed to replace the five year plans mentioned above with an aim to accelerate economic growth to 9%–10%, make the country a $4 trillion economy by 2022–23 and achieve the United Nations Sustainable Development Goals (U.N. SDGs). The Strategy for New India has been disaggregated under four sections: Drivers, Infrastructure, Inclusion and Governance. In the section named drivers, the document lists economic growth, employment and labor reforms, technology and innovation, industry, modernizing agriculture, travel, tourism, and hospitality as key priorities. Priorities in infrastructure include energy, surface transportation, railways, civil aviation, ports, shipping and inland waterways, logistics, digital connectivity, smart cities for urban transformation, and so on.

In addition, since 2014, the Make in India program, initiated by Prime Minister N. Modi, has been implemented. Its objectives are to promote investment in the country to stimulate innovation, create employment opportunities and improve professional skills.[20] One of the most important tasks set is to increase the share of the production sector from 16% to 25% by 2025.[21] Many sectors of the economy that were previously only open to investment from Indian public and private sources are now open to investment from abroad. The majority of these are under the normal regime, which means that investors do not need to obtain government approval.

Based on the statements of Indian leaders and the Make in India program, the main areas of focus for the Government's development can be identified:

1. *Industrial and innovative development*. Viewing India as a platform for innovation, the Indian leadership has made it a strategic goal to become a highly developed country. To achieve it, new solutions are needed that go beyond the national science, technology and innovation policy launched by the Government in 2011.

In recent years, efforts have focused primarily on the development of industry, especially the telecommunications sector, and the introduction of Institutes of Chemical Technology (ICT) in all areas, including the banking sector. The result of these efforts was the rapid establishment of the world's largest financial system, the opening of more than 300 million bank accounts in record time and the formation of self-sufficient "smart" villages, which is more promising than transforming urban conglomerates into "smart" cities, as other countries have done.

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[19] NITI Aayog, Strategy for New India @ 75 (November 2018) (Jan. 5, 2022), available at https://www.niti.gov.in/sites/default/files/2019-01/Strategy_for_New_India_0.pdf.

[20] Bolsonaro Promised Brazil Collapse Without Pension Reform, *supra* note 18.

[21] Tina Sachdeva et al., *Transforming India – A Vision Towards a New Paradigm for Socio-Economic Growth in India Through Financial Services*, 6(5) Indian J. Res. 326 (2017).

The Indian economy is also focused on the development of innovation, such as the digitization of face-to-face transactions, as well as streamling the tax process and broadening the tax base, all of which should lead to more inclusive Indian economic growth.[22] According to the World Economic Forum's Inclusive Development Index, which defines a country's position in the world, India was ranked 62nd in 2018 among seventy-four countries in transition.[23]

The main objective of the Make in India program is to stimulate foreign direct investment (FDI) and, as a result, to ensure economic growth in a population growth environment that is sustainable. India's economic growth in recent years has served as a driver of economic growth for the South Asian region, which has become the fastest growing region in the world.[24] Today, India is the third largest economy in the world, and PwC experts believe it has a good chance of surpassing the United States and becoming the world's second largest market by 2050.[25]

As a result of the Make in India program, substantial financial resources were raised in the country between 2014 and 2016. Thus, the inflow of FDI into the automotive sector grew by 72%,[26] aviation by seven times,[27] computer and software production by 409%[28] and energy by 25%.[29] Significant financial injections have also been made into the construction, biotechnology sector, port facilities, rail transport, road construction, tourism, food industry.

However, FDI inflows to India have been lower than expected due to a lack of electricity and skilled labor, inadequate transport infrastructure, complex legislation and a large number of outdated labor laws and regulations. In addition, trade unions

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22 World Economic Forum, The Inclusive Development Index 2018: Summary and Data Highlights (Jan. 5, 2022), available at http://www3.weforum.org/docs/WEF_Forum_IncGrwth_2018.pdf.

23 *Id*.

24 Andrew Wright, *8 things you need to know about India's economy*, World Economic Forum, 1 October 2017 (Jan. 5, 2022), available at https://www.weforum.org/agenda/2017/10/eight-key-facts-about-indias-economy-in-2017.

25 By 2050, six of the world's seven largest markets will be in developing countries, including Russia, PricewaterhouseCoopers (Jan. 5, 2022), available at https://www.pwc.ru/ru/press-releases/2017/2050.html.

26 Department of Heavy Industries (Jan. 5, 2022), available at https://drive.google.com/file/d/0B-Tv7_upCKANU1JxQWdYMDAzNGM/view.

27 Department of Industrial Policy and Promotion and Ministry of Civil Aviation, Aviation Sector – Achievement Report (February 2017) (Jan. 5, 2022), available at https://drive.google.com/file/d/0B-Tv7_upCKANVVM0bDFBT1lyYjA/view.

28 Department of Industrial Policy and Promotion and Ministry of Electronics & Information Technology, Electronics & IT Sector – Achievements Report (November 2016) (Jan. 5, 2022), available at https://drive.google.com/file/d/0B-Tv7_upCKANTF9YY0RZY0N0S00/view.

29 Department of Industrial Policy and Promotion and Ministry of Power, Power Sector – Achievements Report (December 2016) (Jan. 5, 2022), available at https://drive.google.com/file/d/0B-Tv7_upCKANV1E1dkd3QnVtVzQ/view.

are very influential in the country, trying to impose their conditions on owners, and often resulting in labor conflicts with high financial losses.

2. *Power*. Over the years, India's energy policy has focused on increasing per capita energy consumption. Nearly 304 million citizens have no access to electricity, putting energy security at the forefront. India seeks to achieve double-digit growth in national income by providing clean energy access to all its citizens, which is seen as a key factor in the poverty reduction program.

India is the third largest consumer of oil, behind only the United States and China. For instance, in 2016, it grew by 8.3% to 212.7 million tons, compared to the world's average growth rate of 1.5%.[30] According to India's executive authorities, the country's crude oil production in 2014–2015 was 2,817 million tons, of which 68.5% was produced by a state-owned company, Oil and Natural Gas Company (ONGC) and 31.5 by the private sector, and the volume of production on land and offshore was approximately equal. In the same year, natural gas production was 2,5319 bcm (mostly offshore, 74.0%), of which 73.7% was produced by ONGC and 26.3% by private companies.[31]

Thermal sources (63.2%) are mainly used for power generation in India: hard coal (54.3%), gas (7.0%), lignites (1.7%) and oil (0.2%). Hydroelectric power plants produce 12.7% of total energy, with renewable sources accounting for 22.0%.[32] Electricity production grew dynamically from 2009–2015 (the largest increase occurred in 2014–2015 at 8.43%), but then the pace began to slow down. In 2018–2019, the growth rate was only 3.57%.[33]

In 2017, the National Energy Policy (NEP) was developed and is set to last until 2047, providing for the universal electrification of the country by 2022, a reduction of oil imports by 10% by this year compared to 2014–2015 and a 33–35% reduction of emissions into the atmosphere by 2030 compared to 2005.[34] Much attention is paid here to renewable energy production technologies. As a tropical country, India is rich in them. Thus, it is the fourth largest wind power producer in the world (32848 MW in 2017), second only to China (188232 MW), the United States (89077 MW) and Germany (56132 MW).[35] Solar power has great potential in India because it has

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30 Oil consumption grows fastest in India, The Economic Times, 20 June 2017 (Jan. 5, 2022), available at https://economictimes.indiatimes.com/markets/commodities/news/oil-consumption-grows-fastest-in-india/articleshow/59228022.cms.

31 About Exploration & Production, Ministry of Petroleum and Natural Gas (Jan. 5, 2022), available at http://petroleum.nic.in/exploration-production/about-exploration-production.

32 Power Sector at a Glance ALL INDIA, Ministry of Power (Jan. 5, 2022), available at https://powermin.gov.in/en/content/power-sector-glance-all-india.

33 *Id*.

34 NITI Aayog, Draft National Energy Policy (June 2017) (Jan. 5, 2022), available at https://www.niti.gov.in/writereaddata/files/document_publication/NEP-ID_27.06.2017.pdf.

35 Global Wind Energy Council, Global Wind Statistics 2017 (February 2018), at 3 (Jan. 5, 2022), available at https://gwec.net/wp-content/uploads/vip/GWEC_PRstats2017_EN-003_FINAL.pdf.

an ideal combination of high insolation and population density. The sharp decline in prices for wind and solar technologies in 2010–2015 by approximately 60% and 52% per KWh, respectively, increased the profitability of their use.[36] In addition, approximately 750 million tons of biomass, unsuitable for cattle feeding, which can replace crude oil, coal and LNG, are available in India annually.

3. *Infrastructure development*. In 2018, India was ranked 44th in the World Bank's Logistics Performance Index (LPI) and 53rd in infrastructure development among 160 countries.[37] Since infrastructure is a key element in the development of the Indian economy, the challenge is to bring it up to world standards.

According to the Department of Industrial Policy and Development of India, the volume of FDI in the construction sector (construction and modernization of settlements and residential premises, implementation of development projects) from April 2000 to March 2019 amounted to $25.05 billion. The logistics sector is growing at an average annual rate of 10.5% and is expected to reach $215 billion by 2020.[38] In order to ensure the sustainable development of the country, infrastructure projects will need to be implemented by 2022, which will cost approximately $77.73 billion.[39]

With the world's second-largest road network in terms of length (as of December 2018, its total length was 5,483,000 km, including 120,000 km of national highways and 155,000 km of regional highways), and a total railway length of 1,232,366 km, India is seeking to raise funds for new construction. As of November 2018, 5,759 km of roads have been constructed under the Make in India program.

4. *Digital economy*. Started in 2014, Digital India is going to transform the country into a "digital society and knowledge economy"[40] by providing citizens with online access to public services, digital infrastructure accessible to every citizen and high-speed Internet access. Comprised of three blocks (Digital Infrastructure as the main benefit for every citizen, Management and Services on Demand, Digital Empowerment of Citizens), this program concerns such areas of work as access to high-speed Internet, digital identification of citizens, cyber security, digitalization of government services and businesses, expansion of services through mobile and online platforms, development of cashless electronic transactions, increasing digital literacy of the population, providing digital resources and services in the Indian languages, among others.[41]

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[36] NITI Aayog, *supra* note 34.

[37] Global Ranking 2018, The World Bank (Jan. 5, 2022), available at https://lpi.worldbank.org/international/global.

[38] Infrastructure Sector in India, India Brand Equity Foundation (Jan. 5, 2022), available at https://www.ibef.org/industry/infrastructure-sector-india.aspx.

[39] Indian Infrastructure: Industry Analysis, India Brand Equity Foundation (Jan. 5, 2022), available at https://www.ibef.org/industry/infrastructure-presentation.

[40] Lilia S. Revenko & Nikolai S. Revenko, *Sectoral Cooperation of the BRICS Countries: Potential and Implementation Priorities*, 12(4) The World of New Economy 67 (2018).

[41] *Id*.

5. *Education*. India's education policy is marked by low average literacy rates: in 2015, the adult literacy rate was estimated at 72.2%,[42] and the United Nations Development Program's Education Performance Index ranked India 128th in 2017, after Uganda, Cameroon, Democratic Republic of the Congo, Ghana and Cambodia.[43] The quality of education remains low, despite the fact that there are about 700 universities in the country with about 20 million students.[44]

India's policies in the field of education are aimed at improving the quality of education and teaching, as well as increasing transparency in management. In New Delhi, it is acknowledged that modern education should incorporate new technologies, but that the traditions of Indian society must be respected.

India already has a good record in education. The most interesting aspects of them are:

• National Skill Qualifications Framework, aimed at the introduction of a pan-Indian skills and knowledge certification system.[45]

• The Apprentices Act, which was amended in 2014 to encourage employers to hire more apprentices. According to Act, the share of apprentices may reach 10%. As a result, their number increased from 270,000 to 310,000 in the fiscal year 2015–2016.[46]

• The Skill India program initiated in 2015 by the Ministry of Labor and Employment and the Ministry of Training and Enterprise Development. Its goal is to train and improve the qualifications of 500 million young citizens by 2020.[47]

• The Labor Market Monitoring System (LMIS), which is used to forecast demand for personnel.

India has also been very successful in reforming its vocational education system. The previous system was ineffective (in 2012, with a 25% plan, it covered only 3% of high school students).[48] The new system of employment promotion, called Resource

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[42] India – Adult literacy rate (ages 15+) (Jan. 5, 2022), available at https://knoema.ru/atlas/Индия/topics/Образование/Грамотность/Индекс-грамотности-взрослого-населения.

[43] Ranking of countries by level of education (Jan. 5, 2022), available at https://nonews.co/directory/lists/countries/education.

[44] Краткий сборник лучших практик подготовки кадров стран БРИКС [Brief Collection of Best Practices for Training BRICS Countries] (Jan. 5, 2022), available at https://rda.worldskills.ru/storage/app/media/Reports/2015_BRICS%20best%20practices/2015_BRICS%20best%20practices_report_RU.pdf.

[45] Note: It consists of ten levels, allowing employees, based on their knowledge and skills, to obtain the required level of competencies, find work and improve their qualifications.

[46] Department of Industrial Policy and Promotion and Ministry of Skill Development and Entrepreneurship, Skill Development Sector – Achievements Report (December 2015) (Jan. 5, 2022), available at https://drive.google.com/file/d/0B-Tv7_upCKANdGw5M09NVU9ZRnc/view.

[47] Rumani S. Phukan, *Skill India Programme – Objectives, Features & Advantages*, India Map, 25 December 2014 (Jan. 5, 2022), available at https://www.mapsofindia.com/my-india/society/skill-india-a-new-programme-to-be-launched-in-march-2015.

[48] Анализ зарубежного и отечественного опыта по осуществлению совместных проектов и программ по взаимодействию с научными организациями, работодателями, общеобразователь-

Integration for Sustainable Employment (RISE) has some key elements. It covers a significant part of the population, has a system of information on the labor market, as well as sectoral personnel councils.

If implemented education policies do not fail, India's potential in the global community can be ensured as early as the 2040s.

6. *Social issues*. India is a country with high social inequality: 1% of the richest citizens own 53% of the country's national wealth. For comparison, in the United States, for example, 1% of the richest people own 37.3% of the national wealth. However, 224 million people in India are poor.

A major challenge is the large population: 1.38 billion people,[49] or 17.9% of the world's population, of which 29.7% are under the age of 15 and 64.9% are between the ages of 15 and 64.[50] This age structure is progressive, typical of developing countries with relatively low life expectancy and high mortality rates. The number of men outnumbering women (51.6% and 48.4%, respectively)[51] determines the socio-political atmosphere in society, forcing the authorities to take measures to stabilize it.

Another pressing problem is the high unemployment rate. The number of young people with professions alone exceeds 5 million people, including about 1.5 million graduates of educational institutions.

One of the main directions in the social sphere is the improvement of quality of life indicators. Special emphasis is placed on the agricultural sector, given that it employs more than 50% of the workers[52] and the government provides subsidies to farmers, insuring them against seasonal weather events.

The country's budget provides for the payment of social subsidies under the implementation of a program to provide housing for all segments of the population

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ными организациями, организациями высшего образования, социально ориентированными некоммерческими организациями, международными образовательными центрами для подготовки и переподготовки квалифицированных рабочих и специалистов среднего звена (молодежи, взрослого населения, инвалидов и лиц с ограниченными возможностями здоровья): отчет (2017) [Analysis of Foreign and Domestic Experience in Implementing Joint Projects and Programs for Interaction with Scientific Organizations, Employers, General Education Organizations, Higher Education Organizations, Socially Oriented Non-Profit Organizations, International Educational Centres for the Training and Retraining of Skilled Workers and Mid-Level Professionals (Youth, Adults, Disabled People and People With Disabilities): Report (2017)] (Jan. 5, 2022), available at https://globaledu.ru/files/Информация.pdf.

49 Счетчик населения Индии // CountryMeters [India Population Counter, CountryMeters] (Jan. 5, 2022), available at https://countrymeters.info/ru/India.

50 Распределение населения по возрастным группам // CountryMeters [Age Distribution of Population, CountryMeters] (Jan. 5, 2022), available at https://countrymeters.info/ru/India#population_density.

51 *Id*.

52 Budget 2018: Leaning in on the social sector – Reforms and infrastructure initiatives also augur well for the industry and services, The Financial Express, 2 February 2018 (Jan. 5, 2022), available at https://www.financialexpress.com/budget/budget-2018-leaning-in-on-the-social-sector-reforms-and-infrastructure-initiatives-also-augur-well-for-the-industry-and-services/1045967.

by 2022, and the National Health Program is expected to cover ten categories of families based upon income.

The strategic goal of the country is to eliminate gender and caste inequality.

7. *Corruption*. According to the Global Corruption Barometer, India's corruption index in 2017 was 69%, which is higher than that of other BRICS countries (Russia 34%, China 26%, Brazil 11% and South Africa 7%).[53] As noted by experts, the main reasons for the current state of affairs are the low level of spiritual and moral values in the education system, low civil service salaries and inadequate punishment for the crimes committed.[54]

To combat corruption, a right to information law has been adopted, providing for the provision of all kinds of information to citizens, such as information on the use of tax collection funds. In addition, a Central Vigilance Commission (CVC) has been established to which information about corruption must be reported. These measures, however, are not sufficient, so the idea of creating special courts for the rapid sentencing of corruption cases has been put forward.

3. Analysis of Development Priorities of the People's Republic of China

China has the most developed economy among the BRICS member states. In terms of share in gross world product, calculated at purchasing power parity, China surpassed the United States back in 2014, and by the end of 2017, the gap was already more than two percentage points (17.71% for China and 15.50% for the United States).[55]

The development of the national economy of China is based on five-year plans, as well as strategic long-term plans up to 2050. For a long time, the drivers of China's economic development have been heavy industry, services, retail trade and the promotion of Chinese interests abroad. In March 2016, the 13th Five-Year Plan was approved, aimed at achieving a "new normal" of economic growth and restructuring the economy to address the economic and technological imbalances inherent in China. The Plan implies significant changes that open up new opportunities and, at the same time, new rules for domestic and foreign investors.

The Plan is based on the following five principles:

• Innovation. It should become the main driver of economic development, change the economic structure of the country and transition to a better growth

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53 Global Corruption Barometer: Citizens' Voices from Around the World, Transparency International, 14 November 2017 (Jan. 5, 2022), available at https://www.transparency.org/news/feature/global_corruption_barometer_citizens_voices_from_around_the_world.

54 Corruption in India, Civil Service India (Jan. 5, 2022), available at https://civilserviceindia.com/subject/Essay/corruption-in-india1.html.

55 Natalia Khmelevskaya, *Russia's Trade Policy Priorities in the Orbit of BRICS Economic Cooperation*, 2(10) Econ. Pol'y 93 (2015).

model to replace the mass production model that served as the basis for China's economic boom.

• Coordination. Tasks for coordinating the actions of state agencies in implementing the program of growth and the maximal use of the possibilities of the domestic and world markets are set.

• Green growth. Measures have been taken to address the environmental degradation resulting from China's rapid development, environmental protection and environmentally friendly economic growth.

• Opening. Unlike in previous years, when economic policy was aimed at the development of individual sectors of the economy and free economic zones, attention is now paid to the balanced development of the economy as a whole, as well as bringing rural areas up to the level of cities.

• Inclusive development. It involves raising the standard of living of the general population to ensure China's prosperity and improving the quality of social services provided.

Improving the quality of goods and services and their competitiveness in the world market and positioning the country as a leading generator of innovation are set as medium-term objectives for growth. There is a need to shift from production to consumption, to reform the financial system, to adjust the regional development policy, to change the demographic policy and to ensure that sustainable foundations for relations in society are formed.

While the Chinese authorities aim at integrated development, it is possible to identify areas that are given special attention:

1. *Transportation*. China is rapidly developing its transportation infrastructure, which includes high-speed railways (HSM), highways and ships.

Initiated at the beginning of the twenty-first century, the Program of creating 25–30 thousand km of HSM by 2020 was implemented in a very short period of time. Its implementation was facilitated by the measures taken by the Government to stimulate economic growth and increase employment during the economic crisis. As a result, 19,000 km of HSM were built in ten years, and the Chinese network became the largest in the world.[56] At the end of 2018, out of a total length of 131,000 kilometers of railways, the HSM length was 29,000 kilometers. Starting with Alstom (France), Bombardier (Canada) and Kawasaki (Japan), the Chinese were able to raise their technological level and successfully compete in foreign markets. Nowadays, 850 Fusin trains are capable of speeds of up to 350 km per hour and carry passengers via HSM.

China has the world's largest road network (4.77 million km in 2017), including over 140,000 km of national highways at the end of 2018. According to Chinese Minister of Transport Li Xiaopeng, it increased by 86,000 km in 2018, including 6,000

[56] *Зуенко И.* Дорогой длинною: Как в Китае построили высокоскоростное чудо света // Lenta.ru. 2 марта 2016 г. [Ivan Zuenko, *The Long Road: How China Built a High-Speed Miracle*, Lenta.ru, 2 March 2016] (Jan. 5, 2022), available at https://lenta.ru/articles/2016/03/02/railways.

km of highways. Of these, 20,000 km are of national and provincial importance. The 3,425 km Trans-Chinese Motorway, which connects the port of Lianyungang on the Pacific coast of China to the Khorgos checkpoint on the border with Kazakhstan, is part of the international transport corridor "Western Europe-Western China."[57]

In China, measures are taken to support the national shipbuilding industry in order to encourage the construction of heavy ships: subsidies and soft loans are provided, shipyards are allowed to issue shares to obtain liquid funds, and a Shipbuilding Industry Support Fund was established in 2017. According to the plans, 60–65 vessels for liquefied natural gas transportation are to be built in China during the 13th Five-Year Plan. In addition, four supertankers and ten dry cargoes are under construction by the order of a leading sea cargo carrier, COSCO. In 2016, it was decided to build, with the assistance of Finland, a Chinese icebreaker capable of breaking ice up to 1.5 meters thick.[58]

The growth of ocean transport required the construction of new ports and the reconstruction of existing ones. In early 2017, there were 2,317 berths in China, capable of accommodating vessels with deadweight of over ten thousand tons.[59]

2. *Power engineering*. Providing the industry with oil products, gas and electricity, improving power efficiency and power saving and using new sources and technologies for power storage are among the priorities of the Chinese leadership. China National Petroleum Corporation (CNPC), China Petroleum & Chemical Corporation and China National Offshore Oil have been successfully operating in the domestic and foreign markets for many years, including CNPC's participation in the Yamal LNG project for natural gas production and processing.

Electricity is generated mainly at thermal power plants: in 2017, 64.7% was produced at TPPs where coal was used as fuel, 18.6% at HPPs, 4.7% at wind power plants and 3.9% at NPPs.[60] As a result of this imbalance, cities experience a large amount of airborne pollutants, acid rain and smog in cities.[61] In order to eliminate it, China is developing nuclear power: in addition to the 44 nuclear reactors currently in operation, thirteen more are under construction.[62] Great attention is paid to the use of alternative power sources.

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57 Project "Western Europe–Western China" and "Aktau–Beineu" (Jan. 5, 2022), available at https://europe-china.kz/links.

58 Морской транспорт КНР // Морские вести России [Sea Transport China, Maritime News of Russia] (Jan. 5, 2022), available at http://www.morvesti.ru/analitics/detail.php?ID=71138.

59 Note: Deadweight is the difference between full and empty displacement.

60 2017 electricity & other energy statistics, China Energy Portal, 14 June 2018 (Jan. 5, 2022), available at https://chinaenergyportal.org/en/2017-electricity-other-energy-statistics-update-of-june-2018.

61 *Сидорович В.* Угольная энергетика в Китае: прошлое, настоящее и будущее // RenEn.ru. 5 июля 2017 г. [Vladimir Sidorovich, *Coal Energy in China: Past, Present and Future*, RenEn.ru, 5 July 2017] (Jan. 5, 2022), available at http://renen.ru/coal-energy-in-china-past-present-and-future.

62 IAEA statistics: China, Power Reactor Information System (Jan. 5, 2022), available at https://pris.iaea.org/pris/CountryStatistics/CountryDetails.aspx?current=CN.

In 2016, the 13th Five-Year Renewable Power Development Plan for 2016–2020 was adopted. It is assumed that by 2020, the share of gas in electricity production will be 10%, that by 2030, instead of coal, the main power sources in China will be non-fossil power sources and gas, and that by 2045, they will produce up to half of the electricity.[63]

3. *Digital economy*. China has the largest number of Internet users in the world (829 million as of 30 June 2019), compared to 22.5 million in 2000. This is 1.48 times higher than in India, 2.83 times higher than in the United States and 7.57 times higher than in Russia, which occupy the 2nd, 3rd and 8th places on the list, respectively.[64] The Chinese company Alibaba, with its 552 million customers, is one of the world's leaders in electronic commerce. The number of parcels sent out daily is 12 million, which is four times higher than that of Amazon (3 million).[65] In 2015, a record was set for the number of transactions in one day – $ 14.3 billion.[66]

Internet banking was rapidly developed: the national payment system, UnionPay and platforms Alipay (1 billion users) and Tenpay were created. The latter two provide 92.65% of mobile payments, of which Alipay's share was 53.78% in Q4 2018 and Tenpay's share was 38.87%.[67]

In 2015, a 10-year Internet Plus plan was launched, aimed at the digitalization of the national economy with an emphasis on power, agriculture, finance, public services, logistics, e-commerce, transport, environment and other areas.[68] It is expected that the implementation of the plan will allow "uniting mobile Internet, cloud computing, big data and Internet of Things with modern production, will promote development of electronic commerce, industrial networks and Internet banking, will help Internet companies to improve their international presence."[69]

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63 Неископаемые источники энергии обеспечат 30% энергопотребления КНР к 2050-му // ЭКД. 17 августа 2017 г. [Non-Fossil Energy Sources Will Provide 30% of China's Energy Consumption by 2050, EKD, 17 August 2017] (Jan. 5, 2022), available at https://ekd.me/2017/08/neiskopaemye-istochniki-energii-obespechat-30-energopotrebleniya-knr-k-2050-mu.

64 Top 20 Countries with the Highest Number of Internet Users, Internet World Stats, 30 June 2019 (Jan. 5, 2022), available at https://www.internetworldstats.com/top20.htm.

65 Michael-Jon Lazar, *Step Aside, Amazon: Alibaba Statistics Prove It's the Emperor of Ecommerce*, Ready-Cloud Suite, 16 October 2018 (Jan. 5, 2022), available at https://www.readycloud.com/info/step-aside-amazon-alibaba-statistics-prove-its-the-emperor-of-ecommerce.

66 Gillian Wong et al., *Inside Alibaba, the Sharp-Elbowed World of Chinese E-Commerce*, Wall Street Journal, 2 March 2015 (Jan. 5, 2022), available at http://www.wsj.com/articles/inside-alibaba-the-sharp-elbowed-world-of-chinese-e-commerce-1425332447.

67 China 3rd-party payment overview for Q4, China Internet Watch, 2 April 2019 (Jan. 5, 2022), available at https://www.chinainternetwatch.com/28962/3rd-party-payment-q4-2018.

68 Guidance on Actively Promoting Internet Plus Action Plan by the State Council, Beidou, 21 July 2016 (Jan. 5, 2022), available at http://en.chinabeidou.gov.cn/c/83.html.

69 China unveils Internet Plus action plan to fuel growth, State Council of the People's Republic of China, 4 July 2015 (Jan. 5, 2022), available at http://english.gov.cn/policies/latest_releases/2015/07/04/content_281475140165588.htm.

If it goes as per the intention of the developers, it should contribute to the creation of a new economic model and become an important engine of economic and social development and innovation.

The main objectives of work under the Internet Plus action plan are: modernization of the Internet structure (construction and modernization of high-speed landline and mobile communication lines: it is planned to increase the average speed of the Internet in cities to 50 Mbit/sec and in rural areas to 12 Mbit/sec by 2020[70]); removal of obstacles to the introduction of information and communication technologies; development of trade and services using the Internet; development of hardware and applications for cloud computing, big data and Internet of Things; training of specialists and increasing digital literacy of the population.[71]

4. *Agriculture*. This economic sector, the leading industry of which is crop production, serves as the basis for the textile and food industries. Efforts are being aimed at modernizing production, improving food security and developing new technologies, including biotechnology, to increase yields and productivity. To this end, producers are granted tax breaks and subsidies for purchasing agricultural machinery, granting loans is simplified and state minimum purchase prices for cereals are set.[72] The role of authorities in the development of the industry, the use of the latest technologies in agricultural production, the establishment of fixed prices for agricultural products, the increase in financing of agricultural production and the increase in productivity through the use of modern tillage methods have all been proclaimed as top priorities. Other priority tasks include increasing agricultural production and ensuring import substitution in connection following the imposition of an embargo on its import into the PRC by some states.[73]

Digital technologies are being introduced in agriculture at a rapid pace: programs for finding information on the phenotypes of plants and animals purchased, information collection and processing systems, cloud computing, big data processing, sensors, decision-making models, systems for early warning of plant diseases and

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[70] China Academy of Information & Communication Technology, Broadband China Strategy and its Implementation (Jan. 5, 2022), available at http://www.unescap.org/sites/default/files/Broadband%20China%20Strategy.pdf.

[71] Guiding Opinions on Actively Promoting the "Internet Plus" Action Plan, United States Information Technology Office (Jan. 5, 2022), available at http://www.usito.org/news/state-council-provides-guidance-internet-plus-action-plan.

[72] Хозяйство КНР // Научный словарь-справочник [PRC Economy, Scientific Dictionary] (Jan. 5, 2022), available at https://spravochnick.ru/geografiya/kitayskaya_narodnaya_respublika_geograficheskoe_polozhenie_knr/hozyaystvo_knr.

[73] *Мищенко И.В., Боровиков А.В.* Аграрная политика Китая и возможности ее применения в России // Экономика. Профессия. Бизнес. 2018. Т. 1. № 1. С. 38–42 [Inna V. Mishchenko & Artem V. Borovikov, *The Agrarian Policy of China and the Possibility of Its Application in Russia*, 1(1) Economy, Profession, Business 38 (2018)].

logistics chain management, robotics for quality control and tracking of production movement and so on.[74]

5. *Biotechnology*. There are nearly 900 enterprises and 40 bioparks in China specializing in biotechnology. The development of this industry was stimulated by tax and financial incentives, as well as financing through the National High Technology Research and Development Program and the National Basic Research Program. The basis of this branch of the national economy is biopharmaceuticals (580 companies, whose products account for approximately 7% of the world market for medicinal biopreparations).

China also ranks second in the world after the United States in terms of investment in biotechnology for agriculture. A highly advanced research base in this area has been established.

Four Chinese research organizations are among the world's top ten: "Institute of Crop Science" (germplasm harvesting and storage research, molecular improvement, wheat quality assessment, high-yield resistant varieties of rice and soybeans[75]), Jiangnan University (research in food technology, biological and synthetic colloids), National Research Center for Agricultural and Rural Development of Zhejiang University and the Beijing Genomics Institute (molecular genetics to increase livestock productivity and plant productivity).

6. *Education*. Raising the general education level of the population and training qualified personnel is another of the strategic priorities of the Chinese leadership. The main documents that determine the policy in this area are the Law on Vocational Education, adopted in 1996, and the National Plan for the Medium and Long-Term Reform of Education and Development for 2010–2020. The last document sets goals to reach the level of 40% of people who have completed higher education, 90% for full secondary and 95% for incomplete secondary (9 years).[76]

China has a very effective system for training specialists with higher education: according to QS, six Chinese and four Hong Kong universities are among the 200 best in the world.[77] However, due to the limited number of available seats, only a small percentage of school graduates study in universities. Nevertheless, the quality of

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[74] Martina Gerst et al., *China's 'Internet Plus' Strategy: Context and Market Opportunities for European Small Businesses*, EU SME Centre, 12 June 2016 (Jan. 5, 2022), available at http://www.eusmecentre.org.cn/article/china%E2%80%99s-%E2%80%98internet-plus%E2%80%99-strategy-context-and-market-opportunities-european-small-businesses.

[75] About ICS, Brief Introduction, Institute of Crop Science of CAAS (Jan. 5, 2022), available at http://ics.caas.cn/en/aboutics/briefintroduction/index.htm.

[76] National Plan for Medium- and Long-Term Education Reform and Development (2010–2020) (July 2010) (Jan. 5, 2022), available at https://planipolis.iiep.unesco.org/sites/default/files/ressources/china_national_long_term_educational_reform_development_2010-2020_eng.pdf.

[77] QS World University Rankings, Top Universities (Jan. 5, 2022), available at https://www.topuniversities.com/university-rankings/world-university-rankings/2019.

secondary special education remains lower than in other countries. Many schools, especially in autonomous regions, lack financial resources.

Of the positive developments in China, one could note the experience of implementing continuing education programs for staff, the development of standards for university teachers, the widely used practice of internships at enterprises and state institutions, the involvement of practitioners in the educational process and financial assistance programs for low-income families.

7. *Health*. China has made huge strides in recent years. If in the 50s of the twentieth century, life expectancy was 35 years, then in 2003 it was 71 years[78] and in 2019, it grew to 75 years for men and 78 for women.[79] This result was achieved as a result of an increase in health expenditures (according to World Bank statistics, in 2016 they amounted to 4.98% of the country's GDP[80]) and the resulting factors. The China Health 2030 project has set goals to promote healthy lifestyles and quality of service. It is planned to provide primary health care to 100% of the population.[81]

In China, besides classical medicine, traditional medicine based on other teachings and practices has found widespread application. Considering it a national treasure and scientific discipline, China promotes traditional medicine abroad and even initiated a discussion on this subject between the state representatives during its BRICS presidency in 2017.

8. *Demographics*. Recent problems include an aging of the population, a declining share of people of working-age, a sex-ratio imbalance (51.9% of the male and 48.1% of the female population[82]) and rising wages. As a result, the pension burden on the state budget increased and the incentive to expand businesses in China decreased.

This forced the authorities to review the "One Family, One Child" family planning policy, which had been in place for over 35 years, and to make the transition to the new "One Family, Two Children" demographic policy, which went into effect in January 2016. At the same time, according to experts, China was late in making this decision, and we should expect a drop in the total fertility rate due to a decrease in the number of reproductive-aged women.[83]

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78 *Самойлова А.В.* Здравоохранение в Китае: от нищеты к новациям // Концепт. 2017. Т. 37. С. 129–132 [Anastasia V. Samoilova, *Health in China: From Poverty to Innovation*, 37 Concept 129 (2017)].

79 China – Statistics, World Health Organization (Jan. 5, 2022), available at https://www.who.int/countries/chn/ru.

80 Current health expenditure (% of GDP), The World Bank (Jan. 5, 2022), available at https://data.worldbank.org/indicator/SH.XPD.CHEX.GD.ZS.

81 Samoilova 2017.

82 Счетчик населения Китая // CountryMeters [China Population Counter, CountryMeters] (Jan. 5, 2022), available at https://countrymeters.info/ru/China.

83 Iulia A. Kupriianova & Anna I. Ianishevskaia, *New Population Policy in China: "One Family – Two Children,"* 4(2) Demographic Review 53 (2017).

In addition to the above-mentioned fields, China's priorities also include the development of different areas such as aerospace engineering, machine tools, new materials and so on.

4. Analysis of Development Priorities of the Republic of South Africa

According to a report from the Executive Planning Commission that was published in June 2011, the main challenges to South Africa's socio-economic development are:

- not enough working people;
- poor quality of school education for black residents;
- inappropriate distribution of infrastructure, its inadequacy and poor maintenance;
- space allocation that inhibits inclusive development;
- unsustainable resource intensity of the economy;
- the inability of the public health system to meet demand and maintain quality;
- inadequate and poor quality public services;
- high corruption levels;
- society separation.[84]

After analyzing the situation in South Africa, OECD experts concluded that a key factor in high income inequality is low employment, especially among black South Africans. Job creation is constrained by regulatory restrictions on the entry of new suppliers capable of offering better and cheaper services, as well as collectively agreed-upon wages increased on a legislative basis. The employment problem is complicated by the fact that far too many people with low qualifications live in areas where employment opportunities are limited. Due to the lack of a centralized infrastructure for active labor market policy, the implementation of existing programs is fragmented.[85]

Small and medium-sized businesses, the development of which is key to employment growth, suffer from a high level of regulation. The state-owned economic sectors, primarily electricity and transport, lack capacity and material resources. They were also characterized by cross-subsidization, insufficient regulatory control and limited access to infrastructure by independent service providers. Although the government invests significant amounts in these sectors, there is a shortage of electricity, which affects the pace of economic development. There are far too many public companies in this country whose operations are ineffective.

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[84] National Planning Commission, Our Future – Make It Work: National Development Plan 2030, Executive Summary (2012) (Jan. 5, 2022), available at https://www.gov.za/sites/default/files/Executive%20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf.

[85] OECD, OECD Economic Survey: South Africa (July 2015), at 15 (Jan. 5, 2022), available at https://www.oecd.org/economy/surveys/South-Africa-OECD-economic-survey-overview.pdf.

These and other tasks are expected to be solved in the course of the implementation of the National Development Plan until 2030 (NDP),[86] which was adopted in 2012 and is divided into three phases. Its main objective is to eliminate poverty and reduce inequality by 2030, "by drawing on the energy of its people, developing an inclusive economy, building capacity, and increasing the ability of the government and leaders to work together to solve complex problems."[87]

The critical condition for achieving the set objectives, as stressed in the document, is to improve the quality of public services. To do so, provinces must focus on identifying and overcoming obstacles, as well as strengthening the role of local authorities in effectively fulfilling their roles.

The Plan has formulated three main development priorities:

• increasing employment through faster economic growth;

• improving the quality of education, skills development and innovation;

• building the State's capacity to play a developmental and transformative role.

It is assumed that sustainable employment growth requires accelerated economic development as well as addressing such issues as poor educational quality and spatial patterns of settlement. The implementation of these tasks is of great importance for increasing production and exports, as well as for investment inflow and the competitiveness of products and services.

According to the Plan, by 2030 the number of employed people in the country should increase by 11 million compared to 2010 (from 13 million to 24 million people) and per capita income from R 50,000 to 120,000. To achieve these results, South Africa's GDP growth rate should be 5% on average. The share of fixed capital by 2030 should be approximately 30% and investments in the public sector should be 10% of GDP.[88]

To achieve the set goals, it is necessary:

• to increase exports, which should be done by developing such areas as mining, construction, agriculture, food processing, higher education, tourism and business services;

• to implement infrastructure projects with an emphasis on construction and reconstruction of commercial ports, energy, telecommunications and water facilities;

• to reduce the cost to companies, especially small and medium-sized enterprises, of meeting regulatory requirements;

• to support small businesses by improving coordination among various institutions, including those that provide funding, and the construction of public and private incubators;

• to promote public and private procurement to develop national industry and create jobs;

• to attract investments, especially private ones.

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[86] National Planning Commission, *supra* note 84.

[87] *Id*.

[88] *Id*.

In addition, the social cohesion of the population needs to be strengthened. If the elimination of racial discrimination in property ownership and control of the economy are not accompanied by a reduction in poverty and inequality, the results will be lower than expected. The racial and gender composition of the population must be taken into account when appointing people to various positions.

Accelerating development also requires active support from all segments of the population, putting the public interest above short-term, narrowly focused objectives, and radically improving government performance. The plan therefore focuses on such issues as political freedoms and human rights; social opportunities provided by education, health, public transport and other public services; social security and safety nets; an open society, access to information and a culture of trust; economic opportunities, work, consumption, exchange, investment and production.[89]

Other tasks set out in the Plan are as follows:

1. *Eradication of destitution and poverty*. Reduction in the number of households with monthly income below R419 per person from 39% to zero and a reduction in the Gini index of income distribution inequality from 0.69 to 0.60.[90] To achieve them, it is envisaged:

• to implement active labor market policies and incentives to increase employment, especially among young people and in sectors with predominantly low-skilled labor;

• to involve up to 2 million people in state employment programs by 2020;

• to develop first aid services and expand health programs at the regional level;

• to expand social security services and public employment schemes to support areas with low income and high crime rates;

• to implement a nutrition programs for pregnant women and young children, expand development services for children under five years of age, improve the quality of school education and vocational training in colleges;

• to promote housing construction and more compact urban development;

• to finance public transport development.

2. *Accounting for the demographic situation in the country*. Today, the share of the South African population that is of working age (15–64 years old) is 65.8%, and up to the age of 15 years, it is 28.5%.[91] This age structure is usually characteristic of countries with rising incomes, faster productivity, higher savings and higher living standards. At the same time, this may lead to destabilization, employment problems, increased violence and crime and alcoholism.

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89 National Planning Commission, *supra* note 84.

90 *Id*.

91 Счетчик населения Южно-Африканской Республики// CountryMeters [Republic of South Africa Population Counter, CountryMeters] (Jan. 5, 2022), available at https://countrymeters.info/ru/South_Africa#population_2019.

Added to this is the problem of declining fertility rates (today the population of South Africa is growing by 1% per year, and is projected to grow by 0.5% per year by 2030). The proportion of the country's rural population is declining: in 2012, 60% of South Africans lived in urban areas, a figure that will rise to 70% by 2030.[92] The population of Cape Town and the Etekwini Urban District, which has its administrative centre in Durban, is growing at the fastest rate, creating serious planning and supply challenges in many parts of its administration.

In this regard, the objectives are to achieve a 50% literacy rate, improve the school system, provide children and young people with a good education, enable them to acquire professional skills and assist school leavers in finding jobs. In addition, there is a need to improve nutrition and health systems as well as education standards, to increase access to complementary and higher education and to increase labor mobility.

3. *Environmental protection*. The energy sector of South Africa predominantly uses coal: 70% as a primary energy source and 90% for electricity generation. Mining companies use energy-intensive ore beneficiation processes (depending on how GDP is measured – in nominal terms or at purchasing power parity, energy intensity in South Africa is one and a half to four times higher than the OECD average). As a result, a large amount of carbon dioxide is emitted into the atmosphere, negatively affecting the climate.[93] In order to improve the situation, it is planned to use more gas and technologies that reduce emissions from coal as energy sources. The goal has been set to develop the renewable energy sector in accordance with the 2010 Integrated Resource Plan.

4. *Economy digitalization*. South African leadership is aware that information and communications technology (ICT) is now an important factor in economic activity, creating opportunities for production, productivity and job creation. Although the country now has 32.6 million internet users (56.2% of the population), which is more than the African average (39.8%) and nearly as many as the world average (57.3%),[94] South Africa has lost its position as a continental leader in Internet and broadband connectivity. Prices for ICT services and equipment remain a serious obstacle.

The Plan provides for the development of an ICT strategy and action plan, the key elements of which should be:

• implementation of the strategy by all government agencies and economic sectors,

• stimulating growth and innovation in the sector by attracting public and private investment, especially in upgrading and expanding broadband networks, application development and content,

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92 National Planning Commission, *supra* note 84.

93 *Id*.

94 Internet Penetration in Africa, Internet World Stats (Jan. 5, 2022), available at https://www.internetworldstats.com/stats1.htm.

• encouraging the sharing of mobile infrastructure, given the limited frequency spectrum allocated to it and the individual elements of the fibre optic network,

• public-private partnership development,

• increasing the digital literacy of the population by introducing benefits and incentives for the development of applications for use in health and education.

5. *Agriculture*. The development of this sector is viewed from the angle of employment growth. It is expected that agricultural production could be established in South Africa by 2030, creating 1 million new jobs. This requires the expansion of irrigated agriculture: through more efficient use of existing water resources and the development of new water supply schemes, the area of irrigated land on which almost the entire crop is grown can be increased from 1.5 to 2 million hectares.[95] Within the agricultural sector, the farm industries engaged in the cultivation of olives, citrus fruits, grapes, nectarines, cotton, apples, cane sugar, bananas and vegetables receive notice for their high potential and job creation.

5. Analysis of Development Priorities of the Russian Federation

The main document defining the development of Russia's national economy and social sector is Presidential Decree No. 204 of 7 May 2018, "On National Goals and Strategic Objectives for the Development of the Russian Federation" until 2024.[96] In order to ensure its implementation, the Government of the Russian Federation approved in 2018 the Main Activities for the period up to 2024.[97] The Ministry of Economic Development of the Russian Federation issued a report that forecasts the socio-economic development of the Russian Federation for the period up to 2024.[98]

The strategic development plans were adjusted as they were in the other BRICS countries, taking into account the crisis caused by COVID-19. The five main areas of future development were stated in the Presidential Decree No. 474 of 21 July 2020,

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95 National Planning Commission, *supra* note 84.

96 Указ Президента Российской Федерации от 7 мая 2018 г. № 204 «О национальных целях и стратегических задачах развития Российской Федерации на период до 2024 года» // Собрание законодательства РФ. 2018. № 20. Ст. 2817 [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, Legislation Bulletin of the Russian Federation, 2018, No. 20, Art. 2817].

97 Основные направления деятельности Правительства Российской Федерации на период до 2024 года // Правительство России [The Main Activities of the Government of the Russian Federation for the Period up to 2024, Government of the Russian Federation] (Jan. 5, 2022), available at http://static.government.ru/media/files/ne0vGNJUk9SQjlGNNsXlX2d2CpCho9qS.pdf.

98 Прогноз социально-экономического развития Российской Федерации на период до 2024 года // Законы, кодексы и нормативно-правовые акты Российской Федерации [Forecast of the Socio-Economic Development of the Russian Federation for the Period Until 2024, Laws, Codes and Regulations of the Russian Federation] (Jan. 5, 2022), available at https://legalacts.ru/doc/prognoz-sotsialno-ekonomicheskogo-razvitija-rossiiskoi-federatsii-na-period-do-2024/.

titled "On National Goals and Strategic Objectives for the Development of the Russian Federation" until 2030: preservation of the population; health and well-being of people; opportunities for self-realization and development of talents; a comfortable and safe living environment; decent, efficient work and successful entrepreneurship and digital transformation.

These documents indicate the following as national development goals:

1. Ensuring sustainable natural growth of the population of the Russian Federation and increasing life expectancy. Implementing the Concept of Demographic Policy of the Russian Federation for the period up to 2025[99] resulted in a 15% reduction in total mortality, a 34.1% reduction in infant mortality and a 2.4 times reduction in maternal mortality in 2017 compared to 2008, as well as an increase in life expectancy from 67.6 years in 2007 to 72.7 years in 2017. At the same time, due to the decline in the number of women of reproductive age, there has been a downward trend in fertility.

The objective is to increase fertility and life expectancy to 78 years and to do so by 2030. The main tool for achieving this goal will be the implementation of a number of government programs and national projects.[100] In particular, in order to increase the birth rate, it is planned to use the mechanism of financial support of families, to create conditions for parents with young children to work, to stimulate the birth rate in regions with low birth rates, to create opportunities for vocational training and retraining of parents during holidays to care for children and to increase access to housing for families with children. It is expected that these measures will result in the growth of the labor force from 75.8 million people in 2018 to 76.3 million people in 2024.[101]

2. Ensuring sustainable growth in real incomes of citizens, as well as a level of pension provision above the inflation rate, thereby halving the poverty rate. Since 2000, wage growth has been steadily upward for the past 13 years (except for the crisis year of 2009). As a result, the real incomes of citizens increased and the poverty rate decreased. Due to economic difficulties after the introduction of sanctions against Russia by Western countries, real wages fell by 9% in 2014–2016 and the poverty rate rose to 13.3% in 2015. After the economy recovered from the crisis, wage growth resumed.

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[99] Указ Президента Российской Федерации от 9 октября 2007 г. № 1351 «Об утверждении Концепции демографической политики Российской Федерации на период до 2025 года» // Собрание законодательства РФ. 2007. № 42. Ст. 5009 [Decree of the President of the Russian Federation No. 1351 of 9 October 2007. On Approval of the Concept of Demographic Policy of the Russian Federation for the Period Until 2025, Legislation Bulletin of the Russian Federation, 2007, No. 42, Art. 5009]

[100] Note: Programs Development of Health Care, Social Support of Citizens and national projects Demography, Healthcare.

[101] Forecast of the Socio-Economic Development of the Russian Federation, *supra* note 98.

Pensions are regularly indexed: in 2016, the average pension amounted to 12,081 rubles, in 2017 – 12,426 rubles, in 2018 – 13,360 rubles, in 2019 – 14,102 rubles.[102] It is assumed that from 2019, the insurance pension for non-working pensioners will increase annually on average by 1,000 rubles, and by 2024 it will reach 20,000 rubles.

Sustainable economic growth based on increased labor productivity and accelerated socio-economic development of the regions should become the basis for achieving this objective. At the federal level, support will continue to be provided to certain categories of citizens, the minimum wage will be set annually and the wages of public sector employees will be indexed.

3. Improved housing conditions for at least 5 million families annually. This task is expected to be accomplished mainly by reducing mortgage loan rates below 8% and developing housing construction.

4. Accelerated adoption of digital technologies into the economy and social sphere. In 2017, Russia was ranked 45th out of 176 countries in the International Telecommunication Union's ICT Development Index, following Uruguay, the Czech Republic and Portugal, ahead of Italy, Hungary, Poland and all of the BRICS countries, but significantly behind the United States, Japan, Belarus, Bahrain, Qatar, the UAE and most EU members.[103] In 2018, 80.86% of Russian residents had access to the Internet,[104] and there were 157.43 mobile phones per 100 residents[105] (which is a good indicator). Cyber security remains a fairly serious problem.

5. Creation of a highly productive export-oriented sector in the basic economic sectors, primarily in manufacturing and agro-industrial complexes, developed on the basis of modern technologies and provided with highly qualified personnel.

Based on these objectives, the following have been identified as the most important areas of development of the Russian national economy in the coming years: demography, housing and the urban environment, education, health care, labor productivity and employment support, small and medium-sized enterprises and support for individual entrepreneurial initiatives, digital economy, safe and quality roads, international cooperation and export, ecology, science and culture.

In 2021, against the backdrop of the coronavirus pandemic, the state leadership recognized that the country's main problems are poverty and demographics. Development goals in these areas are critical for the state.

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[102] Средняя пенсия в России в 2018–2019 году // Bankiros [The Average Pension in Russia in 2018–2019, Bankiros] (Jan. 5, 2022), available at https://bankiros.ru/wiki/term/srednaa-pensia-v-rossii.

[103] ICT Development Index, International Telecommunication Union (Jan. 5, 2022), available at https://www.itu.int/net4/ITU-D/idi/2017/index.html.

[104] Percentage of individuals using the Internet, International Telecommunication Union (Jan. 5, 2022), available at https://www.itu.int/en/ITU-яD/Statistics/Pages/stat/default.aspx.

[105] Mobile-Cellular Telephone Subscriptions Per 100 Habitants, International Telecommunication Union (Jan. 5, 2022), available at https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx.

6. Research Results

The analysis of national programs and development priorities of the economies of the BRICS member countries has shown that the programs of Russia and China are the most comprehensive. Brazil's development priorities, the socio-economic development policy of India and South Africa's national development plan are primarily aimed at overcoming the problems inherent in these countries. Among the main areas of interest for all of the BRICS countries are agriculture, digital economy, energy, environment, education and health, finances, labour and employment, infrastructure and transport, trade. It is important to note that these areas of cooperation were also mentioned in the Moscow Declaration of the 12th BRICS Summit and in the New Delhi Declaration of the 13th BRICS Summit.

Economic cooperation within the BRICS framework is mainly conducted in areas where there is a convergence of member countries' interests. This is explained by the fact that BRICS is not an institutionalized association founded on an international agreement with binding rules.

Cooperation between the BRICS countries is likely to develop mainly through the exchange of experiences and best practices, joint research and realization of specific economic projects supervised by executive authorities, central banks and other state bodies. An important institution for economic interaction between the BRICS countries is the New Development Bank. Other successful mechanisms of economic cooperation include the Contingent Reserve Arrangement, the Energy Research Cooperation Platform and the Partnership on New Industrial Revolution. All of these areas of interaction are consistently developed in statements following the results of the annual summits of the BRICS leaders, as well as on specialized tracks.

A promising area of cooperation in BRICS, which is of undoubted interest to Russia, is nuclear and hydropower. In all countries, electricity has so far been generated mainly from power plants that use coal as their fuel source and whose combustion products have a negative impact on the environment. Therefore, the energy policies of the BRICS countries are focused on the use of clean energy sources with a greater emphasis on renewable sources. We believe it would be expedient for the Rosatom State Atomic Energy Corporation to continue promoting the construction of Russian nuclear reactors in the BRICS countries and for the Ministry of Energy to continue promoting Russia's ability to build small hydropower plants.

All of the BRICS countries pay great attention to the development of transport infrastructure, and China's One Belt, One Way initiative envisages the creation of transport corridors. It appears that the main direction of cooperation in the transport sphere will be the formation of transport and logistics corridors, including the active development and use of the Northern Sea Route, which is economically important for Russia (it will allow the country to build ports in the north) and other countries (using this corridor reduces the time and cost of delivery of goods from Asia to Europe).

Cooperation in the field of aviation is of practical importance for the BRICS countries. The task of Russia's Ministry of Transport for the coming years should be cooperation in the areas provided for in the partnership agreement on local airlines dated 26 July 2018.

All of the BRICS members pay great attention to improving food security, increasing the yield of agricultural products and livestock productivity, adapting plants to local weather conditions and increasing planting yields and soil fertility. In this regard, information and experience exchange, technology development and training under the BRICS Agricultural Research Platform Coordination Centre are promising. It is important for Russia's Ministry of Agriculture to take an active part in the work of this center, as well as learn from the experience of the Brazilian Agricultural Research Corporation and establish cooperation with Chinese centers specializing in biotechnology.

As all of the BRICS countries are actively introducing information and communication technologies into all areas of life, cooperation in the digital economy is important. Russia's Ministry of Digital Development, Communications and Mass Media should intensify joint research in areas such as cloud computing and information storage, big data, Internet of Things, blockades, telemedicine, fifth generation mobile networks, smart cities and transportation.

Russia's Ministry of Natural Resources should intensify cooperation under the Memorandum of Understanding on Cooperation in Environmental Protection of 18 July 2018 to exchange information and conduct joint research on clean energy sources, water resources, air quality, climate change, circular economy and other topics.

One of the main objectives of all the BRICS countries is to improve the quality of education. The Russia's Ministry of Education and Science should study the experience of BRICS partners in this area, particularly in creating systems for monitoring the labor market, forecasting human resources needs and strengthening ties between educational institutions and government organizations, enterprises and companies. In addition, it would be advisable to promote the mobility of teachers and students and the implementation of double diploma programs, as well as to intensify interest among young people to seek employment by increasing the attractiveness of careers in professional occupations.

Cooperation among BRICS appears to have promising prospects in the health sector. All of the member countries face similar problems, such as the quality of medical services in rural areas, high rates of infectious, cardiovascular, cancer and other diseases. The main task for the coming years appears to be to implement the action plans developed within the BRICS working groups, including those on HIV/AIDS, tuberculosis and cardiovascular diseases. Joint research on diagnosis of treatment methods and epidemic control, as well as the exchange of experience in training specialists in traditional medicine is also promising.

Culture and tourism are soft power tools that can be used to strengthen the BRICS partnership. Russia's Ministry of Culture should strengthen cooperation by organizing festivals and days of culture and cinema, exchanging creative teams, facilitating contacts between libraries and museums, exchanging copies of documents and materials on the history and culture of member states. Rostourism, the Russian Federal Tourism Agency, should contribute to the growth of tourist flows from BRICS countries to Russia and from Russia to BRICS countries.

Of course, the COVID-19 pandemic has had a significant impact on the short and medium term outcomes of the BRICS countries' development goals. However, it is encouraging that at the end of 2021, the BRICS leaders noted that, despite the ongoing challenges posed by the COVID-19 pandemic, BRICS has maintained momentum and continuity, while consolidating its activities in the spirit of consensus.

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ADMINISTRATIVE OFFENSE PROCEEDINGS AND PRE-TRIAL DISPUTE RESOLUTION IN THE BRICS COUNTRIES

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This article offers a comparative analysis of the particularities of the implementation of proceedings in cases of administrative offenses and pre-trial dispute resolution in the BRICS member states. The article observes that in the BRICS countries, the issues of pre-trial dispute settlement are resolved using the same mechanisms: negotiation and conciliation procedures, including mediation. The implementation of these mechanisms is possible by the parties to the dispute themselves, with the participation of third parties such as proxies or legal representatives who may be interested in carrying out the procedures, and with the services of independent, professional mediators. The article draws attention to the fact that the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa belong to different legal families, which undoubtedly is a feature of the legal regulation of their administrative offense proceedings as well as of their pre-trial dispute resolution. The article finds that Roman law largely influenced all of the BRICS countries, with the exception of India, whose legal system was formed under the influence of English law, and that the versatility of legal regulation does not allow one to speak fully about the balance of administrative legislation in the studied areas. Furthermore, it is characteristic of all of the BRICS countries that administrative punishment cannot be aimed at humiliating the human dignity of a natural person, causing him or her

physical suffering, nor can it be aimed at damaging the business reputation of a legal person. The similarity of the tasks of the administrative legislation of the BRICS countries is noted, which should include the protection of the subjective rights and interests of citizens, ensuring the rule of law, the protection of public order and public safety, and the prevention of administrative offenses. Through the discourse presented by the authors, the concept of an administrative offense is revealed; the acts regulating the proceedings in cases of administrative offenses are considered, as well as the tasks and principles established by national legislation in this direction. Furthermore, the similarities and differences in the legal regulation of proceedings in cases of administrative offenses and pre-trial settlement of disputes are revealed.

Keywords: administrative responsibility; administrative offense; proceedings in cases of administrative offenses; BRICS countries; pre-trial dispute resolution; legal systems of the BRICS countries.

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Introduction

In the modern world, various interactions between countries are characteristic, and cooperation within BRICS is no exception.

BRICS is an association of five countries, which includes the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa. Such an agreement was made possible due to the high transformation of world development and an obvious shift in the balance of power

in the international arena, as well as the rapid rise of the participating countries as growing economies. The complexity of the system of international relations and the adoption of final decisions within the framework of many international institutions (the United Nations, the World Trade Organization, among others) also formed the basis for the creation of a new center of influence in world politics. In this regard, it appears that the role and significance of the BRICS will only increase annually and acquire a clearer framework as indicated by decisions taken jointly by the BRICS member states in various fields of activity. As a result, it is important to seek out new, more dependable world partners capable of exerting an ever greater influence over decisions made on a global scale.

BRICS, an interstate association that is seeking to define its own political, economic and legal course of development, has become a new center of such development. Today, BRICS is regarded as a progressive form of institutional international cooperation as well as a new format of international relations, including in the legal sphere, which is reflected, among other things, in the inclusion of parliamentarians in the partnership dialogue within the framework of this organization as well as the participation of representatives in the discussion and decision of complex issues of integration and development. As a result, the particulars of these emerging interstate relations are based on international law. And states, as the main actors in international relations and subjects of international law, are attempting to diversify the nature of their interactions, such as by organizing cooperation in a variety of areas.

The main circumstance justifying the existence of BRICS, as recognized by experts, is the format of cooperation to achieve the economic goals and objectives of partners. At the same time, some perplexity is caused by the fact that cooperation in the legal sphere is not a priority area of joint activities between the countries, despite some integration steps having been taken in this direction. Thus, the signing of the Protocol of Intent between the Supreme Courts of the BRICS countries in 2009 was aimed at organizing mutual cooperation, identifying a general vector of development of actions aimed at implementing the exchange of information and establishing specific procedures between the higher courts of Brazil, Russia, India and China, as well as disseminating information about such activities within the jurisdiction of a particular state. However, the Strategy for Economic Partnership of the BRICS countries, the Memorandum of Understanding and Cooperation in Science, Technology and Innovation and other joint documents of the participating states allow us to conclude that guidelines have been established for the implementation of large-scale projects, as well as the beginning of movement in this direction, which, in the long run, will make the issue of compatibility of legal regulation in the BRICS countries relevant and arouse practical interest in the implementation of tasks arising in the legal field of these states.

1. Features of the Construction of the Legal Systems of the BRICS Member States

In this section, we will look at the differences in doctrinal and legislative traditions among the BRICS member states in the sphere of administrative jurisdiction, which may be explained by the particularities of the construction of legal systems and their affiliation with one or more legal families.

Brazil, in relation to belonging to a legal family, belongs either to the Latin American legal system, or to a separate Latin American group within the Romano-Germanic legal system, depending on which of the existing classifications the researcher adheres to. The details of legal regulation and a significant portion of the latter are prioritized in countries of this group. The regulation of the social sphere stems from a serious social burden of significant importance on the public sector in Brazil.

Nonetheless, the national legal system of Portugal, based on the traditions of Roman law, had a significant impact on the formation of Brazilian law. At the same time, one or more branches of law were influenced by the legal systems of other countries: for example, constitutional law was influenced by the U.S. legal system, which established the regulation of the federal structure and the delineation of powers between different levels of government; criminal law was influenced by French and Italian criminal law; and German civil law made it possible to codify the norms of Brazilian civil law.

The legal system of modern Russia is attributed to the Roman-Germanic legal family, a characteristic feature of which is the division of branches of law into public and private law. As a result, the presence of branches of law and the presence of codes in the structure, such as the Code of the Russian Federation on Administrative Offenses, is an important criterion for referring Russia to this legal system. In the context under consideration, in addition to the specified codified act, decrees of the President of the Russian Federation, decrees and orders of the government of the Russian Federation, acts of federal executive bodies, as well as laws of the constituent entities of the Russian Federation, should be classified as normative legal acts. Given the special nature of the branch of administrative law, the institutions of administrative law are at its center, and the main element of legal reality is the rule of law. All this helps to make the main point, which is determining the legal nature of the legal system, and the source of law as a law or a normative legal act. As a result, the aforementioned characteristics lead to the conclusion that there is a high degree of commonality between the Russian legal system and Romano-Germanic law.

On the one hand, modern Russian law partially replicates older Soviet models in a transformed form, and, on the other hand, Russian law has absorbed the features of many institutions of foreign law and the norms of international acts.

India, like the majority of modern states, is currently implementing administrative reforms based on the ideas of new public management and the concept of "good

governance." The set of reforms that began in 1991 are fundamental to modern Indian governance.

The Indian legal system prioritizes the characteristics of the common law family, in which, in addition to laws, judicial precedent and, in general, the practice of courts creating law, rather than simply applying it, play a significant role. The difference between the Indian legal system and the English legal system lies in the Constitution, signed in 1949, which establishes the legal system as a distinct legal pyramid. The incorporation of legal custom into the law and even the Constitution of the country can be seen here. As a consequence, the modern Indian legal system is characterized by pluralism in which Hindu law (family property, joint property and so on) and Muslim law (questions of personal status) are applied in the spheres of action for which the state has issued special laws.

The uniqueness of the legal system of the People's Republic of China (PRC) is expressed in a number of factors, including the special socialist character of the PRC, which is a kind of combination of socialist and market principles. The modern law of the PRC is complex, largely contradictory and, yet, in its own way, an integral phenomenon, which reflects various signs: a socialist approach to regulating relations with traditionalism, modern legal forms with anachronism and vagueness of legal norms with a relative certainty of party attitudes according to their understanding and so on. According to the official position of the PRC leadership, the country has formed a "socialist legal system with Chinese characteristics."

The legal system of the Republic of South Africa has a mixed character, combining elements of the Anglo-Saxon and Romano-Germanic systems of law (in the Roman-Dutch version), as well as the customary law of African tribes. English law has had a significant impact on administrative law, as well as legal proceedings in this country, whereas Roman law is unique in terms of family, inheritance and property law.

Thus, from the presented analysis, it can be seen that Roman law influenced all countries to a greater extent, with the exception of India, whose legal system was formed under the influence of English law.

The above provisions, characterizing the legal systems of the BRICS member states, clearly show the complexity of the legal palette that representatives of states in the international arena have to deal with.

In describing the state-territorial structure and national legal systems, we note that three out of the five states (Brazil, Russia and India) are federal, while the remaining two (China and South Africa) are unitary states, but with a certain degree of decentralization. As a result, the particularities of administrative legislation can be traced and identified, which consists not only of normative acts at the national level, but also of the legislation of regions, provinces and autonomous units. On the one hand, this circumstance unites the BRICS countries; and, on the other hand, due to the initial difference, the two-level system of constructing administrative legislation complicates the harmonization of legal systems.

It is worth noting, for example, that the general direction of the development of Russian legislation coincides with the development of legislation in other countries. At the same time, the changes made to the Constitution of the Russian Federation following the results of the nationwide vote in 2020 testify to the Russian Federation's supremacy and priority of direct action on its territory, which was not previously reflected in the Basic Law of the country.

The legal system of the PRC is characterized by a small number of existing laws: As of 2009, the Chinese legal system had 232 laws, including 79 administrative laws, 1 criminal law, 33 civil laws, 55 economic laws, 16 social laws and 9 procedural laws; by the end of 2010, there were 236 laws, 690 administrative acts and more than 8,600 local law-making acts in the Chinese legal system; by the end of 2014, the total number of laws in the PRC had increased to approximately 270.[1] Consequently, in China, such a codified act as the administrative code has not been adopted, and the legislator has no plans to do so. These facts allow the Chinese authorities to respond quickly to changes in the legal field when it comes to issuing by-laws in various branches of law.

P. Troshchinsky writes:

> In the administrative and legal sphere of China, it is planned to adopt a number of amendments to the current environmental legislation, including laws in the fields of food safety, licensing, pharmaceuticals and other areas. As a result of the continuing deterioration of the environmental situation in the country, the Chinese legislator plans to amend the following laws: Land Management Law of the PRC (土地管理法); Environmental Protection Law of the PRC (环境保护法); Water Pollution Prevention Law of the PRC (水污染防治法); Prevention of Air Pollution Law of the PRC (大气污染防治法). A new Prevention of Soil Contamination Law of the PRC (土壤污染防治法) will also be introduced into the legal system. In addition, Chinese Medicine and Medicines Law of the PRC (中医药法), Planning Law of the PRC (发展规划法) will be implemented in the administrative and legal spheres.[2]

South African legislation is uncodified, which makes it possible to discuss the regulation of public relations using a variety of laws and judicial precedents.

As a result of the versatility of legal regulation, it is impossible to fully talk about the balance of administrative legislation in the area under study. The adherence of each of the participating states to the norms and principles of international law

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[1] *Трощинский П.В.* Эволюция правовой системы современного Китая в сравнительно-правовом измерении // Право и государство. 2014. № 3(64). С. 69–76 [Pavel V. Troshchinsky, *Evolution of the Legal System of Modern China in the Comparative Legal Dimension*, 3(64) Law and State 69 (2014)].

[2] *Id*.

follows from the approximation of each of the states to international standards independently. Proceeding from this, harmonization of the national legislation of each of the BRICS member states, as well as the correlation of the norms of national law not with the legislation of the participants of such an association, but with uniform international norms and standards, implies that there will always be a single pattern that simplifies the problem.

2. Characteristics of the Administrative Legislation of the BRICS Countries

In terms of the administrative legislation of the BRICS countries, it is worth noting that the administrative legislation of Brazil consists of federal and state legislation; the administrative legislation of Russia consists of the Code of the Russian Federation on Administrative Offenses and the laws of the constituent entities of the Russian Federation adopted in accordance with it; the administrative legislation of India consists of laws and judicial precedents[3] and the administrative legislation of South Africa consists of acts of parliament, provincial legislation and by-laws.

In modern China, the term "administration" is understood to mean "management and leadership of public affairs" (*zhengwu de guanlihelingdao*). "State administration" (*gojiaxing-jen*) refers to the functions of execution and administration carried out by the state. "Execution," on the other hand, refers to the implementation of state laws, state policies, goals and plans determined by the political course. "Management" (*guanli*) is responsible for the organization, leadership, coordination and control in relation to the domestic and foreign policy of the state. It should be noted that the term "administration" referred to in administrative law is simply the state administration (or state governance).[4]

Considering that there is no uniform code of administrative laws in China, administrative relations are governed by administrative legislation and the content of their control activities is rather complex and extensive. This fact is underscored by the fact that social relations in this area frequently change, posing a challenge to the drafting of the administrative code. The existing Administrative Procedure Code (*xingzhengsusun fa*), the Law on Administrative Organizations (*xingzhengzuzhi fa*), the Law on Civil Servants (*guojiagongyuan fa*) and the Law on Review of Decisions (*xingzhengfui fa*) are integral parts of administrative law, but do not cover all aspects of administrative law. Based on this, we conclude that the norms of administrative legislation are dispersed across a large number of documents.

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[3] Конституция Индии [*The Constitution of India*] 468 (2015).

[4] *Гудошников Л.М., Кокорев К.А.* О некоторых теоретических аспектах административного права КНР // Реформы и право. 2011. № 2. С. 58–63 [Leonid M. Gudoshnikov & Konstantin A. Kokorev, *On Some Theoretical Aspects of the Administrative Law of the PRC*, 2 Reforms and Law 58 (2011)].

The tasks of the administrative legislation of the BRICS countries are largely similar: protection of the subjective rights and interests of citizens; ensuring the rule of law; protection of public order and public safety and prevention of administrative offenses.

A comparison of the principles of administrative law of the member states allows one to single out the principles common to all the BRICS countries: legality; justice and equality before the law. For example, Brazil is characterized by the principles of effective judicial protection, subordination, proportionality and reasonableness and due process; the Russian Federation is characterized by the principle of the presumption of innocence; India is characterized by the principle of organizing activities; China is characterized by the principle of voluntariness and trust; while the Republic of South Africa is characterized by the principles of non-discrimination and racism based on gender, skin color and religion; general voting rights; efficiency and transparency and unified government and intergovernmental ties.[5]

In all the BRICS countries, administrative responsibility is assumed between the ages of sixteen and eighteen.

3. Classification of Administrative Offenses

The general pattern inherent in the types of administrative offenses provided for by the administrative legislation of the BRICS countries is characterized by offenses that infringe on the rights of citizens, protection of property, environmental protection, public safety and public order and transport safety.

Regarding of the types of administrative offenses, it is worth noting that there is a general pattern that applies to all countries in the economic community: offenses that infringe on the rights of citizens, which should include offenses that in one way or another negatively affect the physical, mental and emotional health of members (citizens) of society as well as violations of rights, within the framework of administrative legislation, which relates to the protection of property rights.

For example, the process of studying the environmental legislation of the BRICS countries makes it possible to single out a number of general and specific areas of activity as well as their following classifications: pollution of the environment and bodies of water; illegal logging; non-observance of environmental requirements during the disposal of hazardous substances; damage, damage or destruction of natural objects, as well as illegal hunting (poaching), fishing, construction of objects in the nature protection zone[6] and violations of agricultural norms. Similarly,

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[5] Constitution of the Republic of South Africa, 1996 (Jan. 8, 2022), available at https://www.gov.za/documents/constitution-republic-south-africa-1996.

[6] *Анисимов А.П.* Развитие эколого-правовой культуры в России: проблемы и перспективы // Бизнес. Образование. Право. Вестник Волгоградского института бизнеса. 2014. № 4(29). С. 255–258 [Alexei P. Anisomov, *Development of Ecological and Legal Culture in Russia: Problems and Prospects*,

transportation offenses include speeding, violation of the rules for overtaking and maneuvering, violation of the rules for passing pedestrian crossings, stops and railway crossings, as well as driving under the influence (of alcohol or drugs).

Violations of rights in the field of entrepreneurship are typically associated with monetary, credit, cash and financial transactions. In addition, administrative offenses can be classified according to the following criteria: customs offenses (non-compliance with the established prohibitions and restrictions on the import and export of a certain list of items, goods and so on), violations in the field of public order and offenses relating to the field of military registration (for example, citizens (authorized persons) failing to fulfill military registration duties).

Furthermore, administrative offenses may be classified differently depending on the severity of the offense and the fine imposed, as is the case in Brazil: (a) very serious violations (7 points); (b) serious violations (5 points); (c) moderate violations (4 points); (d) minor violations (3 points).

Thus, this classification is universal for all of the BRICS countries, since the abovementioned offenses take place in each country. Because administrative offenses serve as an effective lever of government, problems with their establishment are relevant to all states.

Administrative punishment as applied in the BRICS countries is regarded as a measure of responsibility established by the state for committing an administrative offense and used in order to prevent the commission of new offenses, both by the offenders and by others. The Administrative Penalties Law of the People's Republic of China, which was adopted at the 4th session of the NPC at the eighth convocation on 17 March 1996, provides for the following types of punishments: warning, fine, confiscation of illegally obtained income and property, decision to suspend activities, administrative arrest, temporary suspension or revocation of the license, as well as other administrative penalties. Administrative penalties provided for in Article 3.2 of the Code of Administrative Offenses of the Russian Federation, in general, are similar to the administrative penalties previously mentioned. Similar parallels can be drawn for the other member states as well.

It is characteristic of all the BRICS countries that administrative punishment cannot be aimed at humiliating the human dignity of individuals, causing them physical suffering, nor can it be aimed at damaging the business reputation of a legal entity. Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights establish that "punishment does not aim at causing physical suffering or humiliation of human dignity."

The persons and bodies authorized to consider cases of administrative offenses include highly qualified, trained specialists and subdivisions (bodies). In

4(29) Business. Education. Law. Bulletin of Volgograd Institute of Business 255 (2014)]; Экологические положения конституций: сборник [*Environmental Provisions of Constitutions: Collection of Articles*] 48–59 (Evgeny A. Vystorobets ed., 2012).

Brazil, a special place in this row is occupied by the Federal Supreme Court, other higher courts and the magistracy. In accordance with section III (Chs. 22, 23) of the Code of Administrative Offenses of the Russian Federation, there are judges, bodies and officials authorized to consider cases of administrative offenses. India is characterized by the lack of a clear classification of bodies and officials who hear cases of administrative offenses; however, it is known that the Supreme Court takes over the authority to consider such cases. In the People's Republic of China, such matters are handled by the State Council or the provincial people's governments. In South Africa, the authorized person is the Commissioner, who then submits the administrative case to the court.

Thus, courts at various levels are the common body for all the BRICS countries considering cases of administrative offenses. The structural divisions of the bodies considering cases of administrative offenses have some similarities.

Administrative responsibility established by the administrative legislation of the BRICS countries consists of the application of measures of administrative punishment to individuals and legal entities guilty of committing an administrative offense. In Brazil, administrative liability is understood as a type of legal liability that determines the obligations of the subject to undergo deprivation of state power for committing an administrative offense. In Russia, administrative responsibility is a kind of state coercion, designed to ensure the implementation of legal norms. Administrative responsibility under the legislation of the PRC is currently in the process of formation and development.

Administrative responsibility is assigned in all the BRICS countries on the following grounds: actual, such as the commission of an offense; normative, such as the rule of law of a particular source and procedural, such as compliance with a special procedure for bringing legal responsibility.

The stages of the administrative process are the legal forms of the implementation of certain powers and decisions of the executive authorities, which, in turn, have a pronounced juridical administrative nature. Such stages are frequently implemented by executive authorities and their officials who ensure the implementation of substantive norms of law, and consist of the procedural activities of authorized entities. The general stages of the administrative process are as follows: analysis of the situation (fixing information in the form of protocols, certificates, diagrams and reports); decision making (order, decree) and execution of the decision. As a result, first, an administrative case is initiated and preliminary material is considered; second, the factual circumstances of the administrative case are established and its consideration on the merits by the competent authority or by the official is prepared; third, a decision is put forward to review or appeal the case and fourthly, the decision made in the administrative case is executed. This creates all of the prerequisites for upholding the guarantees of legality and ensuring the effective implementation of citizens' rights to protection.

4. Pre-Trial Resolution of Disputes Under Administrative Law of the BRICS Countries

In this section, we will look at the particularities of pre-trial settlement of disputes in the participating states, since such a resolution allows us to significantly relieve the burden of the courts.

To carry out comprehensive administrative reforms, the Government of India formed the Second Administrative Reform Commission, which submitted fifteen reports covering all aspects of public administration in 2005. Many of the reports presented are related to the promotion of good governance practices in India. Among them are: "Right to Information: Master Key to Good Governance"; "Unlocking Human Capital: Entitlements and Governance; Ethics in Governance"; "Promoting E-Governance (Unlocking Human Capital, 2005)." The main activities of the commission are to promote transparency, responsibility, accountability, efficiency, integrity and ethical behavior in management, as well as to reduce the discretionary powers of public managers through oversight mechanisms and collective decision-making.[7]

On the other hand, in Russia, when it comes to reforming control and supervisory activities, the Program "Reform of Control and Supervision Activities," approved on 21 December 2016 by the Presidium of the Council under the President of the Russian Federation for Strategic Development and Priority Projects (with an implementation period up to 2025), for instance, is of paramount importance.[8]

China's ongoing administrative reform is being implemented on an experimental basis.[9] The essence of such a reform was to simplify administrative procedures, grant broader powers to local administrative bodies and reduce discretionary powers; to eliminate bureaucracy and sluggishness in the administrative apparatus, to implement widespread introduction of electronic government; to reduce the number of administrative employees and optimize staffing.[10]

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[7] *Волкова А.В., Потапенко Т.Г.* Политико-административные институты развития и перспективы инклюзивного роста: сравнительный анализ Индии и России // Политекс. 2015. Т. 11. № 2. С. 74–86 [Anna V. Volkova & Timothey G. Potapenko, *Political and Administrative Development Institutions and Prospects for Inclusive Growth: A Comparative Analysis of India and Russia*, 11(2) Polytex 74–86] (2015).

[8] Утвержден паспорт приоритетной программы «Реформа контрольной и надзорной деятельности» // Правительство России. 29 декабря 2016 г. [The Passport of the Priority Program "Reform of Control and Supervisory Activities" Was Approved, Russian Government, 29 December 2016] (Jan. 8, 2022), available at http://government.ru/news/25930/.

[9] *Трощинский П.В.* Правовая система Китайской Народной Республики: становление, развитие и характерные особенности // Вестник университета имени О.Е. Кутафина (МГЮА). 2015. № 5. С. 99–117 [Pavel V. Troshchinsky, *The Legal System of the People's Republic of China: Formation, Development and Characteristic Features*, 5 Kutafin Law Review 99 (2015)].

[10] *Бородич В.Ф., Виноградов А.В., Трощинский П.В.* 1-я сессия ВСНП 12-го созыва и новая административная реформа в Китае // Проблемы Дальнего Востока. 2013. № 3. С. 59–65 [Vladimir F. Borodich et al., *1st Session of the NPC of the 12th Convocation and a New Administrative Reform in China*, 3 Problems of the Far East 59 (2013)].

These and other factors indicate different approaches to legislative regulation in the BRICS countries, both in terms of systemic coverage and in terms of intrastate detailing of administrative legal relations, which can be viewed not only as a complicating factor in the harmonization and unification of the administrative legislation of the member states, but also as a long-term line of strategic development of the BRICS countries, both nationally and internationally. And, of course, the achievement of certain compromises at the international level among the BRICS countries will form the basis for more fruitful and coordinated interaction between them. Clearly, the priority areas of international cooperation in the legal sphere, and in our case, in administrative justice, will predetermine the development of a coordinated and balanced vector of development of the administrative legislation of the member states at the international level.

It is necessary, in our opinion, to begin looking for common criteria and guidelines aimed at harmonizing administrative legislation, which, if successfully completed, will serve to strengthen the international legal status of the BRICS.

The harmonization of administrative legislation forms an urgent, multi-stage strategic goal of cooperation between the BRICS countries, with one of the goals being the gradual convergence of national legislation on the basis of developed and clearly formulated principles, on which work aimed at harmonization and unification of administrative legislation should be carried out.

It is unlikely that a supranational institution of administrative legislation will emerge in the near future to carry out proceedings in cases of administrative offenses as well as pre-trial resolution of disputes, since these institutions in legal regulation are more related to individual specifics and are locked into national administrative legislation.

As a result, the task of harmonizing administrative legislation should not be limited only to convergence in the regulation of national legal institutions; it should be broader and include the objective need to improve legal technology. The development of a single categorical apparatus will serve as the methodological basis that will further ensure the harmonization of regional legislation at the interstate level. Such a unification of the initial legal concepts will act as a guarantee of successful harmonization of administrative legislation, since it will eliminate a significant number of gaps and conflicts in the law.

The experience of foreign countries indicates that the settlement of disputes between citizens and the administration is carried out using a form such as administrative justice, that is, the establishment of a system of administrative courts, whose competence includes the resolution of administrative disputes. At the same time, factors such as the workload of courts, the quickest resolution of disputes, financial costs and so on, among others, contribute to the search for other ways to resolve administrative disputes, which should include administrative (pre-trial) appeals as well as other alternative methods.

Countries with a continental legal system (such as France, Germany, the Netherlands) are characterized by the adoption of regulations governing the management process in its positive form, in particular, laws on administrative procedures and management. A violation of the established rules thus falls within the purview of administrative justice. However, it is possible to resolve the dispute before going to court in an administrative manner, often by petitioning a higher authority.

For countries with an Anglo-Saxon system of law, the rule of management as such is not fixed in the normative acts, but "derived" from judicial precedents. They quite often use "appeal" proceedings (consideration of disputes by special commissions created under the departments), as well as mediation and arbitration, as alternative methods of resolving disputes.[11]

Efforts are being made in the BRICS countries to modernize the dispute resolution system. The system of bodies and officials responsible for resolving such disputes in a quasi-judicial manner is quite developed.

An institution's activities carried out in the form of a quasi-judicial procedure ("adjudication") are defined as administrative proceedings (arbitration).[12] For example, in India and South Africa, administrative proceedings are judicial in nature.[13] However, the work of some institutions is not limited to the consideration of applications (claims) of individuals, while others have only one function, which is to consider disputes. A distinctive feature of these institutions is their role in the resolution of disputes. If the court is conducting proceedings to which a public authority is a party, then such institutions are also parties to the petition of a private person. "Disputing acts of management by means of administrative claims," notes A. Zelentsov, "does not go beyond the most active administration." They are considered by bodies and services that are part of the active administration system (for example, appeal departments of various ministries) not to have jurisdictional functions and use of official investigation and review procedures. The specialization of these bodies, their separation from the active administration and giving them the

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[11] *Зырянов С.М.* Соотношение досудебного и судебного обжалования решений и действий (бездействия) органов власти и их должностных лиц при осуществлении ими государственных функций по контролю (надзору) // Государственная служба и кадры. 2014. № 4. С. 69–76 [Sergei M. Zyrianov, *The Ratio of Pre-Trial and Judicial Appeal of Decisions and Actions (Inaction) of Authorities and Their Officials in the Exercise of State Functions of Control (Supervision)*, 4 State Service and Personnel 69 (2014)].

[12] Административное право зарубежных стран: учебное пособие [*Administrative Law of Foreign Countries: Textbook*] 24–25 (Alexander N. Kozyrin ed., 1996).

[13] *Беликова К.М.* Порядок досудебного (в том числе квазисудебного) урегулирования споров в странах БРИКС: общие подходы и вехи развития // Законодательство и экономика. 2016. № 4. С. 49–61 [Ksenia M. Belikova, *Procedure for Pre-Trial (Including Quasi-Judicial) Settlement of Disputes in the BRICS Countries: General Approaches and Development Milestones*, 4 Legislation and Economics 49 (2016)].

right to use separate judicial procedural norms for considering claims leads to their transformation into "quasi-judicial bodies" in many countries.[14]

Since the decisions of such bodies can almost always be appealed in courts, the procedure for considering (settling) a dispute in such institutions (bodies) can be attributed with a certain degree of conditionality to the pre-trial settlement of disputes.

The comprehensive development of such methods as alternative ways of resolving conflicts through arbitration, pre-trial and judicial settlement of disputes through negotiations, contacting mediators and concluding amicable agreements, clearly shows their relevance. The BRICS countries have taken significant steps in this direction. In the event of disagreements between the parties in certain legal relations, the majority of internal regulatory legal acts provide for the possibility of resolving disputes between parties in certain legal relations through a pre-trial, quasi-judicial, or extrajudicial procedure. If such a settlement fails, the person whose interests have been violated has the right to file a claim with the court.

India. The development of alternative mechanisms for resolving disputes is due to the crisis of the country's judicial system associated with the length of litigation, as well as the rapid pace of economic development and an increase in the inflow of foreign investment. As a result, in 1993, a resolution was adopted that secured the legality of resolving disputes not only in court, but also within the framework of the institutions of negotiation, mediation, conciliation and arbitration, as well as the creation of centers for alternative dispute resolution.[15]

Studies carried out in 1994–1996 to identify the causes of delays in the consideration of private law disputes in courts allowed the adoption of proposals to amend the Code of Civil Procedure of India[16] on the admissibility of alternative methods of dispute settlement. According to the 1999 amendment to Article 89 of the Indian Code of Civil Procedure of 1908, judges were empowered to transfer the process of further consideration and resolution of the dispute to one of the alternative dispute resolution (ADR) forms when they discovered, during the course of legal proceedings, the possibility of resolving a dispute by alternative means (including mediation).[17] These ADR methods include conciliation procedure (conciliation proceedings), mediation, arbitration, proceedings through the

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[14] *Зеленцов А.Б.* Административная юстиция: учебное пособие [Alexander B. Zelentsov, *Administrative Justice: Textbook*] 11 (1997).

[15] *Попат П.Д.* Альтернативные способы урегулирования споров – опыт Индии // НП «НОМ» [Prathamesh D. Popat, *Alternative Dispute Resolutions – The Indian Experience*, NOM] (Jan. 8, 2022), available at http://nom-mediator.ru/mediation-in-india.

[16] Mediation and Conciliation Project Committee of the Supreme Court of India, Mediation Training Manual of India (Jan. 8, 2022), available at https://main.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf.

[17] Popat, *supra* note 15.

"lokadalat" system, negotiation the so-called conciliation procedure (mediation), arbitration (con/med-arb), conciliation (mediation), (conciliation/mediation), mini-trial and fast-track arbitration.

The legal basis for a non-judicial, alternative dispute settlement procedure in India is established by the Code of Civil Procedure of 1908[18] which incorporates the norms for such a dispute settlement procedure. It should be noted that it provides for the possibility of alternative settlement of the dispute at the stage of pre-trial proceedings, when the court, after accepting the statement of claim and without considering the case on the merits, may offer the parties to settle the dispute in other ways. According to Article 89 of the Code of Civil Procedure of 1908, in cases where the court believes there are grounds for an alternative means of settling a dispute between the parties, the court must set out the conditions for the settlement of the dispute in writing and issue them to the parties for consideration.

After receiving the opinion of the parties on this issue, the court may reformulate the conditions set forth earlier and determine the following methods of resolving the dispute between the parties: conciliation proceedings; arbitration proceedings; proceedings through the LokAdalat system; mediation.

When settling a dispute between the parties through the first two methods, the Arbitration and Conciliation (Mediation) Act 1996,[19] which replaced the Arbitration Act 1940,[20] and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[21] come into play.

The concept of "conciliation proceedings" in the 1996 Law refers to a pre-trial process in which a conciliator assists in the settlement of a dispute between the parties. The conciliation procedure can be applied to all disputes arising from legal relations, regardless of whether they are of a contractual or non-contractual nature. Conciliation procedures are completely dependent on the wills and wishes of the parties and can be terminated by the parties at any time. These procedures result in a settlement agreement.

Achieving a compromise in disputes is ensured by the special People's Courts (Courts for the People) of India (LokAdalat), which operate under the judicial authorities considering and assisting the parties to the dispute. LokAdalat are traditional Indian dispute resolution methods.

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18 Code of Civil Procedure, 1908 (Act No. 5 of 1908) (Jan. 8, 2022), available at http://chdslsa.gov.in/right_menu/act/pdf/codecivil.pdf.

19 Arbitration and Conciliation Act, 1996 (Act No. 26 of 1996) (Jan. 8, 2022), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=207821.

20 Brochure of ICADR, International Centre for Alternative Dispute Resolution (Jan. 8, 2022), available at http://icadr.ap.nic.in/images/ICADR%20Brochure.pdf.

21 India acceded to the aforementioned 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 13 July 1960 (Jan. 8, 2022), available at http://www.newyorkconvention.org/contracting-states/list-of-contracting-states.

In this regard, it is worth noting that to this day in India, a country with a multi-structured culture and ancient traditions, a number of specific mechanisms for alternative dispute settlement continue to operate and there has not been a rejection of the legal concepts and particularities rooted in the previous period, which is reflected in Article 372 of the Constitution of India. As such, even in ancient India, community professional organizations (such as the Gulas, the Kulas and the Shrenis) were engaged in resolving disputes, the first mention of which dates back to the 5th century BC, and until now, in some parts of the country, the Panchayats, councils of five members, leading a caste, temple organization or rural cooperative, are involved in resolving disputes.[22] That is to say, while India remained member of the British Commonwealth of Nations and part of the family of common law after gaining independence from Great Britain, in many respects, Indian law as a whole is inherently unique in comparison with English law, particularly in the issue under consideration, just as it differs from English law and U.S. law, while remaining generally under common law.[23]

The LokAdalat system was introduced for the first time at the legislative level by the Law "On Services for the Provision of Legal Services" (The Legal Services Authorities Act, 1987[24]), which entered into force in 1989 with the goal of implementing programs to provide qualified free legal aid to the most vulnerable segments of the population.

Under section 22 of the 1987 Act, the LokAdalat is empowered to: summon and ensure the attendance of witnesses; examine and study written or material evidence in the case; direct requests for evidence and so forth. That is, the procedure for considering a dispute by the People's Courts is similar to that of a court (statements by the parties, summoning and questioning witnesses, providing evidence and so on). However, the conditions for resolving the dispute should be acceptable to both parties.

The LokAdalat can handle civil, labor, land and some other cases. The dispute is referred to the LokAdalat within the framework of an ongoing legal proceeding, either at the request of one of the parties, or at the discretion of the court (para. 1 of Art. 20 of the 1987 Law). The parties may also agree to transfer the case to LokAdalat outside of court proceedings.

Thus, in India, the envisaged pre- and quasi-judicial dispute settlement procedures can lead to either an amicable agreement or a compromise solution.

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[22] БСЭ, 1969–1978 [Great Soviet Encyclopedia, 1969–1978] (Jan. 8, 2022), available at http://slovari.yandex.ru.

[23] *Давид Р., Жоффре-Спинози К.* Основные правовые системы современности [René David & Camille Jauffret-Spinosi, *Basic Legal Systems of Our Time*] 477 (1996).

[24] Legal Service Authorities Act, 1987 (Act No. 39 of 1987) (Jan. 8, 2022), available at http://cgslsa.gov.in/Acts/act.pdf.

Brazil. According to Ricardo Perlingeiro,

> The time has come, characterizing a new stage in the interaction of administrative law systems and the administrative processes of Brazil and Russia, within which both countries have reached a new level of interaction within the BRICS and an exchange of experience in the legal field.[25]

Because both countries belong to the same continental legal family, their systems of administrative law and administrative processes are comparable to varying degrees. As much as the scope of the study allows, we will attempt to outline in general terms the system of administrative justice in Brazil, as seen through the prism of the principles of the rule of law and the effectiveness of judicial proceedings.

In Brazilian law, the term "administrative dispute" is defined as a dispute arising from a claim of an individual against an administrative authority or a complaint about its actions; "administrative justice" is characterized as the administration of justice in administrative disputes; and a "administrative court" is a public authority that adjudicates administrative disputes.

The judicial process is preceded by administrative hearings, which, according to the rule of law, are considered exclusively by the judicial authorities. Similarly, filing a complaint directly with an administrative body or its official prior to exercising judicial control does not violate the principle of effective judicial protection.

It should be noted that, similar to Russian legislation, Brazilian legislation allows for the filing of a complaint with a higher authority if the applicant's requirements are not met. Moreover, if the complaint is pending before a higher administrative body, the court proceedings are automatically suspended. When complaints in administrative cases are considered by a public official who, despite being appointed by the highest administrative body, performs his functions independently and is not subordinate to any higher authorities, the concept of an independent administrative body comes into play. Administrative tribunals in England, the appeal commissions in Switzerland and the administrative senates (*unabhängige Verwaltungsenate*) in Austria are just a few examples.[26] In Brazil, all of these models are applicable.

Taking into account the principle of effective judicial protection, applicants may, at their discretion, choose a model of behavior that does not exclude the simultaneous filing of a complaint with a court demanding interim measures, such as a preliminary injunction.

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[25] *Перлинжейру Р.* Система административной юстиции Бразилии: сравнительно-правовой анализ // Государство и право. 2015. № 7. С. 75–90 [Ricardo Perlingeiro, *Administrative Justice System in Brazil: Comparative Legal Analysis*, 7 State and Law 75 (2015)].

[26] Michel Fromont, *Droit administratif des Etats européens* 112–119 (2006).

The Brazilian Administrative Procedure Law allows for a complaint to be filed with a higher administrative authority.[27] Complaints to independent administrative authorities are, for example, complaints to the Brazilian Tax Complaints Council (Conselho Administrativo de Recursos Fiscais, CARF),[28] regulatory agencies,[29] the Federal Audit Office (Tribunal de Contasda União, TCU)[30] as well as the National Council of Justice (Conselho Nacional de Justiça, CNJ).[31]

Russia. The ongoing administrative reform, which provides for the implementation of the "regulatory guillotine,"[32] pays special attention to the development of a mechanism for pre-trial (extrajudicial) procedure for appealing decisions and actions (inaction) of bodies exercising state control (supervision) and their officials.[33]

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[27] *See* Art. 56 of the Law No. 9,784 of 29 January 1999 (Jan. 8, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/l9784.htm.

[28] Conselho Administrativo de Recursos Fiscais (Jan. 8, 2022), available at http://idg.carf.fazenda.gov.br.

[29] *See, e.g.*, Law No. 11.182 of 27 September 2005 "On the Establishment of the National Civil Aviation Agency" (Jan. 8, 2022), available at http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/l11182.htm; Law No. 9.984 of 17 July 2000 "On the Establishment of the National Water Agency" (Jan. 8, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/l9984.htm; Law No. 9.427 of 26 December 1996 "On the Establishment of the National Electricity Agency" (Jan. 8, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/l9427cons.htm; Law No. 9.478 of 6 August 1997 "On the Establishment of the National Agency for Petroleum, Natural Gas and Biofuels" (Jan. 8, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/l9478.htm; Law No. 12.351 of 22 December 2010 "On the Establishment of a Social Fund That Finances Social and Regional Development Through Programs and Projects for Development and Poverty Alleviation" (Jan. 8, 2022), available at http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2010/lei/l12351.htm; Law No. 9.961 of 28 January 2000 "On the Establishment of the National Agency for the Promotion of Health" (Jan. 8, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/l9961.htm; Law No. 10.233 of 5 June 2001 "On the Establishment of the National Road Transport Agency" (Jan. 8, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/leis_2001/l10233.htm; Law No. 9.782 of 26 January 1999 "On the Establishment of the National Agency for Financial Rehabilitation and Monitoring" (Jan. 8, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/l9782.htm. *See also* Law No. 9.990 of 21 July 2000 "On the Extension of the Transition Period Provided by Law No. 9.478" (Jan. 8, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/l9990.htm.

[30] *See* Law No. 8.443 of 16 July 1992 "On the Establishment of the Federal Accounts Chamber" (Jan. 8, 2022), available at http://www.planalto.gov.br/ccivil_03/leis/l8443.htm.

[31] *See* Law No. 11.364 of 26 October 2006 (Jan. 8, 2022), available at http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/l11364.htm.

[32] *Мартынов А.В.* Перспективы применения механизма «Регуляторной гильотины» при реформировании контрольно-надзорной деятельности // Вестник Нижегородского университета им. Н.И. Лобачевского. 2019. № 5. С. 143–165 [Alexei V. Martynov, *Prospects for the Application of the "Regulatory Guillotine" Mechanism in Reforming Control and Supervisory Activities*, 5 Bulletin of the Nizhny Novgorod University 143 (2019)]; *Макарейко Н.В.* Риск-ориентированный подход при осуществлении контроля и надзора // Юридическая техника. 2019. № 13. С. 225–229 [Nikolai V. Makareiko, *Risk-Based Approach to Control and Supervision*, 13 Legal Technology 225 (2019)].

[33] *Шеншин В.М.* К вопросу о досудебном (внесудебном) порядке обжалования решений и действий (бездействия) должностных лиц Росгвардии, осуществляющих государственный контроль (надзор) // Военно-юридический журнал. 2020. № 11. С. 12–16 [Victor M. Shenshin, *On the Issue of the Pre-Trial (Out-of-Court) Procedure for Appealing Decisions and Actions (Inaction) of Rosgvardia Officials Exercising State Control (Supervision)*, 11 Military Law Journal 12 (2020)].

The traditional approach to the relationship between the state and civil society is being modified. The state, as a provider of public services, is guided by the assessment of its activities by citizens and organizations, and seeks to make certain adjustments to them to make them better and more accessible. Citizens and organizations have the right to receive quality public services, and bodies and officials are entrusted with the responsibility to ensure the quality of such services. In this regard, streamlining of control and supervisory relations, including the development of a pre-trial appeal mechanism, as a means of protecting the rights of citizens and organizations in the implementation of state control (supervision), is important.[34]

The Federal Law No. 294-FZ of 26 December 2008, "On the Protection of the Rights of Legal Entities and Individual Entrepreneurs in the Exercise of State Control (Supervision) and Municipal Control" essentially does not regulate relations arising in connection with pre-trial appeal of decisions and actions (inaction) of state bodies control (supervision), but rather refers to the general procedure for appeal, which does not take into account the specifics of control and supervisory activities, provided for by Federal Law No. 59-FZ of 2 May 2006, "On the Procedure for Considering Appeals from Citizens of the Russian Federation."

Part 12 of Article 16 of Federal Law No. 294-FZ creates the prerequisites for the formation of a special procedure for pre-trial appeals of control and supervisory activities, establishing that

> a legal entity, an individual entrepreneur, in case of disagreement with the facts, conclusions, or proposals set out in the inspection report, or … [having been] issued an order to eliminate the identified violations within fifteen days from the date of receipt of the inspection report, have the right to submit to the appropriate state control (supervision) body, in writing, objections to the inspection report and (or) the issued order to eliminate the identified violations in general or its individual provisions.

Furthermore, it did not take off in the indicated direction of development. According to M. Zyryanov,

> Despite a number of obvious advantages, practice shows that individual entrepreneurs and legal entities prefer to seek protection in the courts, rather than use a pre-trial appeal procedure.[35]

We agree with the scholar's assessment that an out-of-court (pre-trial) mechanism for appealing decisions and actions (inaction) of control and supervisory bodies and their officials has a number of advantages:

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[34] Zyrianov 2014.

[35] *Id*.

• firstly, the extrajudicial (pre-trial) appeal procedure does not require financial costs, because administrative complaints in accordance with Federal Law No. 59-FZ are not subject to duty, whereas in accordance with Articles 333.19 and 333.20 of the Tax Code of the Russian Federation, the state duty is paid when filing an application to the court for the recognition of decisions and actions (inaction) of state bodies and their officials that are not legal;

• secondly, the judicial order is characterized by its own attributes, such as the more thorough preparation of the statement of claim, the availability of legal knowledge of the applicant or the involvement of a specialist to provide qualified legal assistance;

• thirdly, the period of limitation of appeal for the pre-trial procedure is not established; in court the period is three months from the day when the applicant became aware of the violation of his rights;

• fourthly, a higher authority or official is vested with broader powers than a court. They have the right not only to recognize the contested decision or action (inaction) as unlawful, but also to change it, as well as to independently reconsider the case and make a new decision;

• fifthly, the choice of the pre-trial procedure does not deprive the applicant of the opportunity to apply to the court as well, which, of course, is a certain guarantee of the successful resolution of the complaint if it is not considered or a decision is made on it that is not in favor of the applicant.

O. Grechkina draws attention to the number of citizens of the Russian Federation who have filed applications with the European Court of Human Rights, with Russia ranking third in the world for the number of complaints against the actions of government officials.[36] In this regard, the Council of Europe recommended that Russia establish a system for resolving applications by public authorities.

In a resolution of 22 July 2020, No. 38-P, the Constitutional Court of the Russian Federation stated that the Constitution of the Russian Federation guarantees everyone the right to apply personally, as well as to send individual and collective appeals to state bodies and local self-government bodies (Art. 33), to defend their rights and freedom in all ways not prohibited by law (part 2 of Art. 45). These constitutional norms require that a citizen be considered not as an object of state activity, but as an equal subject who can defend his rights by any means not prohibited by law and argue with the state in the person of any of its bodies, implying not only the right to submit to the appropriate state body or official application, petition or complaint, but also the right to receive an adequate response to this appeal (Resolution of the Constitutional Court of the Russian Federation of 3 May 1995 No. 4-P; definitions of

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[36] *Гречкина О.В.* Особенности досудебного порядка обжалования решений, действий (бездействий) таможенных органов и их должностных лиц // Вестник ВГУ. Серия: Право. 2009. № 2. С. 228–234 [Olga V. Grechkina, *Features of the Pre-Trial Procedure for Appealing Decisions, Actions (Inaction) of Customs Authorities and Their Officials*, 2 Proceedings of Voronezh State University. Series: Law 228 (2009)].

the Constitutional Court of the Russian Federation of 26 May 2011 No. 619-O-O, of 29 March 2016 No. 551-O, of 30 January 2020 No. 16-O, among others).[37]

Administrative legislation uses concepts such as: pre-trial appeal;[38] out-of-court appeal; claim proceedings[39] and administrative complaint proceedings.[40] However, the legislature does not provide a legal definition or clear delimitation criteria for their application. Some scholars defend the concept of "right to complaint." Thus, S. Makhina considers the right to file a complaint to be an inalienable, universal right inherent in a citizen of any state; he indicates that in the current Russian legislation, the legal institution in question is represented very weakly, dissolving into a more capacious institution of citizens' appeals.[41]

According to the Federal Law "On the Procedure for Considering Appeals of Citizens of the Russian Federation," an appeal is a proposal, statement or complaint sent to a state body or official in writing or in the form of an electronic document, as well as an oral appeal of a citizen to a state body, local self-government body; a complaint is a request of a citizen to restore or protect his violated rights, freedoms or legitimate interests or the rights, freedoms or legitimate interests of others.

The above definition of "complaint" is controversial and puzzling, especially given that the law stipulates that a complaint is a request. Why a "request" if the right of a citizen is violated? The Russian Federation positions itself as a rule-of-law state. The priority of the rights and freedoms of citizens is enshrined in Article 2 of the Constitution of the Russian Federation, and according to Article 18, the rights and freedoms of man and citizen determine the meaning, content and application of laws. As a result, the

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37 Shenshin 2020.

38 Распоряжение Правительства Российской Федерации от 25 октября 2005 г. № 1789-р «О Концепции административной реформы в Российской Федерации в 2006–2010 годах» // Собрание законодательства РФ. 2005. № 46. Ст. 4720 [Order of the Government of the Russian Federation No. 1789-r of 25 October 2005. On the Concept of Administrative Reform in the Russian Federation in 2006–2010, Legislation Bulletin of the Russian Federation, 2005, No. 46, Art. 4720]; Постановление Правительства Российской Федерации от 21 сентября 2006 г. № 583 «О федеральной целевой программе «Развитие судебной системы России» на 2007–2012 годы» // Собрание законодательства РФ. 2006. № 41. Ст. 4248 [Resolution of the Government of the Russian Federation No. 583 of 21 September 2006. On the Federal Target Program "Development of the Russian Judicial System for 2007–2012," Legislation Bulletin of the Russian Federation, 2006, No. 41, Art. 4248].

39 *Зырянов С.М., Лебедева Е.А., Спектор Е.И., Гармаева М.А.* Досудебное урегулирование споров в публичном праве // Журнал российского права. 2011. № 11. С. 21–33 [Sergei M. Zyrianov et al., *Pre-Trial Settlement of Disputes in Public Law*, 11 Journal of Russian Law 21 (2011)].

40 *Назарова И.С., Шеншин В.М.* Проблемы укрепления исполнительной власти в Российской Федерации: учебное пособие [Irina S. Nazarova & Victor M. Shenshin, *Problems of Strengthening the Executive Power in the Russian Federation: Textbook*] (2016).

41 *Махина С.Н.* Диалектика правового института административной жалобы в российском праве и проблемы его дальнейшего развития // Правовая наука и реформа юридического образования. 2012. № 2(25). С. 62–69 [Svetlana N. Makhina, *Dialectics of the Legal Institution of Administrative Complaint in Russian Law and the Problems of its Further Development*, 2(25) Legal Science and Reform of Legal Education 62 (2012)].

requirement to eliminate the violations committed by the state authorities and their officials should be discussed, since the rights and freedoms of citizens are violated. The legislator's approach to an administrative complaint, as revealed in the mentioned law, significantly diminishes the value of this institution.

Pre-trial (out-of-court) appeal is provided for by the Government of the Russian Federation No. 373 of 16 May 2011 "On the Development and Approval of Administrative Regulations for the Implementation of State Control (Supervision) and Administrative Regulations for the Provision of Public Services" which approved the rules for the development and approval of administrative regulations. These rules include a section on the pre-trial (out-of-court) procedure for appealing decisions and actions (inaction) of bodies exercising state control (supervision), as well as their officials.

It is also worth noting the Decree of the Government of the Russian Federation of 24 July 2020 No. 1108 "On Conducting in the Territory of the Russian Federation an Experiment on Pre-trial Appeal of Decisions of a Control (Supervisory) Body, Actions (Inaction) of its Officials," which provides for an experiment on pre-trial appeal of decisions of control (supervisory) bodies and actions (inaction) of their officials from 10 July 2020 to 30 June 2021.

The purpose of the experiment is to test a new pre-trial appeal procedure for the maximum convenience of all participants in control and supervisory activities, while also maximizing automation of this procedure. Control and supervisory authorities received a tool for analyzing law enforcement practice and unifying it, as well as reducing the costs of litigation, all of which will contribute to improving the efficiency of public administration.

The Federal Law "On the Procedure for Considering Appeals from Citizens of the Russian Federation" in Article 15 establishes a rule on liability for violations of the legislation on appeals, establishing that persons guilty of violating the law are liable under the legislation of the Russian Federation.

Part 3 of Article 5.63 of the Code of Administrative Offenses of the Russian Federation, establishes that violation by an official of the procedure or terms for considering a complaint or illegal refusal or evasion of the said official from accepting it for consideration shall result in the imposition of an administrative fine ranging from 20,000 to 30,000 rubles.

The draft of the new Code of Administrative Offenses of the Russian Federation, part 3 of Article 6.11, states that any violation by an official empowered to consider complaints about a violation of the procedure for the provision of a public service, the procedure or terms for considering a complaint, or the illegal refusal or evasion of the said official will entail the imposition of an administrative fine in an amount ranging from 20,000 to 30,000 rubles or disqualification for a period of six months to one year. As can be seen in the draft of the new Code of Administrative Offenses of the Russian Federation, the size of the administrative fine has not changed.

The provisions of the Federal Law "On the Procedure for Considering Appeals from Citizens of the Russian Federation" are aimed at regulating the constitutional

right of citizens to appeal. At the same time, there are no norms that would apply to associations of citizens, including legal entities. As a result, it is recommended at the legislative level to establish the right of legal entities to pre-trial (extrajudicial) appeal against decisions and actions (inaction) of bodies exercising state control (supervision) and their officials, which will meet the requirements of the Constitution of the Russian Federation and the legal position of the Constitutional Court of the Russian Federation on the extension of constitutional human and civil rights to legal entities to the extent that this right by its nature can be applied to them (Resolutions of the Constitutional Court of the Russian Federation of 24 October 1996 No. 17-P and of 17 December 1996 No. 20-P, definition of the Constitutional Court of the Russian Federation of 22 April 2004 No. 213-O).

These findings indicate both the advantages and disadvantages of the pre-trial procedure for considering a complaint.

China. The concept of out-of-court settlement of disputes for the Chinese is a prerogative method of settlement, in which preference is given to "finding a way for a settlement," while "enforcing the law is considered a major failure."[42] This is one of the reasons why the state places a high priority on the development of alternative dispute resolution methods, the use of which has a long cultural tradition.

For the resolution and settlement of disputes, the legislation of China allows the use of such mechanisms and procedures as mediation (mediation) (conciliation procedures); arbitration proceedings[43] and mediation in arbitration proceedings (ArbMed).[44]

In China, there are two ways to conduct conciliation procedures prior to litigation. The first method presupposes the mandatory nature of conciliation (conciliation) procedures with the help of the People's Courts of the People's Republic of China in accordance with the provisions of the Civil Procedure Code of the PRC of 1991,[45] containing Chapter 8 "Reconciliation," also known as judicial mediation. Judicial mediation implies carrying out procedures not only in the period before the trial, but also during the course of the judicial proceedings. At the same time, if the pre-trial procedures are not successful, the judge conducting the pre-trial conciliation procedures, is not entitled to subsequently carry out the trial, whereas the judge conducting the conciliation procedures during the judicial proceeding, even if they are not effective, continues to conduct the trial.

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42 David & Jauffret-Spinosi 1996.

43 Arbitration Law of the People's Republic of China, adopted at the 9th Meeting of the Standing Committee of the 8th National People's Congress on 31 August 1994 and promulgated by Order No. 31 of the President of the People's Republic of China on 31 August 1994 (Jan. 8, 2022), available at https://www.jus.uio.no/lm/china.arbitration.law.1994/.

44 Gu Xuan, *The Combination of Arbitration and Mediation in China* (May 2008) (Jan. 8, 2022), available at http://www.unige.ch/droit/mbl/upload/pdf/ Gu_Xuan__s_paper.pdf.

45 Гражданский процессуальный кодекс КНР от 9 апреля 1991 г. [Civil Procedure Code of the PRC of 9 April 1991) (Jan. 8, 2022), available at http://chinalawinfo.ru/procedural_law/law_civil_procedure.

The second method presupposes the voluntary nature of conciliation procedures carried out in accordance with the provisions of the 2010 Law on People's Mediation[46] in the People's Conciliation Commissions with the participation of People's Mediators,[47] the so-called people's mediation.

South Africa. The exercise of citizens' constitutional right to judicial protection in South Africa is hampered in practice by the excessively high cost of litigation and the length of the process (as in the other BRICS countries). Due to the heavy workload of the courts, they only conduct a study of the evidence base in cases (the parties do not directly participate in the process), affecting the objectivity and fairness of court decisions. The international practice of the last twenty years has revealed a worldwide increase in interest in the mechanisms of alternative dispute resolution based on Aco-existential justice, and South Africa is no exception. This type of justice has always been a part of African or Asian (for example, China or India) traditions, where conciliatory decisions appeared to be more constructive than other legal remedies, and their application frequently became a sine qua non for survival.

In South Africa, the procedure for out-of-court dispute settlement is carried out through arbitration, conciliation and mediation, which are provided as alternative means of resolving disputes in many legislative acts regulating private and public law relations.

There is no legal definition of the term 'conciliation' in South Africa, but a number of regulatory legal acts directly indicate the possibility of referring to this mechanism for resolving disputes between interested parties (for example, the Labor Relations Act 1995 No. 66).[48] The use of conciliation procedures in the consideration of commercial, labor and other disputes meets the goals of justice, which include promoting the formation and development of business partnerships between counterparties, employees and employers and so on.

In practice, objective conflicts frequently arise when determining the differences (advantages and disadvantages) of ADR procedures such as conciliation procedures and mediation. Of course, both forms of ADR refer to a consensual mechanism for

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[46] People's Mediation Law of the People's Republic of China, Order of the President of the People's Republic of China (No. 34), adopted at the 16th meeting of the Standing Committee of the 11th National People's Congress of the People's Republic of China on 28 August 2010 (Jan. 8, 2022), available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/85806/96276/F1660942158/CHN85806.pdf.

[47] In China, there are other laws on mediation: for example, the Law of the People's Republic of China on Mediation and Arbitration of Disputes Arising from Contractual Relations over Agricultural Lands dated 1 January 2010 No. 14 (Law of the People's Republic of China on the Mediation and Arbitration of Rural Land Contract Disputes); the Labor Dispute Mediation and Arbitration Law of the People's Republic of China, etc. *See, e.g.*, Jim H. Young & Lin Zhu, *Overview of China's New Labor Dispute Mediation and Arbitration Law*, Davis Wright Tremaine (2012) (Jan. 8, 2022), available at http://www.dwt.com/advisories/Overview_of_Chinas_New_Labor_Dispute_Mediation_and_Arbitration_Law_01_29_2008.

[48] Labour Relations Act, 1995 (No. 66 of 1995) (Jan. 8, 2022), available at https://www.gov.za/sites/default/files/gcis_document/201409/act66-1995labourrelations.pdf.

resolving disputes with the assistance of a neutral person (mediator), but there are fundamental differences. Thus, the mediator is not authorized to make independent decisions that are binding on the parties. The functions of the mediator are reduced to assisting in determining the most acceptable way for the parties to resolve their dispute by familiarizing themselves with the written materials submitted by them, hearing the parties, putting forward proposals for possible resolution of disagreements and so on. As a result, the decision, if reached, is taken by the parties themselves, but with the assistance of a mediator.

One of the mechanisms designed to achieve this goal is the Commission for Conciliation, Mediation and Arbitration (CCMA).[49] The advantages of conciliation procedures include the voluntariness of the participation of each of the parties in all its stages, economy, confidentiality and the ability to resolve the dispute in a shorter period of time. All decisions reached between the parties during the course of the conciliation procedures must be recorded in writing and non-compliance with this peremptory norm forfeits the parties' right to refer to the results of the compromise reached in the future.

Conciliation procedures may result in the conclusion of a settlement agreement that is final and binding on the parties, as well as the conciliation commission issuing a certificate of the results of the conciliation procedure. The parties to the settlement agreement may apply to the court with an application for its approval if one of the parties fails to fulfill any of the obligations stipulated by the agreement. However, reaching an agreement does not always serve as the basis for ending conciliation procedures. As such, if the parties are unable to reach a mutually beneficial compromise within thirty days and do not agree to extend the term for holding conciliation commissions, the CCMA commissioner issues a certificate of results, on the basis of which the parties may apply to the arbitration procedure or directly to the court.

In general, conciliation procedures as an alternative method of resolving differences are gaining popularity in South Africa.

Conclusion

As can be seen from the foregoing, the issues of pre-trial settlement of administrative disputes are resolved using the same mechanisms in all the BRICS countries: negotiations and conciliation procedures, including mediation.

It is shown that the implementation of these mechanisms is possible both by the parties to the dispute themselves, with the participation of third parties who may be interested in carrying out the procedures (such as proxies and legal representatives) and independent professional mediators.

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[49] Commission for Conciliation, Mediation and Arbitration (Jan. 8, 2022), available at http://www.ccma.org.za.

It was revealed that in both India and China, the legislation allows for the suspension of the trial (litigation of disputes on the merits) at the stage of receipt of materials in court and transferring them by the judge to pre-trial settlement using alternative methods: conciliation procedures with the participation of an independent mediator (in India, there are professional mediators, but in China, there may be another judge), mediation (for example, in China, there is people's mediation), the LokAdalat People's Court in India, arbitration and so forth. It is shown that while the use of mediation as a pre-trial procedure for dispute settlement is not widely developed in Brazil, Russia and South Africa, mediation is recognized as an effective way of resolving disputes in these countries and is moving toward legislative and practical implementation.

Unlike court procedures, which bear the imprint of national particularities and traditions, the resolution of a dispute with the participation of a mediator (mediation that takes into account the interests of the parties) is more flexible than court proceedings, a procedure with a unique opportunity to establish and maintain long-term contacts not only at the level of official relations states, but also subjects of private law of the BRICS countries.

The particularities of the development of the administrative legislation of the BRICS countries include the implementation in practice of large-scale administrative reforms carried out, for example, in Russia, Brazil and China. As a result, each country has accumulated its own experience in the field of administrative reforms,[50] due primarily to the legal characteristics of the development of this sphere of public relations. At the same time, the vector of administrative reforms can be considered in general, allowing comparisons of reforms carried out in the Russian Federation with similar processes in the other BRICS countries.

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[50] Государственное управление и политика [*Public Administration and Politics*] 359–414 (Leonid V. Smorgunov ed., 2002).

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ADDRESSING WRONGFUL CONVICTIONS OR MISCARRIAGES OF JUSTICE IN THE BRICS NATIONS

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For many decades, international human rights law has recognised the danger of wrongful convictions and miscarriages of justice. It is against this background that measures have been taken to prevent or combat wrongful convictions. Thus, Article 14 of the International Covenant on Civil and Political Rights provides for the right to a fair trial as well as compensation in the case of a miscarriage of justice. The BRICS nations have implemented measures at the national level to prevent or combat wrongful convictions before and during trial as well as after conviction. These have included constitutional protection of the right to a fair trial, the establishment of a system to review convictions after the appeals process has been exhausted, should the offender exercise his or her right of appeal, and compensation for wrongful conviction in some countries. The purpose of this article is to highlight these measures and where needed, suggest ways in which these countries can learn from one another to prevent or minimise cases of wrongful convictions.

Keywords: wrongful convictions; miscarriage of justice; post-appeal procedure; compensation.

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Introduction

Wrongful convictions[1] or miscarriages of justice[2] take place in many countries,[3] including in the BRICS nations. Courts in some of the BRICS nations, for example China, have identified some of the factors that lead to wrongful convictions or miscarriages of justice.[4] The BRICS nations have put in place measures to prevent or minimise wrongful convictions. These have included the constitutional protection of the right to a fair trial, the establishment of a system to review convictions after the appeals process has been exhausted, should the offender exercise his or her right of appeal, and compensation for wrongful conviction in some countries. The purpose of this article is to discuss the measures which the BRICS nations have put in place to address the issue of wrongful convictions. The author suggests lessons that these countries can draw from one another in order to better protect their citizens and residents from

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1 In *R. (Mullen) v. Secretary of State for the Home Department* [2004] U.K.H.L. 18 (29 April 2004), para. 4, the House of Lords (Lord Bingham) observed that: "The expression 'wrongful convictions' is not a legal term of art and it has no settled meaning. Plainly the expression includes the conviction of those who are innocent of the crime of which they have been convicted. But in ordinary parlance the expression would, I think, be extended to those who, whether guilty or not, should clearly not have been convicted at their trials. It is impossible and unnecessary to identify the manifold reasons why a defendant may be convicted when he should not have been. It may be because the evidence against him was fabricated or perjured. It may be because flawed expert evidence was relied on to secure conviction. It may be because evidence helpful to the defence was concealed or withheld. It may be because the jury was the subject of malicious interference. It may be because of judicial unfairness or misdirection. In cases of this kind, it may, or more often may not, be possible to say that a defendant is innocent, but it is possible to say that he has been wrongly convicted. The common factor in such cases is that something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted."

2 In *Regina v. Connor & Anor* [2004] U.K.H.L. 2 (22 January 2004), para. 131, the Court (Lord Hobhouse) held that: "It is fundamentally wrong to use the phrase 'miscarriage of justice' selectively as if it only related to perverse convictions. This presents a false picture. Most miscarriages … occur because of some corruption of the evidence used by the prosecution to prove guilt. Such corruptions may take many forms, e.g. non-disclosure of evidence or information favourable to the defence, undetected lies, undiscovered witnesses, partial or incompetent expert evidence. None of these involve any failure of the jury system: the verdict returned was in accordance with the evidence adduced at the trial. This leads on to the other reason why it presents a false picture: a perverse verdict of not guilty, whatever the reason for it, is also a miscarriage of justice. The criminal justice system has failed to convict a person whose guilt has been proved."

3 Case law from different countries shows that courts have found that some people were convicted wrongfully. For example, *SKN v. Republic* [2017] eKLR (Kenya); *Eric Asante v. Republic* (J8A/03/2017) [2018] G.H.A.S.C. 33 (30 May 2018) (Ghana); *Yahaya Abdallah alias Dunda v. Republic* (Criminal Appeal 120 of 2004) [2005] T.Z.H.C. 1 (16 September 2005) (Tanzania); *R. v. Ramonyaloe* (CRI/A/10/90) [1994] L.S.C.A. 84 (18 April 1994) (Lesotho); *Hlophe and Another v. Rex* (17/1996) [1996] S.Z.S.C. 9 (16 April 1996) (Eswatini); *Kalibala & 3 Ors v. Uganda* (Criminal Appeal 16 of 2012) [2012] U.G.H.C. 147 (27 July 2012) (Uganda).

4 For example, in *Kissel v. HKSAR* [2010] 2 H.K.L.R.D. 435 (2010) the Court of Appeal of Hong Kong gave the following as the factors leading to wrongful convictions: "a confusing, and therefore unfair, presentation of the case for the prosecution"; "a failure by the presiding judge to emphasise sufficiently a vital point for the defence"; and "a refusal to allow an adjournment, though applied for on reasonable grounds." *See* paras. 174 & 197.

wrongful convictions. In this discussion, the author focuses on three issues: the right to a fair trial; post-conviction measures; and compensation for wrongful convictions.[5] The discussion begins with the issue of the right to a fair trial.

1. The Right to a Fair Trial

One of the measures in place to prevent wrongful convictions is the protection of the right to a fair trial. This right is protected under Article 14 of the International Covenant on Civil and Political Rights, in the regional human rights instruments ratified by some of the BRICS nations and mentioned in the constitutions of all the BRICS nations. The majority of the BRICS nations have ratified or acceded to the International Covenant on Civil and Political Rights (ICCPR)[6] and the People's Republic of China has signed this Covenant.[7] However, Article 14 of the ICCPR has been adopted as the Bill of Rights in Hong Kong.[8] Article 6 of the European Convention on Human Rights, to which Russia is a party, provides for the right to a fair trial. The Constitution of Russia provides for several rights which make up the right to a fair trial. These include the right to have one's case examined by a judge or jury,[9] as well as the right to qualified legal assistance;[10] the right to be presumed innocent until proven guilty;[11] the right against self-incrimination,[12] the right against double jeopardy[13] and the right not to be punished for conduct which is not criminalised by law.[14] In addition, Russian courts are not "allowed to use evidence received by

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5 The author could not discover the law on post-appeal remedies in Brazil and India.

6 Brazil (on 24 January 1992); Russia (on 16 October 1973); India (on 10 April 1979); and South Africa (on 10 December 1998).

7 China signed the Covenant on 5 October 1998.

8 *See* Art. 11 of the Bill of Rights Ordinance.

9 Art. 47.

10 Art. 48.

11 Article 49 provides that: "[1]. Everyone accused of committing a crime shall be considered innocent until his guilt is proved according to the rules fixed by the federal law and confirmed by the sentence of a court which has come into legal force. [2]. The accused shall not be obliged to prove his innocence. [3]. Unremovable doubts about the guilt of a person shall be interpreted in favour of the accused."

12 Article 51 provides that: "[1]. No one shall be obliged to give incriminating evidence, husband or wife and close relatives the range of whom is determined by the federal law. [2]. The federal law may envisage other cases of absolution from the obligation to testify."

13 Art. 50(1).

14 Article 54 provides that: "[1]. A law introducing or aggravating responsibility shall not have retrospective effect. [2]. No one may bear responsibility for the action which was not regarded as a crime when it was committed. If after violating law the responsibility for that is eliminated or mitigated, a new law shall be applied."

violating the federal law"[15] and "[e]veryone convicted for a crime shall have the right to appeal against the judgement of a superior court according to the rules envisaged by the federal law, as well as to ask for pardon or a mitigation of punishment."[16] An accused also has all the rights which are not expressly mentioned in the Constitution, provided they are provided for in international law. This is because Article 55 of the Constitution provides that "[t]he listing in the Constitution of the Russian Federation of the fundamental rights and freedoms shall not be interpreted as a rejection or derogation of other universally recognized human rights and freedoms." The effect of this provision is, *inter alia*, that some of the rights which are not expressly mentioned in the Constitution but are universally recognised are also guaranteed to the accused. These include rights which have been developed by international human rights bodies, such as the European Court on Human Rights when interpreting Article 6 of the European Convention on Human Rights. Article 6 of the European Convention on Human Rights provides that:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly needed in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
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> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
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> 3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

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15 Art. 50(2).

16 Art. 50(3).

The European Court of Human Rights has developed rich jurisprudence on Article 6, but it is beyond the scope of this article to discuss this jurisprudence. It is clear that some of the rights which are provided for under Article 6 of the European Convention on Human Rights are not expressly mentioned in the Russian constitution. These include the right to be informed of the offence; the right to adequate time and facilities to prepare for one's defence; and the right to the assistance of an interpreter. However, by virtue of Article 55(1) of the Constitution, these rights are also part of Russian law and the accused is entitled to them.

For example, in *Blokhin v. Russia*[17] the Grand Chamber of the European Court of Human Rights held that Article 6 of the Convention contains "far-reaching procedural guarantees."[18] Jurisprudence from the Grand Chamber of the European Court of Human Rights shows that the court has found that the accused in Russia have had their rights to a fair trial protected. These have included the right of the accused to call and cross-examine witnesses.[19] There are also instances in which the European Court of Human Rights has found that Russia violated some of the components of the right to a fair trial under Article 6 of the European Convention on Human Rights despite the fact that these rights are not expressly provided in the Russian Constitution. These have included the accused's rights to be tried within a reasonable amount of time;[20] the right to communicate with their lawyer;[21] the right to confront state witnesses;[22] the right to have a judgement and its reasons published publicly;[23] and the right to be tried before a tribunal established by law.[24] Unlike the Constitution which provides for the right to legal assistance during trial, the European Court of Human Rights held that, in the context of Article 6 of the Convention, this right should also be extended to a suspect who is being questioned.[25] However, the Russian Constitution has to be read in tandem with the Criminal Procedural Code[26] which provides for many rights that are relevant to the right to a fair trial but are not expressly mentioned in the Constitution.

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17 *Blokhin v. Russia* (Application No. 47152/06) (23 March 2016).

18 *Id*. para. 181.

19 *Murtazaliyeva v. Russia* (Application No. 36658/05) (18 December 2018).

20 *Svinarenko and Slyadnev v. Russia* (Applications Nos. 32541/08 and 43441/08) (17 July 2014), paras. 140–145; *Smirnova v. Russia* (Applications Nos. 46133/99 and 48183/99) (24 July 2003); *Kalashnikov v. Russia* (Application No. 47095/99) (15 July 2002).

21 *Sakhnovskiy v. Russia* (Application No. 21272/03) (2 November 2010).

22 *Idalov v. Russia* (Application No. 5826/03) (22 May 2012).

23 *Ryakib Biryukov v. Russia* (Application No. 14810/02) (17 January 2008).

24 *Posokhov v. Russia* (Application No. 63486/00) (4 March 2003).

25 *Blokhin v. Russia* (Application No. 47152/06) (23 March 2016).

26 Criminal Procedural Code of the Russian Federation No. 174-FZ of 18 December 2001.

The right to a fair trial is also provided for in the constitutions of Brazil,[27] India,[28] China[29] and South Africa,[30] as well as in the regional human rights instruments ratified by some of these countries.[31] Courts in these countries have also developed rich jurisprudence on the right to a fair trial.[32] One of the elements of the right to a fair trial is the offender's right to appeal against his or her conviction or sentence to have his or her conviction reviewed by a higher tribunal or court.

As mentioned above, one of the rights provided for in the constitutions of BRICS nations is the convicted person's right to appeal against conviction or sentence. For example, Article 50(3) of the Russian Constitution provides that "[e]veryone convicted for a crime shall have the right to appeal against the judgement of a superior court according to the rules envisaged by the federal law, as well as to ask for pardon or

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27 *See, e.g.*, Art. 5(V) and (XXXVI)–(XL) of the Constitution of the Federative Republic of Brazil (1988).

28 Art. 20 of the Constitution of India (1949).

29 *See, e.g.*, Arts. 125, 126 of the Constitution of the People's Republic of China (1982).

30 Section 35(3) of the Constitution of South Africa (1993) provides that: "Every accused person has a right to a fair trial, which includes the right – (a) to be informed of the charge with sufficient detail to answer it; (b) to have adequate time and facilities to prepare a defence; (c) to a public trial before an ordinary court; (d) to have their trial begin and conclude without unreasonable delay; to be present when being tried; (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly; (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; (h) to be presumed innocent, to remain silent, and not to testify during the proceedings; (i) to adduce and challenge evidence; (j) not to be compelled to give self-incriminating evidence; (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language; (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted; (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted; (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and (o) of appeal to, or review by, a higher court." South African courts have also put in place safeguards to prevent wrongful convictions and these include the cautionary rules when dealing with the evidence of some categories of witnesses. *See, e.g.*, *Sithole v. S* (A206/2011) [2017] Z.A.G.P.P.H.C. 90 (28 February 2017) (the purpose of a cautionary rule when dealing with the evidence of an accomplice is to reduce the risk of wrongful conviction); *Khumalo v. S* (AR5502/19) [2020] Z.A.K.Z.P.H.C. 63 (5 November 2020); *LR and Another v. S* (A333/2017) [2018] Z.A.F.S.H.C. 219; 2019 (2) S.A.C.R. 216 (F.B.) (14 December 2018) (the purpose of a cautionary rule when dealing with the evidence of a child witness is to reduce the risk of wrongful conviction); *BC v. S* (A8/2020) [2020] Z.A.F.S.H.C. 180 (30 October 2020) (the purpose of a cautionary rule when dealing with the evidence of a single witness is to reduce the risk of wrongful conviction).

31 *See* Art. 8 of the American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969. Brazil ratified this treaty on 7 September 1992. *See* also Art. 7 of the African Charter on Human and Peoples' Rights (1981).

32 Iain Currie & Johan de Waal, *The Bill of Rights Handbook* (2013); Daphne Huang, *The Right to a Fair Trial in China*, 7(1) Wash. Int'l L.J. 171 (1998); Neeraj Tiwari, *Fair Trial vis-à-vis Criminal Justice Administration: A Critical Study of the Indian Criminal Justice System*, 2(4) J. L. Conflict. Resolut. 66 (2010); and Andrey Borges de Mendonça, *The Criminal Justice System in Brazil: A Brief Account*, Resource Material Series No. 92 (2014) (Nov. 30, 2021), available at https://www.unafei.or.jp/publications/pdf/RS_No92/No92_07PA_Andrey2.pdf.

a mitigation of punishment." However, it is possible that a person who has been convicted wrongfully may also have his appeal dismissed when the appellate court fails to notice the irregularity. Thus, it is important to take a look at the post-appeal conviction as one of the measures to deal with wrongful convictions.

2. Post Appeal Procedures to Set Aside a Wrongful Conviction

Another way in which BRICS nations are trying to prevent or minimise wrongful convictions is by putting in place post-appeal procedures to ensure that people who claim that they were wrongfully convicted have their cases re-examined even after the appeal process has been exhausted and the sentence has come into force. Article 6(2) of the Criminal Procedural Code of the Russian Federation[33] provides that one of the goals of criminal court proceedings is "protecting the person from unlawful and ungrounded accusations and conviction and from the restriction of his rights and freedoms." Article 413 of the Criminal Procedural Code of the Russian Federation provides for "grounds for resumption of the proceedings on a criminal case because of new or newly revealed circumstances." Article 413(1) provides that "[t]he court sentence, ruling or resolution, which has come into legal force, may be cancelled and the proceedings on a criminal case may be resumed because of new or newly revealed circumstances." Article 413(2) provides for two broad circumstances in which a criminal case may be resumed (reopened) after the sentence has come into force. The first ground is "newly revealed circumstances – the circumstances … which existed at the moment of the entry into legal force of the sentence or other judicial decision, but were unknown to the court."[34] These newly revealed circumstances "shall be":

> (1) a deliberate falsity of the evidence of the victim or of the witness, or of the expert's conclusion, as well as the forgery of the demonstrative proof, of the protocols of the investigative and the judicial actions and of other documents, or a deliberate erroneousness of the translation, which have entailed the passing of an unlawful, unsubstantiated or unjust sentence or of an unsubstantiated ruling or resolution; (2) the criminal actions of the inquirer, the investigator or the public prosecutor, which have entailed the adjudgement of an unlawful, unsubstantiated or unjust sentence, or of an unlawful or unsubstantiated ruling or resolution; (3) the criminal actions of the judge which he has committed during the examination of the criminal case, established by the court sentence that has entered into legal force.[35]

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[33] Criminal Procedural Code of the Russian Federation No. 174-FZ of 18 December 2001.

[34] Art. 413(2)(1).

[35] Art. 413(3).

Article 413(5) provides for ways in which "newly revealed" circumstances can be established.[36] It is thus evident that the newly revealed circumstances apply to every person who in one way or another played a role in the accused's conviction. In other words, the inquiry focuses on the conduct of the individuals involved the criminal justice system, which conduct tainted the accused's trial. The second ground on which a conviction may be reopened relates to "new circumstances … unknown to the court at the moment when it passed the judicial decision, which eliminate the criminality and the punishability of the act."[37] These new circumstances are:

> (1) recognizing by the Constitutional Court of the Russian Federation of the law, applied by the court in the given criminal case, as not corresponding to the Constitution of the Russian Federation; (2) a violation of the provisions of the Convention on the Protection of Human Rights and Basic Freedoms, established by the European Court on Human Rights, during the examination of the criminal case by a court of the Russian Federation, involved in: (a) an application of the federal law, not corresponding to the provisions of the Convention on the Protection of Human Rights and Basic Freedoms; (b) other violations of the Convention on the Protection of Human Rights and Basic Freedoms.

Unlike in the case of the "newly revealed" circumstances where the inquiry focuses on the conduct of the individuals involved in the criminal justice system, in the case of the "new circumstances" the question is whether the accused's trial was fair. In particular, whether the trial complied with the minimum standards of the right to a fair trial as provided for under Article 6 of the European Convention on Human Rights. In order to ensure that the victim of a wrongful conviction can challenge his or her conviction at any time, there is no time limit within which such a challenge can be brought. This is so because Article 414(1) of the Criminal Procedural Code provides that "[r]evision of the sentence of conviction because of new or newly revealed circumstances in favour of the convict is not limited by any time terms." The conviction may also be revised posthumously.[38] The revision of the conviction under

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[36] Article 413(5) provides that these circumstances "may be established, in addition to the sentence, by a ruling or a resolution of the court, by a resolution of the public prosecutor, of the investigator or of the inquirer on the termination of the criminal case on account of an expiry of the term of legal limitation, of an act of amnesty or an act of mercy, in connection with the death of the accused or on account of the person not reaching the age, from when the criminal liability sets in."

[37] Art. 413(2)(2).

[38] Article 414(2) of the Criminal Procedural Code provides that, "The death of the convict shall not be seen as an obstacle to resuming the proceedings on the criminal case for the purpose of his rehabilitation because of new or newly revealed circumstances."

Section 413 of the Criminal Procedural Code is carried out by the Supreme Court.[39] The European Court of Human Rights held that reopening criminal proceedings under Article 413 of the Criminal Procedural Code is one of the forms of redress to deal with a conviction that was based on a trial in which the applicant's right to a fair trial under Article 6 of the Convention was violated.[40] The Court added that "[t]he most appropriate form of redress would, in principle, be the reopening of the relevant proceedings if requested."[41] The request has to be made by the "person concerned."[42] The purpose of reopening the proceedings or conducting the trial *de novo* is to ensure that the applicant is "put in the position in which he would have been had the requirements of that provision [Article 6 of the Convention] not been disregarded."[43] Apart from noting the existence of Article 413, the European Court of Human Rights is also called upon to "urge" the Russian authorities, in the operative part of the judgment, to reopen the proceedings.[44] When a national court reopens the proceedings, the guiding principle, developed by the European Court of Human Rights, is that "courts acting in the new proceedings should be under an obligation to remedy the violations of the Convention found by the Court in its judgment."[45]

Other BRICS nations have also put in place post-conviction measures to address wrongful convictions. For example, Section 327 of the South African Criminal Procedure Act[46] provides that:

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[39] Article 415(5) of the Criminal Procedural Code provides that: "Revision of the court sentence, ruling or resolution in accordance with the circumstances, indicated in Items 1 and 2 of the fourth part of Article 413 of the present Code, shall be performed by the Presidium of the Supreme Court of the Russian Federation at the presentation of the President of the Supreme Court of the Russian Federation not later than one month from the day of arrival of the given presentation. On the results of examining this presentation, the Presidium of the Supreme Court of the Russian Federation shall either cancel or amend the judicial decisions on the criminal case in conformity with the resolution of the Constitutional Court of the Russian Federation or with the resolution of the European Court on Human Rights. Copies of the resolution of the Presidium of the Supreme Court of the Russian Federation shall be forwarded within three days to the Constitutional Court of the Russian Federation, to the person, with respect to whom the given resolution is passed, to the public prosecutor and to the Authorized Person of the Russian Federation in the European Court on Human Rights."

[40] *Pishchalnikov v. Russia* (Application No. 7025/04) (24 September 2009), paras. 99, 100; *Lopata v. Russia* (Application No. 72250/01) (13 July 2010), para. 164.

[41] *Pavlenko v. Russia* (Application No. 42371/02) (1 April 2010), para. 127. *See* also *Karpenko v. Russia* (Application No. 5605/04) (13 March 2012), para. 100.

[42] *Aleksandr Zaichenko v. Russia* (Application No. 39660/02) (18 February 2010), para. 65.

[43] *Damir Sibgatullin v. Russia* (Application No. 1413/05) (24 April 2012), para. 73. *See* also *Y.B. v. Russia* (Application No. 71155/17) (20 July 2021), para. 49; *Nagmetov v. Russia* (Application No. 35589/08) (05/11/2015), para. 70.

[44] Joint Concurring Opinion of Judges Spielmann and Malinverni in *Ilatovskiy v. Russia* (Application No. 6945/04) (9 July 2009), para. 7.

[45] *Navalnyye v. Russia* (Application No. 101/15) (17 October 2017), para. 95.

[46] Criminal Procedure Act 51 of 1977.

(1) If any person convicted of any offence in any court has in respect of the conviction exhausted all the recognized legal procedures pertaining to appeal or review, or if such procedures are no longer available to him or her, and such person or his or her legal representative addresses the Minister by way of petition, supported by relevant affidavit, stating that further evidence has since become available which materially affects his or her conviction, the Minister may, if he or she considers that such further evidence, if true, might reasonably affect the conviction, direct that the petition and the relevant affidavits be referred to the court in which the conviction occurred. (2) The court shall receive the said affidavits as evidence and may examine and permit the examination of any witness in connection therewith, including any witness on behalf of the State, and to this end the provisions of this Act relating to witnesses shall apply as if the matter before the court were a criminal trial in that court. (3) Unless the court directs otherwise, the presence of the convicted person shall not be essential at the hearing of further evidence. (4) (a) The court shall assess the value of the further evidence and advise the President whether, and to what extent, such evidence affects the conviction in question. (b) The court shall not, as part of the proceedings of the court, announce its finding as to the further evidence or the effect thereof on the conviction in question. (5) The court shall be constituted as it was when the conviction occurred or, if it cannot be so constituted, the judge-president or, as the case may be, the senior regional magistrate or magistrate of the court in question, shall direct how the court shall be constituted. (6) (a) The State President may, upon consideration of the finding or advice of the court under subsection (4) – (i) direct that the conviction in question be expunged from all official records by way of endorsement on such records, and the effect of such a direction and endorsement shall be that the person concerned be given a free pardon as if the conviction in question had never occurred; or (ii) substitute for the conviction in question a conviction of lesser gravity and substitute for the punishment imposed for such conviction any other punishment provided by law. (b) The State President shall direct the Minister to advise the person concerned in writing of any decision taken under paragraph (a) … and to publish a notice in the Gazette in which such decision … is set out. (7) No appeal, review or other proceedings of whatever nature shall lie in respect of – (a) a refusal by the Minister to issue a direction under subsection (1) or by the State President to act upon the finding or advice of the court under subsection (4) (a); or (b) any aspect of the proceedings, finding or advice of the court under this section.

The Appellant Division (now the Supreme Court of Appeal), held that Section 327 can only be invoked in meritorious circumstances.[47] It also explained the circum-

[47] *S. v. Nofomela* 1992 (1) S.A. 740 (A.D.), para. 26.

stances in which a court, by way of interdict, can intervene to postpone or suspend the execution of a sentence pending the application to exhaust the procedure under Section 327.[48] The South African Constitutional Court, the highest court in the country, held that "[t]he procedure in Section 327 of the CPA is not an appeal."[49] The same court added that Section 327 is "geared at preventing an injustice"[50] and that the section "applies after the appeal processes are spent and permanently closed. The Section 327 procedure is also not a substitute for an appeal. It is a process beyond the appeal stage that is meant to be the final net in order to avoid a grave injustice."[51]

In mainland China, Section 252 of the Criminal Procedure Law[52] provides that "[p]arties or their legally-designated representatives and close representatives may raise an appeal to a people's court against a judgment or ruling that has already taken effect, but cannot stop the enforcement of the judgment or ruling." Section 253 provides the grounds on which the people's court can review a judgement or ruling which has "already taken effect." It is to the effect that:

> Where parties and their legally-designated representatives or close family member's application meets any of the following circumstances, the people's court shall hold a new trial: (1) Where there is new evidence showing that the facts verified in the original judgment or ruling were truly in error, and might influence conviction or sentencing determinations; (2) Where the evidence on which sentencing was based is not credible, is insufficient or should be excluded in accordance with law; or the principle evidence by which the case was proven is mutually contradictory; (3) Where the law applied by the original judgment or ruling is truly in error; (4) Where violations of statutory litigation procedures might influence the fairness of the judgment; (5) Where, at the time that adjudicators tried the case, there was corrupt, prejudicial or arbitrary conduct.

Sections 254–258 of the Criminal Procedure Law stipulate the steps that have to be followed to rectify the wrongful conviction, and these steps involve a retrial of the person who was initially convicted of the offence or offences. In Hong Kong, Section 83P of the Criminal Procedure Ordinance provides that:

> (1) Where a person has been convicted on indictment ... the Chief Executive may, if he thinks fit, at any time either – (a) refer the whole case to the Court of

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48 *Masuku v. Minister van Justisie en Andere* 1990 (1) S.A. 832 (A).

49 *Liesching and Others v. S. and Another* 2017 (4) B.C.L.R. 454 (C.C.); 2017 (2) S.A.C.R. 193 (C.C.), para. 59.

50 *Id*. para. 60.

51 *Id*. *See* also *Chidi v. Minister of Justice* 1992 (4) S.A. 110 (A.D.), para. 10, where the Court held that Section 327 is applicable where the case has "effectively and finally been concluded."

52 Criminal Procedure Law (2018).

> Appeal and the case shall then be treated for all purposes as an appeal to the Court of Appeal by that person; or (b) if he desires the assistance of the Court of Appeal on any point arising in the case, refer that point to the Court of Appeal for its opinion thereon, and the Court of Appeal shall consider the point so referred and furnish the Chief Executive with its opinion thereon accordingly.
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> (2) A reference by the Chief Executive under this section may be made by him either on an application by the person referred to in subsection (1), or without any such application.
>
> (3) For the avoidance of doubt, it is hereby declared that this section also applies in a case where an appeal has been heard and determined by the Court of Final Appeal.

The Court of Appeal of Hong Kong referred to Section 83P of the Criminal Procedure Ordinance and held that:

> Section 83P(1) gives the Chief Executive unfettered discretion to consider whether or not to refer a certain case to the Court of Appeal … Factors the Chief Executive would consider included the prospects of success of the appeal, whether there was any delay in the application and the finality of the case etc. Prospects of success of the appeal are not the only determining factor.[53]

The Court added that the above-mentioned provision should be invoked in exceptional circumstances, and if it is, the case will be treated as an appeal.[54] For the section to be invoked, there has to be "substantial new evidence or other consideration in the case" to show that the accused's conviction was unsafe.[55] Courts can review the legality, rather than the correctness, of the Chief Executive's decision under Section 83P.[56]

3. Compensation for Wrongful Conviction

As mentioned above, all the BRICS nations have ratified or in the case of China, signed, the ICCPR. Article 14(6) of the ICCPR provides for the right to compensation for a miscarriage of justice. It is to the effect that:

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53 *HKSAR v. Chang Wai Hang Alab* [2016] H.K.C.A. 45; [2017] 1 H.K.L.R.D. 146; C.A.C.C. 71/2014 (29 January 2016), para. 48.

54 *Id*. para. 50.

55 *Muhammad Riaz Khan v. Chief Executive and Another* [2016] H.K.C.F.I. 231; H.C.A.L. 121/2015 (16 February 2016), para. 43 (referring to the relevant Court of Appeal decisions).

56 *Wong Hon Lung v. Chief Executive of HKSAR* [2021] H.K.C.F.I. 2155; H.C.A.L. 712/2021 (25 August 2021), para. 13.

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

In Russia, the issue of compensation for wrongful convictions or miscarriages of justice has been dealt with at two levels – at the international law level and at the domestic law level. It is perhaps important to first deal with the approach Russia has taken to deal with compensation for wrongful conviction at the international law because its domestic legislation on this issue has to be assessed against its international law obligations. Russia ratified the ICCPR and as mentioned above, Article 14(6) of the treaty provides for the right to compensation for wrongful conviction. Russia also ratified Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.[57] Article 3 of this Protocol provides that:

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

There are a few cases in which the European Court of Human Rights has dealt with the right to compensation for miscarriage of justice under Article 3 of the Protocol.[58] Only two of these cases had been brought against Russia as of the time of this writing, and these two will be discussed in the order in which they were decided. The first case was *Shilyayev v. Russia*.[59] In this case, the applicant was convicted of

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[57] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Treaty 117. Russia ratified this Protocol on 5 May 1998.

[58] These cases, excluding those against Russia, were: *Allen v. The United Kingdom* (Application No. 25424/09) (12 July 2013); *Poghosyan and Baghdasaryan v. Armenia* (Application No. 22999/06) (12 June 2012); *O. v. Norway* (Application No. 29327/95) (11 February 2003); *Hammern v. Norway* (30287/96) (11 February 2003); *Čuden and Others v. Slovenia* (Application No. 38597/03) (21 December 2006); *Gerden v. Slovenia* (Application No. 44581/98) (18 March 2008); *Dolhar v. Slovenia* (Application No. 66822/01) (18 March 2008); *Teymurazyan v. Armenia* (Application No. 17521/09) (15 March 2018); *Knez and Others v. Slovenia* (Application No. 48782/99) (21 February 2008).

[59] *Shilyayev v. Russia* (Application No. 9647/02) (6 October 2005).

murder and rape in October 1997 and sentenced to 19 years imprisonment.[60] His conviction and sentence were upheld by the Supreme Court.[61] However, in January 1999, the "Regional Court reversed the conviction by reference to newly discovered circumstances and remitted the case for a fresh investigation to a prosecutor."[62] In February of the same year, "the prosecutor took a decision fully to acquit the applicant."[63] After his acquittal, the applicant instituted proceedings before a court to be paid damages for wrongful conviction and unlawful detention for twenty months.[64] The court awarded him damages (approximately 2,740 euros) for his conviction, the time spent in custody awaiting trial and "related after-effects, such as personal anxiety, anguish and feeling of isolation."[65] The Ministry of Finance paid the money to the applicant accordingly.[66] The applicant relied on, *inter alia*, Article 3 of the Protocol to argue that the compensation paid to him "was insufficient."[67] The Court referred to Russian legislation on compensation for wrongful conviction and to Article 3 of Protocol 7[68] and held that Article 3 of Protocol 7 provides for "a right to compensation for miscarriages of justice, when an applicant has been convicted of a criminal offence by a final decision and suffered consequential punishment."[69] The Court added that Article 3 of Protocol 7 does not "prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach" nor does it "actually refer to any specific amounts."[70] Against that background, the Court held that:

> [T]he domestic authorities recognised the miscarriage of justice in the applicant's criminal case, quashed his conviction … as unlawful and granted him damages of RUR 70,000 (~2,740 euros) in this connection. This award does not appear arbitrary or unreasonable as the courts at two instances carefully examined all relevant circumstances of the applicant's personal situation including the nature of the criminal case against him, total length of his detention and personal after-effects and reached reasoned conclusions

60 *Shilyayev v. Russia*, para. 5.

61 *Id*.

62 *Id*. para. 6.

63 *Id*.

64 *Id*. para. 7.

65 *Id*. para. 8.

66 *Id*. paras. 10–13.

67 *Id*. para. 19.

68 *Id*. paras. 14–19.

69 *Id*. para. 20.

70 *Id*.

> as to the amount of the award. The applicant was fully able to take part in this procedure and the amount of the award does not appear disproportionate even in the domestic terms.[71]

Against that background, the Court dismissed the application as being manifestly ill-founded.[72] A few observations should be made about this judgement. Firstly, the amount of compensation awarded to a person who has been wrongfully convicted should not be arbitrary. The applicant should be informed the reason why he or she has been awarded a given amount. Secondly, the applicant should be able to take part in the procedure leading to the award of the compensation. He or she should, for example, adduce evidence to show how he or she was affected by the wrongful conviction. Finally, the amount should not be disproportionate when compared to the amounts awarded to victims of human rights violations.

In *Matveyev v. Russia*,[73] the European Court of Human Rights dealt with the question of whether the applicant qualified to be compensated for a miscarriage of justice under Article 3 of the Protocol. In August 1981, the applicant was convicted of forging a postal stamp and sentenced to two years' imprisonment.[74] His appeal against conviction and sentence were dismissed and he served his full sentence.[75] However, in October 1999, in "supervisory review proceedings" the regional court "reversed" the appellant's "conviction for forgery of a stamp, finding that it had been wrongful as there was no indication that a crime had been committed."[76] This was so because the applicant's conduct had not been criminalised at the time of his conviction, which only came to the attention of the review court after the applicant had served his sentence.[77] Following the reversal of his conviction, the applicant instituted proceedings for compensation for the wrongful conviction.[78] However, the court dismissed his application on the ground that "at the time of the conviction there had been no provision in domestic law for claiming such damages."[79] His appeal against the court's decision was dismissed.[80] However, he was awarded "pecuniary

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71 *Shilyayev v. Russia*, para. 21.

72 *Id*. para. 22.

73 *Matveyev v. Russia* (Application No. 26601/02) (3 July 2008).

74 *Id*. para. 10.

75 *Id*. para. 11.

76 *Id*. para. 12.

77 *Id*. para. 34. His argument was that "at the time of his trial the relevant postal instructions concerning the use of the stamp and the receipt cards that replaced it had not been available to the court or to the parties. Accordingly, his conviction had eventually been reversed due to newly discovered evidence."

78 *Id*. para. 13.

79 *Id*. para. 14.

80 *Id*. paras. 15–19.

damages" for the loss of income suffered as a result of the conviction.[81] The applicant argued that he should have been compensated for the wrongful conviction as well in accordance with Article 3 of the Protocol.[82] He submitted that he qualified for compensation under Article 3 of the Protocol because of the fact that his conviction was reversed after serving his sentence and that although the conviction took place before Russia ratified the Protocol, "the consequences of his unlawful conviction in 1981 had lasted until its reversal in 2001."[83] The Russian Government advanced three reasons to support its submission that the applicant did not qualify for compensation for the wrongful conviction. Firstly, that the applicant's conviction had been set aside on review because the trial court had incorrectly held that the applicant's conduct had amounted to an offence;[84] secondly, that the applicant's conviction "had been reversed within the framework of the supervisory review procedure and not as a result of the reopening of the case due to newly discovered circumstances" within the meaning of Article 3 of the Protocol;[85] thirdly, that at the time of the appellant's conviction, Protocol No 7 had not yet entered into force in respect of Russia and therefore the Court did not have temporal jurisdiction over the matter.[86]

In resolving these issues, the Court referred to Article 3 of the Protocol and observed that the aim of this provision [Article 3 of the Protocol] is to confer the right to compensation on persons convicted as a result of a miscarriage of justice, where such a conviction has been reversed by the domestic courts. Therefore, Article 3 of Protocol No. 7 does not apply before the conviction has been reversed.[87]

The Court added that the condition for temporal jurisdiction was satisfied in the present case because the applicant's conviction was dismissed after the Protocol had entered into force in respect of Russia.[88] The Court went on to say that the mere fact that it had jurisdiction over the matter did not mean that the applicant qualified for compensation. For the applicant to qualify for compensation, he had to meet the criteria under Article 3 of the Protocol.[89] The Court also stated that when interpreting Article 3 of the Protocol, it is important to refer to the Explanatory Report.[90]Against that background, the Court stated that in the Explanatory Report on Article 3 of

81 *Matveyev v. Russia*, paras. 20–28.

82 *Id*. para. 32.

83 *Id*. para. 34.

84 *Id*. para. 35.

85 *Id*.

86 *Id*. para. 36.

87 *Id*. para. 38.

88 *Id*.

89 *Id*. para. 39.

90 The relevant parts of the Explanatory Report are paragraphs 22–25.

the Protocol that the procedure used to reverse the applicant's conviction was immaterial.[91] The Court added that at the time of the applicant's conviction, had the trial court interpreted the law correctly and assessed the evidence correctly, it would have held that the applicant's conduct did not amount to an offence.[92] Therefore, the fact that the applicant's conduct was not an offence at the time of his conviction was not a new or newly discovered fact within the meaning of Article 3 of the Protocol.[93] Against that background, the Court had regard to the Explanatory Report on Article 3 and concluded that "the conditions of applicability of Article 3 of Protocol No. 7" were not complied with.[94] One of the most important issues that emerge from this judgement is that the time of the applicant's conviction is immaterial when it comes to the issue of compensation for wrongful conviction. What matters is that the conviction was wrongful and that it was reversed, or that the applicant was pardoned at the time when the Protocol had come into force for Russia. As a result, the Court accepted the applicant's argument that the consequences of a wrongful conviction continue until the conviction is reversed.[95] This means that a wrongful conviction could be considered a continuing violation of the applicant's right to a fair trial.[96]

At the domestic level, Russian law provides for circumstances under which a person may be compensated for wrongful conviction. For example, Article 53 of the Constitution of Russia provides that "[e]veryone shall have the right for a state compensation for damages caused by unlawful actions (inaction) of bodies of state authority and their officials." This provision is limited to unlawful activities of state bodies or officials and does not extend to cases of wrongful convictions or miscarriages of justice unless it can be shown that the conviction was unlawful. For example, if it was based on a repealed law. Before bringing a case to the European Court of Human Rights, an applicant should first exhaust the domestic remedies available under Article 53 of the Constitution, such as suing the relevant state agency.[97] Article 1070(1) of the Civil Code of the Russian Federation[98] provides that:

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91 *Matveyev v. Russia*, para. 41.

92 *Id*. para. 42.

93 *Id*. para. 43.

94 *Id*. para. 44.

95 *Id*. para. 34.

96 For the European Court of Human Rights' discussion of the principles governing the concept of continuing violation of human rights, *see, e.g.*, *Varnava and Others v. Turkey* (Applications Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) (18 September 2009).

97 Dissenting Opinion of Judge Sajó in *Ponyayeva and Others v. Russia* (Application No. 63508/11) (17 November 2016), para. 4.

98 Civil Code of the Russian Federation Part One No. 51-FZ of 30 November 1994, Part Two No. 14-FZ of 26 January 1996, Part Three No. 146-FZ of 26 November 2001 and Part Four No. 230-FZ of 18 December 2006.

> The injury inflicted on an individual as a result of illegal conviction, illegal institution of proceedings on criminal charges, illegal application of remand in custody as a measure of suppression or of a written understanding not to leave one's place of residence, of illegally taking to administrative responsibility in the form of administrative arrest, as well as the damage inflicted upon a legal entity as a result of illegally taking to administrative responsibility in the form of an administrative suspension of the activity shall be redressed in full at the expense of the state treasury of the Russian Federation and in cases, stipulated by law, at the expense of the state treasury of the respective subject of the Russian Federation or of the respective municipal body, regardless of the fault of the officials of bodies of inquest, preliminary investigation, procurator's offices or courts of law in the procedure established by law.

In *Gryaznov v. Russia*,[99] the European Court of Human Rights referred to Article 1070 and held that:

> Article 1070 creates an exception to the general rule that all damage inflicted on a person must be compensated by the *tortfeasor*, contained in Article 1064 of the same Code, by establishing that damage caused as part of the administration of justice could be compensated by the State in two categories of cases only… Firstly, Article 1070 contains an exhaustive list of situations where damage caused by unlawful judicial decisions is compensated for, irrespective of any fault on the part of the judge. Secondly, it provides that damage may also be recoverable in cases where the judge's fault has been established in criminal proceedings. The Constitutional Court defined a third category of cases where damage incurred through a violation by a court of the right to a fair trial by acts of a procedural nature could be compensated for even in the absence of a final criminal conviction of a judge, if the fault of the judge has been established in civil proceedings…In all other cases, such as in the applicant's case, no liability could be imposed on the judges or the State.[100]

Article 1070 "provides for strict liability ... of the State treasury for damage incurred through" the commission of any of the acts mentioned therein.[101] In other words, a victim of wrongful conviction has a right to compensation "irrespective of the liability of the State authorities involved."[102] A person who has been convicted

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99 *Gryaznov v. Russia* (Application No. 19673/03) (12 June 2012).

100 *Id.* para. 74.

101 *Fedotov v. Russia* (Application No. 5140/02) (25 October 2005), para. 53. *See* also *Roman Zakharov v. Russia* (Application No. 47143/06) (4 December 2015), para. 102.

102 *Mikheyev v. Russia* (Application No. 77617/01) (26 January 2006), para. 100.

of an administrative offence has no enforceable right to compensation under Article 1070.[103] For a person to qualify for compensation under Article 1070, the conduct of the state must be unlawful and not just unjustified.[104] The unlawfulness is determined according to objective criteria[105] and it is limited to the actions or omissions enumerated in Article 1070.[106] A judicial decision granting compensation under Article 1070 "must be enforced within two months."[107]

Likewise, Article 1100 of the Civil Code provides, *inter alia*, that:

> The moral damage shall be compensated regardless of the guilt of the inflictor of damage in cases where … damage has been done to an individual as a result of his illegal conviction, the illegal institution of proceedings against him, the illegal application of remand in custody as a measure of suppression or of a written understanding not to leave his place of residence, the illegal imposition of the administrative penalty in the form of arrest or corrective labour.

For a person to be compensated under Article 1100, the *tortfeasor's* fault is not a prerequisite.[108] The Civil Procedural Code of the Russian Federation[109] provides the procedure which a person has to follow to institute a claim for unlawful conviction.[110] There are a few observations to make about the preceding two provisions. Firstly, although the Civil Code provides for circumstances in which a person qualifies for compensation for "illegal conviction," it does not describe or define what amounts to an illegal conviction. Based on case law from the European Court of Human Rights on compensation for wrongful conviction in Russia (discussed above), an illegal conviction is the same as a wrongful conviction. Secondly, unlike Article 3 of Protocol No. 7 and Article 14(6) of the ICCPR, which provide that a person qualifies for compensation for a miscarriage of justice after the appeal process has been

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103 *Corley and Others v. Russia* (Applications Nos. 292/06 and 43490/06) (23 November 2021), para. 111.

104 *Abashev v. Russia* (Application No. 9096/09) (27 June 2013), para. 40.

105 *Udaltsov v. Russia* (Application No. 76695/11) (6 October 2020), para. 154.

106 *Kuzhelev and Others v. Russia* (Applications Nos. 64098/09 and 6 others) (15 October 2019), para. 126.

107 *Burdov v. Russia (No. 2)* (Application No. 33509/04) (15 January 2009), para. 37.

108 *Burdov v. Russia (No. 2)* (Application No. 33509/04) (15 January 2009), para. 29; *Govorushko v. Russia* (Application No. 42940/06) (25 October 2007), para. 36.

109 Civil Procedural Code of the Russian Federation No. 138-FZ of 14 November 2002.

110 Article 29(6) of the Civil Procedural Code of the Russian Federation provides that: "Claims for the restoration of the labour, pension and housing rights, for the return of the property or of the cost involved in the recompense of the losses inflicted upon a citizen by an unlawful conviction, by an unlawful bringing to criminal responsibility or by an unlawful application as a measure of restraint of taking into custody or of the recognisance not to leave, or by an unlawful imposition of an administrative punishment in the form of arrest, may also be instituted in the court at the place of the plaintiff's residence."

completed and the conviction has been reversed or the person has been convicted, the Russian legislation is more flexible. Compensation is due as long as a person was wrongfully convicted. Thirdly, unlike Article 3 of Protocol No.7 and Article 14(6) of the ICCPR, which state that a person does not qualify for compensation if they contributed to their conviction, Russian legislation is silent on that issue. This implies that a person could qualify for compensation for an illegal conviction even if he or she contributed to his or her conviction. Finally, unlike in some countries where a person can only be compensated for wrongful convictions if he or she was innocent of the offence of which he or she was convicted,[111] the Russian legislation does not impose such a condition.

Other BRICS nations have also dealt with the issue of compensation for wrongful conviction. For example, Article LXXV of the Constitution of Brazil provides that "the State shall compensate anyone convicted by judicial error, as well as any person who remains imprisoned for a period longer than that determined by his sentence."[112] In this case, the person qualifies for compensation if he/she was convicted because of a judicial error. As mentioned above, Brazil ratified the American Convention on Human Rights and Article 10 of the Convention provides that "[e]very person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice." The Inter-American Commission on Human Rights held that, "Article 10 recognizes the right to be compensated in the event of sentencing via a final judgment issued through judicial error. The determination as to whether there may have been such error … is a precondition for the possible application of Article 10."[113]

This means that Brazilian domestic law is more flexible than Article 10 of the Inter-American Convention on Human Rights. A person qualifies for compensation under Article 10 where, for example, his prosecution and conviction were tainted by human rights violations.[114] The Inter-American Commission of Human Rights held that Article 10 is not applicable where a person has been acquitted on appeal,[115]

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111 This is the case, for example, in the United Kingdom. *See Allen v. The United Kingdom* (Application No. 25424/09) (12 July 2013).

112 Art. LXXV of the Constitution of Brazil (1988).

113 *Arguelles v. Argentina*, Report, Report No. 40/02; Case No. 12.167 (IACmHR, Oct. 09, 2002), para. 59. *See* also *Acurso Marechal v. Argentina*, Report, Report No. 2/03; Case No. 11.306 (IACmHR, Feb. 20, 2003), para. 35.

114 For example, in *Eduardo Cirio v. Uruguay*, Report, Report No. 124/06; Case No. 11.500 (IACmHR, Oct. 27, 2006), para. 124, the Inter-American Commission of Human Rights held "that the Uruguayan authorities violated Major Cirio's human rights by depriving him of his status and benefits, as a punishment for his criticism of the actions of the armed forces and, even though they recognized the political and ideological nature of the punishment, they did not rescind the resolutions punishing him or offer full reparations (restitutio in integrum). In light of the above, the Commission concludes that the State violated Mr. Tomás Eduardo Cirio's right under Article 10 of the Convention."

115 *Rojas Piedra v. Costa Rica*, Report, Report No. 43/04; Case No. 306/99 (IACmHR, Oct. 13, 2004), para. 64.

a court's ruling related to a civil matter "does not constitute a conviction,"[116] the state refuses to give effect to an order of the Human Rights Committee to compensate the petitioner,[117] the applicant is a victim of an unfair administrative body order because "there was no question of justice being dispensed by a judicial authority,"[118] and the prosecution against the accused was dismissed before conviction,[119] or the claim is based on a hypothetical situation.[120]

The Constitution of the People's Republic of China, unlike those of Brazil and Russia, does not provide for compensation for wrongful conviction. However, a person who has been wrongfully convicted can be compensated. This is on the basis of Article 15 of the State Compensation Law of the People's Republic of China[121] which provides that:

> The victim shall have the right to compensation if an organ in charge of investigatory, procuratorial [prosecutorial], judicial or prison administration work, or its functionaries, infringe upon his right of the person in the exercise of its functions and powers in any of the following circumstances: (1) Wrong detention of a person without incriminating facts or proof substantiating a strong suspicion of the commission of a crime; (2) Wrong arrest of a person without incriminating facts; (3) Innocence is found in a retrial held in accordance with the procedure of trial supervision, but the original sentence has already been executed; (4) Extortion of a confession by torture or causing bodily injury or death to a citizen by using or instigating the use of violence such as beating one up; or (5) Causing bodily injury or death to a citizen by the unlawful use of weapons or police restraint implements.

It is thus clear that for a person to be compensated for wrongful conviction, he or she has to be innocent of the offence of which he or she was convicted. He or she can be compensated if the conviction has been set aside for retrial. In other words, he or she does not have to have exhausted the appeal procedure. There are indeed cases in which people have been compensated for wrongful conviction[122] and recently a man

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116 *Garcia Fajardo v. Nicaragua*, Report, Report No. 100/01; Case No. 11.381 (IACmHR, Oct. 11, 2000), para. 93.

117 *Lewis v. Jamaica*, Report, Report No. 97/98; Case No. 11.825 (IACmHR, Dec. 17, 1998), para. 49.

118 *Velez Loor v. Panama*, Report, Report No. 95/06; Case No. 92-04 (IACmHR, Oct. 23, 2006), para. 60.

119 *Grande v. Argentina*, Report, Report No. 3/02; Case No. 11.498 (IACmHR, Feb. 27, 2002), para. 43.

120 *Raxacaco Reyes v. Guatemala*, Report, Report No. 73/02; Case No. 50/02 (IACmHR, Oct. 09, 2002), para. 38.

121 State Compensation Law of the People's Republic of China, adopted at the 7th session of the Standing Committee of the 8th National People's Congress on 12 May 1994 and amended in accordance with the Decisions on Amendment to the State Compensation Law of the People's Republic of China at the 14th session of the Standing Committee of the 11th National People's Congress on 29 April 2010 and shall take effect as of 1 December 2010.

122 *See, e.g.*, Na Jiang & Yue Wang, *Remedies for Wrongful Convictions in China*, 8(1) J. Civ. Leg. Sci. 1 (2018).

who was imprisoned wrongfully for 27 years applied for compensation.[123] However, not everyone who has been wrongfully convicted qualifies for compensation. This is because Article 17(1) of the State Compensation Law of the People's Republic of China provides that "[t]he State shall not be liable for compensation" if, *inter alia*, the "sentencing … [was] due to a citizen's own intentionally made false statements or fabricated evidence of guilt."

Hong Kong, although an administrative region in China, has taken an approach different from that of mainland China on the issue of compensation for wrongful conviction. It did this by incorporating Article 14(6) of the ICCPR into its Bill of Rights Ordinance. As a result, Article 11(5) of the Hong Kong Bill of Rights Ordinance provides that:

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Hong Kong has adopted two schemes to deal with compensation for wrongful convictions: the statutory scheme, under Article 11(5) of the Bill of Rights Ordinance, and the ex gratia scheme. On the issue of compensation for wrongful conviction under the ex gratia scheme, the policy in Hong Kong is to the effect that:

> The Government may make an ex gratia payment in certain exceptional cases, where the claimant has spent time in custody following a wrongful conviction or charge resulting from a serious default by the police or other public authority. This might be the case, for example, when bail was refused because of incorrect information given to the court by the prosecutor or the police, or where the police suppressed material evidence that would have helped to exonerate a convicted person. Compensation may also be payable on this basis where the wrongful act was that of a judge or magistrate. The Government will assess these applications having regard to any relevant judicial views that the court(s) may have expressed during any appeal or review process(es) of the cases concerned, as well as all other available and relevant materials.[124]

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123 Man detained wrongfully for 27 years applies for $4.4m compensation in China, Nestia, 3 September 2020 (Nov. 30, 2021), available at https://news.nestia.com/detail/-/4921838.

124 Compensation for persons wrongfully imprisoned, Information for claimants (June 2014), para. 5 (Nov. 30, 2021), available at https://www.doj.gov.hk/eng/archive/pdf/ann20140617e.pdf.

However, there is a disclaimer for both schemes:

> There is no general entitlement to recompense for a wrongful conviction or charge. For example, compensation will not be awarded in cases where at the trial or on appeal the prosecution was unable to prove its case beyond reasonable doubt against the accused person, or where the conviction was quashed on a technicality. Where circumstances are such that compensation could be awarded, it may be refused or reduced if the claimant was wholly or partly to blame for his misfortune: for example, where he deliberately withheld evidence which would have demonstrated his innocence.[125]

In the case of *A v. Secretary of Justice and Another*,[126] the Court dealt with compensation for wrongful conviction under both the statutory and ex gratia schemes. With regards to the statutory scheme, the Court referred to Article 11(5) of the Bill of Rights Ordinance and held that:

> Four conditions must be satisfied before a person is entitled to claim compensation under HKBOR 11(5), namely: (1) he has by a final decision been convicted of a criminal offence; (2) his conviction has been reversed or he has been pardoned; (3) on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice; and (4) he has suffered punishment as a result of such conviction. In addition, compensation is not payable if the non-disclosure of the unknown fact in time is wholly or partly attributable to the convicted person.[127]

The Court added that:

> When considering the meaning of an article of the HKBOR that should be adopted by a Hong Kong court, it is important to bear in mind that the HKBOR is, after 1 July 1997, the means by which the relevant provisions of the ICCPR are applied to Hong Kong under Article 39 of the Basic Law. The consistent views of the HRC [Human Rights Committee] as regards the meaning or interpretation of a relevant article of the ICCPR should, in my view, be regarded as being highly relevant and persuasive … I also consider that I should give an article of the HKBOR the same meaning that the corresponding article of the ICCPR is currently being given by the HRC unless there is some good reason to depart from the HRC's interpretation.[128]

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125 Compensation for persons wrongfully imprisoned, *supra* note 124, para. 2.

126 *A. v. Secretary for Justice and Another* [2020] H.K.C.F.I. 427; H.C.A.L. 176/2018 (11 March 2020).

127 *Id*. para. 14.

128 *Id*. para. 28.

On the issue of the ex gratia scheme, the Court held that an applicant has "no legal entitlement to be paid compensation under the Ex Gratia Scheme" and that the Department of Justice has the discretion to decide whether or not to compensate an applicant.[129] The Court held further that the Department of Justice has the discretion to decide "whether there is serious doubt about the Applicant's innocence" before deciding to compensate the applicant.[130] The Court also explained the rationale behind limiting the number of people who should be compensated for wrongful convictions. It held that "there are good policy reasons for the Government to be circumspect about making an ex gratia payment under the scheme" and that one of them is not to spend government money unnecessarily.[131]

Unlike Russia, China, and Brazil, which have domestic legislation on compensation for wrongful conviction, a person who was wrongfully convicted in South Africa has to institute a civil claim (relying on the law of delict) in order to be compensated. For example, in *Nohour and Another v. Minister of Justice and Constitutional Development*,[132] the Supreme Court of Appeal held that although applicants had been acquitted of the offence after serving some time in prison, they could not be compensated for the conviction and sentence because they did not meet the required threshold for compensation in the law of delict. Although Section 327 of the Criminal Procedure Act[133] recognises that a person could be wrongfully convicted and provides for circumstances in which he or she could be released from prison, it does not provide for the right to compensation. Likewise, in India, a person who has been wrongfully convicted does not have a right to be compensated.[134]

Conclusion

Wrongful convictions take place in many countries, which explains why national and international measures have been put in place to prevent and/or minimise them. The BRICS nations have taken two broad measures to prevent and/or minimise wrongful convictions: the signing or ratification of international human rights treaties

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129 *A. v. Secretary for Justice and Another*, para. 40.

130 *Id*. para. 42.

131 *Id*. para. 41. For a detailed discussion of this decision and the law on compensation for wrongful convictions in Hong Kong generally, *see* Jamil Ddamulira Mujuzi, *Compensation for Wrongful Conviction/ Miscarriage of Justice in Hong Kong in Light of A v Secretary for Justice and Another [2020] HKCFI 427; HCAL 176/2018 (11 March 2020)*, 10(2) Int'l Hum. Rts. L. Rev. 291 (2021).

132 *Nohour and Another v. Minister of Justice and Constitutional Development* (1139/2018) [2020] Z.A.S.C.A. 27 (26 March 2020).

133 Act 51 of 1977. *See* also *Mosuwe v. Minister of Police and Another* (18229/2011) [2021] Z.A.G.P.P.H.C. 507 (11 August 2021) (in which the plaintiff instituted a civil claim for wrongful conviction).

134 Law Commission of India, Wrongful Prosecution (Miscarriage of Justice): Legal Remedies, Report No. 277 (August 2018) (Nov. 30, 2021), available at http://lawcommissionofindia.nic.in/reports/Report277.pdf.

that include provisions relevant to wrongful convictions and the enactment of relevant domestic legislation. The discussion above has shown that South Africa and India do not have legislation providing for that right to compensation for wrongful conviction, whereas Russia, Brazil and China have such legislation. It is recommended that South Africa and India may have to amend their legislation to provide for that right in their domestic legislation. It has been illustrated above that in Hong Kong, there are two compensation schemes, namely the statutory scheme, which gives effect to Article 14(6) of the ICCPR, and the ex gratia scheme, which is to accommodate people who do not meet the threshold for being compensated under the statutory scheme. This ensures that as many victims of wrongful convictions as possible are accommodated and compensated. This is an approach that may have to be followed in the other BRICS countries. Unlike in some of the non-BRICS nations where there are specific institutions to deal with post-conviction cases of wrongful convictions,[135] none of the BRICS nations has yet to establish such an institution. This approach may have to be explored so that such cases are dealt with by a specialised body.

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[135] For example, section of the 194A Criminal Procedure (Scotland) Act 1995, c 46 establishes the Scottish Criminal Cases Review Commission; Criminal Cases Review Commission Act 2019 (New Zealand).

JUSTICE IN TORT LAW OF RUSSIA AND CHINA

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The article describes the main issues of tort liability regulation in the context of the principle of justice and its implementation into the legislation and law enforcement practice of the Russian Federation and the People's Republic of China (PRC). The comparative method of the study revealed critical differences in the provisions of Russian and Chinese tort law. The analysis of the domestic and foreign scientists' works and judicial practice in disputes on compensation for harm contributed to findings and results related to the forms of justice implementation in these countries. The authors argue the dominance of procedural form of justice implementation in the Russian legal system but distributive form in the Chinese legal system. Positive and negative aspects of both forms are discussed. The reform of Chinese civil law which completely changed legal regulation of tort liability and excluded many of the controversial provisions of the previous PRC law on liability for offenses required new theoretical studies aimed at evaluating new laws. Comparison of the new tort law of the People's Republic of China and the tort law of the Russian Federation is especially acute in connection with the objective to integrate the BRICS member countries against the background of the increasing conflicts in international arena. Optimization of legal norms by choosing the most effective model for the principle of justice would improve the protection of victims' rights. In particular, the authors conclude that it is necessary to integrate the Russian and Chinese approach for determining the compensation and defining clear criteria for resolving disputes. In addition, possibility of the tort liability parties to agree on the procedure, time frame and amount of compensation should be set out under the law.

Keywords: tort liability; tort law of the Russian Federation; tort law of the People's Republic of China; compensation for harm; justice.

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Introduction

The strategic partnership of the Russian Federation and the People's Republic of China within the framework of BRICS alliance requires harmonization of law, identification of common and special homogeneous social relations in the regulation of domestic law and relevant comparative legal research.

Justice as a principle of law is embodied in all legal systems of civilized countries and in all branches of law. However, its manifestation can be completely different. The principle of justice takes on particular value in relations concerning the protection of victims in cases of harm. This is due to the fact that a person having undergone deprivation of a non-property or property nature needs a special approach of the legislator to protect his or her rights. At the same time, the establishment of excessively harsh conditions for the harm can lead to abuse of the right by the victim and lead to his or her unjust enrichment. One of the purposes of tort liability is compensation (re-establishing of a pre-breach situation), which can only be achieved by balancing the interests of a victim and a tortfeasor.

Russian tort law is based on the provisions of Chapter 59 of Part 2 of the Civil Code of the Russian Federation (hereinafter referred to as the RF CC). Certain laws reflect only private issues, for example, the Law of the Russian Federation No. 2300-I of 7 February 1992 "On the Protection of Consumer Rights" (hereinafter referred to as the RF Law on the Protection of the Consumer Rights) specifies the rules on compensation for harm caused by the defects in goods to the consumer.[1] Despite the

[1] *See* Закон Российской Федерации от 7 февраля 1992 г. № 2300-I «О защите прав потребителей» // Ведомости съезда народных депутатов РФ и Верховного Совета РФ. 1992. № 15. Ст. 766 [Law of the Russian Federation No. 2300-I of 7 February 1992. On the Protection of Consumer Rights, Vedomosti of the Congress of People's Deputies of the Russian Federation and the Supreme Council of the Russian Federation, 1992, No. 15, Art. 766].

tremendous changes associated with the rapid increase in demand for information technologies and with the projected change in the number and types of torts, with the pandemic and taking measures by states to combat its spread Russian tort law remains conservative. Since 2013, civil law reform has hardly affected tort law. Such an effect is logical to expect in cases of recognition of legal norms as optimal and not requiring changes. However, is that true?

Until the end of 2020, Chinese tort law was concentrated in the Tort Liability Law of the People's Republic of China (hereinafter referred to as TLL) which consisted of 12 chapters including general provisions and certain types of torts.[2] Some laws established specific rules for special torts (for example, Law on the Protection of Consumer Rights and Interests (CRIPL) of 2013).[3] On 28 May 2020, it was adopted a comprehensive Civil Code containing general provisions and special rules in which the rules on tort liability are included in Part 7. TLL has lost its legal force since the entry into force of the Civil Code of the People's Republic of China – from 1 January 2021 (hereinafter referred to as the PRC CC).[4] Against the background of large-scale reforms in the scientific community, interest has intensified in the problem of the adequacy of the introduced norms of tort law to modern realities and the state's tasks. Chinese scientists raise problems of the balance of interests between the demands of society and the provision of remedies to victims that correspond to the degree of harm;[5] they identify the particular importance and practice of applying rules on social liability[6] and analyze the factors influencing the formation of tort law.[7] A significant part of the modern works of such authors as Zhang Xinbao, Wei Zhang, Chenglin Liu is devoted to the fundamental idea of justice of the law and its embodiment in tort law. This is due to the fact that the reform of civil legislation can be successful only in cases where individual private torts will be based on

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[2] 中华人民共和国主席令 第 二十一 号 《中华人民共和国侵权责任法》已由中华人民共和国第十一届全国人民代表大会常务委员会第十二次会议于2009年12月26日通过 [Tort Liability Law of the People's Republic of China, promulgated by the Standing Committee of the National People's Congress, 26 September 2009] (Dec. 25, 2021), available at http://www.gov.cn/flfg/2009-12/26/content_1497435.htm.

[3] 中华人民共和国消费者权益保护法1993年10月31日第八届全国人民代表大会常务委员会第四次会议通过 [Law on the Protection of Consumer Rights and Interests, adopted as the fourth member of the Standing Committee of the Eighth National Assembly of Representatives, 31 October 1993] (Dec. 25, 2021), available at https://gkml.samr.gov.cn/nsjg/fgs/201906/t20190625_302783.html.

[4] 中华人民共和国民法典2020年5月28日第十三届全国人民代表大会第三次会议通过 [Civil Code of the People's Republic of China, adopted at the third session of the 13th National People's Congress, 28 May 2020] (Dec. 25, 2021), available at http://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml.

[5] Xinbao BZhang, *Legislation of Tort Liability Law in China* (2018).

[6] Chenglin Liu, *Socialized Liability in Chinese Tort Law*, 59(1) Harv. Int'l L.J. 16 (2018).

[7] Wei Zhang, *Understanding the Law of Torts in China: A Political Economy Perspective*, 11(2) U. Pa. Asian L. Rev. 171 (2014).

fundamental principles which are reflected not only in the general provisions of the Civil Code but also in special rules. In fact, justice as a moral and legal principle expressing the basic ideas of civil law, the basic requirements for legal acts and law enforcement should directly regulate public relations.[8]

In Russia, special attention is paid to the manifestation of justice in tort law only in the works of D. Bogdanov,[9] in the work of S. Dontsov and V. Gliantsev dealing with the concept of social justice in compensation for harm and in the work of M. Egorova describing presumed guilt and innocent tort liability.[10] Meanwhile, justice should be manifested in all material elements reflected in law (torts and punishments, damage and reimbursement).[11] Accordingly, the issues of justice in cases of harm are of paramount importance to victims and tortfeasors.

The purpose of this study is to determine the optimal legal regulation in terms of the implementation of the principle of justice in Russian and Chinese norms on torts.

To achieve the goal, a comparative legal research method and a system analysis method were used. They made it possible to draw conclusions on the most successful regulatory options and interpret the norms of the law not in isolation from each other and the practice of their application but as a single legal matter.

1. General Provisions on Torts Under the Laws of Russia and China

Torts arise in case of violation of the non-property rights of the subject (life, health, name, reputation) or violation of the property status of a person expressed in the death, loss or damage of his or her property.

Tort liabilities protect the victim's rights in all cases where the harm is caused outside of any legal relationship in general, as well as when the harm is not fully compensated under the rules of social security, voluntary or compulsory insurance. The right of the victim to protection in the event of harm includes three powers: the ability to take real steps to protect and restore his or her right (use of self-defense measures, measures of operational impact); the ability to require the State to restore

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[8] *See* Гражданское право: участники правоотношений: учебное пособие [*Civil Law: Participants of Legal Relations: A Study Guide*] 172 (Vladimira V. Dolinskaya & Vladimir L. Slesarev eds., 2016).

[9] *Богданов Д.Е.* Триединая сущность справедливости в сфере деликтной ответственности // Журнал российского права. 2013. № 7. С. 49–62 [Dmitry E. Bogdanov, *The Triune Essence of Justice in the Sphere of Tort Liability*, 7 Journal of Russian Law 49 (2013)].

[10] *Егорова М.А., Крылов В.Г., Романов А.К.* Деликтные обязательства и деликтная ответственность в английском, немецком и французском праве: учебное пособие [Maria A. Egorova et al., *Tort Obligations and Tort Liability in English, German and French Law: A Study Guide*] 32 (Maria A. Egorova ed., 2017).

[11] *Донцов С.Е., Глянцев В.В.* Возмещение вреда по советскому законодательству [Sergei E. Dontsov & Valentin V. Gliantsev, *Compensation for Harm Under Soviet Legislation*] 267 (1990).

the violated right (application of protective measures and liability); ability to protect property rights (enforcement).[12] These abilities are manifested in tort law in different ways. Thus, the use of self-defense and protection of third parties is possible only if certain conditions are met, therefore, both Russian and Chinese legislation provide for tort liability if the necessary defense is exceeded and if absolutely necessary in certain cases (Arts. 1066, 1067 of the RF CC; para. 2 of Art. 1077 of the PRC CC). In the PRC CC in Article 1177 there are rules which are known to a Russian legislator as self-defense (Art. 12 of the RF CC), according to which the victim of the alleged tort has the right to protection by taking actions to seize property owned by the tortfeasor. This new law, referred to as the self-help doctrine, was previously unknown to TLL. It allows the commission of such actions only if the victim, in the absence of active actions on his or her part, will suffer irreparable damage, as well as upon the immediate report of the tort to the relevant state bodies.[13] This doctrine integrates Russian rules on the prevention of harm (Art. 1065 of the RF CC) and self-defense. The first ones lie in the possibility of granting the right to demand a ban, termination, suspension of the disturber's activities while the second ones lie in the possibility of committing independent actions to suppress it.

The right to demand in court the suspension or termination of the relevant activities of the defendant that creates a threat or danger of harm (Art. 1065 of the RF CC; Art. 1167 of the PRC CC) can also be considered as the application of coercive measures in tort law.

With regard to protective measures and liability, that ability of the victim could be applied in various torts. Russian legislation provides for such methods of compensation for harm as compensation in kind, correction of a damaged thing and compensation for caused losses (Art. 1082 of the Civil Code). Chinese law in Article 15 TLL mentioned, along with the previous ones, such methods of protection as restitution, apology, elimination of influence and restoration of reputation. It has been noted that these methods may be used alone or in combination. In the PRC CC, they are not highlighted in a separate article in Part 7. The mentioned methods of protection, with the exception of apology, are also reflected in the general part of the RF CC in Article 12 and in special legislation. Therefore, they can also be applied if necessary and in liabilities for compensation for harm. The official apology offered on behalf of the Russian Federation by the prosecutor as a way of protecting of a rehabilitated person's rights is contained in Article 136 of the Criminal Procedure Code of the Russian Federation.

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[12] Denis Karkhalev, *Protection of Rights Under Russian Civil Law in a Comparative Context*, 3(1) BRICS L.J. 126, 128 (2016).

[13] 全国人民代表大会宪法和法律委员会关于 《民法典侵权责任编（草案）》修改情况的汇报 [Report of the Constitution and Law Committee of the National People's Congress on the revision of the Civil Code Tort Liability (Draft)] (Dec. 25, 2021), available at https://npcobserver.files.wordpress.com/2019/08/2019828-public-consultations-explanations.pdf#page=3.

The duty of the tortfeasor is to perform certain actions to restore the violated right. As a rule, such restoration can be achieved by appropriate compensation. In the RF CC, the procedure for determining the amount of compensation is established in relation to cases of harm to life or health (Arts. 1085–1092). The Law of the Russian Federation on the Protection of Consumer Rights contains an indication of the possibility of recovering a fine if the consumer's requirement is not fulfilled voluntarily (Art. 13). In TLL, the size and procedure for determining compensation was not contained. This omission was noted by scientists as one of the significant shortcomings of the law. Thus, K. Thomas points out that, based on the analysis of the provisions of TLL, it is unclear whether the calculation of various punitive damages should be related to the degree of damage to the applicant or the amount of behavior of the defendant.[14] As a result, the provisions on tort liability were supplemented in the PRC CC with a separate chapter which describes the procedure for determination and the types of refundable or compensated income of the victim (Arts. 1179–1187). Compensation is paid for medical expenses, nursing expenses, transportation costs, food costs, other reasonable expenses for treatment and rehabilitation, compensation by reducing income at work, disability, funeral, compensation for mental damage. Chapter 2 of the PRC CC also specifies the algorithm for calculating various damages.

In the laws of both countries, the construction of rules on compensation for harm is based on the principle of general provisions to private ones. Chapter 59 of the RF CC first establishes the principle of full compensation for harm (Art. 1064 of the RF CC); indicates the obligatory existence of guilt to impose liability for causing harm, except in cases established by law; the conditions for exemption from reparation and the possibility of imposing a duty of reparation on a person who is not the tortfeasor are noted. Further, individual varieties of torts are regulated. In particular, rules are established for compensation for harm if the necessary defense and extreme necessity are exceeded (Arts. 1066, 1067 of the RF CC); liability for harm committed by minors and persons with disabilities (Arts. 1073–1078 of the RF CC); liability for harm caused by a source of increased danger (Art. 1079 of the RF CC) and other special torts. The PRC CC also first establishes general rules on the liability to compensate for damage caused, on the concept of harm, on conditions for exemption from liability and its reduction. Further, special types of torts are regulated: liability for product quality, liability for traffic accidents, liability for medical negligence, liability for environmental pollution and harm, liability for super-hazardous activities, liability for harm caused by pets and liability for harm caused by buildings (construction, repair works) or facilities.

In contrast to Russian law, Chinese law focuses liability for damage caused to the environment in the provisions of the Civil Code and prescribes the right to demand

[14] Kristie Thomas, *The Product Liability System in China: Recent Changes and Prospects*, 63(3) Int'l Comp L.Q. 775 (2014).

compensation from the violator for the restoration of the ecological environment (Art. 1235 of the PRC CC), as well as compensation for losses possible during the restoration of the damaged environment functions; compensation for the costs of research, identification and assessment of environmental damage; costs of pollution elimination, prevention of damage spread. However, the method of calculating punitive damages is not specified in the PRC CC.

It is distinguished by the specificity of the tort liability regulation when causing harm from objects with increased danger. In Russian legislation, regardless of the variety of such facilities, the norms are the same. They prescribe increased liability (liability without fault) for the owners of such objects (Art. 1079 of the RF CC). If the gross negligence of the very victim contributed to the occurrence or increase of harm, the amount of reparation should be reduced depending on the degree of guilt of the victim and the causing of the harm.

In the PRC CC, norms on liability for road accidents, for medical damage, for the operation of especially dangerous objects and for damage caused by pets and buildings, construction and other objects are allocated in separate chapters. Thus, the types of facilities are clearly distinguished and their exploitation entails strict liability.

Harm caused as a result of the injured's intention during the operation of dangerous objects, as well as insurmountable force or force majeure, is not compensable in both legal orders. In the presence of gross negligence of the victim in the torts under consideration, Russian law prohibits refusing to compensate for harm to life or health. Compensation may be reduced in such cases. Chinese tort law allows the reduction of the compensation amount for gross negligence of the victim only in a tort related to high-altitude, high-pressure or underground excavation or high-speed rail transportation (Art. 1240 of the PRC CC). Gross imprudence or negligence of the victim in a tort in causing harm to pets will not only reduce but also exempt from tort liability (Art. 1245 of the PRC CC). In this context, a person in the treatment of animals should be aware of the potential unpredictability of their behavior and the impossibility of establishing complete control over them. Strict standards compared to Russian law are provided for owners, escaped or abandoned animals, since they are responsible for the harm caused by their animals (Art. 1249 of the PRC CC). There are no special rules in this regard in Russian legislation.[15] Meanwhile, tort liability issues in this area are very relevant, considering Russia has introduced norms on the responsible treatment of animals (Federal Law No. 498-FZ of 27 December 2018 "On Responsible Treatment of Animals and on Amending Certain Legislative Acts of the Russian Federation") which tighten control over the actions of animal owners.

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[15] *Летута Т.В., Минеев Е.В., Шипилова О.В.* Вред, причиненный животными: проблемы гражданско-правовой защиты потерпевших // Вестник Оренбургского государственного университета. 2014. № 3. С. 29 [Tatiana V. Letuta et al., *Harm Caused by Animals: Problems of Civil Protection of Victims*, 3 Bulletin of Orenburg State University 29, 29 (2014)].

However, there is no regulation of the rules of civic behavior with strangers or wild animals.

Such a special type of tort in Chinese law as harm by medical organizations and their employees is very interesting. This tort in the RF CC does not stand out as a separate kind. The PRC CC assumes the liability of such entities for guilt. Rules are established under which medical organizations are presumed guilty if there has been either violation of treatment standards according to the relevant laws and rules, concealment or refusal to provide medical documentation, fabrication, falsification or destruction of medical documentation (Art. 1222 of the PRC CC). Conditions are also established under which tort liability is excluded: the fulfillment by medical workers of their duty to reasonably diagnose and treat in emergency situations (rescue of dying patients); difficulty of diagnosis and treatment based on the available level of medicine (Art. 1224 of the PRC CC). The introduction of rules on the responsibility of medical organizations and workers in the PRC CC is a convenient approach of the legislator for victims. The existence of a specific violation does not require a search and systematic analysis of the various sources of law governing liability in the relevant area. In Russia, the absence of such rules in the RF CC creates a situation in which the norms that allow medical organizations to bring to tort liability are scattered in voluminous medical legislation, in separate laws and subordinate acts. General rules on the possibility of imposing liability (wrongfulness of acts, harm, causal link, guilt) in the absence of special provisions in Chapter 59 of the RF CC do not allow to unequivocally answer the question of the need for guilt in the actions of employees of medical organizations, its form and significance for compensating patients. The latter problem gives rise to a debate about the relationship between medical activities and those associated with the exploitation of a source of increased danger.[16] The issue does not find its unequivocal solution under what conditions and in what cases medical organizations and employees will be responsible without guilt, and in what cases for guilt.

Chinese law provides for the possibility of imposing tort liability on network users and network service providers who use the network to infringe on civil rights and the interests of others. Liability of network users and network service providers in Russia is provided in the Civil Code in Part 4, regulating intellectual rights, as well as laws establishing administrative liability for certain violations on the Internet (Federal Law No. 126-FZ of 7 July 2003 "On Communication," Federal Law No. 152-FZ of 27 July 2006 "On Personal Data," Federal Law No. 149-FZ of 27 July 2006 "On Information, Information Technologies and on Information Security"). There is no direct consolidation of the possibility of applying tort rules to the actions of network users and network service providers in Russia. Meanwhile, the approach of Chinese law seems worthy of attention because bringing the liability of these entities to the

[16] *Мохов А.А.* Некачественное медицинское обслуживание как источник повышенной опасности для окружающих // Современное право. 2004. № 10. С. 6 [Alexander A. Mokhov, *Poor Quality Medical Care as a Source of Increased Danger to Others*, 10 Modern Law 2, 6 (2004)].

level of tort eliminates the need to link the actions of the offender with a violation of specific rules of law as is the case now in Russian law. For example, when disseminating information defaming human honor and dignity on the Internet, a person will be subject to liability according to the rules on moral harm and the general provisions of the Civil Code on the protection of honor and dignity (Arts. 151, 152 of the RF CC). If the Internet is used for threats and blackmail, the person will be subject to criminal or administrative liability and compensation for non-pecuniary damage is also possible. Thus, in Russian law, liability for such entities comes not for the unlawful use of the network (which can take completely different forms) but for the specific content of the violator's actions. However, the imposition of fines, restriction of actions and other sanctions that can be applied in such cases do not seem to cover the real expenses of the victim (for example, treatment by a psychotherapist) and compensation for non-pecuniary damage should not perform the functions of covering victim's losses. Therefore, the approach of a Chinese legislator in this matter greatly facilitates the search for grounds, the determination of the compensation amount and the protection process for the injured.

One of the significant innovations in the PRC CC is the introduction of the "safe harbor" rule for Internet providers (network service providers). Its essence lies in the procedure of the provider's actions when information about the violation of his/her rights is received from the copyright holder. The provider must immediately take measures to eliminate violations and inform the content user of violations on his/her part who in turn can send a rebuttal. If the copyright holder does not answer the refutation, does not justify the claims (does not send the complaint to state authorities, to the court), the Internet provider is exempted by law from tort liability for violation of the rights of the copyright holder (Arts. 1195, 1196 of the PRC CC).

A comparative analysis of the provisions of Russian and Chinese legislation leads to the conclusion that there is a significant similarity in the legal regulation of torts and at the same time that there are differences that fundamentally affect the regulation of torts.

2. On Justice and Tort

The principle of justice occupies a special place in scientific works and judicial practice. The abstract notion of justice needs to be specified on formulating more or less specific rules. These rules are determined by the nature of the relationship to which their scale is applied, as well as the needs and interests of stakeholders. In relation to torts, horizontal and vertical justice[17] are distinguished as well as retributive,

[17] *Прибыткова М.* Обоснование размера морального вреда: принципы горизонтальной и вертикальной справедливости // Журнал РШЧП. 2018. № 1. С. 193 [Maria Pribytkova, *Justification of the Amount of Moral Harm: The Principles of Horizontal and Vertical Justice*, 1 Journal of the Russian School of Private Law 191, 193 (2018)].

distributive and corrective one.[18] As A. Cherdantsev correctly pointed out, any type of justice changes during historical development.[19] D. Bogdanov noted that justice in tort law is a historically established idea of conformity with the social ideals of compensation for losses caused by harm.

The significance of justice is explained by the history of tort law which since the time of Roman law originated as an alternative and later a replacement of the principle of the talion "an eye for an eye, a tooth for a tooth" which previously provided for the possibility of lynching causing the same harm to the offender. Since tort law was entrusted with the mission of replacing the psychologically necessary instinct of revenge for a person, a significant equivalent to a talion should have been offered. This "equivalent" was a tort despite various interpretations of which the general intention is to proclaim at the level of law any harm wrongful and requiring its compensation.

With the development of statehood, with the growing need of rulers to eradicate arbitrariness among the population and to strengthen the authority of state power, the principle of the talion began to gradually be replaced by a fine. The Laws of the Twelve Tables contained a rule on revenge for self-mutilation if there was no voluntary agreement between the parties to pay a fine. But for other torts, the payment of a fine was already a mandatory measure of liability. So the principle of the talion was gradually ousted from the sources of law.[20] In contrast to Roman law, in imperial China, compensation in the form of property compensation for damage caused to life or health was virtually not practiced. Physical punishment (bamboo sticks) was the only remedy.[21] Accordingly, for a long time there was no question of equitable compensation for harm in Chinese law. Moreover, given the traditions of Confucianism, where property belonged to the family as a fundamental concept and was managed by the head of the family, the topic of collecting money from the head of the family for the actions of a family member could raise questions. What are the grounds? Is there a causal link? Does age affect? Where are the limits of the family's property responsibility for the actions of its members? Therefore, Chinese law, unlike other legal systems, has gone a rather long way of replacing physical penalties with monetary compensation.

Modern states preach the idea of social or socialized justice. The latter is widely discussed in the legal literature and has various interpretations.[22] In general, it should

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18 Bogdanov 2013.

19 Справедливость и право: межвузовский сборник научных трудов [*Justice and Law: Interuniversity Collection of Scientific Papers*] 7 (1989).

20 *Климович А.В.* Обязательства из деликтов в римском праве // Сибирский юридический вестник. 2008. № 1(40). С. 44 [Alexander V. Klimovich, *Obligations from Tort in Roman Law*, 1(40) Siberian Legal Bulletin 44, 44 (2008)].

21 Hao Jiang, *Chinese Tort Law in the Year of 2020: Tradition, Transplants, Codification and Some Difficulties*, SSRN Papers (2020) (Dec. 25, 2021), available at https://ssrn.com/abstract=3622837.

22 *Аверкиева Е.С.* Равенство, социальная справедливость и общественное благосостояние // Вопросы регулирования экономики. 2016. Т. 7. № 3. С. 44–54 [Elena S. Avarkieva, *Equality, Social Justice and Social Welfare*, 7(3) Issues of Economic Regulation 44 (2016)].

be noted that social justice should be aimed at creating an enabling environment for a certain category of persons. In the usual sense, justice is characterized by the establishment of equality which in tort law consists in taking into account the guilt of the victim and the causer, taking into account the property situation of the harm when awarding compensation (Arts. 1078, 1083 of the RF CC). The injured is always a weak party to tort liabilities and the special attitude of the Russian and Chinese legislator towards him/her is determined by the application of the presumption of guilt of the tortfeasor that implies his/her guilt until it is proved otherwise. Shifting the burden of proof has the goal of protecting the weaker. Therefore, derogations from the principle of legal equality and equality are possible in order to achieve justice in the context under consideration.

Social justice is a means of integrating politics, morality and law in a single plane of action, in a single, albeit contradictory, system of assessing people's behavior and the resulting way of treating them. Accordingly, justice is a reflection of the common will of the people which is embodied in the form of law at a specific period of the historical development of statehood.

In the legal literature, not only the types of justice are distinguished but also the forms of the realization of justice.

According to the classification by K. Muzdybaev, such forms can be attributed to distributive, correctional and procedural.[23] In general, this classification echoes the types of justice indicated earlier. However, in cases where we need to understand the mechanism for the realization of justice in the rules of tort law and the acts of its application, the latter classification is of greater interest.

The correctional form allows implementing the punitive component of justice and emphasizes the tortfeasor's guilt. Punitive compensation in both Russian and Chinese tort law is an exception to the general rule and manifests only in isolated rules. For example, in Russia, it relates to the fines that imposed on retailers for refusing to voluntarily satisfy consumer requirements in cases of harm due to defects in goods, while in China, it relates to the fines that imposed on the manufacturer and seller that did not remove from economic activities goods with defects which can cause serious damage to the life and health of citizens. The corrective form is also considered by Chinese scientists in the context of strictly established rules on the need for full reparation. It is assumed that this form requires strict protection of the individual (private) rights of the subjects through a mechanism of compensation for harm – "punishment with money" or, in other words, negative property consequences for the tortfeasor. The correction of the situation at the expense of the causer as an equitable option for restoring the property sphere of the victim does not in itself entail any complaints but it cannot take into account the peculiarities of each specific case of harm and according to Confucianism it is not generally welcome.

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[23] *Муздыбаев К.* Идея справедливости // Социологические исследования. 1992. № 11. С. 95 [Kuanyshbek Muzdybaev, *The Idea of Justice*, 11 Sociological Research 94, 95 (1992)].

In the distributive form of justice, the law focuses on the distribution of rights and duties, resources and various benefits. In this form, normative provisions will tend to the realization of such components of justice as "meeting the needs of those in need of something," "the public utility of the norm," "minimizing suffering." The distributive form implies universal burden sharing, the elimination of injustice by "common forces" in the absence of "selfishness."[24]

The procedural form of the exercise of justice should be manifested in the establishment of mechanisms at the law level that allow the subjects of tort law relations to effectively exercise their rights.

According to Jiang Hao in China, the traditions of Confucianism created the conditions for the development of a distributive form of justice. In Chinese tort law, the distributive form manifests itself in the establishment of a "medium" liability which applies if the amount of liability is difficult to determine or the property of the tortfeasor is insufficient and "joint" liability when it is impossible to identify a particular offender (formerly Arts. 9–11 of the TLL, now Art. 1254 of PRC CC), as well as "equitable" ("socialized" or liability "in share") of liability which is established in cases where the victim and the tortfeasor are not guilty of causing damage, but both parties, by decision of the court, can divide the damage in accordance with the real situation while previously the only reason for distributing the amount of compensation was the "wealth" of the tort liability parties (Art. 1186 of the PRC CC). To date, the wording of the law is limited to the need to separate losses in accordance with the provisions of the law. The distributive form of justice is also disclosed in the new rules on "alleged risk" when tort liability is reduced, "dissipated" under certain conditions. For example, with voluntary participation in activities related to certain risks, the causer, in the absence of intent and gross negligence on his part, is exempted from tort liability (Art. 1176 of the PRC CC). Another example is associated with a reduction in tort liability of drivers of vehicles not involved in entrepreneurial activity (Art. 1217 of the PRC CC). This rule demonstrates the legislator's desire to improve the legal situation of drivers who are not private entrepreneurs in order to gradually resolve the issue of the development of non-commercial passenger traffic and the unloading of public transport.

Jiang Hao believes that a similar approach is contained in Russian tort law when the guilt of the victim and the property of the tortfeasor are taken into account. However, this is not quite true. Russian tort law does not propose and did not propose legislative constructions in which the absence of guilt on both parties would lead to compensation for harm. Causing harm in special torts that do not require guilt by the tortfeasor but in the event of gross negligence of the victim are cases where the amount of compensable life or health damage can be reduced. Such a rule is aimed at forming a responsible attitude of "potential" victims to their actions and, in

[24] Jiang, *supra* note 21.

the whole, the lawful behavior of citizens. For example, the crossing of a pedestrian a red light is an unlawful action which in the event of a traffic accident should lead to such serious property consequences for the driver as in the case of an incident where the victim abided by traffic rules and crossed the road a green light. Thus, we are talking about the presence of guilt on the part of the victim.

Taking into consideration the tortfeasor's property status under Article 1083 of the RF CC occurs if the damage arose out of negligence or in the absence of the tortfeasor's fault. Such a consideration is intended to prevent cases where strict tort liability is established due to the danger of the object but may result in unfairly exorbitant compensation. A classic example of the need for this rule is commonly known: the tortfeasor is the owner of an old cheap car as a result of awkward movement during a maneuver scratches the door of a new expensive car. Apparently, both the danger to society and the victim's expenses actually required for repair are small here. However, for the tortfeasor, they can cause serious negative property consequences.[25] Thus, consideration of the property status of the latter person occurs exclusively in those torts where the harm appears in the absence of the tortfeasor's fault or due to negligence.

It seems that this version of regulation available in Russian law is more consistent with a universal understanding of the principle of justice and allows taking into account the circumstances of each particular tort. The existence of the rules under consideration allows, within the framework of the law, to ensure an individual approach and not lead to the authorization by the court of an act requiring compensation from a person who is not involved in the tort or who is actually the victim of a combination of circumstances. Soviet scientists moved even further in their discussions about the justice of tort liability. The main emphasis was on the significance of the guilt of both the tortfeasor and the victim. They insisted that the high risk and unexpected nature of torts should not undermine the foundations of social stability, confidence in the legitimate actions and, after all, in the correctness of the city traffic. Otherwise, a person is sealed for endless anxiety, for example, "I will go today in public transport, suddenly it will slow down sharply or I will unsuccessfully step on the foot of another person and will have to compensate for a long treatment or I will suffer and will not be able to continue to work." Therefore, at clarification of a question of imposing of the tort liability there can't be "approximate," "inexact," "average" legal categories. F. Gavze noted that the courts should take into account not only the specific situation in which the harm was caused but also the form and varieties of guilt (intent, carelessness in the form of negligence or frivolity), motive, purpose of the actions of the victim.[26] As

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[25] This example intentionally does not explain the purpose and mechanism of compulsory insurance for vehicle owners. The visibility of cases of inconsistency in the amount of damage for the victim and the causer was the reason for the demonstration of such an example.

[26] *Гавзе Ф.И.* Возмещение вреда, причиненного механизированным транспортом [Faivel I. Gavze, *Compensation for Damage Caused by Mechanized Transport*] 48 (1988).

an example, he convincingly shows that in a multimillion city, the crossing a red light by a middle-aged urban resident and the crossing a red light by an elderly citizen living all his life in a far village and being first time in the city are completely different acts from the point of view of taking into account their guilt.

Indeed, questions of guilt in determining tort liability in Chinese law are a subject of separate reasoning. They are not elaborated to the extent that they occur in other legal systems. This is also due to the peculiarity of the development of Chinese law. Tort liability on general grounds (for guilt) and strict (increased, without guilt) liability are supplemented by the previously indicated "equitable" liability (Art. 1186 of the PRC CC). Moreover, the form of guilt is not disclosed in the laws. As there are precedents in which guilt is not important for the even distribution of losses in a tort, the theory of guilt as such has not been the subject of in-depth studies.

It should be noted that given the resonance of Chinese court cases that made it possible to recover damage from persons who did not actually cause harm, modern Chinese courts make decisions that do not aim to satisfy the need for harm compensation that arose but have the goal of clarifying all the circumstances of the case. For example, in one of the cases, the court explained that according to common sense a river in winter is an apparently dangerous place that threatens human health and life. Predictability of hazardous effects can be known without professional knowledge. So entering the territory of the river, not intended for public events which is not a public recreation area or a zone for crossings the drowned one acted overly self-confident. Every citizen must realize that "he or she should not, at will, enter places where mass events are not held ... Adults should be primarily responsible for their own safety. They should not make their security dependent on the constant reminders of the relevant state bodies". Therefore, the lawsuit of the relatives of the drowned to the Beijing Yongding River Administration is not satisfied.[27]

The fragmentation of liability into various subspecies (equitable, medium, joint) may indicate the desire of the Chinese legislator to achieve the goal of harm compensation in any possible way and even in cases where it is impossible to establish the exact degree of the tortfeasor's guilt. Such an approach may be justified, however, it poses a risk of unjustifiable infringement of the tortfeasor's rights or the rights of third parties not related to the harm. It is indeed widely used, for example, in cases of harm caused by a "falling object." According to Article 1254 of the PRC CC liability for harm done by the falling objects, not fenced holes and unauthorized dumps comes if owners, proprietors, managers or builders can't prove the innocence. When it is impossible to identify the tortfeasor, plaintiffs, in such cases, can sue all citizens living in a residential building. So the court decides that all residents are responsible in equal

[27] 指导案例141号：支某1等诉北京市永定河管理处生命权、健康权、身体权纠纷案 [Guiding Case No. 141: *ZHI X 1 et al. v. The Yongding River Management Office of Beijing Municipality, A Dispute over the Right to Life, the Right to Health, and the Right to Body*] [Judgment of 16 October 2020] (Dec. 25, 2021), available at http://www.court.gov.cn/fabu-xiangqing-263581.html.

shares with the exception of those who were able to prove their absence from the house. In practice, it is not enough for the owner (manager or builder) to prove that he/she took reasonable care. He/she must prove that the third person, the plaintiff or the natural force caused harm to the plaintiff. Managers must prove that they took the necessary security measures to prevent such torts. If security measures have not been taken, they are liable. As Chenglin Liu points out, if the court followed traditional fault-based principles, a victim injured by a falling object would most likely be left without a remedy since the cost of finding the tortfeasor and holding him/her to account would be excessively high.[28] For jurisprudence, this theoretical nonsense in practice expresses a fairly clear task of Chinese tort law like speedy compensation for losses to the victim, a person who is at an extremely disadvantage compared to the defendant. In this part, a new law of the PRC CC is the establishment of a mandatory immediate investigation by the police and other state bodies of the liable person's location. Only if such an investigation does not make it possible to identify the tortfeasor, residents in the building may be obliged to pay.

Chinese "equitable" liability or, as Chenglin Liu calls it "socialized liability" is criticized by scholars who give examples of fairly controversial court decisions made using it. Chinese scientists note the space and uncertainty of such liability which allows the widest possible use of "judicial discretion." As a result, in some cases, citizens have to reimburse medical expenses, funeral expenses when the labor relations between the defendant and the victims were not related to the illness of the latter and his/her death and when the defendant took the necessary measures to assist in saving the victim. In other cases, "equitable liability" allows courts to dismiss claims against a party guilty of mass tort proceedings in the name of maintaining social stability. Judicial discretion raises the problem of justice of the decision of the court in a tort dispute. A just judgment is interpreted according to three concepts. The first puts the law at the forefront. Therefore, a court decision consistent with the law can be equitable. The second recognizes a just decision that is based on the law. The third concept only defines an equitable solution that complies only with the norms of justice and can run counter to legislative provisions.[29] Undoubtedly, if possible, the law should be essentially equitable. But due to the causistic nature of tort law, the act cannot provide for all possible regulatory options. Therefore, despite attempts by Russian or Chinese legislators to resolve in detail various aspects of offenses in the law, the objective impossibility of the existence of a tort law should be recognized in which the court could always refer to a specific norm prescribing such a case. Under the existing conditions, for example, the decision of the Russian court does not raise questions in justice according to which the victim, in addition to the expenses of treatment, it was

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[28] Liu 2018, at 24–26.

[29] *Черданцев А.Ф.* Социалистическое право и справедливость [Alexander F. Cherdantsev, *Socialist Law and Justice*] in *Justice and Law*, *supra* note 19, at 5, 13.

reimbursed the cost of airfare which she could not use due to a complication caused by a medical organization.[30] In this case, the court justly considered that the reason for being in a stationary medical organization and the inability of the victim to fly to her parents for a holiday was the result of an inflammatory process after removing a tooth. Despite the fact that the removal process itself was carried out in accordance with the standards of medical activity, the rules for further accompanying the patient after such removal were violated. It was necessary to prescribe adequate drug treatment of the patient's peculiarity which was expressed in the ability to develop a strong inflammatory process after mechanical effects on the body.

In other case, the decision of the Chinese court to refuse to satisfy the claim in case when the actions to detain the victim did not directly cause his death is beyond question.[31] In that situation, there was a collision between an adult driving a bicycle and a cyclist who was a minor. As a result of the accident, the latter was injured. Eyewitnesses took measures to block the movement of the adult's bicycle calling the parents of the minor and calling emergency services. A few minutes later, during a heated discussion on what happened, when the culprit of the collision tried to leave, he became ill and after a while he died. Subsequently, it turned out that he had a number of diseases that could lead to death due not only to intense emotional excitement but also as a result of other external influences. Given the legality of the actions that detained him, the court rightly dismissed the claim of the relatives of the deceased.

As a whole, despite the uncertainty of equitable or socialized liability, its use, taking into account the provisions of other norms of the PRC CC, really allows to compensate for harm by any means. Judicial errors may be related to the amount of compensation, however, without compensation for harm, the victim (at least in torts not related to harm caused by the state) cannot remain in such conditions. Accordingly, Chinese tort law, as Zhang Xinbao notes, presupposes the correction of the victim's situation to the detriment of finding out the guilt of the defendants and, according to the opinion of Chenglin Liu, contributes to the equalization of wealth between rich and poor.[32]

In contrast to this approach, Russian tort law remains committed to the formal principles of imposing liability and requires detailed proof of guilt, the wrongfulness and causation of the plaintiffs including those affected by the falling objects, pits on the roads, etc. For example, in practice, attempts to identify exactly if the ice formation fell from the roof of an apartment building or from the visor of a glazed

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30 *See* the case *Patrina v. Alexander Vakulchik Dentistry Corporation* (Judgment of 7 July 2016).

31 指导案例142号：刘明莲、郭丽丽、郭双双诉孙伟、河南兰庭物业管理有限公司信阳分公司生命权纠纷案 [Guiding Case No. 142: *Liu Minglian, Guo Lili, and Guo Shuangshuang v. Sun Wei and the Xinyang Branch of Henan Lanting Real Estate Management Co., Ltd., A Dispute over the Right to Life*] [Judgment of 9 October 2020] (Dec. 25, 2021), available at http://www.court.gov.cn/fabu-xiangqing-263591.html.

32 Zhang 2018, at 34.

balcony may be unsuccessful. The courts having established the fact of harm, nevertheless refuse to satisfy the claims of the victims due to the impossibility of determining the specific place of separation of the ice formation and, accordingly, the person liable for the harm.[33] In such judicial examples, the triumph of formalism gives rise to the absolute helplessness of the victims.

The courts may claim the incorrect basis of the statement of complaint and deny the claim in those torts that arise in a contractual relationship.[34] The victim in torts (for example, when providing poor-quality medical services or when causing harm to a poor-quality product) in some cases is actually deprived of the possibility of bringing a tort lawsuit. Meanwhile, tort defense can often provide more opportunities for the victim due to fines and compensation established at the law level.

The study of both the theory of Russian tort law and judicial practice makes it possible to note that Russia is characterized by a procedural form of the implementation of justice. The procedure involves careful attention to the grounds for presenting claims and to the content of these claims and their provability. The procedural form of the realization of justice is manifested in the detail of the issues of the size and procedure of compensation for harm, as well as in the procedure for proving the wrongfulness and guilt of the tortfeasor, in the detail of the tort types. The latter feature, in particular, is manifested in the allocation as an independent type of state liability (including law enforcement agencies). Despite the fact that the provisions of the RF CC in this part are criticized in some cases due to the lack of a presumption of guilt of the State, they demonstrate a readiness for a high degree of liability for creating conditions for the effective performance of their functions by state bodies.

Despite the presumption of tortfeasor's guilt in all other torts proclaimed in the Civil Code, victims are generally obliged to prove to the court not only the fact of harm and the causal link but also the wrongfulness of the tortfeasor's acts and, in fact, the guilt of the latter. There is a finding by the court of the tortfeasor's guilt with a focus on the evidence presented by the plaintiff, except where liability arises without guilt.[35]

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[33] *See* the case *Hadarin v. Vesta LLC* (Judgment of 31 March 2014).

[34] In the Ruling of the Supreme Court of the Russian Federation of 23 November 2016 in case No. A51-20318/2015, it was concluded that in making the claim, the plaintiff essentially based the claim on the position that the defendant, as a contractor, improperly fulfilled its obligations to repair the vessel, which meets the criteria of improper quality of the result of the work, and the plaintiff's arguments about the need to apply to the claims in this case, in particular, the provisions of Article 1095 of the Civil Code (on causing harm due to defects in goods) are rejected due to an erroneous interpretation of the law and the circumstances of the case Ruling of the Supreme Court of the Russian Federation No. 303-ES16-15223 (23 November 2016) (Dec. 25, 2021), available at http://www.supcourt.ru/stor_pdf_ec.php?id=1493388.

[35] Справка по результатам изучения судебной практики рассмотрения споров, связанных с возмещением вреда, возникших из деликтных правоотношений / Саратовский областной суд [Saratov Regional Court, Reference on the Results of the Study of Judicial Practice in the Consideration of Disputes Related to Compensation for Damage Arising from Tort Relations] (Dec. 25, 2021), available at http://oblsud.sar.sudrf.ru/modules.php?name=docum_sud&id=10146.

Formalism and, in some cases, excessive settlement of Russian tort law can still not be considered exclusively in a negative way. The general concept of the need to prevent the illicit enrichment of the victim creates opportunities for the observance of the principle of justice in relation to the tortfeasors. Available rules:

Firstly, to bring law and practice as closely as possible in order to avoid the breadth of judicial discretion. In this version, an equitable court decision just finds its approval within the framework of the previously indicated legalistic concept.

Secondly, it eliminates subjectivity in the interpretation of the law when the number of tort disputes in the country is very impressive, and in some cases tends to increase, a clear legal formulation of the order, conditions, methods of protection is critically necessary. For example, judicial statistics on claims for damages from unlawful actions of law enforcement agencies and the court show that the number of cases considered by courts in this category is consistently high and in the first half of 2020 significantly exceeded the annual testimony of previous years (Table 1).

Table 1

Year	2016	2017	2018	2019	1st half of 2020
The number of cases	4371	4227	3581	3726	5372

Unfair compensation can be avoided not so much by relying on judicial discretion in the framework proposed by the legislator but by the impossibility of awarding it by virtue of the rules prescribed by law. For example, in a case claiming compensation for moral harm from the State, the court found that the plaintiff had already exercised his rights to reparation through a complaint to the European Court of Human Rights about the investigation ineffectiveness of his application for criminal proceedings. As a result of the appeal, he was awarded compensation in the amount of 45,000 euros. Given that on the same grounds a lawsuit was filed in a Russian court, he was denied satisfaction of the lawsuit.[36]

It should be noted that the number of tort cases in China is also quite large, but due to different criteria and the basis for the formation of statistics in Russia and China, it is hardly possible to draw direct parallels. However, the approximate data can still be correlated.

For example, in the Russian Federation, the number of cases of compensation for harm for violation of environmental legislation is separately allocated. In 2018, the courts considered 3025 cases.[37] During the same period, according to paragraph 3

[36] *See* the case *D. v. Russia* No. 2-3315/17 (Judgment of 17 July 2017).

[37] Отчет о работе судов общей юрисдикции по рассмотрению гражданских, административных дел по первой инстанции за 2018 год / Судебный департамент при Верховном Суде РФ [Judicial

of the decision on the report on the work of the Supreme People's Court of the People's Republic of China, 251,000 cases on natural resources and compensation for harm to the ecological environment were considered. It is possible that this number of cases includes not only cases of compensation for harm but also other cases of environmental violations. However, even this figure indicates a large number of cases in the area under consideration.[38]

The number of claims for compensation for harm from road accidents (except for injuries and the death of a breadwinner) in the Russian Federation in 2017 amounted to 98 998, while in 2018, there were 102 141 ones.[39] In the People's Republic of China, statistics cover the total number of cases of liability disputes in road traffic accidents considered by people's courts at all levels in different categories in the country over several years. So, from 1 January 2012 to 30 June 2017, it amounted to 4.491 million.[40]

One way or another, statistics indicate the relevance of tort law in practice. And if the Russian courts have improved the system of collecting and analyzing statistical data, dividing them into separate torts specified in the Civil Code of the Russian Federation, then the Chinese courts are not yet ready to analyze the number of cases based on the division into separate special torts. Despite the fact that a significant number of tort disputes in China can only be judged on the basis of available generalized data, it can be assumed that the development of a single concept of justice in such a large state needs to be gradually separated from the distributive form of the implementation of justice and the introduction of more or less clear parameters of tort liability and its streamlining with the borrowing of elements of the distributive form of justice. Such a form would make it possible to achieve uniformity in court decisions and their unambiguity.

Thus, an analysis of legislation and judicial practice in Russia leads to the conclusion that the procedural form of the implementation of justice dominates. An analysis of Chinese law and law enforcement practice leads to a conclusion regarding

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Department under the Supreme Court of the Russian Federation, Report on the Work of the Courts of General Jurisdiction for the Consideration of Civil and Administrative Cases in the First Instance for 2018] (Dec. 25, 2021), available at http://www.cdep.ru/index.php?id=79&item=4891.

[38] 最高人民法院工作报告——2019年3月12日在第十三届全国人民代表大 [Report on the Work of the Supreme People's Court at the 13th National People's Congress on 12 March 2019] (Dec. 25, 2021), available at http://gongbao.court.gov.cn/Details/a5a0efa5a6041f6dfec0863c84d538.html.

[39] Отчет о работе судов общей юрисдикции по рассмотрению гражданских, административных дел по первой инстанции за 2017, 2018 год / Судебный департамент при Верховном Суде РФ [Judicial Department under the Supreme Court of the Russian Federation, Report on the Work of the Courts of General Jurisdiction for the Consideration of Civil and Administrative Cases in the First Instance for 2017, 2018] (Dec. 25, 2021), available at http://www.cdep.ru/index.php?id=79&item=4151; http://www.cdep.ru/index.php?id=79&item=4891.

[40] 机动车交通事故责任纠纷案件报告 [Motor Vehicle Traffic Accident Liability Dispute Case Report] (Dec. 25, 2021), available at http://www.court.gov.cn/fabu-xiangqing-88822.html.

the predominance of a distributive form of the implementation of justice in the event of harm.

3. Justice in Determining the Amount and the Procedure for Compensation for Harm

Professor Wei Zhang points out that China's tort law provides for mandatory legislative provisions.[41] This distinguishes tort law from contract law in which contracting parties can adapt most rules. Such provisions are certainly characteristic of the tort law of Russia. However, a significant difference between the PRC CC and the RF CC is that the possibility for the parties to agree on the amount of compensation that the injured person must pay to the victim is legally prescribed (Art. 1187 of the PRC CC). If the tortfeasor is not able to pay a lump sum at a time, he/she can do it in installments but with the condition of providing an appropriate guarantee of payment. Only in the event that agreement cannot be achieved, the court must determine the amount of compensation in accordance with the actual situation based on the provisions of Article 1179 of the PRC CC and other laws. Such provisions list the possible types of expenses that will be compensated, also in Article 1185 of the PRC CC indicates penalties for violation of intellectual property rights. The Notification of Opinion of the Supreme People's Court on a number of issues concerning the application of the general principles of civil law of the People's Republic of China (for judicial application) dated 4 February 1988 which was declared partially invalid by the new legislation provides that compensation for the costs of treatment is generally based on the hospital's diagnostic certificate, medical expenses and hospitalization charges. Moreover, the cost of medicines purchased without the permission of the attending doctor should not be reimbursed.[42]

The rules on tort liabilities in Russia are mandatory excluding the discretion of the parties in determining the conditions for their occurrence and the amount of compensation. It is a matter of course that there is no prohibition on voluntary reparation on the basis of an agreement. However, the possibility of a contractual settlement of compensation is not prescribed by law. Compared to Chinese tort law, Russian tort law in determining the types and procedure of payments is strictly formalized and contains detailed explanations in the RF CC. In order to identify possible distinctive features or similarities in the regulation of the issue under consideration, we will reflect the provisions of interest in Table 1 where the numbers in parentheses indicate the number of the article of the relevant civil code.

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41 Zhang 2014.

42 最高人民法院印发《关于贯彻执行＜中华人民共和国民法通则＞若干问题的意见(试行)》的通知 [失] [Notice of the Supreme People's Court on Issuing the Opinions on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (for Trial Implementation)] (Dec. 25, 2021), available at http://www.lawinfochina.com/display.aspx?lib=law&id=3700.

Table 2

RF CC	PRC CC
lost earnings (income) (1085, 1086)	costs by reducing income due to missed work (1179)
cost of treatment (1085)	medical expenses (1179)
supplementary feeding (1085)	food expenses, hospital food subsidies (1179)
costs of external care (1085)	expenses paid for patient care (1179)
acquisition of special vehicles (1085)	Cost of assistive devices for persons with disabilities and disability compensation (1179)
purchase of drugs, prosthetic appliances and treatment in a sanatorium or resort (1085)	other reasonable costs of treatment and rehabilitation (1179)
–	transport costs (1179)
training for another occupation (1085)	–
if the victim – a minor – is compensated for damage related to the loss or decrease of his or her working capacity based on the cost of living of the able-bodied population as a whole in the Russian Federation (1087)	–
funeral costs (1094)	funeral costs (1179)
for persons who were supported (dependent) by the deceased victim – the share of earnings (income) of the deceased that they received or were entitled to receive for their maintenance during their lifetime is reimbursed (1089)	–

–	market price of property lost as a result of tort at the time of loss or by other reasonable methods (1184)

A visual presentation of the data makes it possible to verify that the statutory list of reimbursable expenses in both countries reflects all significant losses for the victim. However, Russian tort law is featured by higher concreteness and takes into account the interests of different categories of victims and their needs. The absence of the rule on the amount of compensation for lost property in the norms of the RF CC in the chapter on torts may be explained by the possibility of applying the general provisions of the civil code on determining the value of property in the liabilities.

According to the explanations given in paragraph 12 of the decision of the Plenum of the Supreme Court of the Russian Federation No. 25 of 23 June 2015 "On the Application by the Courts of Certain Provisions of Section 1 of Part 1 of the RF CC," the amount of reimbursement should be calculated with a reasonable degree of certainty. The materials of court cases indicate that the degree of accuracy of calculations for tort liabilities is not inferior to the specificity of calculations in contractual liabilities between entrepreneurs. Consequently, in the absence of rules similar to those of China on the preferential possibility of the tortfeasor and the victim to agree on the amount of compensable damage, the procedure for determining the compensable harm is established quite accurately.

As regards such compensation as compensation for moral harm, compensation for moral (mental) harm in Chinese law does not contain a detailed interpretation or the rules for its application. It is indicated only that it is used when serious moral harm is caused (Art. 1183 of the PRC CC). Reimbursement for such damage is compensated by applying the Interpretation of the Supreme Court on a number of issues on the establishment of liability for compensation for moral harm in civil law; Article 10 states that the amount of compensation for moral harm is determined based on the degree of tortfeasor's guilt, the circumstances of the tort, the consequences, income situation of the tortfeasor and the average standard of living in the area where the case was initiated.[43] However, the general principle of freedom of agreement between the parties on the amount and procedure for compensation specified in Article 1087 of the PRC CC applies to compensation for mental harm.

The victim in China has greater opportunities to determine the amount of compensation for harm with implying no need for strict regulation of moral (mental) harm which, either due to the high amount of compensation on other grounds, is not of interest to the victim or can be imposed arbitrarily without violating the legal provisions.

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[43] 最高人民法院关于确定民事侵权精神损害赔偿责任若干问题的解释法释[2001]7号 [Interpretation of the Supreme People's Court on Several Issues Concerning the Determination of Liability for Compensation for Mental Damage in Civil Torts (2001)] (Dec. 25, 2021), available at http://jtgl.beijing.gov.cn/jgj/jgxx/flfg/qt/122224/index.html.

The RF CC in contrast to Chinese law contains not only the characteristic of moral harm but also the grounds, method and amount of its compensation (Arts. 151, 1099, 1101 of the RF CC). Russian legislation clearly states that the amount of compensation for non-pecuniary damage is determined by the court. Guidelines for its definition are: the nature of the suffering of the victim (includes an assessment by the court of the actual circumstances of the case and the individual characteristics of the victim), the degree of guilt of the tortfeasor (if in the tort before the court liability comes for the guilt), requirements of reason and justice.

The Supreme Court of the Russian Federation drew attention to the need to take into account the requirements of justice in the form of a reasoned justification of the specific amount of compensation.[44] This legal position of the Supreme Court of the Russian Federation is of great importance for the elimination in judicial practice of the formalism characteristic of the procedural form of justice realization. However, the vagueness of the category of justice elevated to the rank of criterion allows courts to make decisions that cause an intense negative assessment in the scientific community. Consequently, for example, the motivation parts of court decisions can, on formal grounds, correspond to Article 1101 of the RF CC, take into account its requirements, with the exception of a common understanding of reason and justice. For instance, one of the cases states that a law enforcement officer who achieved significant merit in his career should have stress resistance, therefore, a criminal case illegally instituted against him/her could not significantly affect his mental health and the preventive measure in the form of house arrest did not entail any adverse consequences for him/her.[45]. In another case, when determining the amount of compensation for moral harm, the court takes into account the type of preventive measure chosen, the period of illegal criminal prosecution against the plaintiff, the severity of the act in which the plaintiff was suspected, the scope of investigative actions, marital status, the type and kind of her activity, her state of health, and having a family.[46] Unquestionably, these criteria can and should be taken into account. However, how can one discuss the amount of compensation for moral harm caused by the state to a citizen, based on his/her successful or unsuccessful personal life or on his/her abilities to being good at work? After all, the degree of suffering should be calculated primarily from the degree of negative effects of the harm and not from the victim's merit or failure of in his/her own life.

It seems that insufficient attention to moral harm, as well as the amount of compensable damage, is paid in China due to the possibility of agreeing on its size

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[44] *See* the case *Zvereva v. Ministry of Finance of Russia* (Judgment of 5 March 2018).

[45] *Иванова Е.В.* Проблемы возмещения вреда, причиненного органами следствия, прокуратуры, суда // Проблемы экономики и юридической практики. 2018. № 3. С. 255 [Elena V. Ivanova, *Problems of Compensation for Harm Caused by the Investigation, Prosecutor's Office, Court*, 3 Problems of Economics and Legal Practice 251, 255 (2018)].

[46] *See* the case *Minina v. Ministry of Finance of Russia* (Judgment of 2 June 2015).

by the parties to the tort. Such an approach does not require details of the amount of compensation for harm, it does not limit the victim in making claims. For example, in one of the cases described by Chenglin Liu, the court partially satisfied the plaintiff's claims. Dew to the claims made by the widow of the deceased for damages for part of the medical expenses, funeral expenses and emotional experiences in the amount of about 270,000 yuan, 16,800 yuan was recovered from the defendant, taking into account the fact that he was not guilty and was not responsible for the illness and death of the victim.[47] Moreover, as a recent study convincingly reflects, the strong influence of the peculiar history of religion and state in China on tort law explains the significant specifics of Chinese law.[48] Jiang Hao explains that Confucianism does not welcome litigation and does not contribute to the development of a person's need to chase property benefits and to cover minor losses. The solution to the question of an equitable restoration of the "balance" between the person who caused the harm and the person who suffered from the harm should be concerned with development and self-improvement. The relevant mentality is reflected not only in the actions of citizens but also in the norms of law formed by the authorities and judicial practice. For example, Chinese tort law establishes the rule that the person who caused the harm but voluntarily provided emergency assistance is exempt from liability (Art. 184 of the PRC CC). Jiang Hao describes a case in which the victim was not restored a paid tour which he could not use due to an accident.[49] The court argued that such a property loss arose from the contractual relationship between the plaintiff and the travel agency and its occurrence does not depend on the property of the tortfeasor and the person. They can be uncertain and unpredictable. At the same time, there are decisions of Chinese courts in which, in the absence of substantiation by the plaintiff of the actual expenses incurred, the court satisfies its requirements on the basis of the obvious economic losses that the plaintiff incurs and may suffer from the defendant's guilty actions.[50] The essence of such court conclusions is that violating the reputation of an entrepreneur by distributing insulting, slanderous or derogatory statements on an information network (having an attribute of public space) will inevitably lead to losses. Therefore, the defendant was brought to legal liability. Consequently, a certain inaccuracy in the specificity of the order and the amount of compensation exist in Chinese law not as a gap but due to the need to leave the possibility for a judge to make a decision corresponding to the historical and religious spirit of Confucianism.

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47 Liu 2018, at 24.

48 Jiang, *supra* note 21.

49 指导案例143号：北京兰世达光电科技有限公司、黄晓兰诉赵敏名誉权纠纷案 最高人民法院审判委员会讨论通过2020年10月9日发布 [Guiding Case No. 143: *Beijing Lanshida Optoelectronics Technology Co., Ltd. and Huang Xiaolan v. Zhao Min, A Dispute over Rights to Reputation*] [Judgment of 9 October 2020] (Dec. 25, 2021), available at http://www.court.gov.cn/shenpan-xiangqing-263601.html.

50 Kui-Hua Wang & Danuta Mendelson, *An Overview of Liability and Compensation for Personal Injury in China Under the General Principles of Civil Law*, 4(2) Torts L.J. 1, 36 (1996).

Taking into account mentioned points, significant progress has been made in regulating torts in China in the late nineties of the last century being at a very early stage of development. In such a short period of time, a legislator was able to fix the types of compensation in the law retaining priority over the contractual establishment of the amount of such reimbursement.

In Russian law and legal practice, it is important to determine the limits of violation of the victim's property issues, since the damage reimbursement liability should not serve to the victim's unreasonable enrichment. For example, when considering tort disputes, the prosecutor may demand a reduction in the amount of claims filed by the plaintiff insisting on the groundlessness of the treatment costs which include drugs that are not included in the list of appointments.[51]

The issue on the significance of the procedure for calculating the amount of compensation in tort liabilities is of fundamental importance. Definitely, on the one hand, the victim must be exempted from excessive burdens associated with the search for evidence of specific property losses while experiencing physical or moral suffering due to the fact of the harm done. However, baseless penalties from the tortfeasors, or even, as in the practice of the Chinese court, from third parties, can also be regarded as actions completely inconsistent with the general principles of the law. Apparently, the issue on the procedure for calculating the losses suffered, their composition, should still find its specific permission at the law level where the procedure for determining the amount of compensation should be established. At the same time, in order to maximize the protection of the victims' rights, the law should establish the possibility of the tort liability parties to agree on the procedure, the time frame, the amount of compensation (not lower than the legal minimum). This rule will allow to level situations when it is difficult to find out the specific amount of losses for the victim.

Therefore, on the issue under consideration, an integrated approach, including a variant of Russian law and Chinese law, seems quite optimal comparing with the approaches currently contained in Russia and China.

Conclusion

Justice in Russian tort law is implemented in a procedural form that allows taking into account the characteristics of each particular casus. Justice in Chinese tort law takes the form of a moderate distribution of property benefits and restoration of the victim's property by any means.

What is indeed, both the forms of realization of the justice of Chinese tort law and the corresponding forms of Russian tort law have a number of undeniable advantages, as well as a number of significant shortcomings. However, the idea of justice which reaches its climax precisely in tort liabilities due to their inexpertness,

[51] *See* the case *Gerasimova v. Abdulkhalikova* (Judgment of 20 June 2017).

risk for injury and, as a rule, the negativity of their actual consequences, both for the victim and for the tortfeasor (in some cases), should be improved taking into account modern political and economic development. The very fact that Chinese scientists and practitioners pay great attention to the development of tort legislation deserves special attention and support. China seeks to integrate into the world community preserving the basic political tenets and ideas of collectivism. At the same time, the inexplicable rigidity in the discussion and introduction of new provisions in the RF CC into the chapter on tort liabilities remains incomprehensible and incompatible with current reality.

It should be recognized that despite numerous complaints and interesting proposals in the literature to improve the norms in force in China, the proposed form of implementation of justice actually seems to be optimal and in some cases especially effective for victims. According to S. Dontsov and V. Gliantsev, the main value of tort liabilities lies in the ability to compensate for property losses suffered by an organization or a citizen.[52] The evident main social value of reparation is the achievement of justice.

Given the peculiarities of China's political and economic development, the current system of norms on tort liabilities most fully reflects justice in the context of collectivism and the need to smooth out social inequalities. The forms that it acquires are mainly in the moderate distribution of property benefits and the speedy restoration of the property status of the victim.

Compared to the tort law of China, the undeniable advantage of Russian tort law is the establishment at the law level of clear guidelines for determining compensation, as well as taking into account the guilt of both the victim and the tortfeasor. Jurisprudence demonstrates a commitment to the formal requirements of identifying the necessary conditions for tort liability. With this approach, there is no doubt that the issues of holding third parties unrelated to the tort to account are removed. Also, given the provisions of Russian law, the amount of compensation cannot be unreasonably overstated.

The problem of the procedure for calculating victims' losses should be solved on the basis of integrating the Russian and Chinese approaches and find their specific permission at the law level by determining the criteria for such calculations. At the same time, in order to protect the rights of victims, at the level of the law, the possibility of the tort liability parties to agree on the procedure, the time frame and the amount of compensation (not lower than the legal minimum) should be set out.

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52 Dontsov & Gliantsev 1990, at 10.

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LEGAL ANALYSIS OF REAL ESTATE INVESTMENT TRUST REGULATION IN INDIA

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As has been the case around the world, the real estate sector has played a pivotal role in the overall growth process of the Indian economy. Since the privatisation of the Indian economy in 1991, the government of India has introduced a variety of investment instruments to capture the interest of millions of potential investors over the last three decades. One such instrument is the Real Estate Investment Trust (REIT). In order to make the market more accessible to investors interested in REIT investments, the Draft Regulations were introduced in 2007. Following numerous modifications, the REIT regulations were finally ratified in 2014 by the Securities and Exchange Board of India. The Indian REIT regulations are aimed at providing an organized market of retail investors in a professionally managed ecosystem. However, since its launch in 2014, the REIT regime in India has failed to attract the expected number of investors. Through this paper, the legal structure of REITs in India is reflected, along with changes experienced up to the 2019 amendment. This study also takes a comparative approach in examining the structural aspects of Indian regulations in comparison to those of other countries, and comes up with some recommendations for the improvement of REIT regulations in India.

Keywords: Real Estate Investment Trust; REIT; Securities and Exchange Board of India; special purpose vehicle.

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Table of Contents

Introduction

"Real Estate Investment Trusts[1] *are companies that own or finance income-producing real estate across a range of property sectors."*

National Association of Real Estate Investment Trusts

REITs are a subset of innovative structured finance transactions. Due to its customised nature, there are no standard definitions available. Prior to the establishment of REITs in the United States, that is, prior to 1960, the customers could only gain

[1] Hereinafter referred to as REITs.

access to the real estate market by buying real property from the property market.[2] In India, REIT has been defined as part of a business trust under section 13A of the Income Tax Act which is a form of trust.[3] The corporate sector in India is growing at a rapid pace. This unstoppable growth in the corporate sector has introduced a new level of demands in the market. As the corporate sector expands, there is a strong demand for rented buildings, shopping malls, residential buildings, and other social spaces. As a result of this desire for real estate properties, investment in real estate has increased. One of the common features of REITs globally is their slow pace, for example in Singapore the REIT Regulations were launched in 1999 but the first project did not begin until 2002.[4]

Prior to 2014, there was no proper mechanism for investing in real estate, nor was there any systematic approach for doing so in India. Previously, people would rent or buy buildings, and those who invested in them would take loans from banks, financial institutions, and others. As a result, in 2014, the Securities and Exchange Board of India (SEBI) introduced the concept of Real Estate Investment Trust. REITs have the potential to transform the fragmented real estate stratosphere in India. The Indian real estate markets which are characterized by various obligations from acquisitions to disposal, have remained the primary reason why such a regime has not been able to take root in the Indian economy.[5] However, with the new regulations in place, investors who invest their money in listed units of REITs could benefit from both a stabilized return and an appreciation in the market value of assets in a regulated, transparent environment. Nevertheless, due to a lack of data on REITs since only three have been registered in India to date, and the first being listed on 1 April 2019, it is difficult to assess their market success and compare them to other structured financial entities in conduit form.

1. Real Estate Investment Trust

According to the National Association of Real Estate Investment Trusts, REITs, or real estate investment trusts, are companies that own or finance income-producing

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2 Su H. Chan et al., *Real Estate Investment Trusts: Structure, Performance, and Investment Opportunities* (2003).

3 Saurav Malpani, *Real Estate Investment Trusts: Are They Heading Towards Reality?*, Vinod Kothari Consultants, 5 August 2014 (Jun. 20, 2021), available at http://www.vinodkothari.com/wp-content/uploads/2014/08/REITs_Are_they_heading_towards_reality.pdf.

4 JLL India, India REITs: Heralding a New Era in Real Estate Investments (April 2019) (Jun. 20, 2021), available at http://naredco.in/notification/pdfs/updated-india-reits-heralding-a-new-era-in-real-estate-investments.pdf.

5 PricewaterhouseCoopers, India's New Real Estate and Infrastructure Trusts: The Way Forward (5th ed., July 2016) (Jun. 20, 2021), available at https://www.pwc.in/assets/pdfs/research-insights/2019/new-real-estate-and-infrastructure-trusts.pdf.

real estate across a range of property sectors.[6] These companies are registered with the Securities Regulator and need to follow eligibility criteria, capital adequacy norms and the listing of their debt or equity securities on a recognised stock exchange. REITs offer a way to include real estate in one's investment portfolio. Additionally, some REITs may offer higher dividend yields than other investments. REITs provide investors with an extremely liquid stake in real estate. They receive special tax considerations and typically offer high dividend yields.[7] The two most common forms of REITs are Mortgage REITs[8] and Equity REITs.[9] However, REITs have limitations such as no guarantee for distribution of assets, tax and regulatory bottlenecks and limitations on the simple basis of economics rationale.[10] Nevertheless, REITs remain an effective way of raising capital and providing investors with an exit strategy.[11]

1.1. Literature Review

For the review of the literature, the author referred to a reputed law journal and filtered papers titled with Real Estate Investment Trust, finding 18 articles on Hein Online, 13 Articles in JStor and 30 Articles in Science Direct. There have been very few papers that define REITs. In general, all papers have a common reference to REITs as trusts that pool real estate investments.

The New York Institute of Finance (1988) defines REITS as:

> A REIT may be a corporation, business trust, or association primarily developed to own or finance real estate. As with most corporations, a board of directors or trustees elected by shareholders sets policy and arranges the day-to-day operation of the REIT by professional managers or advisors. Persons with real estate experience, such as real estate brokers or mortgage bankers, organize many REITs. They may also be organized by commercial banks or insurance companies.[12]

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6 Helen X.H. Bao et al., *Real Estate Investment Trust Returns: Predictability and Determinants*, 18(1) J. Real Estate Pract. Educ. 107 (2015) (Jun. 20, 2021), also available at http://www.jstor.org/stable/24863168.

7 James Chen, *Real Estate Investment Trust (REIT)*, Investopedia, 4 November 2017 (Jun. 20, 2021), available at http://www.investopedia.com/terms/r/reit.asp.

8 Mortgage REITs, on the other hand, invest in mortgages or mortgage securities which are knotted to residential or/and commercial property assets.

9 Equity REITs produce income by collecting rent from and selling the various long-term properties owned by them.

10 Ravi Sinha, *REITs fail confidence test*, The Tribune, 4 April 2015 (Jun. 20, 2021), available at http://www.tribuneindia.com/news/real-estate/reits-fail-confidence-test/62534.html.

11 Surabhi Arora, *REITs in India! Is this the right time?*, Money Control, 26 August 2014 (Jun. 20, 2021), available at http://www.moneycontrol.com/news/real-estate/reitsindia-is-thisright-time_1163634.html.

12 Paul Beals & A.J. Singh, *The Evolution and Development of Equity REITS: The Securitization of Equity Structures for Financing the U.S. Lodging Industry*, 10(1) J. Hosp. Fin. Mgmt. 10 (2002) (Jun. 20, 2021), also

Business trusts have existed in the United States since the nineteenth century. Because of the United States Supreme Court's decision to tax these corporations, the United States Congress decided to introduce a special structure for Real Estate Investment Trusts similar to Mutual Funds.[13] With the emergence of the REIT model in the United States in 1960, many countries later encroached on REITs by adopting the same model. However, Switzerland and Germany already had their own models.[14] The Multistate Tax Commission, USA (2008), defines REITs as, "The term Real Estate Investment Trust shall have the meaning ascribed to such term in Section 856 of the Internal Revenue Code of 1986 as amended."

As per section 856 of the Internal Revenue Code of 1986, a REIT is:

> A real estate investment trust, the shares or beneficial interests of which are not regularly traded on an established securities market and more than fifty per cent of the voting power or value of the beneficial interests or shares of which are owned or controlled, directly or indirectly, or constructively, by a single entity that is:
>
> 1. treated as an association taxable as a corporation under the Internal Revenue Code of 1986, as amended, and
>
> 2. not exempt from federal income tax under the provisions of Section 501(a) of the Internal Revenue Code of 1986, as amended. To meet the 100 shareholder requirement, shares are often held by company employees or board members.[15]

In the United Kingdom, REITs were introduced in 2006. The general definition adopted by HM Treasury (2005) in its discussion paper to introduce REITs in the United Kingdom markets is,

> Generally, they are closed-ended companies or trusts that hold, manage and maintain real estate for investment purposes, which is leased to tenants.[16]

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available at https://scholarworks.umass.edu/jhfm/vol10/iss1/3?utm_source=scholarworks.umass.edu%2Fjhfm%2Fvol10%2Fiss1%2F3&utm_medium=PDF&utm_campaign=PDFCoverPages.

13 A. Overton Durrett, *The Real Estate Investment Trust: A New Medium for Investors*, 3(1) Wm. & Mary L. Rev. 140 (1961).

14 Davor Jagodić et al., *REIT Regimes in EU Countries – Institutional Environment versus Attractiveness of Real Estate Investment Vehicles*, research project Croatian Financial Markets and Institutions (2011) (Jun. 20, 2021), available at https://bib.irb.hr/datoteka/547735.konferencija_celje.pdf.

15 Department of Business, Economic Development & Tourism Research and Economic Analysis Division, Interim Report: Real Estate Investment Trusts in Hawaii: Preliminary Data and Analysis (December 2015) (Jun. 20, 2021), available at https://files.hawaii.gov/dbedt/economic/reports/REIT_Interim_Dec2015.pdf.

16 HM Treasury, UK Real Estate Investment Trusts: a discussion paper (March 2005) (Jun. 20, 2021), available at http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/bud05_reits_366.pdf.

KASB Securities Limited (2005) defines REIT as a security that sells like a stock and invests in real estate directly or indirectly.[17] Joshua A. Harris (2012) defines REIT as e-firms that own and manage income-producing commercial real estate for the benefit of their shareholders.[18] Professor Ko Wang (2015) defines REITs as closed-end funds created exclusively for holding real properties, mortgage-related assets or both.[19]

A REIT, as per Wang, Sun & Chen in the Chinese market, is a corporation or trust that uses the pooled capital of many investors to invest in or purchase and manage property.[20]

In Europe, REITs were first introduced officially in the Netherlands taxation regime in 2007, followed by Germany. Their model is almost similar to the United States and is defined as

> a company that owns, and in most cases, operates income-producing real estate, such as apartments, office buildings, warehouses and shopping centres.[21]

In India, the concept of REITs began in 1996, when the SEBI (Mutual Funds) Regulations 1996 were amended with chapter VIA to introduce Real Estate Mutual Funds in India.[22] Later, it was introduced through a structured finance model, similar to what is available in other countries through the Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations 2014.[23] According to the SEBI Regulations, "a Real Estate Investment Trust shall mean a trust registered as such under these regulations."

According to FTSE Russell, USA (2021),

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17 KASB Securities Limited, Research Paper on Real Estate Investment Trust (December 2005) (Jun. 20, 2021), available at https://www.secp.gov.pk/wp-content/uploads/2016/05/REITs_ResearchPaper-KASBSecuritiesLimited.pdf.

18 Joshua A. Harris, *Real Estate Investment Trust Performance, Efficiency and Internationalization*, Electronic Theses and Dissertations, 2004–2019 (2012) (Jun. 20, 2021), available at https://stars.library.ucf.edu/cgi/viewcontent.cgi?article=3363&context=etd.

19 *Id.*

20 Hao Fang et al., *The Impact of Macroeconomic Factors on the Real Estate Investment Trust Index Return on Japan, Singapore and China*, 13(4-1) Invest. Mgmt. Fin. Innov. 242 (2016) (Jun. 20, 2021), also available at https://www.businessperspectives.org/images/pdf/applications/publishing/templates/article/assets/8109/imfi_en_2016_04cont_Fang.pdf.

21 Anna Mazurczak, *Development of Real Estate Investment Trust (REIT) Regimes in Europe*, 4(1) J. Int. Stud. 115 (2011) (Jun. 20, 2021), also available at https://www.jois.eu/files/MazurczakV4N1.pdf.

22 Chan et al. 2003.

23 Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations 2014 (Sep. 20, 2021), available at https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-real-estate-investment-trusts-regulations-2014-last-amended-on-august-03-2021-_38449.html.

> A REIT is a publicly-traded real estate company that owns, and in most cases, operates income-producing real estate such as apartments, shopping centres, offices, hotels and warehouses.[24]

After analysing all the definitions used by various authors and authorities, it can be concluded that REITs are conduits that hold pooled capital of investors in the form of a trust to purchase and manage real estate properties.

1.2. Market Statistics

REITs were first introduced in the United States in 1960, with the incorporation of section 856 of the Internal Revenue Code.[25] Since their introduction, REITs in the United States have acquired an overall market capitalization of approximately US$1.5 trillion.[26] Australia was also an early entrant into the REIT framework, where the first REIT was listed in the year 1971. Since then, various amendments have been brought in to provide flexibility to the market. There was a complete change in the framework by introducing the Managed Investment Scheme (MIS) (through which the Australian REITs are governed) into the Corporations Law in 1988. In the United Kingdom, REITs were introduced in the year 2006 as part of the Finance Act of that year. Since then, the market has grown tremendously. Singapore also introduced the REIT in 1999 (whereas the first REIT was listed in the year 2002), commonly identified as S-REIT.

The first and only REIT to be listed in India to date is the Embassy Office Parks REIT in the year 2019, backed by the private equity giant Blackstone. Surprisingly, the first REIT in India was launched approximately five years after the regulations were published in 2014. With the emergence of REITs, the Indian real estate market is moving from traditional finance to the structured finance era. Nevertheless, the cautious response of investors reflects the lack of investor awareness about this new investment vehicle. According to the research report of a brokerage called Anarock, India can raise US$25 billion through REITs over the next three years.[27] However, its slow pace of growth shows that the REIT market has to face many challenges in order to enter the mainstream of investment instruments in the capital market.

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[24] FTSE Russell, FTSE EPRA Nareit Developed REITs and Non-REITs Indices, 31 March 2022 (Apr. 2, 2021), available at https://research.ftserussell.com/Analytics/Factsheets/Home/DownloadSingleIssue?issueName=ERGLANDENRG&IsManual=false.

[25] Jack E. Roberts, *Real Estate Investment Trust – New Tax-Saving Opportunity for Investors*, 13 Tax Inst. 27 (1961).

[26] Market cap of REITs in the U.S. 1975–2020, Statista (Jun. 20, 2021), available at https://www.statista.com/statistics/916665/market-cap-reits-usa/.

[27] Commercial REITs can raise over $25 billion in next 3 years: ANAROCK, Newsbarons, 10 October 2019 (Jun. 20, 2021), available at https://www.newsbarons.com/real-estate/commercial-reits-can-raise-over-25-billion-in-next-3-years-anarock/.

1.3. Structural Framework of REIT

In India, REIT is structured as a three-party model – the sponsor or sponsor group, the trustee and the manager. The sponsor is the entity that sets up the REIT. A sponsor is needed to transfer the assets to the REIT. A trustee is a person who holds the assets of a trust for the benefit of the unit holders. The manager looks into the investment decisions concerning the assets of the REIT, including additional investment or divestment.[28] The manager works in accordance with the Investment Management Agreement, entered into between the trustee and the manager. There are three main structures under which REIT's may operate:

• The REIT or Trust may hold a Special Purpose Vehicle (SPV) which shall hold the assets.

• The Trust may hold the Holdco which shall have a separate SPV which shall further hold the assets.

• The last model consists of the REIT or Trust directly holding the assets.

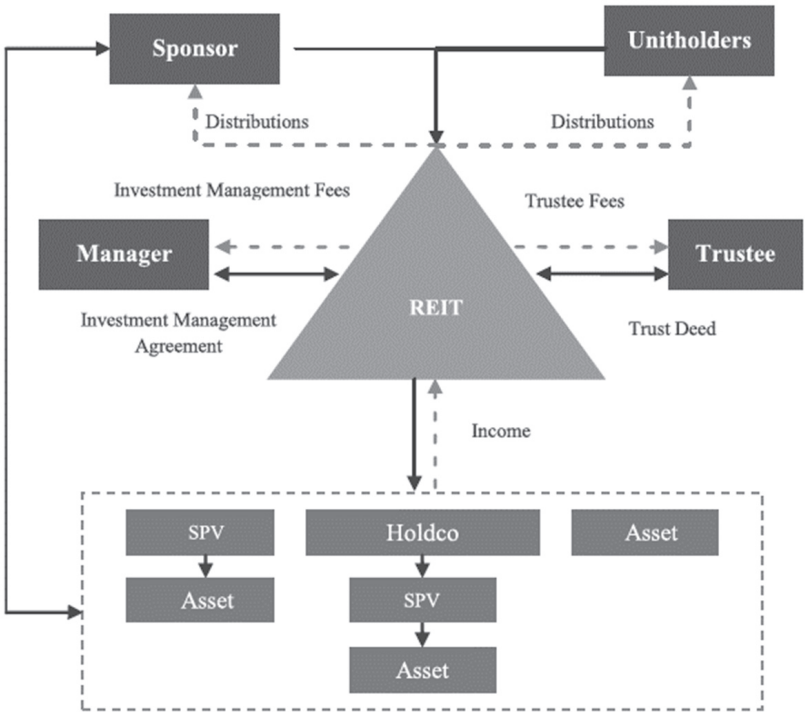

Fig. 1: CAM[29]

[28] REIT Regulation 10(1).

[29] Cyril Amarchand Mangaldas, De'constructing InvITs and REITs (October 2020) (Jun. 20, 2021), available at https://www.cyrilshroff.com/wp-content/uploads/2017/01/De_construct_ing-InvITs-and-REITs-.pdf.

2. Regulatory Aspects of REIT India

On 10 October 2013, the Securities and Exchange Board of India (SEBI) released its draft guidelines for REITs, which were open to public opinion, along with the regulation to govern infrastructure investment trusts in India through a separate regulation. The final regulations, however, were issued on 26 September 2014 after considering the opinions. At present, REITs in India are regulated through SEBI (Real Estate Investment Trusts) Regulations,[30] 2014.[31] Currently, foreign market norms for overseas investment have been relaxed.[32] However, the REITs market in India has been dormant in India since 2019.[33]

2.1. Trustee

The trustee in this structure is responsible under the trust deed for the safe custody of the assets of the REIT and also acts responsibly for the benefit of the unitholders as a whole.

The trustee is bound under the SEBI regulations in the following capacities:

Holder of Assets – The trustee has a fiduciary duty to hold the assets of the trust for the benefit of the unitholders.[34]

Supervisor – The trustee also serves as supervisor, overseeing the activities of the manager and ensuring that the manager complies with the regulations and the Investment Management Agreement. In addition to supervising the manager, the trustee must ensure that the activities of the REIT are carried out in consonance with the trust deed, REIT regulations and the offer document.[35]

Protection of Interests of Unit Holders – The trustee has a legal obligation to review and resolve the complaints of the unitholders and seek redress for them.[36] They are also required to report any activity to the SEBI if it is detrimental to the interests of the unitholder.[37]

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30 Hereinafter referred to as REIT Regulation.

31 Bathiya & Associates LLP, Real Estate Investment Trusts (REIT) in India (October 2018) (Jun. 20, 2021), available at https://www.bathiya.com/wp-content/uploads/2018/10/13.-REIT_Research-Article_Bathiya.pdf.

32 Pooja Thakur, *India Eases Rules to Allow Foreign Investment in REITs*, Bloomberg, 7 May 2015 (Jun. 20, 2021), available at http://www.bloomberg.com/news/articles/2015-05-07/india-eases-rules-to-allow-foreign-investment-in-reits.

33 Divya Malcolm, *India: REITs Regulation from 2014 to Future*, Mondaq, 24 February 2020 (Jun. 20, 2021), available at https://www.mondaq.com/india/fund-management-reits/897116/reits-regulation-from-2014-to-future.

34 REIT Regulation 9(1).

35 REIT Regulation 9(16).

36 REIT Regulation 9(6).

37 REIT Regulation 9(18).

2.2. Manager

The main role of a manager is to make all decisions regarding future investment and divestment involving the assets and funds of the REIT.[38] The manager also ensures that all current assets of the REIT have proper legal marketable title,[39] and that investments are made in accordance with investment conditions and the investment strategy of the REIT.[40] (The trustee also needs to determine who is responsible if the conditions set under Regulation 18 are not met.) The manager has to undertake the management of REIT assets,[41] which includes lease management, asset maintenance and structural and safety audits. Furthermore, the manager has to appoint various entities (with the approval of the trustee), including a valuer, an auditor, a registrar and transfer agent (RTA), a merchant banker, a custodian and other intermediaries.[42]

To protect the interests of the trust and unitholders, insurance of the assets is required and the manager must obtain insurance coverage of assets.[43]

The manager is also responsible for adequately and timely redressing the issues of all unitholders,[44] as well as disclosing various items of information to the unitholders the board of trustees and the designated stock exchange as stipulated in the regulations.[45] To fulfil its obligations towards the trustee, the manager has to submit various reports to the trustee, including the quarterly report on the activities of the REIT, valuation reports, decisions to acquire, sell or develop any property, details of any action requiring approval from unitholders and details of any material facts, such as changes in directors, any key legal proceeding and so on.[46] If the manager fails to provide such information to the trustee as required under Regulation 18 or 9(8), the trustee has to intimate the board and the board may take any action as it deems fit.[47]

The manager has to ensure that the valuation of the REIT is completed by the valuer in accordance with Regulation 21.[48] In addition, the manager is also responsible for coordinating the REIT operations with the trustee.[49]

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38 REIT Regulation 10(1).

39 REIT Regulation 10(2).

40 REIT Regulation 10(3).

41 REIT Regulation 10(4).

42 REIT Regulation 10(5).

43 REIT Regulation 10(7).

44 REIT Regulation 10(13).

45 REIT Regulation 10(14).

46 REIT Regulation 10(18).

47 REIT Regulation 10(19).

48 REIT Regulation 10(21).

49 REIT Regulation 10(20).

2.3. Sponsor

The sponsor or sponsor group has to set up the REIT and appoint the trustee.[50] Because the sponsor is the entity that sets up the REIT, they are generally the original owner of the assets of the trust. As a result, they must transfer or undertake to transfer complete ownership of the real estate assets, shareholding or ownership of the Holdco or SPV prior to the allotment of units of the REIT to applicants.[51] The sponsors are also obligated to hold the minimum interest in the REIT in order to ensure compliance with the regulations.[52] If the sponsor wishes to exit its position and it falls below the minimum holding requirement, then it may only do so after arranging a new sponsor or selling the units to an existing sponsor. If the same is done, then the approval of the unitholders is a must; otherwise they shall be provided with an exit opportunity.[53]

3. Taxation Aspects of REIT

Taxation has a significant impact on how investors perceive the instrument and its future. As can be seen, market participation was negligible in the first few years of the framework's launch. Although, amendments have been made to the policy, some issues persist. In this chapter, the author covers taxation of REITs in India, changes made to the policy and additional recommendations to boost investment.

3.1. Sponsor

A REIT can be set up by the sponsor by:

• transfer of shareholding, rights or interest in the holding company or SPV, or

• transferring the real estate asset in favour of the trust, in exchange for units of REIT.

Capital gains are to be deferred when shares of the SPV or Holdco are exchanged for units of the REIT. It is to be paid at the time of disposal of REIT units by the sponsor. While calculating the liability under the heading of capital gains at the time of sale of units, the period of holding will include the time spent holding shares of the SPV, and the cost of acquisition will be the cost of shares in the SPV. An exemption from the Minimum Alternative Tax (MAT) is also provided at the time of such an exchange.[54]

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50 REIT Regulation 11(1).

51 REIT Regulation 11(2).

52 REIT Regulation 11(3) – Sponsors have to hold a minimum of 25% of the issue after the initial offer for at least three years after the date of listing, and any such holding above the minimum holding shall be held for at least one year after the date of listing. Moreover, the sponsor(s) have to collectively hold at least 15% of the outstanding units at all times and each sponsor has to individually hold at least 5% of the units at all times.

53 REIT Regulation 11(4).

54 Previously not provided. Introduced by the Finance Bill of 2018.

These exemptions are not available if the ownership, rights or interest in the real estate asset itself is transferred, as stipulated in the second situation.

The contribution by the sponsor to the trust that is not a shareholding in a SPV or Holdco is also liable to stamp duty (transfer of immovable property) and registration charges. The same is in contrast with Singapore where a transfer of assets in lieu of units of REIT is exempt from stamp duty also.

At the time of the sale of units of a REIT, both capital gains (deferred liability) and securities transaction taxes are required to be paid by the sponsor.

3.2. SPV or Holdco

Although the trust has been accorded the status of a pass-through entity, the SPV or Holdco has not been granted any such exemption. The distribution of dividend income by the SPV or Holdco to the trust is liable for Dividend Distribution Tax (DDT) at the rate of 15%. The exemption of capital gains at the time of the transition from the SPV to the REIT is only limited to shares of the SPV. However, if the assets are transferred by the SPV to the REIT, the same is taxable at the time of the transfer itself, as mentioned above.

3.3. Business Trust

Because the REIT is a pass-through entity, dividend income received by the REIT is taxed only at the hands of the SPV or Holdco and is thus exempt at the hands of the REIT. Interest income received by the REIT from the SPV or Holdco is exempt in the hands of the REIT but taxable in the unitholder's hand. Interest income distributed to the unitholders is liable for withholding tax at the rate of 5% in the case of residents and 10% in the case of non-residents. However, capital gains at the time of disposal of assets of the trust are to be taxed in the hands of the trust. As a result, it can be concluded that the pass-through nature is merely hybrid.

3.4. Unitholder

Because a REIT is a pass-through entity, the nature of the income received by the unitholder from the REIT does not lose its character as in the case of companies. The interest income received by the unit holder will be taxed at a concessional rate of 5%. Similarly, rental income received by the trust will be taxed in the category of "Income from House Property."

Because the sale of REIT units is the same as the sale of listed equity shares, the sale of REIT units will be subject to the Securities Transaction Tax (STT). Long Term Capital Gain (LTCG) for the same is exempt, but Short Term Capital Gain (STCG) is taxable at the rate of 15%. If the transaction is not carried out through an exchange, the exemption from LTCG will not be applicable.

4. Recent Changes in REIT Laws in India

Due to the slow growth of REITs in India, it was inevitable for the market regulator to revisit the regulations and minimise the challenges faced by REITs in the Indian market. REIT regulations have been amended numerous times in response to market demands.

4.1. 2017 Amendment

To increase avenues for raising capital, a REIT was permitted to raise funds by issuing debt securities with the caveat that the debt securities so issued should also be listed on any recognised stock exchange.[55]

Thus, the concept of "strategic investor" was introduced.[56] This was done to boost investor confidence because the units would now be offered to them before the general public. Furthermore, safeguards for public investors were also introduced by establishing a lock-in period and ensuring that the price at which such units are offered to strategic investors is not less than the price offered to the general public (in the case of a difference, that difference in amount needs to be deposited by the investor to the REIT).

The board's compliance requirement at the time of the application was reduced by excluding close relatives of the applicant from the scope of disclosure of disciplinary action.[57]

The clause requiring REITs to hold at least two projects was removed.

In the case of a related party transaction, the condition of obtaining two reports from different valuers was removed, because merely disclosing the same information was considered to be unnecessary.

The compulsion to follow internationally acceptable accounting standards was also removed. Overall, it can be stated that the 2017 amendment was a sincere effort to reduce the regulation in the sector by removing the overprotection that led to unnecessary complexities in the regulation.

4.2. 2018 Amendment

Controlling interest – Previously, more than 50% ownership or voting rights were required for having a controlling interest, but this has been reduced to not less than 50%. As a result, if an entity holds even 50% of the interest, it will be deemed to have a controlling interest in the same.

Real Estate Asset – the definition has been expanded to include both leasehold and freehold property, regardless of whether it is held by Holdco or a SPV.

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55 REIT Regulation 20(1).

56 REIT Regulation 2 (ztb).

57 REIT Regulation 4(2)(l).

Dispute resolution – One of the most important amendments in 2018 is making it mandatory to include a dispute resolution clause in the shareholder agreement or partnership agreement, in the event of a dispute between the REIT and the shareholders or partners of the SPV, where any investment is made by the REIT through the SPV.

Restrictions on nominees – Previously, the manager and trustee were given broad and unfounded power to appoint the majority of the board members of the SPV through which the REIT would invest. The same was to be exercised even when the REIT did not own the majority of interest in the SPV. This has now been amended to limit their ability to appoint their nominees to the board only to the extent of their shareholding.

Investment – Previously, the REIT was not allowed to invest in unlisted companies from the remaining 20% bracket (80% needs to be invested in completed and rent generating properties). The same is now open provided the company derives 75% of its operating income from real estate activities. This step needs to be viewed with caution because it increases the variety of investment options available for the REIT, but there is no compliance with disclosure or corporate governance standards, making an investment in these companies dubious for the investor.

4.3. 2019 Amendment

The minimum subscription amount has been reduced from Rs. 2 lakhs to Rs. 50,000. In addition, the trading lot size has also been reduced from Rs. 1 lakh to Rs. 50,000. These reforms were aimed to hasten the adoption of these products by retail investors.

4.4. 2020 Amendment

As a result of Covid-19, the SEBI has relaxed the filing of documents for fulfilling compliances and administration for REITs and InViTs, as well as lock-in requirements for REITs. Furthermore, the regulator has also broadened the categories of strategic investors for REITs by including insurance companies and mutual funds.[58]

5. Comparative Analysis

Singapore and Australia have been used for comparisons because Singapore has many similarities with India in terms of regulatory financial structure and Australia was one of the early adopters of the REIT framework. Both jurisdictions also form part of the common law legal system, which offers a systematic advantage for the comparison.

5.1. Comparative Structure

As previously stated, the Indian REIT regulations require three parties to form a REIT: the sponsor, the trustee and the manager. The sponsor plays the main role in

[58] Amendments to SEBI (Real Estate Investment Trusts) Regulations 2014 and SEBI (Infrastructure Investment Trusts) Regulations 2014 (Jun. 20, 2021), available at https://www.sebi.gov.in/sebi_data/meetingfiles/jul-2020/1594015497516_1.pdf.

providing the assets to the trust in exchange for units of the REIT, as well as registering the trust, which further includes appointing the trustee. Thereafter, the trustee plays an active role until the appointment of the manager. Now that all three parties have been established, only the manager and the trustee oversee the functioning of the REIT. Each of them has different rights and responsibilities that set them apart from the others.[59] The role of the trustee is primarily supervisory, whereas the manager plays a more active role and makes all the investment decisions.[60] Both the entities have different roles, but as observed in Singapore and Australia, some overlap may become unavoidable, giving rise to conflicts resulting from multiple masters.[61]

In its consultation paper titled "Regulation of Business Trusts," the Monetary Authority of Singapore (MAS) proposed merging the roles of manager and trustee into a single responsible entity known as a "trustee-manager." The rationale behind such a proposal was twofold: first, to ensure that there is only one entity that is liable; and second, because the trustee, as an independent entity, may not have sufficient business knowledge to supervise or approve the manager's business decisions because they may involve potential liabilities.[62] The newly formed single entity may then appoint a manager as an agent to perform managerial functions.[63] Australia dealt with the potential problem of split duties in a very similar manner quite early on. In May 1991, the Australian Law Reform Commission (ALRC) was tasked with reviewing the law governing collective investment in Australia. One of the main issues considered was "Whether managers should also have fiduciary duties to investors?" One of the key recommendations in response to the issue was to eliminate the requirement for a trustee and a separate manager which was abolished and replaced by one single entity.[64] The same recommendation was adopted in the legislation via the Managed Investments Act 1998.[65] This Vague Citation provides the exact legislative change:

> By streamlining the dual functions of a trustee and a manager into a single responsible entity and imposing specific statutory duties on this responsible

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59 REIT Regulation 9 for trustee, Regulation 10 for manager and Regulation 11 for sponsor and sponsor groups. Regulation 9(3) – The trustee shall oversee activities of the manager in the best interests of the unit holders, ensure that the manager complies with Regulation 10 and shall obtain a compliance certificate from the manager in the form as may be specified on a quarterly basis.

60 REIT Regulation 10 – The manager shall make the investment decisions with respect to the underlying assets of the REIT, including any further investment or divestment of the assets.

61 Kam Fan Sin, *The Legal Nature of the Unit Trust* 204 (1997).

62 MAS Consultation Paper, Regulation of Business Trust, Section 3: Structure of Responsible Entity for Business Trust (December 2003), at 12 (Jun. 20, 2021), available at https://www.mas.gov.sg/-/media/MAS/resource/publications/consult_papers/2003/Regulation-of-BT_Consultation-Paper.pdf.

63 *Id.*

64 ALRC Report 65.

65 Pamela F. Hanrahan, *Managed Investments Law & Practice* (1999), para. 2-420, 2, 301.

entity, the Australian approach has achieved a higher degree of clarity on the duties owed by the responsible entity towards REIT unit-holders.[66]

The argument that the trustee only serves a supervisory role and hence there can be no dispute in determining the liability of the manager or trustee does not hold weight. Until 1988, in Australia until 1988, the trustee was responsible for ensuring that the scheme manager properly discharged its duties. However, the model was discontinued in order to avoid the possibility of a "responsibility gap" between trustees and scheme managers, which could result in defaults in the operation of the trusts.[67]

New Zealand has adopted a special approach by including a specific provision in the Unit Trust Act that the manager of a unit trust is subject to the same liability for its acts and omissions as a trustee.[68]

However, the reason for the removal of the dual-responsible entity structure in Australia's Collective Investment Scheme can be found in the ALRC report of 1993, which stated that it was not clear which of the parties, namely, manager or trustee, was responsible for which aspect of the scheme,[69] which sometimes results in neither taking the responsibility for compliance with the law as each can blame the other.

5.2. REITs in BRICS

Initially, the foreign ministers of four states, Brazil, Russia, India and China, established BRIC at a United Nations General Assembly meeting in 2006; South Africa was added to it in 2011. BRICS represents a group of the world's fastest-growing emerging economies. The BRICS organization was founded to address global challenges and it is garnering attention both regionally and globally.[70]

The structured finance market in Brazil allows two types of conduits: *Fundos de Investimento em Direitos Creditorios* (FIDCs) (asset-backed investment funds) and *Certificados de Recebfveis Imobilidrios* (CRIs) (real estate-backed certificates).[71] These are subject to the regulations of the Securities Exchange Commissions of Brazil. REITs in Brazil have been in existence since 1993. These investment funds for real estate are known as *Fundo de Investimento Imobiliário* (FII).[72] These are operated as a contractual arrangement between the investor and the fund manager and thus

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66 Suet Fern Lee & Linda Esther Foo, *Real Estate Investment Trusts in Singapore: Recent Legal and Regulatory Developments and the Case for Corporatisation*, 22(1) Singap. Acad. L.J. 36 (2010).

67 Jennifer Ball, *Insolvent Unit Trusts in Australia*, 8(5) International Corporate Rescue 340 (2011).

68 Sec. 3(2)(c) of the Unit Trust Act 1960.

69 ALRC Report 65(1).

70 Elena Gladun, *The BRICS: A Major Participant in the Multipolar World Order*, 5(1) BRICS L.J. 169 (2018).

71 Georgette C. Phillips, *The Paradox of Commercial Real Estate Debt*, 42(3) Cornell Int'l L.J. 335 (2009).

72 European Public Real Estate Association, Global REIT Survey 2016 (2016) (Jun. 20, 2021), available at https://prodapp.epra.com/media/EPRA_REIT_2016_AMERICAS_1481039767927.pdf.

do not have a legal entity structure and capital adequacy requirements. They can also be kept open for an unlimited period.[73] The Brazilian Stock Exchange listed approximately 130 publicly traded REITs,[74] whereas countries like India and China were just considering setting up REITs by 2010,[75] indicating that Brazil was far ahead of the other BRICS nations in REIT expansion.

Out of all the BRICS nations, China was the only country remaining without REITs after the introduction of the structure in India. The Chinese government has taken initiatives to introduce REITs in 2020 to finance highways and development infrastructure projects regulated under a joint circular of the China Securities Regulatory Commission (CSRC) and the National Development and Reform Commission (NDRC).[76] This move is expected to increase employment in China and provide the Chinese economy with stimulus while it recovers from the COVID-19 impacts. The Chinese REITs structure is entirely different from that of other REITs operating globally, as there is no specific law to regulate it, only guidelines that allow for a structured conduit with restrictions. However, in Hong Kong, the REIT market has been in existence since 2003, and it is regulated by the Securities and Futures Commission (SFC) under the Real Estate Investment Trust Code 2003.[77] As per this code, Hong Kong REITs must be established as Hong Kong unit trusts (which is entirely different from the corporate structure available in other BRICS nations).[78]

REITs first appeared in the Russian market in 2001, with a comprehensive legal framework known as ZPIFN (Closed Share Investment Real Estate Fund).[79] They are allowed to have a trust form or corporate form. These are a very convenient tool for tax planning in Russia.

REITs in South Africa were first introduced in 2013.[80] These are corporate entities or trusts, similar to the REIT structure in the other BRICS nations that pool investors'

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73 European Public Real Estate Association, *supra* note 72.

74 Adriana Bruscato Bortoluzzo et al., *Diversification and Property Control Impact on the Performance of Brazilian Real Estate Investment Trusts (REITs)*, 8(1) Revista Evidenciação Contábil & Finanças 5 (2020) (Jun. 20, 2021), also available at https://www.balas.org/resources/Documents/2018%20Conference%20Files/2018%20Conference%20Proceedings/Diversification%20and%20property%20control%20impact%20on%20the%20performance%20of%20Brazilian%20Real%20Estate%20Investment%20Trusts.pdf.

75 CFA Institute, Asia-Pacific REITs: Building Trust through Better REIT Governance (2011) (Jun. 20, 2021), available at https://www.cfainstitute.org/-/media/documents/article/position-paper/asia-pacific-reits.ashx.

76 S&P Global, China's Infrastructure REIT Market: From Slow Start to Big Bang? (October 2022) (Jun. 20, 2021), available at https://www.spglobal.com/_assets/documents/ratings/research/100046937.pdf.

77 World Services Group, Hong Kong: Hong Kong REITs Update (February 2006) (Jun. 20, 2021), available at https://worldservicesgroup.com/publications.asp?action=article&artid=1211.

78 *Id*.

79 Andrei Protasov: "The Future of Investment in Commercial Real Estate – Alternative Financing," ILM, 26 June 2019 (Jun. 20, 2021), available at https://www.ilm.ru/en/expert-opinion-interview/andrei-protasov-future-investment-commercial-real-estate-alternative.

80 Mpilo Ntuli & Omokolade Akinsomi, *An Overview of the Initial Performance of the South African REIT Market*, 25(2) J. Real Estate Lit. 365 (2017) (Jun. 20, 2021), also available at https://www.jstor.org/stable/26391920.

funds to invest in the real estate sector and are listed on the Johannesburg Securities Exchange (JSE).[81]

Overall, REITs in the BRICS nations have huge growth potential. According to Frédéric Juillet (2012), investing in the BRICS regions provides a higher return on investment than investing in the United States markets.[82]

5.3. REITs vs. InvITs

Both REITs and InvITs (Infrastructure Investment Trusts) were introduced in India by the SEBI in 2014 and are regulated through the SEBI (Infrastructure Investment Trusts) Regulations 2014. The structure of both instruments is nearly identical, namely, pooling of investment, listing and investment in assets. InvITs are a type of pool that invests in operational infrastructure such as highways and power plants and is managed by a trustee and manager in the same way REITs are. Income from Indian corporate entities controlled by InvITs or REITs is exempt from taxes.[83] In terms of features and functionality, InvITs are similar to mutual funds or real estate investment trusts (REITs).[84] India's first InvIT, IRB InvIT Fund (sponsored by IRB Infrastructure Developers Ltd; a publicly held company), was launched on 25 April 2017 and called for bids (similar to how a company offers its equity shares for sale in an initial public offering) between 3 May and 5 May 2017.[85] Like REITs, InvITs lack the backing of tangible assets, which is an important factor for investors, and investors give priority REITs over InvITs. Both are permitted to invest in mutual funds up to a certain amount. Compared with REITs, InvITs are more thinly traded.[86] Nevertheless, the market for REITs and InvITs is relatively nascent in India. The InvITs market in India expanded much earlier than the REITs market.[87]

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81 IGrow Wealth Investments, Investing in SA Real Estate Investment Trusts for Good Returns (Jun. 20, 2021), available at https://igrow.co.za/investing-in-sa-real-estate-investment-trusts-for-good-returns/.

82 Frédéric Juillet, *Analysis of the Real Estate Investment Trust (REIT) Industry*, MBA Student Scholarship (February 2012) (Jun. 20, 2021), available at https://scholarsarchive.jwu.edu/cgi/viewcontent.cgi?article=1005&context=mba_student.

83 Mukesh Butani & Seema Kejriwal, *India's Budget – Implications for the international business community*, MNE Tax, 3 February 2021 (Jun. 20, 2021), available at https://mnetax.com/indias-budget-implications-for-the-international-business-community-42368.

84 Definition of "Infrastructure Investment Trusts," The Economic Times (Jun. 20, 2021), available at https://economictimes.indiatimes.com/definition/infrastructure-investment-trusts.

85 Kayezad E. Adajania, *InvITs in your mutual fund. Good or bad?*, LiveMint, 1 May 2017 (Jun. 20, 2021), available at http://www.livemint.com/Money/MBYzpoth1PItwCNCxVn9SP/InvITs-in-your-mutual-fund-Good-or-bad.html.

86 Sunil Sanghai, *Better late than never! Investors finally lap up Indian REITs & InvITs*, The Economic Times, 10 August 2020 (Jun. 20, 2021), available at https://m.economictimes.com/markets/stocks/news/better-late-than-never-investors-finally-lap-up-indian-reits-invits/articleshow/77350999.cms.

87 PricewaterhouseCoopers, *supra* note 5.

5.4. Comparative Legal Issues

Over the last decade, REITs and InvITs have developed into a mature market, providing easy access to high-quality assets and enabling a stable return on investments. To illustrate this, as of 2012, there were over 500 REITs across 22 countries.[88] The Indian drafters of the regulations have considered this and provided distinct roles and responsibilities for both of them that are mutually exclusive. The intention of the legislators is quite evident as the trustee has been provided with the role of holding the property for the benefit of unitholders, overseeing the activities of the manager (ensuring that the manager complies with reporting and disclosure requirements, reviewing the status of complaints of unitholders and their redress by the manager and ensuring that the distributions are made by the manager on time), whereas the manager has to ensure that the working of the trust is smooth concerning the maintenance of the properties, such as ensuring that the properties have a proper legal and marketable title and that investment decisions are made in compliance with the regulations. More safeguards have also been introduced in this respect, which include the trustee's obtaining a compliance certificate from the manager on a quarterly basis.[89]

But the main question to be addressed here is whether it is better to have separate roles and responsibilities for managers and trustees or to combine the roles of manager and trustee into a single entity.

The Law Reform Commission of Australia raised and responded to the same question. In its report No. 65 (para. 12), a dilemma was faced: whether to revise the roles of both the parties more precisely under the same regime or to focus on a single party model and question whether the mandated third party is necessary.

Traditionally, the trustee took full responsibility for undertaking the activities of the trust and was responsible for the beneficiaries. But in commercial or business trusts, the liability is shared between the manager and the trustee. It is the role of the trustee to oversee the activities of the manager in the interest of the unitholders,[90] but from a legal viewpoint the trustee should not be involved in determining the commercial viability of each of the manager's investment decisions.[91] As a result, the entire concept of dual responsibility was considered problematic by the Australian Law Reform Commission.

Hence, there can be three known approaches for solving the problems arising out of the dual responsible entity structure of a REIT:

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88 PricewaterhouseCoopers, India's New Real Estate and Infrastructure Trusts: The Way Forward (Jun. 20, 2021), available at https://www.pwc.com/sg/en/publications/assets/aprea-in-realestate-infra-trusts.pdf.

89 REIT Regulation 9(3).

90 REIT Regulation 10.

91 Australian Law Commission report – Permanent Trustee Company Limited Submission. Also, Singapore in 2003 provided the same rationale, *see* Bao et al. 2015.

• Defining the distinct roles and responsibilities of the managers and trustee will ensure that liability in the event of a breach can be attributed to any or both of the parties. This will ensure that the problem of two masters blaming each other for any default does not exist. This model has been adopted in India.

• Another model is to abolish the dual–responsible entity structure in favour of a single entity that will be responsible to the unitholders in case of any breach. This entity will be the sole entity that will owe a fiduciary duty to the investors. The model was adopted by Australia and Singapore in 1998[92] and 2004[93] respectively. The trustee may also appoint a manager to undertake the activities of the REIT, but the manager will be solely liable to the unitholders.

• A third option is to make the manager also owe a fiduciary duty to the unitholders, as currently the manager is only a contractual party to the REIT. This same model was adopted by New Zealand, but it was rejected by the ALRC because "when a person is under fiduciary duties of his own, it should not be necessary for another fiduciary to watch that those fiduciary duties are performed."[94] As a result, this model itself advocates for a single entity.

When comparing the REIT markets, it is evident that the Brazilian and South African REIT markets are far more developed as compared to those of other BRICS nations. India and China are just getting started and Russia prefers the structure of mutual funds. In all REIT structures, the entity must distribute at a major profit (at least 90% in Brazil, India and China and 75% in South Africa and Russia) of their income to their investors and the instrument is closed-ended.

Conclusion and Suggestions

The regulations have been drafted in such a manner that the roles and responsibilities of the trustee and manager are separated, thus making them mutually exclusive. Nonetheless, in light of the challenges already faced in other jurisdictions, they can continue to implement reforms and look for the single entity model that will further promote investor (unitholder) protection, which is the primary goal of the SEBI.

Currently, if the transfer of units is done in exchange for shares of the SPV then the transaction is tax neutral. The same exemption can be considered for the transfer of ownership of properties directly from the sponsor because it saves SPV level distribution if the same exemption is provided directly.

Although, the initial exchange of shares for a unit of REIT is not a commercial transaction in and of itself, the sponsor is liable for VAT, hence the government may

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92 Managed Investment Act 1988.

93 Business Trust Act 2004.

94 Law Council of Australia Submission (1992).

consider exempting the transaction from the purview of VAT. Adding to transition cost, stamp duty and registration charges are mandatory. Similarly, transfer of assets at the initial stage shall also be considered for exemption from stamp duty payable when assets are transferred to a REIT or SPV owned by a REIT. A similar exemption has been granted in Singapore.

Because SPVs are typically established in corporate form, any distribution made by an SPV will be liable for distribution tax. As a result, the government should consider providing an exemption to the SPV if it distributes profits to the REIT in the form of a dividend.

For capital gains, mere deference is provided at the time of transition from an SPV to a trust. As a result, at the time of selling units, the sponsor will be liable for a large amount of tax, whereas the unitholder will be exempt.[95]

The units of REIT are not classified as securities under the Securities Contract Regulations Act 1956 (SCRA). Moreover, under the Income Tax Act, for a transaction to be considered long-term for capital gains tax purposes, the time limit is three years; otherwise, the transaction is taxed as short-term capital gains. However, there is an exemption for listed equity shares: the consideration period is reduced from thirty-six months to twelve months. The same treatment is proposed for units of investment trust to bring them on par with equity investments.

The current pass-through provision is illusionary. The pass-through benefit for the REIT is restricted to only interest income and rental income, which are taxed at the hands of investors, whereas the income arising from capital gains and other income is taxable at the REIT or trust level. The SPV is also required to pay full corporate taxes and dividend distribution tax (DDT).

One of the main reasons for the high market capitalisation of the REITs in the United States is their accessibility to various institutional investors. In India, the Insurance Regulatory and Development Authority of India (IRDAI) should consider relaxing the investment regulatory guidelines for insurance companies in order to increase their investor base, and pension funds should consider making REIT an eligible instrument to invest in.

To date, there has only been one issue in the REIT segment in India. The policy has undergone significant changes in terms of relaxing various structural and taxation aspects and reforms are currently underway to make the vehicle more lucrative for investors, which will also unlock value for different stakeholders by providing liquidity to the so-called illiquid sector. By comparing the regulations with those of Singapore and Australia, various changes, with an emphasis on the dual structure model, can be incorporated to avoid any future challenges faced on the same subject matter.

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[95] Sriram Govind & Ruchir Sinha, *REITs: Tax Issues and Beyond*, Mondaq, 3 November 2014 (Jun. 20, 2021), available at http://www.mondaq.com/article.asp?article_id=351206&type=mondaqai&r=2&t=5.

By analysing the consistent efforts of regulators and the government regarding incorporating changes in the policy, one can predict the Pandora's Box waiting to be opened in the sector in the near future.

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LEGAL PROTECTION OF INVESTORS FROM THE CORPORATE MALFEASANCE OF INSIDER DEALINGS: A SOUTH AFRICAN-CANADIAN COMPARATIVE REVIEW

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Ensuring market discipline, integrity, and transparency with the overall aim of protecting the investing public is critical to the wellness of a capital market and a financial system. However, one corporate ill besetting the securities markets in all jurisdictions is insider trading. Apart from being unethical, insider trading disrupts market dynamics. In South Africa, over the years, successive Acts have been enacted, amended, and repealed to ensure discipline and protect the integrity of the nation's securities market. In 2012, the Financial Markets Act of 2012 (FMA) was enacted to improve, among others, the enforcement of insider trading regulation in South Africa. However, the regulation of insider trading and its enforcement in terms of the FMA have been insufficient. This article therefore seeks to benchmark the South African position against Canadian model with the objective of drawing lessons for South Africa. The choice of Canada was informed by the fact that Canada has a well-developed anti-insider trading regulatory framework and presents a case study of international best practices in the regulation of insider trading. Therefore, the conclusion in this article is that with creative and appropriate reforms of the FMA, using the Canadian model, the investing public will be adequately protected against insider trading, and investors' confidence and the financial markets' integrity and efficiency will be better enhanced.

Keywords: insider trading; regulation; South Africa; Financial Markets Act (FMA); Canada; Ontario Securities Act (OSA).

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Introduction

The securities market represents a very important component of the financial system in every free-market economy. As they are mainly created to generate long-term investment capital, they play a very important role in every country.[1] They also enhance industrial growth and aid socio-economic transformation by encouraging free enterprise, promoting good governance, creativity, and advancement.[2] Therefore, ensuring market discipline, integrity and transparency with the overall

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[1] Anthony Otaru Abuja, *Efficient dispute resolution, key to strong capital market, says CJN*, The Guardian, 24 February 2016 (Dec. 21, 2021), available at http://www.ngrguardiannews.com/2016/02/efficient-dispute-resolution-key-to-strong-capital-market-says-cjn/.

[2] *Id.*

protection of the investing public is critical to the wellness of a capital market and the financial system. However, one of the corporate ills besetting the securities markets in all jurisdictions is insider dealing.[3] Apart from being unethical, insider dealing disrupts market dynamics.

Over the years in South Africa, successive Acts have been enacted, amended, and repealed to ensure discipline and protect the integrity of the nation's securities markets. In 2012, the Financial Markets Act of 2012 (FMA) was enacted to improve, among others, the enforcement of insider trading regulation in South Africa.[4]

In the 1990s, the securities markets in South Africa experienced high levels of market-abuse practices such as insider trading.[5] Insider trading was first prohibited in South Africa in terms of section 233 of the Companies Act of 1973 (CA 61 of 1973),[6] which was enacted based on several recommendations made by the Van Wyk de Vries Commission of Inquiry into the Companies Act in its Main Report.[7] Section 233 made it a crime to deal in the shares of a company while an insider had price-sensitive information which had not been made public yet. However, section 233 was ineffective in regulating insider trading. This was made more obvious by the fact that there was no concluded and successful prosecution under this section.[8] Then, section 440F in the Companies Amendment Act 78 of 1989 was enacted. It contained a general anti-fraud provision and prohibited trading by insiders and those who got their information from insiders about the securities of a company before the information was made public.[9] Later, this was replaced by the Second Companies Amendment Act 69 of 1990. The last two Acts "raised more questions than they were able to answer."[10]

The above and other flaws resulted in the enactment of the Insider Trading Act (ITA) in 1998, based on the recommendation of the King Task Group in Insider Trading Legislation.[11] However, this Act also failed to provide a permanent solution to insider dealings in South Africa. In the Act, the definitions of "insider" and "inside information"

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3 Insider dealing is also known as insider trading. The terms are used interchangeably in this article.

4 Howard Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, 35(2) Obiter 254, 271 (2014).

5 Howard Chitimira, *The Regulation of Insider Trading in South Africa: A Roadmap for Effective, Competitive and Adequate Regulatory Statutory Framework*, unpublished LLM thesis, University of Fort Hare (2008), at 29 (on file with University of Fort Hare's Library System).

6 Companies Act 61 of 1973 (S. Afr.).

7 Chitimira, *supra* note 5, at 20–21.

8 Stephanie Luiz, *Insider Trading: A Transplant to Cure a Chronic Illness?*, 2(1) S.A. Merc. L.J. 59, 59 (1990).

9 Stephanie Luiz, *Prohibition Against Trading on Inside Information – The Saga Continues*, 2(3) S.A. Merc. L.J. 328, 328 (1990).

10 Chitimira, *supra* note 5, at 20–21.

11 Hereinafter known as the "King Task Group." Richard Jooste, *A Critique of the Insider Trading Provisions of the 2004 Securities Services Act*, 123(3) S.A. L.J. 437, 438 (2006).

were "cumbersome and counter-intuitive."[12] Finally, it was heavily criticized by academics because very little was achieved in enforcing its provisions in court.[13]

In 2005, the ITA was repealed by the Securities Services Act (SSA). Unfortunately, the SSA also had many flaws like the ITA in the sense that there were a lot of uncertainties. The definitions of "insider" and "inside information" were also clumsy as they were in the ITA. Thus, the Act was fundamentally flawed and incoherent.[14] The Act failed and only provided for the imposition of fines and other penalties by the Registrar (or Deputy Registrar) of Securities Services in section 95 and by a court during enforcement proceedings, and for the establishment of an "enforcement committee" in section 97. Apart from these, there were hardly any other enforcement measures provided for such as "disgorgement of profits" or whistleblowing.[15]

Therefore, against the backdrop of the above, it seems that the regulation of insider trading and its enforcement in terms of the FMA are insufficient and there is a compelling need for a robust legal framework that would guarantee a fair and economically safe securities market built on sound policy and practical consideration. Although lawyers, academics, and economists have done much work on insider dealings, this question has not been answered satisfactorily.[16]

This article therefore seeks to interrogate whether the FMA offers adequate protection to the investing public in South Africa and then highlight the weaknesses in the FMA Specifically, the South African position will be benchmarked against the

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[12] These were interconnected definitions, but they were circular. To know if information qualified as "inside information," one had to know the definition of an "insider," and vice versa. "Inside information" was defined as "information obtained or learned as an insider." An "insider" was "a person who has inside information." The provisions of the Act that imposed civil and criminal liability operated based on the meaning of "inside information." Thus, the Act was essentially not coherent at all.

[13] *Id. See* also Stephanie Luiz & Kathleen van der Linde, *The Financial Markets Act 19 of 2012: Some Comments on the Regulation of Market Abuse*, 35(4) S.A. Merc. L.J. 458 (2013); Patrick Osode, *The New South African Insider Trading Act: Sound Law Reform or Legislative Overkill?*, 44(2) J. Afr. L. 239 (2002); and Howard Chitimira, *A Historical Overview of the Regulation of Market Abuse in South Africa*, 17(3) Potchefstroom Electron. L.J. 936 (2014).

[14] *Id.*

[15] Disgorgement of profits practically entails enforcing restitution of all profits made in relation to the impugned transactions the investors allegedly injured. How it works and how effective it differs from jurisdiction to jurisdiction. *See* Michael P. Dooley, *Enforcement of Insider Trading Restrictions*, 66(1) Va. L. Rev. 1, 14 (1980). Whistleblowing occurs where workers report wrongdoings at the workplace. It is usually in the public interest. Thus, whistle blowers are legally protected. They cannot be treated unfairly or lose their jobs. Whistleblowing for employees, Gov.uk, 2 July 2015 (Dec. 21, 2021), available at https://www.gov.uk/whistleblowing/what-is-a-whistleblower.

[16] Kwasi Opoku, *What Is Really Wrong With Insider Trading?*, unpublished LLM thesis, University of Cape Town (2014), at 7 (on file with the University of Cape Town's Library System). It seems that the offender must know that he is contravening the insider trading provisions of the FMA before he can be liable in terms of the FMA. This is a problem because like the SSA, the FMA does not mention any presumptions that can be used to improve the prosecutions of insider dealings-related cases in South Africa. Moreover, the FMA duplicates several of the flaws in the SSA.

Canadian model with the objective of drawing lessons for South Africa to improve on the current level of legal protection offered to investors in the country.

Furthermore, the authors will argue that with the creative and appropriate reforms of the FMA, drawing inspiration from the Canadian model, the investing public will be adequately protected against insider trading and investors' confidence and the financial markets' integrity and efficiency will be better enhanced. The choice of Canada was informed by the fact that Canada has a well-developed anti-insider trading regulatory framework and presents a case study of international best practices in the regulation of insider trading. Its framework is rigid, but effective. Moreover, Canada has better detection and enforcement mechanisms. Furthermore, it has a better criminal justice system which can ensure the successful prosecution of offenders. However, the authors will specifically focus on the Ontario Securities Act (OSA)[17] and the Canada Business Corporations Act (CBCA).[18]

The next section explores the regulation of insider trading in South Africa.

1. Legal Frameworks of Insider Trading in South Africa

The core objective of this section is to highlight the legal framework for the regulation of insider trading in the South African securities markets with the intention of drawing attention to its inherent flaws. Before embarking on this analysis however, it is important to discuss the meaning and nature of insider trading; articulate the arguments for and against its regulation; and briefly give a chronological narrative of insider trading regulation in South Africa.

1.1. Definition of Terms

The use of the terms "insider dealing" and "insider trading" could be misleading.[19] They are used to refer to the buying and selling of a company's securities by persons associated to it (insiders), who possess "price-sensitive" information that is not public, and which they obtained as a result of such association.[20] Dealing or trading by insiders on its own is not wrong; in most jurisdictions, insiders can trade in securities

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17 Ontario Securities Act of 1990.

18 Canada Business Corporations Act of 1985. This is because insider trading is regulated on a provincial basis in Canada and analysing the legislation of all the provinces will make the scope of this research too wide. Thus, it is a suitable choice. The South African Parliament can get good ideas from this framework and improve the anti-insider trading regulatory framework we have in South Africa. Another reason is that the writer can speak and understand its two official languages: French and English. Thus, there are no language barriers.

19 Farouk H.I. Cassim et al., *The Law of Business Structures* 928 (2012).

20 *Id.* The previous approach to this practice was to govern the conduct of directors and prescribed officers. Now, the approach is to regulate all trading on "inside information," not only by "insiders," but also by persons who have received inside information from "insiders." These people are known as "secondary insiders" or "tippees." They include those who wrongfully gained the information. Thus, it is generally more accurate to speak of "trading on inside information," rather than of "insider trading."

of companies with whom they are associated as long it is not done on the basis of non-public material information for their personal benefit.[21]

To understand the nature of insider trading, one must first comprehend the value of information in the capital markets. Capital markets rely on information to determine the value of shares traded there. According to the efficient capital market hypothesis, a company's share price correctly shows all available information about a company's financial future.[22] Thus, market participants can be confident that share prices correctly reflect a company's prospects, and this will safeguard the efficient apportionment of capital resources in that market. An insider dealer's aim is to deal in shares when he has non-publicized "price-sensitive" information which has not affected the share price yet. Insider dealing is therefore a "white-collar" crime. This kind of crime involves a person committing illegal acts by non-physical means and by concealment, to obtain money or property, or to avoid loss thereof, or to obtain any business or personal advantage.[23]

1.2. Why Should Insider Trading Be Regulated and What Are the Arguments Against its Regulation?

It is important to note from the outset that the securities market aids the stimulation of investment and economic growth in an economy. It provides a conducive environment where sellers who make secondary offers of securities to the public can meet with willing buyers and trade. Thus, the regulation of insider trading is seen as a function of the financial markets.[24]

Nonetheless, the literature on the debate as to whether insider trading should be regulated is huge. Two opposing schools will be mentioned here. The supporters of the regulation of insider trading argue that it improves market efficiency, and it speeds up the correct pricing of securities. Thus, it improves the economy's distribution of capital investment. It also minimizes the volatility of securities' prices.[25]

The opinion that there is nothing wrong with insider trading was first expressed by Manne.[26] He was an American lawyer and economist and might be the most quoted critic of the regulation of insider dealings. He argued that insider dealing is beneficial

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21 Margaret Smith, *Insider Trading*, Library of Parliament, 22 December 1999 (Dec. 21, 2021), available at https://publications.gc.ca/site/eng/9.561274/publication.html.

22 Derek Botha, *Control of Insider Trading in SA: A Comparative Analysis*, 3(1) S.A. Merc. L.J. 1, 64 (1991).

23 *Id.*

24 Cassim et al. 2012, at 931. This is why governments and financial markets around the world allocate substantial resources towards regulating insider trading. The main aim of regulating insider trading is to achieve market efficiency and competitiveness.

25 *Id.* Moreover, they argue that insider trading is an efficient and justifiable method of compensating managers for unveiling the information in the first place. Thus, it benefits the firm and society at large because it creates an incentive to be ingenious.

26 *See* Henry G. Manne, *Insider Trading and the Stock Market* (1966).

in the economic sense and should not be regulated. His arguments were based on two crucial issues.[27] First, he submitted that share prices efficiently show all information about a company through insider dealing, thus, increasing the informational efficiency of the market. Second, insider dealing stimulates entrepreneurial activities in large companies which have bureaucratic structures. This creates opportunities for active capitalist economics.[28]

Even if Manne's arguments have merit, the point in regulating insider dealings is to boost investors' confidence in the capital markets. Not every instance of insider dealing can be prevented; it can only be regulated to ensure the integrity of capital markets. Regulators are not capable of controlling people's will and choices. Insider trading is therefore usually detected where an instance of insider dealing has substantial, noticeable consequences such as a sudden fall in the price of a company's securities triggering an investigation, or where a whistle blower or other mechanisms expose insider dealings.[29] Insider dealing is nonetheless regulated in most countries where free market enterprise holds sway so that investors can be confident enough to invest their assets in the securities markets.[30]

Another argument in favor of regulating insider dealings is that the insiders hold a position of trust, and thus, they should not be allowed to abuse that position to benefit themselves to the detriment of shareholders who are the beneficiaries of that trust.[31] Moreover, the argument that the use of such information for personal gain is a normal benefit of being associated with the company has been rejected because of "commercial morality." Furthermore, it has been argued that the core issue in insider trading is the breach of a fiduciary duty owed by the insider to his company based on their fiduciary relationship. This view underlies the misappropriation theory.[32]

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27 Roy A. Schotland, *Unsafe at Any Price: A Reply to Manne, Insider Trading and the Stock Market*, 53(7) Va. L. Rev. 1425 (1967).

28 *Id*.

29 For instance, say we have a very small company. The inside information is such that it will not have much impact on the price of the company's securities. Also, there is nothing so unusual about the trading. The profit made from trading on the information is R5000. In this instance, the Johannesburg Stock Exchange (JSE) and the Financial Sector Conduct Authority (FSCA) might not kick its mechanisms into motion and start an expensive trial or administrative proceedings against the offender. They may not even detect it in the first place. Yet, an insider trading offence may have been committed. Thus, it is usually where trading on such information has a big impact on the price of securities or a big loss is avoided or a big profit is made that the JSE might smell a stinking fish and investigate. This is probably the same situation in other jurisdictions across the world, because the investigation and prosecution of these cases are expensive.

30 Other arguments in favour of insider trading include notions of morality, fairness, and market integrity. *See* Cassim et al. 2012, at 928.

31 *Id*. at 929.

32 *Id*. The misuse of inside information by "tippees," can be placed within this theory as well. They misappropriate inside information to their benefit. However, the misappropriation theory provides for criminal liability of the offender, and deems the wrong done to the company. It renders the offender

According to the misappropriation theory, insider dealing amounts to the theft of valuable corporate property from the rightful owner – the company.[33] Thus, insider dealings should be regulated. Whatever gain made by the insiders without the rightful owner's permission belongs to the company.[34] Moreover, insider trading could harm the company. It can incentivize the managers to manipulate the prices of the company's securities.[35] It could also incentivize managers to minimize their losses when the company is down.[36]

Furthermore, fairness requires equal opportunities. The natural unfairness of insider trading is the reason why it should be regulated. The insider who has inside information has an unfair advantage over the other person who is not privy to the same information. This advantage cannot be attributed to any merit or industry that justifies it.[37]

Additionally, insider dealing reduces the confidence of investors in a financial market in the sense that it seriously corrodes the integrity of the markets.[38] This is because the investing public would be at a disadvantage, thus, potential investors are driven away by this practice.[39] The most crucial function of financial markets is to act as a pathway for channeling capital into the economy for development. Obviously, investors must have confidence in the markets for this function to be fulfilled. Insider dealings therefore hurt the integrity of the market, and this is harmful to the economy. The benefit of increased informational efficiency of the market as

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liable to the company. The authors also mention that the theory is deficient in the sense that it indirectly protects persons trading in shares, by enforcing the insider's wrong to the company. Also, they argue that for insider trading to constitute a wrong to the person with whom the insider trades, this must be as a result of a duty to disclose the inside information to them.

33 Opoku, *supra* note 16, at 4.

34 *Id*. However, a company is a separate legal entity from its shareholders in terms of *Salomon v. Salomon*, [1896] U.K.H.L. 1 (Eng.). The common law position on misuse of inside information is based on *Percival v. Wright*, [1902] 2 Ch. 401 (Eng.), which held that directors have no general duty to disclose price-sensitive information to individual shareholders, but only to the company itself. This decision has been criticized as being "calamitous."

35 Opoku, *supra* note 16, at 18. For example, they could time the release of information or withhold it. Managers could also be diverted from performing their duties to the company.

36 *Id*. Besides, a company depends on its reputation to raise capital. However, insider trading reduces a company's reputation of integrity. Thus, the incentive to avoid "flops" by the company is reduced.

37 *Id*.

38 Cassim et al. 2012, at 930.

39 Opoku, *supra* note 16, at 3. Investors would be hesitant to invest in a market where insiders can trade on inside information to make undue profits or avoid personal losses at their expense, with no legislative regulation. For instance, corporate insiders may perform activities that could lower the long-term value of the company and harm shareholders' investments. They may make investment and production decisions that may increase the volatility of a company's securities' prices and destabilise the firm's ability to take advantage of price swings. This clearly discourages corporate investment and reduces market efficiency.

a result of insider dealing[40] is outweighed by harm caused to the economy at a more fundamental level.[41]

The above reasons have made the call to criminalize all dealings or trading on inside information plausible.[42] The confidentiality of undisclosed inside information identifies "price-sensitive" information that may not be used.[43]

In the next section, the historical and chronological developments of the regulation of insider trading in South Africa are examined.

2. The Regulation of Insider Trading in South Africa

2.1. Companies Act of 1973 (CA 61 of 73)

The first attempt to regulate insider dealings in South Africa was in terms of section 233 of CA 61 of 73.[44] Prior to this, certain information about directors' shareholding had to be recorded by the company. The move towards regulating insider dealings was based on the report of the Van Wyk de Vries Commission of Inquiry into CA 61 of 73. This Commission reported that insider trading is a corporate "white collar" crime, and all its forms should be condemned.[45] It found that directors, officers, employees, and other persons engaged in insider dealings. Moreover, it was practiced in relation to other interests and unlisted securities of a company, apart from listed securities.[46]

Importantly, section 233 criminalized insider dealings and provided that if any director, past director, officer or person knows any information that may materially affect the price of securities, and he deals directly or indirectly in those securities for his benefit, he commits an offence.[47] Section 441 of this Act provided that an offender could face a maximum of R8000 or two years' imprisonment, or both.[48]

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40 An argument Manne advances as mentioned above.

41 Cassim et al. 2012, at 930.

42 It looks like this was taken up in section 78(3)(a) of the FMA. It says: "Any person who deals for an insider directly or indirectly or through an agent in the securities listed on a regulated market to which the inside information possessed by the insider relates or which are likely to be affected by it, who knew that such person is an insider, commits an offence." Thus, the offender does not have to be an insider or necessarily have inside information.

43 Cassim et al. 2012, at 931.

44 Companies Act 61 of 1973. This position differs from Ontario, Canada. The first attempt to regulate insider trading in Canada was in the OSA of 1966. *See* Howard Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, 5(4) Mediterr. J. Soc. Sci. 144 (2014).

45 Jan Van Wyk de Vries et al., *Commission of Enquiry into the Companies Act: Supplementary Report and Draft Bill* (1972), para. 44.57.

46 *Id*.

47 Botha 1991, at 5.

48 *Id.*

One of key criticisms levelled against section 233 is that it only provided for insider trading committed by primary insiders such as directors, employees, and former directors. Secondary insider-tippers and "tippees" were excluded. Thus, insiders who encouraged or discouraged other people from dealing in certain securities based on the inside information they had could not be held liable under section 233.[49] The person who received a tip or who was encouraged to or discouraged from dealing in such securities based on such information could not be held liable.[50] Other people not directly or indirectly involved in management or not employees, were not prevented from trading in securities based on inside information they could possibly have. Examples are the financial advisors or attorneys that advise the company.[51]

The CA 61 of 73 was amended in 1989, and a new chapter regulating securities was inserted.[52] This chapter contained a prohibition of insider trading in relatively wide terms.[53] Section 440B created the Securities Regulation Panel (SRP) which supervised dealings in securities, received and dealt with representations. It seemed that the legislature wanted the SRP to play the main role in monitoring and investigating insider dealing activities. The penalties were also substantially increased. In terms of section 441, they went up from R8000 to R500 000 and from two to ten years imprisonment, or both. However, the effectiveness of such was questionable as yet again, no clear definitions of "insider" and "inside information" were given.

Section 440F of the Act which defined insider trading offences had its roots in American law. However, the American statute could not help in interpreting this provision because of its imprecise language. One of the grounds on which the Act was criticized was its "questionable draftsmanship and conceptual deficiencies."[54] This section never commenced however; it was soon replaced by a new section 440F in terms of the Second Amendment Act 69 of 1990, due to fears that the previous provisions were insufficient.[55]

In 1990, the CA 61 of 73 was further amended to correct the flaws of section 440F. It aimed to shed more light on the scope of the regulation of insider dealings. The added provisions to the Act were better drafted than the previous provisions, yet, they attracted criticism, though they attempted to provide a statutory definition of insider trading.[56]

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49 Chitimira, *supra* note 5, at 29.

50 *Id.* This criticism was probably taken up by Parliament in terms of section 78(5). It says: "An insider who knows that he or she has inside information and who encourages or causes another person to deal or discourages or stops another person from dealing in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it, commits an offence."

51 Chitimira, *supra* note 5, at 29.

52 *See* chapter XVA.

53 Botha 1991, at 32.

54 *Id.* at 16.

55 *Id.* at 32.

56 *Id.* at 16.

Section 440F was revised extensively. It applied to all dealings in securities. The definition of "securities" included company shares, stock debentures convertible into shares, rights or interests in a company, among others. One criticism that was levelled against this section was that it only applied to companies. Other entities including government and semi-government ones were clearly excluded, like it was in section 233 discussed above. One notable improvement on previous provisions nevertheless was that it covered insider dealings by "tippees." Thus, a party who knew information had been obtained in one of the prohibited ways and traded based on that, would have been guilty of insider dealing in terms of this provision.[57]

In addition, the 1990 Act did not provide for a case where the insider was acting in the best interests of the company. Apparently, all forms of insider dealings were illegal. Thus, despite the enactment of this Act, the regulation of insider dealings in South Africa remained problematic.[58]

2.2. Insider Trading Act 1998 (ITA)

"The King Task Group into Insider Trading Legislation" was appointed by the Reserve Bank's Policy Board for Financial Services and Regulation on the request of the Ministry of Finance.[59] The mandate of the King Task Group was to investigate the problem of insider trading in South Africa's securities markets. It recommended that a separate Act be enacted to help regulate insider trading. In addition, it recommended that insider trading regulation should apply to all securities and listed financial instruments.[60] Thus, the ITA was enacted after Parliament adopted the final report of the King Task Group. Moreover, the Report recommended that liability for insider trading should be extended to secondary insiders. Tougher penalties were also recommended. It also recommended a fine of R2 million or imprisonment for a period not exceeding 10 years or both. Again, it recommended that the proposed Act should provide for civil liability. Finally, it proposed that the Financial Sector Conduct Authority (FSCA)[61] be entrusted with the duty of administering the Act. However, this Act did not conclusively deal with the menace of insider trading.[62]

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57 Botha 1991, at 34–35.

58 *Id*. at 37. This is shown by the fact that there was not a single conviction. The first case where prosecution was attempted was the case involving Carol Botha of Waterkloof Agricultural Holdings in Pretoria and Charles Owen Wiggill (CW), the managing director of Nissan Manufacturing, a wholly owned subsidiary of Automakers. It was alleged that Carol made a profit of R947 634 by dealing in 700 000 shares of Automakers on the basis of unpublished price-sensitive information that she obtained from Charles. However, it took five years for them to be prosecuted because of the inadequate insider trading prohibition in the Act.

59 Hereinafter known as the "King Task Group." *See* Webber Wentzel, *South Africa: Insider Trading Act*, Mondaq, 14 April 2000 (Dec. 21, 2021), available at http://www.mondaq.com/southafrica/x/8564/securitization+structured+finance/Insider+Trading+Act.

60 King Task Group into Insider Trading Legislation, Final Report by the King Task Group into Insider Trading Legislation (1997), para. 3.3.1. Hereinafter known as the "King Task Report."

61 The FSCA was formerly known as the Financial Services Board.

62 *Id*.

2.3. Securities Services Act of 2005 (SSA)

The SSA commenced in February 2005. It repealed the ITA and the Stock Exchange Control Act (SECA)[63] and consolidated them into one Act. It also amended the repealed laws to improve some of their provisions. The main aim of the Securities Services Act (SSA) was to increase confidence in South Africa's securities markets, thereby, ensuring a stable financial sector and enhancing the international competitiveness of securities' services in South Africa. However, it has been submitted that the SSA unfortunately failed to address some of the issues identified in the ITA.[64] Also, it unwittingly introduced more uncertainties into the law on insider trading.[65] Moreover, it significantly tightened insider trading regulation in South Africa, in its aim to enhance confidence in South Africa's financial markets.[66]

The SSA defined an "insider" as a person who possesses inside information. A person is then defined to include a trust and a partnership.[67] Thus, the scope of insider trading prohibition was extended to cover juristic persons, including companies incorporated outside South Africa. This position was better than the ITA which simply defined an "insider" as an "individual who has inside information."[68]

The SSA retained the insider trading offences which were in the ITA.[69] In relation to the offence of dealing for one's own account, it is unclear whether this prohibition applied to unlawful transactions relating to other money-market instruments and derivatives. This uncertainty still exists in the FMA.[70]

In terms of the ITA, an accused had the right to raise any other defense apart from the ones set out in the SSA. The SSA however, left out this right to the accused. Cassim argues that this was bad because there may be cases where one could justifiably rely on a defense not provided for in the SSA.[71] Moreover, the ITA's insider dealing prohibition applied mainly to listed securities. This was a flaw that was carried over to the SSA.[72]

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63 Stock Exchange Control Act 1 of 1985 (S. Afr.).

64 Chitimira, *supra* note 5, at 21.

65 *Id*.

66 Rehana Cassim, *Some Aspects of Insider Trading – Has the Securities Services Act 36 of 2004 Gone too Far?*, 19(1) S.A. Merc. L.J. 44, 44 (2007).

67 Sec. 1 of the SSA.

68 Cassim 2007, at 44. A "person" in terms of section 2 of the Interpretation Act 33 of 1957, is defined as including the following. Any divisional council, municipal council, village management board, or like authority. Any company incorporated under any law. Anybody of persons corporate or incorporate.

69 *See* the offences listed in section 4.2 above.

70 Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, at 264.

71 *Id*. at 64.

72 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 148. This is also the position in Canada.

2.4. Financial Markets Act of 2012 (FMA)

The SSA was repealed by the FMA to improve the regulation of insider trading, among others. However, insider trading regulation in South Africa has been "scant and inconsistent" till date. This is despite the fact that the FMA was enacted as a separate legislation to consolidate all previous insider trading provisions of the SSA.[73]

Under the FMA, anyone who knows he has, and reveals improperly "non-public price sensitive information", will incur civil or criminal liability.[74] Criminal or civil liability could also be incurred by anyone who encourages or discourages another person from dealing in, or deals directly or indirectly for his benefit or another's in securities to which the aforementioned information relates, or where the price of such securities could be affected by such dealing. The SSA prohibited these same practices.[75] However, the FMA does not provide for any new crimes relating to insider trading.

Then, the question at this juncture is: What is insider trading in terms of the FMA?

The definitions of "inside information" and "insider" must first be given. Section 77 defines "inside information" as specific information which an insider learns, and if made public, would have a material effect on the price or value of any listed securities. On the other hand, an "insider" is defined as a person who has inside information because he is a director or shareholder or employee of the issuer of securities. Also, if you have access to inside information by reason of your employment or office or profession, you are an insider. Moreover, if you know the source of certain information as a director or shareholder or employee of the issuer of securities, you are an insider. Thus, there are two types of insiders: there are the primary insiders who get the information directly from a primary source – the company, and they include directors, shareholders, and employees; there are also the secondary insiders who get their information from a primary insider.[76]

Apart from individuals, the definition of "person" in the FMA covers partnerships and trusts, as well as corporate and other legal entities. Thus, insider trading can also be committed by an individual, partnership, trust, company, or other legal entity who misuses inside information.[77] Chitimira however submits that the use of the pronouns, "he" or "she" in some provisions of the FMA might cause uncertainty by implying that those provisions only apply to individuals. The use of such pronouns could imply that the definition of "person" is restricted to natural persons. This flaw was in the SSA and still remains in the FMA.[78]

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73 Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, at 271.

74 *Id*. at 254.

75 *See* sec. 73 of the SSA.

76 Piet Delport, *Securities Law*, unpublished LLB lecture (April 2015). *See* also Nothemba Lugaju, *The Effectiveness of the Insider Trading Regulation in South Africa*, unpublished LLM thesis, University of Pretoria (2018), at 10 (on file at O.R. Tambo Law Library, University of Pretoria).

77 *Id*. at 259. *See* Jooste 2006, at 438.

78 *Id*.

Section 78 of the FMA lists five different scenarios where a person would be guilty of insider trading as follows:

i. If they are an insider and they know they have inside information and deal directly or indirectly or through an agent for their benefit in listed securities to which the information relates;

ii. If they are an insider and they know that they have inside information and deal directly or indirectly or through an agent for another person's benefit in the listed securities to which the information relates;

iii. If they deal for an insider directly or indirectly or through an agent in the securities to which the information relates or which is likely to be affected by it and they know the other person is an insider;

iv. If they are an insider and they know they have inside information and disclose it to another person; and

v. If they are an insider and they know that they have inside information and they encourage or cause another to or discourage or stop another from dealing in the information to which the information relates or which are likely to be affected by it.

Section 78(5) of the FMA offers no defense to the disclosure offence, such as the so-called "closed circles defense" as it is referred to in the United Kingdom.[79] Nevertheless, the person accused of insider dealing is meant to have known that he had inside information in order to be held liable based on this provision. A possible defense the accused could raise therefore is that they did not know of the price-sensitive character of the information at the time they encouraged or discouraged anyone to deal.[80]

Despite the existence of the above provisions, insider trading regulation has been ineffective till date in South Africa.[81] This may be aggravated by the fact that one would only be guilty of insider trading if they knew that they violated directly or indirectly, the insider trading provisions of the FMA.[82] Thus, they need to know of the insider trading offence before they can be liable for it. Moreover, like the SSA, the FMA does not provide any presumptions that may enhance prosecution and secure convictions in insider trading cases.[83] Certain difficulties were encountered in previous insider trading provisions because of factors such as double jeopardy, over-criminalization in

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[79] Cassim 2007, at 65. The "closed circle" defence can be raised by a person who had a reasonable basis for believing that the information they had was already disclosed broadly enough so that no party to the impugned transaction will be prejudiced because they did not have the same information. *See* Keith Wotherspoon, *Insider Dealing – The New Law: Part V of the Criminal Justice Act 1993*, 57(3) Mod. L. Rev. 419, 430 (1994).

[80] Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, at 264–65.

[81] *Id*. at 257.

[82] *Id*. The requirement of knowledge is flexibly enforced in Canada, when you consider various insider trading defences and exemptions that are available. *See* Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 148.

[83] *Id*. This position differs from that in section 440F of CA 61/73 which had two rebuttable presumptions to assist the prosecution in securing a conviction. See the discussion of this provision above.

different Acts, and repetition of same provisions. Thus, mere consolidation of insider trading provisions into the SSA, and then, the FMA, does not on its own improve insider trading regulation in South Africa. The FMA duplicated several of the flaws in the SSA. Thus, whether the FMA enhances the regulation of insider trading and protection of investors remains to be seen.[84]

The Financial Sector Conduct Authority (FSCA)[85] has the discretion to make market-abuse rules (which include insider trading rules) after consulting with the Directorate of Market Abuse (DMA).[86] Apart from this, the FSCA is not expressly empowered in the FMA to make its own rules regarding the enforcement of criminal and administrative sanctions for insider trading offences. This flaw was borrowed from the SSA and reintroduced in the FMA. No alternative ways of empowering the FSCA to make its own rules relating to the enforcement of criminal and administrative sanctions for insider trading offences were provided.[87]

The FMA also includes provisions related to foreign "regulated markets." "Regulated market" refers to any market – domestic or foreign – which is regulated in terms of the laws of the country where it exists as a financial market. Thus, any person who commits an insider trading offence in a foreign financial market may be prosecuted in South Africa. This is not limited to where there is a territorial link between the commission of the offence and South Africa. Although this extra-territorial application looks like a good step to regulate cross-border insider trading activities, it has not been used much. A probable reason is the lack of resources. Chitimira however argues that insider trading prohibition should apply either where a territorial link is present because the offender is at the relevant time physically present in South Africa, or he was acting through an intermediary who is in South Africa or because the prohibited conduct occurred in South Africa.[88]

Another problem with the extraterritorial application of the FMA's insider trading provisions is timeous recognition and enforcement of foreign judgments in cross-

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[84] *Id*. Market-abuse rules include the FSCA's duties to make relevant rules concerning the following: i) The administration of insider trading provisions; ii) The manner in which insider trading investigations are to be conducted; iii) The notifications of any civil monetary compensatory amounts received; iv) The procedure for lodging and proving claims; v) The administration of trust accounts and distribution of payments in respect of claims; vi) The meetings of the DMA which are generally designed to ensure the DMA and the FSCA are able to perform their duties dealing with the way in which inside information should be disclosed, and with the conduct expected of persons in relation to such information.

[85] The FSCA is a statutory-backed board established in terms of Financial Services Board Act 97 of 1990 as amended. The Board's functions, among others, is to supervise and enforce compliance with laws regulating financial institutions and the provision of financial services.

[86] Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, at 257.

[87] *Id*. at 260.

[88] *Id*.

border insider trading cases.[89] Chitimira suggests that South African courts should recognize relevant foreign laws where necessary to provide for timeous recognition and enforcement of foreign insider trading judgments.[90]

In addition, the phrase "through an agent" were inserted into some of the insider dealing provisions in the FMA.[91] Thus, any insider who knowingly and indirectly practices insider trading for his own benefit is criminally liable. This is a positive development. However, the question of who exactly an agent is, is unclear. This uncertainty can assist other persons who knowingly deal in listed securities through agents, and such agents themselves, to escape liability. This flaw existed in the SSA. It also remains unsolved in the FMA.[92]

In the FMA, if one is found guilty of insider trading, one would get a fine not exceeding R50 million or imprisonment not exceeding 10 years or both. Criminal sanctions were increased from R2 million under the ITA to R50 million under the SSA, and under the FMA.[93] Relatively high penalties are a positive improvement, however, even the R50 million fine and 10 years imprisonment cannot be an effective deterrent, standing alone. Prospects of huge profits may overshadow the deterring effects of the stipulated fine and/or prison sentence. For instance, companies may regard it as another business expense, especially where the profits gained exceeds the penalty imposed. Moreover, perpetrators may plead guilty and be convicted of lesser offences. This may have an adverse effect on any impact a criminal sanction could have. Furthermore, the difficult burden of proof required in criminal prosecutions has restricted the prosecution of insider trading offences to some extent in South Africa. This is not likely to change in future.[94]

Additionally, under the FMA, violation of insider dealing provisions can result in civil liability. The FMA's provisions are similar to those of the SSA in this respect. The only exception being that the words "compensatory and punitive purposes" are absent in the FMA.[95] A recent case illustrating this point is the case of Steinhoff International Holdings, a South African-German-Dutch international retail holding

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89 Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, at 264.

90 This is provided for in section 1(1) of the Law of Evidence Amendment Act 45 of 1988. For example, there is a South African who is an insider and domiciled in New York. He contacts a broker in SA to buy securities on the JSE to hide the illegal nature of such dealing. The FSCA and or a court can cooperatively rely on the US Securities and Exchange Commission (SEC) to investigate and prosecute such person for insider trading. Furthermore, if a judgment relating to such offence is given in South Africa, it will have extraterritorial force in the U.S. *See* Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, at 260.

91 Just as it was in the SSA.

92 Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, at 264.

93 *Id*. at 269.

94 *Id*.

95 *Id*. *See* the discussion of the provisions of the SSA above.

company listed on the German and South African stock exchanges. The Financial Sector Conduct Authority (FSCA) found that on November 30, 2017, shortly before the much-publicized significant decrease in the market value of Steinhoff shares, Markus Jooste, the then Chief Executive Officer who was privy to Steinhoff-related inside information disclosed some of the information in a "warning SMS" encouraging four individuals close to him to dispose of their Steinhoff shares prior to the publication of the information to the rest of the market. On the heels of this disclosure and prodding from Jooste, the three recipients of the "warning SMS" sold their shares in Steinhoff. In October 2020, FSCA fined former Steinhoff CEO Markus Jooste and three others at least R241 million for insider trading-related breaches that date back to 2017.[96] Jooste appealed the FSCA's decision to the Financial Sector Tribunal (FST) but the FSCA's decision was upheld.[97]

In the next section, the Canadian experience in the regulation of insider dealings is examined and the objective is to draw lessons from Canada to improve on the current level of protection offered investors in South Africa. The choice of Canada was informed by the fact that Canada has a well-developed anti-insider trading regulatory framework and presents a case study of international best practices in the regulation of insider dealings.[98] The authors will however specifically focus on the Ontario Securities Act (OSA)[99] and the Canadian Business Corporations Act 9 (CBCA).[100]

3. Regulation of Insider Trading in Canada

Canada has a well-developed anti-insider trading regulatory framework. Thus, the focus of this section is to examine Canada's model which is believed to be one of the international best practices in insider trading regulation.[101]

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96 *See* Financial Sector Conduct Authority (FSCA), FSCA fines Mr Markus Jooste and three others around R241 million for insider trading related breaches, FSCA Press Release, 30 October 2020 (Dec. 21, 2021), available at https://www.fsca.co.za/News%20Documents/FSCA%20Press%20Release%20FSCA%20fines%20Markus%20Jooste%20and%20others%20%20R241%20million%20for%20insider%20trading%20breaches%2030%20October%202020.pdf.

97 *See* Helena Wasserman, *Markus Jooste fights back against R162m insider trading fine*, Business Insider South Africa, 15 February 2021 (Dec. 21, 2021), available at https://www.businessinsider.co.za/markus-jooste-fights-back-against-insider-trading-fine-2021-2; Lukanyo Mnyanda, *Tribunal confirms insider trading finding against Markus Jooste*, Business Day, 15 December 2021 (Dec. 21, 2021), available at https://www.businesslive.co.za/bd/companies/retail-and-consumer/2021-12-15-tribunal-confirms-insider-trading-finding-against-markus-jooste/.

98 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 144.

99 Ontario Securities Act of 1990 (Can.)

100 Canadian Business Corporation Act of 1985. This is because insider trading is regulated on a provincial basis in Canada and analysing the legislation of all the provinces will make the scope of this work too wide.

101 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 144.

The overarching objective here therefore is to draw lessons for South Africa. The lessons drawn could be used by parliament to enhance insider trading regulation in South Africa in tandem with international best practices.

3.1. History of Insider Trading Regulation in Canada

In terms of market capitalization, Canada was ranked the seventh in 2018.[102] Its regulatory model is characterized by its relatively strict but effective insider trading prohibition. This framework has been described as one of the most adequate and effective regulatory frameworks to be found in recent years.[103] Insider trading is still regulated on a provincial basis despite attempts to create a federal securities regulator.[104] Regulation is therefore operative at the provincial level; each province enacts and enforces its insider trading laws. Provincial regulators however try to harmonize regulation of the capital markets via the Canadian Securities Administration (CSA). Complaints can be taken to the CSA but enforcement happens locally where the parties are located.[105] The biggest securities exchange – the Toronto Securities Exchange – is located in Ontario.[106] This has informed the choice and focus of this article on the Ontario Securities Act (OSA) as amended in 1990.[107]

The OSA was passed after the Report of the Attorney General's Committee on Securities Legislation was adopted on 11 March 1965.[108] Before this date, insider dealings were not statutorily regulated in Canada. However, this legislation applied only to insider trading activity in the securities of "reporting issuers."[109] This resulted

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[102] Market capitalization of listed companies in current prices, Knoema (Dec. 21, 2021), available at https://knoema.com/atlas/topics/Economy/Financial-Sector-Capital-markets/Market-capitalization.

[103] Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 144.

[104] On 9 November 2018, the Supreme Court of Canada in *Reference re Pan-Canadian Securities Regulation*, [2018] 3 S.C.R. 189, ruled that the establishment of a single federal securities regulatory body as presented in draft federal and model provincial laws was not unconstitutional, thereby overruling a decision from the Quebec Court of Appeal that such a federal regulatory body was unconstitutional. The problem however is that the provincial legislatures are not under the obligation to enact the proposed model legislation into law as it has been written and can make changes to whatever law they decide to enact. *See* also National Securities Regulator Gets Go-Ahead from Supreme Court, Lexology (Dec. 21, 2021), available at https://www.lexology.com/library/detail.aspx?g=493f8984-8406-4ff0-be49-ebcf873b994c; and Sean Kilpatrick, *Top court ruling leaves us no closer to a national securities regulator*, National Post, 9 November 2018 (Dec. 21, 2021), available at https://nationalpost.com/news/canada/top-court-ruling-leaves-us-no-closer-to-a-national-securities-regulator.

[105] James H. Thompson, *A Global Comparison of Insider Trading Regulations*, 3(1) Int'l J. Account. Financ. Report. 1, 9 (2013).

[106] Toronto Stock Exchange, Encyclopedia Britannica (Dec. 21, 2021), available at https://www.britannica.com/topic/Toronto-Stock-Exchange.

[107] Insider trading is regulated on a provincial basis. Thus, the analysis of all the provincial insider trading Acts is beyond the scope of this study.

[108] *Id*. Hereafter referred to as the Kimber Report.

[109] Secs. 108–117 of the OSA. A reporting issuer is a corporation or company whose securities are traded on a stock exchange or other market place. Thus, the OSA at this stage only applied to listed securities.

in many subsequent reviews of this Act and similar statutes in other provinces in order to have more adequate and stricter insider trading provisions.[110]

The Canada Corporations Act (CCA)[111] had an insider trading prohibition.[112] This Act was aimed at preserving the integrity of federal companies by shielding their shareholders from the menace of insider dealing, among other illegal and unethical practices.[113] Moreover, it prohibited insiders or other people holding positions of trust from dealing in the securities of a company if they had price-sensitive information regarding such securities, which all shareholders were unaware of.[114]

The CCA was later amended. This resulted in the enactment of the Canada Business Corporations Act (CBCA).[115] The CBCA prohibited insider trading in a "distributing corporation."[116] Moreover, it prohibited insiders from selling shares that they did not own or have a right to own, and from buying and selling a call or put option regarding a share of the distributing corporation of which they were insiders.[117] Similar provisions were retained with few changes in the CBCA amended in 1985.[118]

An attempt was made to complement and revive the original insider trading provisions contemplated in the OSA. Thus, the Ontario Business Corporations Act (OBCA)[119] was enacted. This Act widened the definition of "insider" to include all the employees of a corporation, as well as senior officers.[120] However, it dealt with the liability of insiders of corporations which do not offer securities to the public. This led to the amendment of the OSA in 1990. This Act extended the reporting duties of all insiders.[121] This was to deter insiders from profiting unfairly from their previous knowledge of any unpublished inside information regarding a company, such as a pending take-over or other acquisition.[122]

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110 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 145.

111 Canada Corporations Act, 1970.

112 Secs. 93–97 of the CCA.

113 *Multiple Access Ltd v. McCutcheon*, (1982) 138 D.L.R. (3d) 18 (Can. Ont. S.C.C.).

114 *Id*.

115 Canada Business Corporations Act of 1985.

116 Sec. 126. A distributing corporation was defined to include a corporation that is a reporting issuer unless it is subject to an exemption from the relevant legislation. Or it has filed a prospectus regarding the public distribution of its shares if such shares and/or their price remain outstanding and that they are held by more than one person. Or if such corporation has securities listed and traded on a stock exchange in or outside Canada.

117 *Id*.

118 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 145.

119 *Id*. Ontario Business Corporations Act, 1982, c. 4 (Can.).

120 Sec. 138.

121 *Id*.

122 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 145.

The Canadian Securities Administrators (CSA) and the federal government introduced a Uniform Securities Law Project (USLP) and a Bill C-46 respectively in order to enhance overall insider trading regulation in all Canadian provinces and address possible cross-border insider trading issues. The USLP aimed to provide a national framework for securities regulation by harmonizing insider reporting duties. Moreover, the Bill C-46 proposed the introduction of the new Criminal Code of Canada which contained insider trading and tipping offences. Later, this bill was introduced in March 2004. It created the first precise Criminal Code crimes regarding insider trading and other related practices. It also criminalized threatening or retaliation against employees who unveil any insider trading or related activities. This is known as whistleblowing.[123]

The provincial regulation of insider trading increased awareness of and contributed a lot to the timeous prosecution of insider trading cases in Canada.[124]

3.2. Insider Trading Prohibition Under the Ontario Securities Act R.S.O. 1990, c. S. 5, 1990 (OSA)

The Ontario Securities Act prohibits any person in "a special relationship" with a reporting issuer and who knows of an unpublished "material change" or "material fact" of relevant circumstances regarding its securities from disclosing this information to others or trading based on such information.[125] Related practices such as tipping are also prohibited.[126]

The insider trading prohibition in section 76 applies to a wider range of persons and companies than is provided for by the definition of "insider" in terms of section 1(1) of the OSA. Thus, the most important definition in section 76 is that of a person in a "special relationship," and not that of an "insider." A person or company in a special relationship with an issuer is defined as follows in terms of section 76(5) –

(a) A person or company that is an insider, affiliate or associate of,

(i) the issuer,

(ii) a person or company that is considering or evaluating whether to make a take-over bid, as defined in Part XX, or that proposes to make a take-over bid, as defined in Part XX, for the securities of the issuer, or

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123 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 145.

124 *Id*. at 147.

125 Sec. 76(1). "Material fact" or "material change" refers to a change in the business, operations or capital of an issuer. Or a fact that reasonably be expected to have a substantial impact on the price or value of the issuer's securities.

126 Sec. 76(2). For example, illegal disclosure to another of undisclosed material information regarding the reporting issuer's securities is prohibited; whether it is by that issuer, a special relationship person or, any other person who has such information. To reduce the risk of insider trading, all persons referred to in section 76 of the OSA are prohibited from speculative trading in the securities of any corporation. *See* Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 158.

(iii) a person or company that is considering or evaluating whether to become a party, or that proposes to become a party, to a reorganization, amalgamation, merger or arrangement or similar business combination with the issuer or to acquire a substantial portion of its property,

(b) a person or company that is engaging in any business or professional activity, that is considering or evaluating whether to engage in any business or professional activity, or that proposes to engage in any business or professional activity if the business or professional activity is,

(i) with or on behalf of the issuer, or

(ii) with or on behalf of a person or company described in subclause (a) (ii) or (iii),

(c) a person who is a director, officer or employee of,

(i) the issuer,

(ii) a subsidiary of the issuer,

(iii) a person or company that controls, directly or indirectly, the issuer, or

(iv) a person or company described in subclause (a) (ii) or (iii) or clause (b),

(d) a person or company that learned of the material fact or material change with respect to the issuer while the person or company was a person or company described in clause (a), (b) or (c),

(e) a person or company that learns of a material fact or material change with respect to the issuer from any other person or company described in this subsection, including a person or company described in this clause, and knows or ought reasonably to have known that the other person or company is a person or company in such a relationship.

In *Finkelstein v. Ontario Securities Commission*,[127] the Ontario Court of Appeal had to decide for the first time the meaning and application of the tipping and insider trading section of the Securities Act, R.S.O. 1990, c. S. 5, which specially defines a person in a special relationship with the issuer in section 76(5)(e) – quoted above – as it can be applied to succeeding tippees who have material information about an issuer that has not yet been made public.[128] The standard of review the court opted for was the standard of reasonableness.[129] The court specifically addressed when it might be inferred that a person is in a "special relationship" with the issuer sufficient to warrant liability. The answer to this question varies depending on several factors, including whether the tippee is registered; registered tippees have the duty to investigate the source of the information they received. A failure to verify is not a legal defense to insider trading or tipping. Essentially, the court confirmed that a person might be liable for insider trading if they deal in the securities of an issuer

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[127] This was on 5 January 2018. *Finkelstein v. Ontario Securities Commission*, 2018 ONCA 61 DOCKET: C63514 & C63502 (Can.). Hereafter referred to as *Finkelstein*.

[128] *Id*. para. 1.

[129] *Id*. para. 40.

while they have material information that has not yet been made public and are in a special relationship with the issuer. A person in such special relationship might also be liable for tipping if they pass the non-public material information to another person in a situation that is not in the ordinary course of business. The breath of the special relationship limitation is quite broad. Apart from obvious special relationship parties such as the issuer's directors, officers, employees and affiliates,[130] the following are also in a special relationship with the issuer: 1) parties to whom business or professional functions have been outsourced such as attorneys, accountants, and consultants are included (as well as those considering receiving such business from the issuer);[131] 2) parties working in such positions for another company that seeks to merge with the issuer or acquire them; and 3) parties who receive material information that has not yet been made public from other people they know or reasonably ought to know are involved in a special relationship with the issuer (in other words, the parties aforementioned).[132] The downside to the aforementioned legal requirements is that they can be difficult to prove and costly to prosecute which might lead to lesser tipper-tippee prosecutions in relation to other nations where there are not as many requirements to prove liability.[133]

3.3. Civil and Criminal Sanctions

Civil and criminal sanctions are used to regulate insider trading and tipping in Canada. Any "special relationship" person who violates section 76's provisions, either through tipping or insider trading is criminally liable.[134] If convicted, they can be sentenced to pay a fine equal to the amount of the profit made or the loss avoided up to a maximum of $1 000 000 or to two years' imprisonment or both. These penalties were later increased and offenders can be liable for up to $5,000,000 or imprisonment for a maximum period of 5 years less one day, or both. Such person may be further ordered to pay a maximum fine equal to the profit made or loss avoided. An additional maximum fine equal to the greater of $5,000,000 and/or the amount equal to three times the profit made or loss avoided can also be imposed.[135]

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130 David Badham & Erin Hoult, *"Insider" Trading: Who Is an Insider?*, JD Supra, 7 February 2018 (Dec. 21, 2021), available at https://www.jdsupra.com/legalnews/insider-trading-who-is-an-insider-61016/.

131 *Finkelstein*, para. 54.

132 *Id*. paras. 48 & 55.

133 Anita Anand et. al., *An Empirical Comparison of Insider Trading Enforcement in Canada and the United States*, Osgoode Hall Law School of York University, Osgoode Digital Commons, Articles & Book Chapters, Faculty Scholarship (2019), at 19 (Dec. 21, 2021), available at https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3752&context=scholarly_works.

134 Sec. 122(1) of the OSA 1990.

135 *Id*. Regarding tipping, it is not required that the "tippees" have traded on the basis of confidential inside information they received from "special relationship" parties, before they can be criminally liable. Maximum prison time is ten years. *See* Thompson 2013, at 16.

Under the CBCA of 1985, persons guilty of insider trading and/or short selling were liable on a summary conviction to a fine not exceeding the greater of $1,000,000 and three times the profit made, or imprisonment for a term not exceeding six months, or both.[136] Bill C-13 of 2004 created the first precise Criminal Code sanctions for insider trading and tipping of a maximum imprisonment term of up to ten years respectively.[137] Both insider trading and tipping are treated as indictable offences in terms of the Code. Canada has relatively been successful in prosecuting criminal cases of insider trading and related practices. For instance, prosecutions and settlements were successfully gotten in thirteen insider trading cases. About $1.9 million in fines and fees was recovered from offenders in 2010.[138]

A civil remedy is available to victims of unlawful insider trading.[139] For instance, if a special relationship party trades in securities while knowing unpublished price-sensitive information, he is liable to compensate all the affected persons for all the losses caused by such trading.[140]

The basis for liability in terms of section 134 of the OSA 1990 is different depending on whether the plaintiff is an innocent party to the unlawful trade, or is the reporting issuer to which the undisclosed information relates. Innocent counterparties to unlawful insider trading can recover damages for any loss suffered as a result of the trading from the defendant. Besides, in cases of actions brought by the reporting issuer, the liability of insiders, associates or affiliates of such an issuer is measured by the extent of the benefit they have gained because of the insider trading. Moreover, insiders who commit insider trading and/or tipping will be liable directly to pay compensatory damages to the affected corporation and individuals in terms of the CBCA.[141]

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136 Sec. 130(4) of the CBCA.

137 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 145.

138 Emily Cole, *Canada's First Criminal Conviction for Illegal Insider Trading*, Miller Thompson, 1 February 2010 (Dec. 21, 2021), available at http://www.millerthomson.com/en/publications/newsletters/securities-practice-notes/2010-archives/spring-2010/canadas-first-criminal-conviction-for-illegal. In *SEC v. Grmovsek*, Case No. 09-9029 (Judge McMahon), Cornblum and Grmovsek were found guilty of insider trading in Canada and in the U.S. Later, Grmovsek was sentenced to disgorge illegal profits made of about $8.5 million with a waiver of nearly $1.5 million in the U.S. Further, he was sentenced to 39 months imprisonment and ordered to pay the OSC a total fine of $1.03 million, $283 000 to Ontario's Attorney-General and $250 000 investigation costs to the OSC in Canada.

139 Sec. 126 of the OSA 1990.

140 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 145. This civil remedy is available to four classes of plaintiffs. "a) First, those who are the innocent counterparties to unlawful insider trading with insiders; b) Secondly, those who are the innocent counterparties to insider trading with tippees; c) Thirdly, to mutual funds or the clients of portfolio managers or of registered dealers, against someone who had access to unpublished confidential information relating to the investment program of those funds, managers or dealers and who benefits by trading on the basis of such information (s 134(3) of the Ontario Securities Act, R.S.O. 1990, c. S. 5, 1990); and d) Lastly, reporting issuers whose insiders, affiliates, or associates have gained by trading with knowledge of undisclosed material information or have communicated such information to others."

141 *Id*. South Africa also has civil and criminal sanctions in place [sec. 82 of the FMA]. However, insider trading was mainly treated as a criminal offence carrying inadequate penalties of R500 000 fine or

South Africa also has civil and criminal sanctions in place.[142] However, insider trading was mainly treated as a criminal offence carrying inadequate penalties of R500 000 fine or imprisonment for 10 years, or both, under the CA 61/73 before 2004. Later, insider trading resulted in civil and criminal liability under the ITA. Offenders were liable to pay the FSCA a maximum of R2 million, or imprisonment for a maximum of 10 years, or both.[143] Eventually, insider trading attracted civil, administrative and criminal liability under the SSA and the FMA. However, offenders were still liable for relatively insufficient penalties of a maximum fine of R50 million or imprisonment of a maximum of ten years, or both under the SSA. These same penalties were retained in the FMA.[144] It is submitted that imposing very heavy penalties will help in deterring more offenders. This is a very salient feature of the insider trading regulatory models in the United States of America and Canada, and it works. The good news however is that the FSCA is trailing in their footsteps by imposing heavy penalties as it is shown in the recent case of *Zietsman and another v. Directorate of Market Abuse and another*.[145]

Currently, criminal prosecution of insider trading offences in South Africa is rare, because of the powers of the FSCA. This is because dealing with insider cases through

imprisonment for 10 years, or both, under the CA 61/73 before 2004. Later, insider trading resulted in civil and criminal liability under the ITA. Offenders were liable to pay the FSCA a maximum of R2 million, or imprisonment for a maximum of 10 years, or both. *See* Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 145. Eventually, insider trading attracted civil, administrative and criminal liability under the SSA and the FMA. However, offenders were still liable for relatively insufficient penalties of a maximum fine of R50 million or imprisonment of a maximum of ten years, or both under the SSA. These same penalties were retained in the FMA. It is submitted that imposing very heavy penalties will help in deterring more offenders. This is a very salient feature of the insider trading regulatory models in the United States of America and Canada, and it works. The good news however is that the FSCA is trailing in their footsteps by imposing heavy penalties as it is shown in the recent case of Zietsman and another v. Directorate of Market Abuse and another (A679/14, GNP 24 August 2015-S.A).

142 Sec. 82 of the FMA.

143 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 145.

144 *Id.* at 149. Refer above for a more detailed discussion of civil, criminal and administrative liability for insider trading under these Acts. Unlike the position in Canada, the defendant's civil liability under the FMA does not depend on whether the affected person is an innocent counter party or not. In this regard, a distinction between an innocent counterparty and a counterparty who is not guilty should have been drawn in the FMA to enhance the enforcement of civil remedy in SA.

145 A679/14 (GNP 24 August 2015) (S. Afr.). Hereafter known as *Zietsman*. In this case, the FSCA's enforcement committee found the two appellants guilty of insider trading on the basis that they had traded in securities based on information pertaining to the amount of the loan facility the Industrial Development Corporation (IDC) approved in favour of AC Towers, which was not yet made public. This happened in 2011, thus, the FMA was not in operation at the time. Thus, it constituted insider information as defined in the SSA. They were charged with the contravention of section 73(2)(a) and section 73(1)(a) of the SSA. The appellants argued *inter alia* that the information available to them at the time of the trades did not constitute "insider information" in terms of section 72 of the SSA. The enforcement committee fined the appellants the amount of R1000 000 and ordered them to pay the legal costs, jointly and severally. The court dismissed the appeal against the conviction and the imposed fine with costs. *See Zietsman*, paras. 2–12.

the FSCA's Enforcement Committee is more efficient than criminal prosecutions.[146] This is confirmed in *Zietsman*.[147] The court held that the enforcement committee can make such decisions and impose such penalties as an administrative tribunal.[148] Thus, the FSCA can continue to make such decisions and impose deterrent penalties, without cases having to go to court.[149] This case was decided in terms of section 82 of the SSA. However, section 84 of the FMA provides that the FSCA can exercise similar powers. Thus, the principles in this case apply in the new dispensation in terms of the FMA.

Some defenses and exemptions exist for an insider or person alleged to have violated section 7 of the Ontario Securities Act (OSA) 1990.[150] For example, with respect to tipping, any tippee who intentionally trades based on material confidential information before it is "generally disclosed" may avoid liability if he proves that he did not know or ought not reasonably to have known that the tipper was a person, or a company in a special relationship with the reporting issuer – section 76(4) read with (5)(e). The mere issuing of a press release without actual and timeous disclosure of material facts to the public is insufficient for the purposes of this defense.[151]

Now that the insider trading provisions, sanctions, exemptions, and defenses based on the OSA have been discussed, the next section will focus on benchmarking the regulation of insider dealing in South Africa against the Canadian model with the objective of drawing lessons for South Africa. The lessons drawn could be used by parliament to enhance insider trading regulation in South Africa in tandem with

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146 This is because there is a backlog of cases in South African courts, the heavier burden of proof in criminal cases, and the fact that the "wheel of justice turns very slowly" in criminal matters, according to the head of the Directorate of Market Abuse, which is part of the FSCA. Thus, criminal prosecution of insider trading cases in South Africa is not the solution to this menace in South Africa. *See* Patrick Cairns, *Precedent-setting case clarifies insider trading in SA*, Moneyweb, 7 September 2015 (Dec. 21, 2021), available at http://www.moneyweb.co.za/news/companies-and-deals/precedent-setting-case-clarifies-insidertrading-in-sa/.

147 Paras. 34–36.

148 *Id*.

149 *See* Cairns, *supra* note 146.

150 Sec. 76 of the OSA.

151 *See* Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 150. In contrast, it seems that under the Companies Act as amended prior to 2004 in South Africa, no defenses for insider trading offences were expressly provided. The defenses provided for in the ITA were insufficient. For example, other defenses like Chinese Walls were not considered. Similar defenses and flaws were reintroduced in the SSA. Furthermore, relatively inadequate and few new defenses were introduced in the FMA. For instance, no defense is expressly provided for persons accused of encouraging or discouraging others from dealing in certain listed securities in terms of the FMA. Additionally, the FMA did not expressly provide alternative defenses and exemptions such as Chinese Walls for persons facing civil liability charges for insider trading under the FMA. This contrasts with the Canadian position because the defenses currently stated in the FMA are primarily restricted to instances involving criminal cases of insider trading.

international best practices. Some of the initiatives that have been implemented in both countries will also be discussed.

4. Benchmarking the Regulation of Insider Dealings in South Africa Against the Canadian Model

Canada uses a unique multi-functional regulatory system that does not empower any specific regulatory authority to supervise the regulation of its capital markets and/or the regulation of insider trading at the federal level. This means that insider trading regulation in Canada is a shared duty involving the federal government; provincial governments; other securities regulators such as the OSC, Integrated Market Enforcement Teams (IMETS), and self-regulatory organizations; the Intelligent Market Monitoring System (IMMS); the Canadian Investor Relations Institute (CIRI); the CSA; and the Canadian Institute of Chartered Accountants.[152]

In 1998, the OSC introduced the OC Policy 33-601 to give guidelines relating to employee education, containment of inside information, compliance, and restriction of transactions in order to curb insider trading. Thus, employee education aims to create awareness about insider trading and the regulation thereof, ethical standards and the consequences for violating insider trading provisions. The protection or containment of inside information involves restricting access to inside information, thus, prohibiting unauthorized transmission thereof. Also, information in sensitive areas is kept secure to ensure that electronic transmission of such information takes place under sufficient supervision. Restriction of transactions means that grey lists, information barriers and restricted lists are used. Finally, compliance involves monitoring and reviewing trading in the accounts of OSC registrants, monitoring and restricting trade in securities about which the registrant or its employees may possess inside information, requiring all employees to maintain accounts with the employer registrant only, and conducting a periodic review of the effectiveness of procedures and policies.[153]

Reporting issuers are required by the OSC to report insiders in relation to them within ten days to curb insider trading. A System for Electronic Disclosure (SEDI) was adopted in 2001 to simplify the reporting and filing process of all insiders of the reporting issuers, for this purpose. Moreover, section 135 of the OSA 1990 provides a method by which the OSC, security holders of a reporting issuer or security holders of a mutual fund may institute an action in the name of the issuer or mutual fund against the offenders.[154] Moreover, the federal government established the IMETS

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[152] Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 153.

[153] *Id*. The OSC in some cases managed to impose administrative fines ranging from $100 000 to $1 million on individuals and $5 million on juristic persons.

[154] *Id*. at 153. In terms of section 134(3) or (4) of the OSA. This has assisted the OSC to successfully investigate about eleven insider trading cases between 1995 and 2005. Regardless of these efforts, Chitimira submits that the OSC failed somewhat to consistently and successfully get more convictions

in Toronto, Montréal, Vancouver, and Calgary to investigate capital markets fraud and insider trading cases, as part of its efforts to enhance the regulation of insider trading.[155]

In addition, self-regulatory organizations such as the Market Services Incorporated, the Bourse de Montréal Incorporated, CIRI, CICA, CSA, IMM and the ITTF have to date contributed greatly towards the regulation of insider trading and related practices in Canada. Likewise, the courts have played an important role in this regard. This is shown in some of the reported cases.[156]

In contrast, South Africa does not use the Canadian multi-functional regulatory model to regulate insider trading.[157] Instead, the FSCA has regulatory powers and functions to supervise the regulation of insider trading at a national level. Chitimira suggests that policy makers should enact additional provincial laws to regulate insider trading activities.[158] The authors do not agree with this suggestion. This is because there are no functional securities markets outside Gauteng, for instance.

Having discussed the insider trading provisions, sanctions, exemptions, and defenses based on the OSA, the next section will focus on the place of regulatory bodies in enforcing insider trading laws and will discuss some of the initiatives that have been implemented in Canada and South Africa.

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in insider trading criminal cases. This could have been aggravated by the OSC's failure to use other enforcement methods such as whistleblowing immunity, bounty rewards and the fact that the biggest investigation unit within its enforcement department was understaffed and it only had fourteen employees in late 2010. However, this position will change soon as the OSC successfully launched its own in-house detection platform to detect insider trading and tipping offenders, towards the end of 2010. Furthermore, a new OSC chairman as hired in 2011. He pledged to expand the OSC's cooperation policy to encourage more people to settle with the OSC (bounty rewards) and to seek more resources to improve the enforcement of the insider trading prohibition.

155 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 154. An effective process within the IMETS structure to address unlawful insider trading includes the activities of securities' commissions, self-regulatory organisations, the Department of Justice and police officers who are highly qualified financial investigators. The IMETS has also created some criteria for case assessment and integrated procedures for the speedy prosecution of insider trading cases.

156 *Id*. Examples include *Doman v. British Columbia (Superintendent of Brokers)*, (1998) B.C.J. 2378 (Can.). This case involved approximately $2.3 million in losses avoided. This was after a sale of Doman industries Limited shares in 1988. *Doman* confirmed that all parties impacted by insider trading have a civil remedy available to them. Such parties include innocent counterparties to insider trading involving tippees and insiders, clients of registered dealers or portfolio managers against any person who had non-public, material information based on the investment programs of the funds and gained from trading based on it; and reporting issuers whose insiders and affiliates have made gain based on non-public, material information. *See Id*. at 149. Another case is *R. v. Harper*, (2000) O.J. 3664 (Can.). The perpetrator was convicted based on two counts of insider trading. This case involved approximately $3.6 million in losses avoided from selling Golden Rule Resources Limited shares in 1997.

157 *Id*.

158 *Id*.

5. The Place of Regulatory Bodies and Other Role-Players

The following entities will be discussed: the Intermarket Surveillance Group, the Canadian Securities Administrators, the Ontario Securities Services Commission, and the courts.

The Intermarket Surveillance Group (ISG)

The ISG exists to provide a platform for sharing information and coordinating regulation across securities exchanges in an effort to address potential market abuses. Its members include markets that qualify as "Self-Regulatory Organizations" (SROs) as well as nongovernmental organizations that deliver regulation services to their home markets.[159] Canada is a member of the ISG. Its derivatives and equities markets can therefore trade within similar markets around the world. The ISG's technological surveillance department enables the Canadian markets to effectively detect any signs of cross-border insider trading in similar markets across the globe. The ISG also has a database that assists members markets' regulators to share relevant information and to investigate inter-market insider trading.[160]

The Ontario Securities Commission (OSC)

The OSC is an independent entity that is empowered to supervise securities trading and to provide public scrutiny of the capital markets, in order to combat illegal practices like insider trading.[161] Its regulatory oversight stems from the enforcement of the OSA, the Commodity Futures Act, R.S.O. 1990, c. C.20, and certain provisions of the Ontario's Business Corporations Act, R.S.O. 1990, c. B.16.[162] It has various powers. These powers cover issuing compliance orders, ceasing trade orders, and imposing punitive and administrative penalties in civil cases of insider trading, among others.[163] The FSCA in South Africa has similar functions and powers.[164]

Canadian Securities Administrators (CSA)

The CSA is the umbrella entity which covers all of Canada's territorial and provincial securities regulators. Its aims are: 1) to streamline and improve the regulation of

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159 Intermarket Surveillance Group: An information-sharing cooperative governed by a written Agreement, Intermarket Surveillance Group (Dec. 21, 2021), available at https://isgportal.org/.

160 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 153. The ISG was created to provide an inter-market anti-insider trading regulatory framework for sharing information and coordinating regulatory efforts among securities and commodities markets and market regulators in North America, Europe and Asia. This regulatory framework is responsible for combating the inter-market trading abuses and for developing the best practices. At the time Chitimira wrote his article, it was not clear if Canada had successfully used this database to regulate insider trading.

161 About Us, Ontario Securities Commission (Dec. 21, 2021), available at https://www.osc.ca/en/about-us. *See* also sec. 3 of the OSA.

162 *Id*.

163 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 153.

164 Sec. 84 of the FMA.

Canada's capital markets; 2) attain consensus regarding policy decisions affecting the securities market; and 3) foster collaboration in the enforcement of regulatory policies across the country such as the filings of prospectuses and the review of mandated disclosure.[165] Enforcement of securities laws is however done by each provincial regulator, as already mentioned above.

The Courts

Both the High and Supreme courts are empowered to prosecute insider trading cases as stated in provincial securities Acts and other Acts like the CBCA. However, the orders the courts may make differ from one province to another, under the provincial Acts.[166] Chitimira argues that these courts play a significant role in regulating insider trading and similar practices in Canada, even though the sanctions they impose are not uniform.[167]

The SSA and the FMA in South Africa both stipulate that the prosecution of all criminal cases involving insider trading rests with the Director of Public Prosecutions (DPP) and not with the FSCA.[168] However, the DPP can only exercise his prosecutorial powers on a referral basis. In terms of the SSA, competent courts played an important role in determining and calculating appropriate damages in civil cases involving insider trading. This refers to the compensatory or punitive amounts paid to the FSCA or to victims by offenders. This enabled all claimants to be able to get appropriate monetary remedies awarded to them by the court from the FSCA. The FMA extends the same role of the competent courts regarding insider trading. Nevertheless, the SSA and the FMA provide no appropriate presumptions to help the DPP get more convictions in insider trading cases. Thus, relatively few convictions and settlements have been obtained in insider trading cases by the courts and the FSCA to date.[169]

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165 About Us, Canadian Securities Administrators (Dec. 21, 2021), available at https://www.securities-administrators.ca/about/.

166 *Id*. For example, the disgorgement orders, civil penalties, monetary fines and prison sentences imposed by the courts in Quebec may differ from those imposed by the courts in Ontario. Furthermore, courts in different provinces may impose fines ranging from $1 million to $5 million, or payment of a multiple of profits made and imprisonment periods ranging between three, five and ten years, in quasi-criminal proceedings.

167 Chitimira, *The Regulation of Insider Trading in Canada: A Historical Comparative Perspective*, at 151. Likewise, the effectiveness of these courts is shown by the number of successful convictions that have been obtained in insider trading cases till date. Regarding civil cases, the OSA 1990 provides clear guidelines to help courts determine compensatory damages for victims. Chitimira again submits that courts have a discretion where required, to supplement the guidelines in section 134(6) of the OSA 1990 with more sufficient and appropriate measures, as the facts of a case may require. This has enabled courts to successfully obtain settlements in civil cases.

168 *Id*.

169 *Id*. Only 32 cases of insider trading and eight cases of trade-based market manipulation were investigated by the FSCA between January 1999 and January 2008. However, no convictions were gotten by the courts in all these criminal cases.

Conclusion

In this article, the authors have argued that the regulation and enforcement of insider trading in terms of the relevant anti-insider dealing laws are insufficient despite the various statutory efforts that have been made in terms of the provisions in the successive legislation enacted in South Africa. It further argued that with creative and appropriate reforms of the current legislation, FMA, the investing public will be adequately protected against insider dealing with the effect of enhancing the investors' confidence and the integrity and the efficiency of the securities markets. Moreover, more people will be willing to invest in South Africa's securities markets, especially if the FSCA exercises its powers effectively in deciding on insider trading cases and imposing deterrent penalties. The conclusion therefore is that with an appropriate amendment of the FMA by parliament, and the courts interpreting the FMA in a creative manner, the investing public will be adequately protected against the menace of insider trading in the nation's securities market. Moreover, if the FSCA exercises its powers effectively in deciding on insider trading cases and imposing deterrent penalties, the investors' confidence and financial markets' integrity and efficiency will be better enhanced and more people will be willing to invest in South Africa's financial markets.

Based on the findings above, the authors therefore make the following recommendations: First, Section 84 of the FMA should be amended to compel the FSCA to impose deterrent penalties in insider dealing cases. Moreover, guidelines on such fines should be given in order to promote legal certainty and fairness. In other words, alternative ways of empowering the FSCA to make its own rules relating to the enforcement of criminal and administrative sanctions for insider dealing offences should be provided. Second, the defenses in respect of the offences in section 78 should be exhaustive. In other words, the appropriateness of other defenses like "Chinese Walls" should be considered.[170] The defenses provided should not mainly be limited to criminal prosecutions. Third, appropriate presumptions should be provided for in the FMA to help the FSCA obtain more settlements in insider dealing cases. Moreover, section 84 of the FMA should be amended to expressly widen the powers of the FSCA by confirming the *ratio decidendi* of the court in *Zietsman*. Thus, there can be a legislative basis for the FSCA having such wide powers as described in this case.[171] Fourth, the FMA should be amended to statutorily and financially empower the FSCA to get its own surveillance systems, so that it has sole anti-insider dealing surveillance responsibility.[172] Fifth, the FMA should be amended to provide

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[170] Especially for people facing civil liability charges for insider trading.

[171] *See* the discussion of the *Zietsman* case in chapter 3.

[172] The JSE currently has this responsibility. However, insider trading regulation would be more effective if the FSCA is the one to detect and deal with insider trading cases. *See* Chitimira, *Overview of the Market Abuse Regulation Under the Financial Markets Act 19 of 2012*, at 255.

for other enforcement methods like private rights of action and whistleblowing specialized insider dealing courts.

The authors are confident that implementing these recommendations would enhance investors' confidence and financial markets' integrity and efficiency.

The overall implication of this is that more investors will be willing to invest in South Africa's financial markets, especially if the FSCA exercises its powers effectively in deciding on insider dealing cases and imposing deterrent penalties.[173]

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[173] This was confirmed in *Zietsman and another v. Directorate of Market Abuse and another*, A679/14 (GNP 24 August 2015) (S. Afr.).

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